

## Chapter 3

### Work of the committee in 2010-11

3.1 This chapter discusses the work of the committee 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 10 private meetings in 2010-11, at which it considered 1809 instruments.

3.3 The number of instruments examined was significantly fewer than in 2009-10 (2468) and 2008-09 (3404). This is attributable to a reduction in the number of airworthiness directives (ADs) made under the *Civil Aviation Act 1988* (74 in 2010-11 compared to 708 in 2009-10 and 1755 in 2008-09). This followed a change (from 1 October 2009) whereby the Civil Aviation Safety Authority (CASA) is no longer required, as a matter of course, to re-issue ADs issued in a (foreign) State of Design as Australian ADs. Instead, operators must now comply with the AD as issued by the (foreign) State of Design.

3.4 The holding of the 2010 federal election may also have reduced the number of instruments made in comparison to the previous two years.

3.5 Details of all instruments scrutinised by the committee were recorded in the committee publication, the *Delegated legislation monitor* (the monitor). The committee published nine periodical monitors in 2010-11, as well as the consolidated monitor for 2010.

3.6 Appendix 1 provides a breakdown of the instruments made in 2010-11 by Act and instrument type. For further detail on specific instruments in this period, the monitors for the relevant years should be consulted.

#### **Instruments of concern and notices**

3.7 Of the 1809 instruments examined by the committee during 2010-11, 129 instruments were identified as raising a concern.<sup>1</sup>

3.8 The committee gave notices of motion to disallow the following four instruments:<sup>2</sup>

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1 Details of these instruments may be found on the 'Scrutiny of disallowable instruments' webpage at [http://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=regord\\_c tte/scrutinyleginst2012.htm](http://www.apf.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_c tte/scrutinyleginst2012.htm).

- ASIC Market Integrity Rules (ASX Market) 2010 [F2010L02211];
- Australian Wine and Brandy Corporation (Annual General Meeting of the Industry) Amendment Regulations 2010 (No. 1) [Select Legislative Instrument 2010 No. 218] [F2010L02114];
- Electoral and Referendum Amendment Regulations 2010 (No. 3) [Select Legislative Instrument 2010 No. 227] [F2010L02131]; and
- Producer Offset Amendment Rules 2010 (No. 1) [F2010L01826].

3.9 There were no unresolved notices of motion (given by the committee) at the end of the reporting period. All the notices listed above were ultimately withdrawn following receipt of satisfactory responses from ministers.

## Undertakings

3.10 During 2010-11:

- thirteen undertakings to amend legislation were provided to address concerns raised by the committee (see tables 1 and 2 at appendix 2 for details); and
- ten undertakings were implemented (see table 1 at appendix 2).

3.11 Twenty-three undertakings remained outstanding (at 30 June 2011) (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

3.12 Scrutiny principle (a) requires that an instrument of delegated legislation be validly made, in accordance with both its authorising Act or instrument and any other relevant legislation, such as the *Legislative Instruments Act 2003* (the LIA) and the *Acts Interpretation Act 1901* (the AIA). The LIA, for example, imposes specific requirements relating to the provision and content of explanatory statements (ESs),<sup>3</sup> the prohibiting of prejudicial retrospectivity,<sup>4</sup> and the incorporation of extrinsic material.<sup>5</sup>

### *Explanatory statements: describing consultation*

3.13 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

2 The 'Disallowance alert' (the alert) provides details of all notices of motion for disallowance given by the committee, as well as by individual senators and members of the House of Representatives. The alert may be accessed at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=regord\\_c tte/alert2012.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_c tte/alert2012.htm).

3 LIA, section 26 (previously LIA, section 4).

4 LIA, section 12(2).

5 LIA, sections 14 and 26 (previously LIA, section 4)

contain.<sup>6</sup> This includes a description of the nature of consultation undertaken or an explanation as to why consultation was considered unnecessary or inappropriate. In 2010-11, the committee identified a relatively large number of instruments that did not meet these requirements.

3.14 In approximately 32 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.

3.15 In another 27 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.

3.16 An example of this was the **Australian Meat and Live-stock Industry (Export of Live-stock to the Republic of Indonesia) Order 2011 [F2011L00970]** and three associated instruments (June 2011),<sup>7</sup> which implemented prohibitions on the export of live-stock to the Republic of Indonesia in response to animal welfare concerns in that country. The ESs to the instruments noted only that consultation had not been possible 'given the circumstances' in which the orders were made. In response to the committee's inquiry, the Minister for Agriculture, Fisheries and Forestry (the Agriculture Minister) advised that consultation had been considered inappropriate because the urgent suspension of the live-stock trade was required to prevent further live-stock being handled in ways that did not meet acceptable animal welfare standards.

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

7 Australian Meat and Live-stock Industry (Protection of Animal Welfare) Order 2011 [F2011L00932]; Export Control (Export of Live-stock to the Republic of Indonesia) Order 2011 [F2011L00969]; and Export Control (Protection of Animal Welfare) Order 2011 [F2011L00930].

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

3.17 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 considerations and limitations which are relevant to its operation.

***Imposition of an obligation***

3.18 The committee wrote to a number of ministers seeking clarification about the scope and content of obligations imposed by delegated legislation. An example of this was the **Broadcasting Services (Anti-terrorism Requirements for Open Narrowcasting Television Services) Standard 2011 [F2011L00579]** and an associated instrument (April 2011),<sup>8</sup> which introduced into the existing standards a prohibition on the broadcast of programs that advocate the doing of a terrorist act. The prohibition relied on a distinction between urging or praising the doing of a terrorist act and merely informing viewers about the activities, beliefs, or opinions of a listed terrorist. The committee considered that this distinction could be unclear in practice, potentially resulting in broadcasters being unsure as to their obligations and/or leading to inadvertent breaches of the standard, and wrote to the Minister for Broadband, Communications and the Digital Economy (the Communications Minister) to express its concerns. In reply, the Communications Minister noted that the wording of the standard was consistent with other Commonwealth Acts dealing with such matters,<sup>9</sup> but nonetheless provided an undertaking to update the Australian Communications and Media Authority's guidelines to provide guidance on the interpretation and application of the prohibition in question. The committee was given the opportunity to assess the updated guidelines and, finding the guidance provided on the new standard to be adequate, concluded its interest in the matter.

***Property rights***

3.19 Where an instrument may affect personal property, the committee is careful to ensure that any interference with personal property is reasonable and proportionate. One example of this during the reporting period was the **Therapeutic Goods (Medical Devices) Amendment Regulations 2010 (No. 3) [Select Legislative Instrument 2010 No. 267] [F2010L02787]** (October 2010), which amended the Therapeutic Goods (Medical Devices) Regulations 2002 so as to allow the Secretary of the Department of Health and Ageing to direct, in certain circumstances, that unused emergency medical devices be destroyed, exported to another country or supplied to another person. While the instrument specified that an order to export or

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8 Broadcasting Services (Anti-terrorism Requirements for Subscription Television Narrowcasting Services) Standard 2011 [F2011L00581].

9 For example, the *Classification (Publications, Films and Computer Games) Act 1995* and the *Criminal Code Act 1995*.

supply any such device would not affect a person's liability to pay the owner of the device for providing it for export or supply, it did not specify how any such liability would be affected by a direction for the destruction of an unused device. In response to the committee's correspondence on the matter, the Parliamentary Secretary for Health and Ageing provided an assurance to the committee that no third-party entitlements could be adversely affected by a direction to destroy unused medical devices, as in all cases the devices would be the property of the Commonwealth.

***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***

3.20 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 the framing of those powers 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.

***Timeframe for making decisions***

3.21 An example of the concerns which may arise under this scrutiny principle was the **Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011** [Select Legislative Instrument 2011 No. 54] [F2011L00647] (April 2011), which made a number of changes and consolidations to the regulatory arrangements governing exploration, discovery, development and production or injection operations for petroleum and greenhouse gas substances. The committee noted that a number of the decisions authorised by the instrument were not required to be made within a specific timeframe, but rather 'as soon as practicable'. This included decisions related to the acceptance or rejection of a field development plan (FDP), objections to a requirement to vary an FDP and approval to commence well activities. The committee considered that it was not clear why the regulations did not establish specific timeframes for the making of these decisions. In response to the committee's inquiry, the Minister for Resources and Energy (the Resources Minister) advised that all but one of the decisions in question were to be made jointly by the relevant Commonwealth and territory ministers. Each minister would need to separately consider and endorse such decisions and it was therefore not possible to establish more specific timeframes. The absence of a specific timeframe in relation to approvals also reflected the need to retain sufficient flexibility to fully consider the range of relevant safety and integrity matters relevant to well activities, as a specific timeframe could, for example, impede the ability of the regulator to conduct a full and proper appraisal of well integrity or safety risks. In light of these administrative and regulatory considerations, the committee concluded its interest in the matter.

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

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. Concerns related to this principle are less commonly raised by the committee (or, at least, less commonly characterised in such terms), and no significant matters were identified under this scrutiny principle in the reporting period.

**Senator Mark Furner**

**Chair**