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Standing

Committee on Regulations and Ordinances

Delegated legislation monitor

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# Delegated legislation monitor

## Introduction

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

### The committee's terms of reference

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

(1) A Standing Committee on Regulations and Ordinances shall be appointed at the commencement of each Parliament.

(2) All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the committee for consideration and, if necessary, report.

The committee shall scrutinise each instrument to ensure:

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

(d) that it does not contain matter more appropriate for parliamentary enactment.

### Work of the committee

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

The committee's longstanding practice is to interpret its scrutiny principles broadly, but as relating primarily to technical legislative scrutiny. The committee therefore does not generally examine or consider the policy merits of delegated legislation. In cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister or instrument-maker seeking further explanation or clarification of the matter at issue, or seeking an undertaking for specific action to address the committee's concern.

The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments, which are established by the *Legislative Instruments Act 2003*.[[2]](#footnote-2)

### Structure of the report

The report is comprised of the following parts:

Chapter 1, 'New and continuing matters', sets out new and continuing matters about which the committee has agreed to write to the relevant minister or instrument-maker seeking further information or appropriate undertakings;

Chapter 2, 'Concluded matters', sets out any previous matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date; related (non-confidential) correspondence is included at Appendix 3;

Appendix 1 provides an index listing all instruments scrutinised in the period covered by the report;

Appendix 2 contains the committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003*.

### Acknowledgement

The committee wishes to acknowledge the cooperation of the ministers, instrument-makers and departments who assisted the committee with its consideration of the issues raised in this report.

**Senator Mark Furner**

**Chair**

# Chapter 1

## New and continuing matters

This chapter lists new matters identified by the committee at its meeting on **20 June 2013**, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to relevant ministers or instrument makers in relation to substantive matters seeking further information or an appropriate undertaking within the disallowance period.

Matters which the committee draws to the attention of the relevant minister or instrument maker are raised on an advice-only basis and do not require a response.

### Guidelines for the use of the word 'university' in company names (Revocation) Instrument 2013 [F2013L00757]

|  |  |
| --- | --- |
| **Purpose** | Revokes the guidelines for the use of the word 'university' in company names |
| **Last day to disallow[[3]](#footnote-3)** | 27 August 2013[[4]](#footnote-4) |
| **Authorising legislation** | Corporations Regulations 2001 |
| **Department** | Treasury |

**ISSUE:**

#### Insufficient description regarding consultation

Section 17 of *the Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The 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 only that the 'Department of Industry, Innovation, Science, Research and Tertiary Education has consulted with the Department of Treasury on the development of this instrument.' While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description, such as in this case, is not sufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. **The committee therefore requests further information from the minister and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003***.

### Defence Determination 2013/19, Class of travel, remote location leave travel, aide-de-camp allowance and compulsory tuition fees – amendment

|  |  |
| --- | --- |
| **Purpose** | Clarifies the class of rail travel that should be used when an Australian Defence Force (ADF) member or dependant is required to travel by rail, removes unhelpful examples in the ADF remote location leave travel provisions, adds a new position to the list of those eligible for aide-de-camp allowance and renumbers a subclause relating to education costs for ADF members posted overseas |
| **Last day to disallow** | 27 August 2013 |
| **Authorising legislation** | *Defence Act 1903* |
| **Department** | Defence |

**ISSUE**

#### Uncertain term

The determination makes a number of amendments to Defence Determination 2005/15, which is the main determination of ADF conditions of service within Australia and overseas. One of the amendments is intended to clarify that where a member or dependent is required to travel by rail they are entitled to travel first class, or in the highest class available. The amendment also provides that the member or dependent is entitled to a sleeping berth if the travel is expected to extend over 'a major portion of the night'. The concept of a 'major portion' of the night does not appear to be defined in the principal determination and it is potentially unclear how the term might be interpreted or understood in practice. **The committee therefore requests further information from the minister**.

### National Capital Plan – Amendment 81 – Removal of Outdated and Unnecessary Policy Material [F2013L00782]

|  |  |
| --- | --- |
| **Purpose** | Amends the National Capital Plan (December 1990) to remove redundant and out-of-date material and increase the clarity of the plan |
| **Last day to disallow** | 9 September 2013 |
| **Authorising legislation** | *Australian Capital Territory (Planning and Land Management) Act 1988* |
| **Department** | Regional Australia, Local Government, Arts and Sport |

**ISSUE:**

#### Drafting

The instrument amends the National Capital Plan to remove outdated and redundant material. Schedule 1 (Amendment B) provides for the deletion of 'the following annotation on Figure 17':

For details of proposed widening of Morshead Drive refer to Appendix R.

The committee notes, however, that there is no apparent annotation on Figure 17. **The committee therefore draws this issue to the attention of the minister**.

### Charter of the United Nations Legislation Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 72, 2013] [F2013L00791]; and Charter of the United Nations (Sanctions - the Taliban) Regulation 2013 [Select Legislative Instrument No. 73, 2013] [F2013L00787]

|  |  |
| --- | --- |
| **Purpose** | (1) Amends several regulations implementing United Nations Security Council sanctions in order to give effect to recent changes, but principally amends the Charter of the United Nations (Sanctions - Al Qaida and the Taliban) Regulations 2008 to create a stand-alone regime for Al Qaida; and (2) gives effect to the decision to split the Al-Qaida and Taliban sanctions regimes into separate instruments currently governed by the Charter of the United Nations (Sanctions - Al-Qaida and the Taliban) Regulations 2008 |
| **Last day to disallow** | 9 September 2013 |
| **Authorising legislation** | *Charter of the United Nations Act 1945* |
| **Department** | Foreign Affairs and Trade |

**ISSUE:**

#### Insufficient information regarding strict liability offences

The instruments amend several regulations implementing United Nations Security Council sanctions in order to give effect to recent changes. One of these is that, where authorisation by the Minister for Foreign Affairs is required to make a sanctioned supply, perform a sanctioned service or make available or deal with an asset, the element of the offence for unsanctioned behaviour relating to 'not authorised by a permit' is subject to a strict liability test. While the ES states that this change reflects the strict liability provisions set out in Part 4 of the *Charter of the United Nations Act 1945*, the committee's usual expectation is that an ES for an instrument providing for offences (particularly offences of strict liability) provide adequate information regarding the justification for the framing of the offence. **The committee therefore requests further information from the minister**.

### Financial Management and Accountability Amendment Regulation 2013 (No. 3) [Select Legislative Instrument No. 70, 2013] [F2013L00802]

|  |  |
| --- | --- |
| **Purpose** | Amends the Financial Management and Accountability Regulations 1997 to add a new program to Schedule 1AA relating to the proposed referendum on the recognition of local government in the Constitution |
| **Last day to disallow** | 9 Septembere 2013 |
| **Authorising legislation** | *Financial Management and Accountability Act 1997* |
| **Department** | Finance and Deregulation |

**ISSUE:**

#### Addition of new program to Schedule 1AA of Financial Management and Accountability Regulations 1997

The amendment relies on section 32B of the *Financial Management and Accountability Act 1997*, which provides legislative authority for the Government to spend monies on programs listed in Schedule 1AA to Financial Management and Accountability Regulations 1997. Section 32B was introduced in response to the decision of the High Court in *Williams v Commonwealth* ([2012] HCA 23) in June 2012. The new program is described as providing legislative authority for the Government to spend on activities related to a referendum on the financial recognition of local government. The objectives of the referendum are to provide for (a) a national civics education campaign and (b) the implementation of a communications campaign by non-government bodies and those with various views on the referendum question. The ES to the instrument notes that spending decisions under the program will not be subject to judicial merits review (ADJR), an issue about which the committee has previously made inquiries. **The committee notes the concerns of the Senate Standing Committee for the Scrutiny of Bills regarding the justification for excluding such decisions from the *Administrative Decisions (Judicial Review) Act 1997*, and draws the attention of senators to the comments of that committee on the Financial Framework Legislation Amendment Bill (No. 2) 2013 in Alert Digest No. 5 of 2013 (15 May 2013)**.

### CASA 67/13 – Authorisation – pilot maintenance on class B rotorcraft [F2013L00756]; CASA ADCX 007/13 - Revocation of Airworthiness Directives [F2013L00738]; CASA ADCX 008/13 - Revocation of Airworthiness Directives [F2013L00750]; and CASA ADCX 009/13 - Revocation of Airworthiness Directives [F2013L00751]

|  |  |
| --- | --- |
| **Purpose** | (1) Permits suitably trained pilots of rotorcraft, other than rotorcraft that are certificated in the transport category or are under an air operator's certificate for regular public transport operations, to carry out maintenance on those aircraft in the form of specified types of inspection; and (2) the remaining instruments each revoke two airworthiness directives |
| **Last day to disallow** | 27 August 2013 |
| **Authorising legislation** | Civil Aviation Regulations 1988; and Civil Aviation Safety Regulations 1998 |
| **Department** | Infrastructure and Transport |

### ASIC Class Order [CO 13/552] [F2013L00742]; and ASIC Market Integrity Rules (ASX 24 Market) Amendment 2013 (No. 1) [F2013L00739]

|  |  |
| --- | --- |
| **Purpose** | (1) Amends ASIC Class Order [CO 10/321] by extending the minimum subscription requirement of at least $50 million until 12 November 2013; and (2) amends the ASIC Market Integrity Rules (ASX 24 Market) 2010 to address changes in market structure and growth in automation and innovation in electronic trading (in particular, proprietary trading) in domestic futures markets |
| **Last day to disallow** | 27 August 2013 |
| **Authorising legislation** | *Corporations Act 2001* |
| **Department** | Treasury |

### Defence Determination 2013/15, Disturbance allowance and vehicle allowance – amendment; Defence Determination 2013/16, Medical officers specialist officer career structure – amendment; Defence Determination 2013/17, Post indexes – amendment; Defence Determination 2013/18, Leave travel to a restricted destination – amendment; Defence Determination 2013/19, Class of travel, remote location leave travel, aide-de-damp allowance and compulsory tuition fees – amendment; Defence Determination 2013/20, Living-in contribution for Residential Support Officers – amendment; and Defence Determination 2013/21, Post indexes and approved clubs – amendment

|  |  |
| --- | --- |
| **Purpose** | (1) Amends the principal determination to make an annual adjustment to disturbance allowance and vehicle allowance rates; (2) amends the current rules for increment advancement through the medical officers specialist career structure to encompass the new medical procedural specialists; (3) implements revised post indexes for ADF members at overseas posting locations; (4) modifies the appointment that holds a selection of powers in relation to travel to certain restricted destinations while a member is on recreation leave and corrects an incorrect cross reference; (5) makes a number of minor technical amendments, including to clarify the class of rail travel to be used by ADF members and to remove unhelpful examples in the ADF remote location leave travel provisions; (5) exempts members from the requirement to contribute to the cost of living-in accommodation and meals if performing the role of Residential Support Officer; and (6) revises post indexes for ADF members at overseas posting locations and includes a new approved club |
| **Last day to disallow** | 27 August 2013 |
| **Authorising legislation** | *Defence Act 1903* |
| **Department** | Defence |

### Private Health Insurance (Data Provision) Amendment Rules 2013 (No. 1) [F2013L00771]

|  |  |
| --- | --- |
| **Purpose** | Amends the Private Health Insurance (Data Provision) Rules 2012 to incorporate a reference to the revised 'HCP1 Data from Insurers to the Department' document in the definitions section |
| **Last day to disallow** | 28 August 2013 |
| **Authorising legislation** | *Private Health Insurance Act 2007* |
| **Department** | Health and Ageing |

### Public Service Commissioner's Amendment Direction 2013 (No. 2)

|  |  |
| --- | --- |
| **Purpose** | Enables an Agency Head to put in place measures to address aspects of the employment related to disadvantage experienced by people with disability |
| **Last day to disallow** | 28 August 2013 |
| **Authorising legislation** | *Public Service Act 1999* |
| **Department** | Prime Minister and Cabinet |

### Remuneration Tribunal Determination 2013/05 – Remuneration and Allowances for Holders of Public Office including Judicial and Related Offices [F2013L00761]

|  |  |
| --- | --- |
| **Purpose** | Amends principal Tribunal determination 2012/09 (Judicial and related offices) as a result of changes to the name of the Federal Magistrates Court (now 'Federal Circuit Court') and to the titles of its judicial officers; and amends principal Tribunal determinations 2012/13 (Part-time offices) and 2012/24 (Full-time offices) to recognise restructuring of the Social Security Appeals Tribunal, t remove references to the Australian Solar Institute, and to set remuneration for certain new offices |
| **Last day to disallow** | 27 August 2013 |
| **Authorising legislation** | *Remuneration Tribunal Act 1973* |
| **Department** | Prime Minister and Cabinet |

### Finance Minister's Amendment Orders (Financial Statements for reporting periods ending on or after 1 July 2012) [F2013L00773]

|  |  |
| --- | --- |
| **Purpose** | Amends the Finance Minister's Orders (Financial Statements for reporting periods ending on or after 1 July 2011) to mandate financial reporting obligations for Commonwealth entities' annual financial statements |
| **Last day to disallow** | 9 September 2013 |
| **Authorising legislation** | *Aboriginal and Torres Strait Islander Act 2005*; *Commonwealth Authorities and Companies Act 1997*; *Defence Service Homes Act 1918*; *Financial Management and Accountability Act 1997*; *High Court of Australia Act 1979*; and *Natural Heritage Trust of Australia Act 1997* |
| **Department** | Finance and Deregulation |

### Private Health Insurance (Health Insurance Business) Amendment Rules 2013 (No. 1) [F2013L00775]

|  |  |
| --- | --- |
| **Purpose** | Amends the Private Health Insurance (Health Insurance Business) Rules 2010 to give effect to the revised HCP Data from Hospitals to Insurers and the PHDB Data from Private Hospitals to the Department documents |
| **Last day to disallow** | 9 September 2013 |
| **Authorising legislation** | *Private Health Insurance Act 2007* |
| **Department** | Health and Ageing |

### Radiocommunications (Labelling) Determination 2013 [F2013L00821]; and Radiocommunications Licence Conditions (Apparatus Licence) Amendment Determination 2013 (No. 1) [F2013L00824]

|  |  |
| --- | --- |
| **Purpose** | (1) sets out the requirements for the labelling of radiocommunications transmitters operated under apparatus licences; and (2) amends the Radiocommunications Licence Conditions (Apparatus Licence) Determination 2003 to replace references to the Australia Standard (AS) with references to the AS/NZS Standard and to include transitional mechanisms for compliance after this determination has commenced |
| **Last day to disallow** | 9 September 2013 |
| **Authorising legislation** | *Radiocommunications Act 1992* |
| **Department** | Broadband, Communications and the Digital Economy |

### Superannuation (Productivity Benefit) (Penalty Interest) Amendment Determination 2013 (No. 1) [F2013L00823]

|  |  |
| --- | --- |
| **Purpose** | Amends the Superannuation (Productivity Benefit) (Penalty Interest) Determination 1995 to specify the formula used to calculate penalty interest during on and after the 2013-14 financial year |
| **Last day to disallow** | 9 September 2013 |
| **Authorising legislation** | *Superannuation (Productivity Benefit) Act 1988* |
| **Department** | Finance and Deregulation |

**ISSUE**:

#### Drafting

Each of the instruments listed above appears 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, it would be preferable for the making words of the instrument and the ES to clearly identify the authority for the exercise of the power. **The committee therefore draws this issue to the attention of relevant ministers and instrument-makers**.

### National Health (Pharmaceutical Benefits) Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 53, 2013] [F2013L00650]

|  |  |
| --- | --- |
| **Purpose** | Amends the National Health (Pharmaceutical Benefits) Regulations 1960 to reflect changes to the provisions in Part 6A reflecting the reasons in the December 2012 *Sanofi-Aventis Australia Pty Limited v Minister for Health* Federal Court judgment |
| **Last day to disallow** | 27 August 2013 |
| **Authorising legislation** | *National Health Act 1953* |
| **Department** | Health and Ageing |

**ISSUE:**

#### Insufficient description regarding consultation undertaken

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the instrument states, in part, that 'representatives of the medicines industry, consumer, pharmacy and wholesaler organisations were briefed' in relation to the making of the instrument. While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description of consultation undertaken, such as in this case, is not sufficient to satisfy the requirements of the *Legislative Instruments Act 2003* **[the committee sought further information from the minister and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**MINISTER'S RESPONSE:**

The minister advised that the regulation was made following a December 2012 Federal Court decision concerning calculations for the Pharmaceutical Benefits Scheme price disclosure arrangements. However, while the minister undertook to update the ES in accordance with the committee's request, the minister's letter did not provide any information regarding consultation as per the committee's request.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for her response. However, as no further information was provided regarding the consultation undertaken in this case, the committee again requests this information from the minister.**

### Social Security (Deeming Threshold Rates) (FaHCSIA) Determination 2013 [F2013L00216]

|  |  |
| --- | --- |
| **Purpose** | Revokes the Social Security (Deeming Threshold Rates) (FaHCSIA) Determination 2010 (No. 1) to change the deemed rates of income upon financial assets for the purposes of the means test for the rate of social security payments administered by FaHCSIA (from 20 March 2013) |
| **Last day to disallow** | 18 June 2013 |
| **Authorising legislation** | *Social Security Act 1991* |
| **Department** | Families, Housing, Community Services and Indigenous Affairs |

**ISSUE:**

#### Unclear basis for determining rates

The instrument revokes and replaces the Social Security (Deeming Threshold Rates) (FaHCSIA) Determination 2010 (No. 1) to change the deemed rates of income upon financial assets for the purposes of the means test for the rate of social security payments administered by FaHCSIA. Noting that the deeming rate would presumably have a financial impact on certain individuals, the committee's usual expectation is that the ES to an instrument with a financial impact sets out the basis on which any new fee, charge or rate has been set or calculated **[the committee sought further information from the minister]**.

**MINISTER'S RESPONSE:**

The minister advised that deeming rates are subject to continuing review by the department to ensure they are set to reflect the returns available in the market to pensioners for their financial investments. The department considers a range of investment indicators including those commonly held by pensioners (such as term deposit rates) and data and analysis from the Reserve Bank of Australia and Treasury. Following consideration of these factors, the deeming rate was reduced by 0.5 per cent [**the committee thanked the minister for her response but requested that the ES be updated to include the information on the basis for reducing the deeming rates]**.

The minister subsequently advised that it was not feasible to include this information in the ES as the determination and ES had already been laid before each House of the Parliament and the disallowance period had expired. The minister indicated that she would ensure that information relevant there to the committee's terms of reference would be included in future explanatory material.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for her response. However, the committee notes that the inclusion of information in ESs regarding the basis of changes to such things as fees, levies and rates allows stakeholders to reasonably ascertain the basis for assumed costs, and generally improves the accessibility and intelligibility of explanatory material accompanying delegated legislation. Noting that the updating or correcting of ESs on the Federal Register of Legislative Instruments occurs regularly, the committee again requests that the minister update the ES with the information previously provided to the committee. Alternatively, the committee requests further advice from the minister as to the basis for the view that this is no longer feasible**.

# Chapter 2

## Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **20 June 2013**. The committee has concluded its interest in these matters on the basis of responses received from ministers or relevant instrument-makers.

Correspondence relating to these matters is included at Appendix 3.

### Export Market Development Grants (Extended Lodgement and Consultant Quality Incentive) Determination 2012 [F2013L00258]

|  |  |
| --- | --- |
| **Purpose** | Contains the circumstances and number of months, as required by subsection 70(4) of the *Export Market Development Grants Act 1997* (the Act), to be complied with by Austrade in assessing whether an application for grant meets the requirements of subparagraph 70(2)(b)(ii) of the Act |
| **Last day to disallow** | 18 June 2013 |
| **Authorising legislation** | *Export Market Development Grants Act 1997* |
| **Department** | Foreign Affairs and Trade |

**ISSUE:**

#### Availability of merits review

Regarding review rights, the ES for this instrument states:

Review rights exist in relation to decisions made by Austrade to refuse to approve an applicant as a participating EMDG consultant or to cancel the approval of a participating EMDG consultant.

However, while the instrument clearly provides for these decisions to be reconsidered by the CEO of Austrade it does not, on its face, appear to make provision for merits review as the ES may be taken to suggest. The committee notes that the decisions in question also do not appear to be (Administrative Appeals Tribunal (AAT)) reviewable decisions for the purposes of section 97 of the *Export Market Development Act 1997* **[the committee sought further information from the minister]**.

**MINISTER'S RESPONSE:**

The Parliamentary Secretary for Trade responded, advising that the decisions in question are subject to merits review by the AAT. The Parliamentary Secretary noted that, when Austrade refuses to approve a consultant as a participating consultant or cancels the approval of a participating consultant, the person will be advised of their review rights, including access to merits review by the AAT.

**COMMITTEE RESPONSE:**

**The committee thanks the parliamentary secretary for his response and has concluded its interest in the matter**.

However, subsequent to the parliamentary secretary's response, the committee received a submission from the Export Consultants Group (ECG) outlining a number of concerns in relation to the determination, including adequacy of the description of consultation in the ES and, in broad terms, the effect of the determination on a person's ability to practice a trade or profession or carry on a business affecting livelihood. **While the committee's consideration of these matters did not identify any new matters referable to the committee's scrutiny principles, the committee draws the attention of senators to the matters raised in the correspondence from the ECG**.

### Fair Entitlements Guarantee Regulation 2012 [Select Legislative Instrument 2012 No. 326] [F2012L02474]

|  |  |
| --- | --- |
| **Purpose** | Builds upon the scheme created by the *Fair Entitlements Guarantee Act 2012* to create a scheme to allow for financial assistance to be advanced to contract outworkers in the textile, clothing and footwear industry in certain circumstances |
| **Last day to disallow** | 15 May 2013 |
| **Authorising legislation** | *Fair Entitlements Guarantee Act 2012* |
| **Department** | Education, Employment and Workplace Relations |

**ISSUE:**

#### Insufficient explanation provided in relation to consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the instrument states only that representatives from 'employer and employee groups were consulted in relation to this regulation'. The committee generally takes the view that overly bare or general descriptions, such as this, are not adequate to satisfy the requirement that an ES describe the nature of the consultation undertaken **[the committee sought further information from the minister and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**MINISTER'S RESPONSE:**

The minister advised that background information and a draft copy of the regulation were provided to the Australian Industry Group, the Australian Chamber of Commerce and Industry, the Australian Council of Trade Unions, the Textile, Clothing & Footwear Union of Australia and the Insolvency Practitioners Association of Australia. The department provided an opportunity for these groups to discuss the details of the regulation through a teleconference or written comments. The participants at the teleconference raised no concerns regarding the effect of the regulation and no written comments were received. The minister further advised that the ES would be amended in accordance with the committee's request.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in the matter**.

### Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2013 [F2013L00477]

|  |  |
| --- | --- |
| **Purpose** | Lists the Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) List 2012 (the list) to give effect to the decision of the Minister for Foreign Affairs to revoke designations and declarations in relation to persons on the list |
| **Last day to disallow** | 20 August 2013 |
| **Authorising legislation** | Autonomous Sanctions Regulations 2011 |
| **Department** | Foreign Affairs and Trade |

**ISSUE:**

#### Insufficient description regarding consultation undertaken

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the instrument states only that '[r]elevant Commonwealth Government departments were consulted prior to and during the drafting of this legislative instrument'. While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description, such as in this case, is not sufficient to satisfy the requirements of the *Legislative Instruments Act 2003* **[the committee sought further information from the minister and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**MINISTER'S RESPONSE:**

The minister advised that the department prepared the list in consultation with the Australian High Commission in Harare, the Department of the Prime Minister and Cabinet, the Attorney-General's Department, the Department of Immigration and Citizenship and the Office of Parliamentary Counsel. The department also notifies the financial services sector and the broader business community of all changes to the Department of Foreign Affairs and Trade (DFAT) Consolidated List of entities and individuals subject to autonomous and UN Security Council (UNSC) sanctions through its email subscription service. The minister further advised that the department had been requested to update the ES in accordance with the committee's request.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in the matter**.

### Primary Industries Levies and Charges Collection Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 39, 2013] [F2013L00594]; and Primary Industries (Customs) Charges Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 37, 2013] [F2013L00595]

|  |  |
| --- | --- |
| **Purpose** | (1) Amends the Primary Industries Levies and Charges Collection Regulations 1991 by adding a new Part 29 and sets out details for the payment, by olive producers, of three new statutory levies on fresh olives for processing; and (2) amends the Primary Industries (Customs) Charges Regulations 2000 by adding a new part (Part 29) in Schedule 10 to deal with olives |
| **Last day to disallow** | 27 August 2013 |
| **Authorising legislation** | *Primary Industries Levies and Charges Collection Act 1991*; and *Primary Industries (Customs) Charges Act 1999* |
| **Department** | Agriculture, Fisheries and Forestry |

**ISSUE:**

#### No information provided regarding consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the ESs accompanying the instruments contain no reference to consultation **[the committee sought further information from the parliamentary secretary** **and requested that the ESs be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**PARLIAMENTRY SECRETARY'S RESPONSE:**

The Parliamentary Secretary for Agriculture, Fisheries and Forestry advised that the Australian Olive Association assisted the department in identifying and consulting with all levy payers about the proposed levies. Around 83 per cent of producers voted to support the introduction of the levies in a ballot conducted in June 2011. This information was omitted in error from the ESs and they have subsequently been amended to include details about the consultation that was undertaken.

**COMMITTEE RESPONSE:**

**The committee thanks the parliamentary secretary for his response and has concluded its interest in the matter**.

### Intellectual Property Legislation Amendment (Raising the Bar) Regulation 2013 (No. 1) [Select Legislative Instrument No. 31, 2013] [F2013L00479]

|  |  |
| --- | --- |
| **Purpose** | Amends the Patents Regulations 1991, Trade Marks Regulations 1995, Designs Regulations 1995 and the Copyright Regulations 1969 in relation to intellectual property and for related purposes |
| **Last day to disallow** | 21 August 2013 |
| **Authorising legislation** | *Copyright Act 1968*; *Patents Act 1990*; *Trade Marks Act 1995*; and *Designs Act 2003* |
| **Department** | Industry, Innovation, Science, Research and Tertiary Education |

**ISSUE:**

#### Insufficent information regarding offence provisions

The instrument gives effect to a number of changes to the intellectual property system (essentially flowing from the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012*), including the introduction of a number of offence provisions (see new regulations 20A.13, 20A16 and 20A.21). Regulation 20A16, for example, establishes 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. In general, the committee expects that, where an instrument makes provision for offences, the ES provide a full justification for the need, scope and framing of those offences. This is particularly so in cases of strict liability or where the evidential burden is placed on a defendant. The ES in this case provides very little information in these respects **[the committee sought further information from the minister]**.

**MINISTER'S RESPONSE:**

The minister advised that new Chapter 20A extends to incorporated patent attorneys (IPAs) longstanding provisions that have been in their present form since 1 July 2008. The new offences are the same as in Chapter 20 applying for individual patent attorneys.

First, the minister advised that new regulation 20A.13 'protects the public interest' by providing for disciplinary tribunal hearings involving IPAs to be held in public (except in special circumstances). The offence for failing to comply with a direction of the tribunal was intended to give force to the tribunal's capacity to direct its own proceedings.

Second, IPAs' representatives appearing before the tribunal were subject to three further potential offences to ensure the tribunal's capacity to carry out its responsibilities. These were: failing to comply with a summons, refusing to be sworn or to answer a relevant question after being summoned to appear at a hearing and refusing to be sworn or to answer a relevant question after having accepted expenses and allowances to appear as a witness (regulation 20A.16). The minister noted that strict liability was applied in the latter case as the person would not be in a position to argue lack of intent or ignorance of regulation 20A.16 as a defence.

Third, the minister advised that the regulation sought to protect consumers by obliging deregistered or suspended IPAs to help registered patent attorneys appointed as temporarily replacements. The offence for failing to comply with a notice requesting assistance (regulation 20A.21) was aimed at ensuring compliance with this requirement, and an IPA would bear the evidential burden in mounting a defence in accordance with section 13(3) of the Criminal Code.

Finally, the minister noted that the offences were all in compliance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

The minister further advised that IP Australia would amend the ES to include the information provided.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in the matter**.

# Appendix 1

## Index of instruments scrutinised

The following instruments were considered by the committee at its meeting on **20 June 2013**.

The Federal Register of Legislative Instruments (FRLI) website should be consulted for the text of instruments and explanatory statements, as well as associated information.[[5]](#footnote-5) Instruments may be located on FRLI by entering the relevant FRLI number into the FRLI search field (the FRLI number is shown in square brackets after the name of each instrument listed below).

### Instruments received week ending 10 May 2013

***A New Tax System (Goods and Services Tax) Act 1999***

Goods and Services Tax: Correcting GST Errors Determination 2013 [F2013L00754]

***Civil Aviation Act 1988***

CASA 67/13 – Authorisation – pilot maintenance on class B rotorcraft [F2013L00756]

CASA ADCX 007/13 - Revocation of Airworthiness Directives [F2013L00738]

CASA ADCX 008/13 - Revocation of Airworthiness Directives [F2013L00750]

CASA ADCX 009/13 - Revocation of Airworthiness Directives [F2013L00751]

CASA EX53/13 – Exemption – from standard take-off and landing minima – Japan Airlines [F2013L00743]

***Corporations Act 2001***

ASIC Class Order [CO 13/552] [F2013L00742]

ASIC Market Integrity Rules (ASX 24 Market) Amendment 2013 (No. 1) [F2013L00739]

Guidelines for the use of the word 'university' in company names (Revocation) Instrument 2013 [F2013L00757]

***Currency Act 1965***

Currency Legislation (Perth Mint) Amendment Determination 2013 (No. 1) [F2013L00735]

***Defence Act 1903***

Defence Determination 2013/15, Disturbance allowance and vehicle allowance – amendment

Defence Determination 2013/16, Medical officers specialist officer career structure – amendment

Defence Determination 2013/17, Post indexes – amendment

Defence Determination 2013/18, Leave travel to a restricted destination – amendment

Defence Determination 2013/19, Class of travel, remote location leave travel, aide-de-damp allowance and compulsory tuition fees – amendment

Defence Determination 2013/20, Living-in contribution for Residential Support Officers – amendment

Defence Determination 2013/21, Post indexes and approval clubs – amendment

***Environment Protection and Biodiversity Conservation Act 1999***

Amendment of List of Exempt Native Specimens – Western Australian West Coast Deep Sea Crustacean Managed Fishery (29/04/2013) [F2013L00745]

Amendment of List of Exempt Native Specimens – Northern Territory Timor Reef Fishery (01/05/2013) [F2013L00747]

***Federal Court of Australia Act 1976***

Federal Court Amendment Rules 2013 (No. 1) [Select Legislative Instrument No. 65, 2013] [F2013L00749]

***Fisheries Management Act 1991***

Southern Bluefin Tuna Fishery Overcatch and Undercatch Determination 2013 [F2013L00752]

***Fuel Tax Act 2006***

Fuel Tax: Correct Fuel Tax Errors Determination 2013 [F2013L00753]

***Greenhouse and Energy Minimum Standards Act 2012***

Greenhouse and Energy Minimum Standards (Computer Monitors) Determination 2013 [F2013L00733]

Greenhouse and Energy Minimum Standards (Computers) Determination 2013 [F2013L00726]

Greenhouse and Energy Minimum Standards (Gas Water Heaters) Determination 2013 [F2013L00729]

***Higher Education Support Act 2003***

Higher Education Provider Approval No. 2 of 2013 [F2013L00741]

Higher Education Support Act 2003 - VET Provider Approval (No. 16 of 2013) [F2013L00740]

Higher Education Support Act 2003 - VET Provider Approval (No. 17 of 2013) [F2013L00755]

***Veterans' Entitlements Act 1986***

Statement of Principles concerning chronic gastritis and chronic gastropathy No. 26 of 2013 [F2013L00722]

Statement of Principles concerning goitre No. 23 of 2013 [F2013L00721]

Statement of Principles concerning goitre No. 24 of 2013 [F2013L00725]

Statement of Principles concerning Graves' disease No. 33 of 2013 [F2013L00736]

Statement of Principles concerning Graves' disease No. 34 of 2013 [F2013L00737]

Statement of Principles concerning hashimoto's thyroiditis No. 31 of 2013 [F2013L00732]

Statement of Principles concerning Hashimoto's thyroiditis No. 32 of 2013 [F2013L00731]

Statement of Principles concerning hypothyroidism No. 29 of 2013 [F2013L00728]

Statement of Principles concerning hypothyroidism No. 30 of 2013 [F2013L00730]

Statement of Principles concerning hyperthyroidism and thyrotoxicosis No. 27 of 2013 [F2013L00723]

Statement of Principles concerning hyperthyroidism and thyrotoxicosis No. 28 of 2013 [F2013L00724]

### Instruments received week ending 17 May 2013

***Clean Energy Act 2011***

Clean Energy (Auction of Carbon Units) Determination 2013 [F2013L00759]

Clean Energy Legislation Amendment (International Linking) Regulation 2013 [Select Legislative Instrument No. 78, 2013] [F2013L00778]

Clean Energy Legislation Amendment (Various Measures) Regulation 2013 [Select Legislative Instrument No. 79, 2013] [F2013L00779]

***Environment Protection and Biodiversity Conservation Act 1999***

Amendment of List of Exempt Native Specimens - Western Australian Mackerel Fishery (04/05/13) (deletion) [F2013L00767]

Amendment of List of Exempt Native Specimens - Western Australian Mackerel Fishery (04/05/2013) (inclusion) [F2013L00769]

Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (122) (30/04/2013) [F2013L00766]

Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (139) (29/04/2013) [F2013L00765]

Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (141) (30/04/2013) [F2013L00764]

Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (144) (26/04/2013) [F2013L00763]

***Private Health Insurance Act 2007***

Private Health Insurance (Data Provision) Amendment Rules 2013 (No. 1) [F2013L00771]

***Public Service Act 1999***

Public Service Commissioner's Amendment Direction 2013 (No. 2)

***Remuneration Tribunal Act 1973***

Remuneration Tribunal Determination 2013/05 – Remuneration and Allowances for Holders of Public Office including Judicial and Related Offices

***Social Security Act 1991***

Social Security (Personal Care Support - Tasmanian Self Directed Funding Pilot) (FaHCSIA) Determination 2013 [F2013L00770]

***Tertiary Education Quality and Standards Agency Act 2011***

Tertiary Education Quality and Standards Agency (Information) Guidelines 2013 [F2013L00760]

### Instruments received week ending 24 May 2013

***A New Tax System (Australian Business Number) Act 1999***

A New Tax System (Australian Business Number) Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 81, 2013] [F2013L00785]

***Australian Capital Territory (Planning and Land Management) Act 1988***

National Capital Plan - Amendment 81 - Removal of Outdated and Unnecessary Policy Material [F2013L00782]

***Australian Charities and Not-for-profits Commission Act 2012***

Australian Charities and Not-for-profits Commission Amendment Regulation 2013 (No. 2) [Select Legislative Instrument No. 82, 2013] [F2013L00793]

***Australian Prudential Regulation Authority Act 1998***

Australian Prudential Regulation Authority (confidentiality) determination No. 8 of 2013 [F2013L00797]

***Australian Radiation Protection and Nuclear Safety Act 1998***

Australian Radiation Protection and Nuclear Safety Legislation (Fees and Charges) Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 74, 2013] [F2013L00796]

***Broadcasting Services Act 1992***

Broadcasting Services (Exempt Digital Transmission Areas) Determination (No. 2) 2013 [F2013L00818]

***Carbon Credits (Carbon Farming Initiative) Act 2011***

Carbon Credits (Carbon Farming Initiative) Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 77, 2013] [F2013L00800]

***Charter of the United Nations Act 1945***

Charter of the United Nations Legislation Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 72, 2013] [F2013L00791]

Charter of the United Nations (Sanctions - the Taliban) Regulation 2013 [Select Legislative Instrument No. 73, 2013] [F2013L00787]

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2013 (No. 1) [F2013L00789]

***Civil Aviation Act 1988***

AD/BEECH 200/38 Amdt 6 – Wing Front Spars [F2013L00820]

Civil Aviation Legislation Amendment (Miscellaneous) Regulation 2013 [Select Legislative Instrument No. 80, 2013] [F2013L00798]

***Corporations Act 2001***

Corporations Amendment Regulation 2013 (No. 2) [Select Legislative Instrument No. 83, 2013] [F2013L00780]

Corporations (Derivatives) Determination 2012 [F2013L00819]

***Criminal Code Act 1995***

Criminal Code Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 66, 2013] [F2013L00825]

***Currency Act 1965***

Currency (Royal Australian Mint) Determination 2013 (No. 2) [F2013L00799]

***Environment Protection and Biodiversity Conservation Act 1999***

Amendment of List of Exempt Native Specimens - Australian High Seas Fishery (20/05/2013) (deletion) [F2013L00810]

Amendment of List of Exempt Native Specimens - Australian High Seas Fishery (20/05/2013) (inclusion) [F2013L00812]

Amendment of List of Exempt Native Specimens - Queensland Mud Crab Fishery (10/05/2013) [F2013L00804]

Amendment of List of Exempt Native Specimens - Torres Strait Finfish Fishery (10/05/2013) [F2013L00805]

Amendment of List of Exempt Native Specimens - Western Australian South Coast Trawl Fishery (14/05/2013) (deletion) [F2013L00806]

Amendment of List of Exempt Native Specimens - Western Australian South Coast Trawl Fishery (14/05/2013) (inclusion) [F2013L00807]

Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (117) (02/04/2013) [F2013L00817]

Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (143) (07/05/2013) [F2013L00794]

Inclusion of ecological communities in the list of threatened ecological communities under section 181 of the Environment Protection and Biodiversity Conservation Act 1999 – Scott River Ironstone Association (EC 123) (30/04/2013) [F2013L00816]

***Fair Work Act 2009***

Fair Work Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 69, 2013] [F2013L00815]

***Financial Management and Accountability Act 1997***

Financial Management and Accountability Amendment Regulation 2013 (No. 3) [Select Legislative Instrument No. 70, 2013] [F2013L00802]

Finance Minister’s Amendment Orders (Financial Statements for reporting periods ending on or after 1 July 2012) [F2013L00773]

***Financial Sector (Collection of Data) Act 2001***

Financial Sector (Collection of Data) determination No. 62 of 2013 [F2013L00776]

***Higher Education Support Act 2003***

Higher Education Support Act 2003 - VET Provider Approval (No. 18 of 2013) [F2013L00781]

***Income Tax Assessment Act1997***

Income Tax Assessment Amendment (Private Health Insurance Statement) Regulation 2013 [Select Legislative Instrument No. 84, 2013] [F2013L00784]

***Migration Act 1958***

Migration Amendment Regulation 2013 (No. 2) [Selective Legislative Instrument No. 75, 2013] [F2013L00795]

Migration Amendment Regulation 2013 (No. 3) [Select Legislative Instrument No. 76, 2013] [F2013L00786]

***National Consumer Credit Protection Act 2009***

National Consumer Credit Protection Amendment Regulation 2013 (No. 2) [Select Legislative Instrument No. 85, 2013] [F2013L00814]

***National Environment Protection Council Act 1994***

National Environment Protection (Assessment of Site Contamination) Amendment Measure 2013 (No. 1) [F2013L00768]

***Parliamentary Entitlements Act 1990***

Parliamentary Entitlements Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 71, 2013] [F2013L00792]

***Privacy Act 1988***

Privacy (Private Sector) Amendment (Centrelink eServices Organisations) Regulation 2013 [Select Legislative Instrument No. 67, 2013] [F2013L00790]

***Private Health Insurance Act 2007***

Private Health Insurance (Health Insurance Business) Amendment Rules 2013 (No. 1) [F2013L00775]

***Radiocommunications Act 1992***

Australian Radiofrequency Spectrum Plan Variation 2013 (No. 1) [F2013L00826]

Radiocommunications (Labelling) Determination 2013 [F2013L00821]

Radiocommunications Licence Conditions (Apparatus Licence) Amendment Determination 2013 (No. 1) [F2013L00824]

***Shipping Reform (Tax Incentives) Act 2012***

Shipping Reform (Tax Incentives) Act 2012 - Subsection 10(5) specification of kinds of vessels [F2013L00774]

***Superannuation (Productivity Benefit) Act 1988***

Superannuation (Productivity Benefit) (Continuing Contributions) Declaration 2013 [F2013L00813]

Superannuation (Productivity Benefit) (First Interest Factor) Declaration 2013 [F2013L00808]

Superannuation (Productivity Benefit) (Penalty Interest) Amendment Determination 2013 (No. 1) [F2013L00823]

Superannuation (Productivity Benefit) (Second Interest Factor) Declaration 2013 [F2013L00822]

***Superannuation Industry (Supervision) Act 1993***

Superannuation Industry (Supervision) Amendment Regulation 2013 (No. 2) [Select Legislative Instrument No. 86, 2013] [F2013L00783]

***Telecommunications Universal Service Management Agency Act 2012***

Telecommunications Universal Service Management Agency Amendment (Accessible Services) Regulation 2013 [Select Legislative Instrument No. 68, 2013] [F2013L00801]

***Therapeutic Goods Act 1989***

Therapeutic Goods (Listing) Notice 2013 (No. 1) [F2013L00772]

Therapeutic Goods (Listing) Notice 2013 (No. 2) [F2013L00777]

### Total number of instruments scrutinised: 103

# Appendix 2

## Guideline on explanatory statements: 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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/guidelines.htm) 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*](http://www.comlaw.gov.au/Details/C2012C00041) (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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/alert2012.htm).

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_Committees?url=regord_ctte/index.htm> or by contacting the committee secretariat at:

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# Appendix 3

## Correspondence relating to committee's scrutiny

1. Prior to 2013, the monitor provided only statistical and technical information on instruments scrutinised by the committee in a given period or year. This information is now most easily accessed via the authoritative Federal Register of Legislative Instruments (FRLI), at www.comlaw.gov.au. [↑](#footnote-ref-1)
2. For further information on the disallowance process and the work of the committee see *Odger's Australian Senate Practice*, 13th Edition (2012), Chapter 15. [↑](#footnote-ref-2)
3. 'Last day to disallow' refers to the last day on which notice may be given of a motion for disallowance in the Senate. [↑](#footnote-ref-3)
4. In the event that the disallowance period is interrupted for the election of the 43rd Parliament, as is expected to occur over August-September 2013, the counting of the 15-day disallowance period will continue from the first day of sitting of the new Parliament. [↑](#footnote-ref-4)
5. FRLI is found online at http://www.comlaw.gov.au/. [↑](#footnote-ref-5)