

The Senate

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Standing  
Committee on  
Regulations and  
Ordinances

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Report on the work of the committee  
in 2010-11

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# Committee information

## Current members (March 2013)

Senator Mark Furner (Chair)	Queensland, ALP
Senator the Hon Richard Colbeck (Deputy Chair)	Tasmania, LP
Senator Claire Moore	Queensland, ALP
Senator Louise Pratt	Western Australia, ALP
Senator Scott Ryan	Victoria, LP
Senator Arthur Sinodinos AO	New South Wales, LP

## Former members 2010-11

Senator the Hon Michael Ronaldson (Deputy Chair) (13.02.08 – 16.03.12)	Victoria, LP
Senator Carol Brown (13.09.05 – 01.07.11)	Tasmania, ALP
Senator Michaelia Cash (02.02.10 – 07.02.13)	Western Australia, LP
Senator the Hon Jacinta Collins (12.05.10 – 27.09.10) (Chair from 13.05.10 – 27.09.10)	Victoria, ALP
Senator Mathias Cormann (13.02.08 – 27.09.10)	Western Australia, LP
Senator the Hon Ursula Stephens (Chair) (30.09.10 – 01.07.11) (Chair from 30.09.10 – 01.07.11)	New South Wales, ALP

## Secretariat

Mr Ivan Powell, Secretary  
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# Acronyms and abbreviations

<b>AAT</b>	Administrative Appeals Tribunal
<b>AD</b>	airworthiness directive
<b>AIA</b>	<i>Acts Interpretation Act 1901</i>
<b>(the) alert</b>	Disallowance alert (webpage)
<b>ASIC</b>	aviation security identification card
<b>CASA</b>	Civil Aviation Safety Authority
<b>ES</b>	explanatory statement
<b>FDP</b>	field development plan
<b>FRLI</b>	Federal Register of Legislative Instruments
<b>LIA</b>	<i>Legislative Instruments Act 2003</i>
<b>(the) monitor</b>	<i>Delegated legislation monitor</i>
<b>SDIL</b>	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.<sup>1</sup>

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* (LIA).<sup>2</sup>

1.5 This report on the work of the committee covers the 2010-11 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.

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1 *Odger's Australian Senate Practice*, 13<sup>th</sup> Edition (2012), p. 416.

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

1.7 Current members at March 2013 were as follows:

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

1.8 The following senators were also members of the committee during the reporting period:

- Senator Carol Brown;<sup>9</sup>
- Senator Michaelia Cash;<sup>10</sup>
- Senator Mathias Cormann;<sup>11</sup>
- Senator the Hon Michael Ronaldson (Deputy Chair);<sup>12</sup> and
- Senator the Hon Ursula Stephens (Chair).<sup>13</sup>

### ***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 adviser during the reporting period was Professor Stephen Bottomley.

## **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.<sup>14</sup> Once registered, the instruments are delivered to the two Houses for tabling, and to the committee secretariat.

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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 13.09.05 to 01.07.11.

10 Committee member from 02.02.10 to 07.02.13.

11 Committee member from 13.02.08 to 27.09.10.

12 Committee member from 13.02.08 to 16.03.12.

13 Committee member from 30.09.10 to 01.07.11 (Chair from 30.09.10 to 01.07.11).

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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 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.<sup>15</sup>

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'.<sup>16</sup>

### *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.

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14 LIA, sections 30, 38 and 39.

15 *Odgers' Australian Senate Practice*, 13<sup>th</sup> Edition, (2012), p. 424.

16 *Odgers' Australian Senate Practice*, 13<sup>th</sup> Edition (2012), p. 432.

## **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](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments).

### ***Disallowable instruments list***

1.18 The 'Senate disallowable instruments list' (SDIL) is a list of all disallowable instruments tabled in the Senate.<sup>17</sup> This online resource may be used to ascertain 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.

### ***'Disallowance alert' webpage***

1.20 The 'Disallowance alert' webpage (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<sup>18</sup>.

### ***Delegated Legislation Monitor***

1.21 The *Delegated Legislation Monitor* (the monitor) is an online publication which records all disallowable instruments tabled in the Senate for a given period of sittings or for a consolidated year. The monitor provides a range of information for each instrument (authorising Act, administering department, Federal Register of Legislative Instruments (FRLI) number et cetera) as well as some statistical information.

### ***Ministerial correspondence***

1.22 Approximately twice a year, the committee tables in the Senate volumes of ministerial correspondence relating to its scrutiny of delegated legislation<sup>19</sup>.

### ***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.

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17 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](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments).

18 Since 2013 the monitor includes reporting on the work of the committee and details matters raised in relation to instruments tabled in the Senate and subsequently scrutinised by the committee.

19 Ministerial correspondence is incorporated into the monitor when the committee concludes its interest in the relevant matter. Prior to 2013, the committee tabled separate volumes of ministerial correspondence.

1.24 Information on seminar dates and booking inquiries may be accessed through the Senate website<sup>20</sup>.

### **Structure of the report**

1.25 Chapter 2 provides an overview of delegated legislation and the disallowance process, including discussion of the LIA.

1.26 Chapter 3 reports on the work of the committee during 2010-11.

### **Acknowledgements**

1.27 The committee wishes to acknowledge the work and assistance of its legal adviser, Professor Stephen Bottomley.

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.

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20 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](http://www.aph.gov.au/About_Parliament/Senate/Public_Information_and_Events/Seminars_for_public_servants).



## 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);<sup>1</sup> (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);<sup>2</sup> 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.

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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

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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;<sup>3</sup> 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'.<sup>4</sup>

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.

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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*, 13<sup>th</sup> 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.<sup>5</sup>

#### *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.<sup>6</sup>

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:

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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;<sup>7</sup>
  - 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.<sup>8</sup>

### **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.<sup>9</sup>

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*, 13<sup>th</sup> Edition (2012), Chapter 15.

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7 LIA, section 46.

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

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



## 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.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=regord\\_c tte/scrutinyleginst2012.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_c tte/scrutinyleginst2012.htm).

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- 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

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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].

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***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**

# Appendix 1

## Breakdown of instruments 2010-11

The table below provides a breakdown of instruments considered in 2010-11 by Act and instrument type. For further detail on particular instruments, the consolidated *Delegated legislation monitor* for the relevant years should be consulted.

<b><i>A New Tax System (Family Assistance (Administration) Act 1999</i></b>	
determination	3
<b><i>A New Tax System (Goods and Services Tax) Act 1999</i></b>	
determination	5
regulation	3
<b><i>A New Tax System (Wine Equalisation Tax) Act 1999</i></b>	
regulation	1
<b><i>Acts Interpretation Act 1901</i></b>	
regulation	1
<b><i>Administrative Appeals Tribunal Act 1975</i></b>	
regulation	2
<b><i>Aged Care Act 1997</i></b>	
determination	24
principles	11
<b><i>Agricultural and Veterinary Chemicals (Administration) Act 1992</i></b>	
instrument	2
order	1
regulation	5
<b><i>Airports Act 1996</i></b>	
regulation	2
<b><i>Annual Appropriation Acts</i></b>	
determination	20
<b><i>Antarctic Treaty (Environment Protection) Act 1980</i></b>	
declaration	1
proclamation	2
<b><i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i></b>	
rules	5
<b><i>AusCheck Act 2007</i></b>	
regulation	2

<b><i>Australian Communications and Media Authority Act 2005</i></b>	
determination	1
<b><i>Australian Citizenship Act 2007</i></b>	
instrument	2
<b><i>Australian Crime Commission Act 2002</i></b>	
regulation	1
<b><i>Australian Federal Police Act 1979</i></b>	
approval	1
<b><i>Australian Film, Television and Radio School Act 1973</i></b>	
determination	1
<b><i>Australian Information Commissioner Act 2010</i></b>	
regulation	1
<b><i>Australian Meat and Live-stock Industry Act 1997</i></b>	
order	7
regulation	2
<b><i>Australian Participants in British Nuclear Tests (Treatment) Act 2006</i></b>	
principles	2
<b><i>Australian Passports (Application Fees) Act 2005</i></b>	
determination	1
<b><i>Australian Prudential Regulation Authority Act 1998</i></b>	
determination	25
instrument	6
<b><i>Australian Securities and Investments Commission Act 2001</i></b>	
regulation	3
<b><i>Authorised Deposit-taking Institutions Supervisory Levy Imposition Act 1998</i></b>	
determination	1
<b><i>Authorised Non-operating Holding Companies Supervisory Levy Imposition Act 1998</i></b>	
determination	1
<b><i>Australian Radiation Protection and Nuclear Safety Act 1998</i></b>	
regulation	2
<b><i>Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998</i></b>	
regulation	1
<b><i>Australian Wine and Brandy Corporation Act 1980</i></b>	
regulation	2

<b><i>Automotive Transformation Scheme Act 2009</i></b>	
regulation	1
<b><i>Aviation Fuel Revenues (Special Appropriation) Act 1988</i></b>	
determination	1
<b><i>Aviation Transport Security Act 2004</i></b>	
regulation	5
<b><i>Banking Act 1959</i></b>	
direction	3
exemption	3
prudential standard	2
regulation	1
<b><i>Bankruptcy (Estate Charges) Act 1997</i></b>	
determination	1
<b><i>Bankruptcy Act 1966</i></b>	
determination	2
regulation	2
<b><i>Broadcasting Services Act 1992</i></b>	
declaration	7
determination	6
licence area plan	15
notice	10
standard	3
<b><i>Building and Construction Industry Improvement Act 2005</i></b>	
direction to inspectors	1
regulation	1
<b><i>Building Energy Efficiency Disclosure Act 2010</i></b>	
determination	3
regulation	1
<b><i>Census and Statistics Act 1905</i></b>	
proclamation	1
regulation	1
<b><i>Charter of the United Nations Act 1945</i></b>	
declaration	3
list	1
regulation	8

<b><i>Christmas Island Act 1958</i></b>	
determination	1
list of Acts of the Western Australian Parliament	1
<b><i>Civil Aviation Act 1988</i></b>	
airworthiness directive	74
exemption	97
instrument	56
manual of standards	8
order	17
regulation	4
revocation of airworthiness directives	33
<b><i>Classification (Publications, Film and Computer Games) Act 1995</i></b>	
regulation	1
<b><i>Cocos (Keeling) Islands Act 1955</i></b>	
determination	1
list of Acts of the Western Australian Parliament	1
<b><i>Commonwealth Authorities and Companies Act 1997</i></b>	
order	1
regulation	1
<b><i>Commonwealth Electoral Act 1918</i></b>	
proclamation	1
regulation	2
<b><i>Commonwealth Places (Mirror Taxes) Act 1998</i></b>	
regulation	2
<b><i>Competition and Consumer Act 2010</i></b>	
consumer protection notice	11
price notification	1
regulation	1
<b><i>Copyright Act 1968</i></b>	
regulation	2
<b><i>Corporations Act 2001</i></b>	
accounting standard	15
auditing standard	1
class order	21
market integrity rules	9
regulation	9

<b><i>Crimes Act 1914</i></b>	
regulation	1
<b><i>Criminal Code Act 1995</i></b>	
regulation	7
<b><i>Currency Act 1965</i></b>	
determination	10
<b><i>Customs Act 1901</i></b>	
CEO direction	1
CEO instrument of approval	16
determination	1
regulation	12
<b><i>Defence Act 1903</i></b>	
defence determination – section 58B	67
rules	1
regulation	2
<b><i>Defence Home Ownership Assistance Scheme Act 2008</i></b>	
determination	1
<b><i>Dental Benefits Act 2008</i></b>	
rules	1
<b><i>Disability Discrimination Act 1992</i></b>	
standard	1
<b><i>Do Not Call Register Act 2006</i></b>	
determination	3
<b><i>Electoral and Referendum Amendment (Pre-Poll Voting and Other Measures) Act 2010</i></b>	
regulation	1
<b><i>Energy Efficiency Opportunities Act 2006</i></b>	
instrument	1
regulation	1
<b><i>Environment Protection and Biodiversity Conservation Act 1999</i></b>	
amendment – exempt native specimens	56
amendment – specimens taken to be suitable for live import	10
amendment – threatened species	8
inclusion – threatened ecological communities	2
inclusion – threatened species	11
instrument – general	2
instrument – recovery plans	5

<b><i>Extradition Act 1988</i></b>	
regulation	13
<b><i>Export Control Act 1982</i></b>	
order	6
<b><i>Export Inspection (Establishment Registration Charges) Act 1985</i></b>	
regulation	1
<b><i>Export Market Development Grants Act 1997</i></b>	
determination	2
<b><i>Fair Work Act 2009</i></b>	
direction to inspectors	1
rules	1
regulation	1
<b><i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i></b>	
regulation	1
<b><i>Family Law Act 1975</i></b>	
determination	7
regulation	7
<b><i>Farm Household Support Act 1992</i></b>	
regulation	1
<b><i>Federal Court of Australia Act 1976</i></b>	
regulation	5
<b><i>Federal Magistrates Act 1999</i></b>	
regulation	3
<b><i>Federal Financial Relations Act 2009</i></b>	
determination	1
<b><i>Financial Management and Accountability Act 1997</i></b>	
determination – special account	16
order	1
regulation	7
<b><i>Financial Sector (Collection of Data) Act 2001</i></b>	
determination – reporting standard	14
exemption	2
<b><i>First Home Saver Account Providers Supervisory Levy Imposition Act 2008</i></b>	
determination	1

<b><i>Fisheries Management Act 1991</i></b>	
determination	10
direction	18
fishery management plan	6
order	4
regulation	3
<b><i>Fishing Levy Act 1991</i></b>	
regulation	1
<b><i>Freedom of Information Act 1982</i></b>	
regulation	4
<b><i>Fringe Benefit Tax Act 1986</i></b>	
regulation	1
<b><i>Fuel Tax Act 2006</i></b>	
determination	1
<b><i>General Insurance Supervisory Levy Imposition Act 1998</i></b>	
determination	1
<b><i>Gene Technology Act 2000</i></b>	
guidelines	1
regulation	1
<b><i>Hazardous Waste (Regulation of Exports and Imports) Act 1989</i></b>	
regulation	1
<b><i>Healthcare Identifiers Act 2010</i></b>	
regulation	1
<b><i>Health Insurance Act 1973</i></b>	
declaration	4
determination	19
principles	1
regulation	10
rules	1
<b><i>Hearing Services Administration Act 1997</i></b>	
determination	1
<b><i>High Court of Australia Act 1979</i></b>	
direction	1
regulation	4

<b><i>Higher Education Support Act 2003</i></b>	
approval – higher education provider	3
approval – VET provider	40
declaration	1
guidelines	6
list of grants	2
<b><i>Immigration (Education) Act 1971</i></b>	
instrument	1
procedures or standards for functional English	1
<b><i>Income Tax Assessment Act 1936</i></b>	
instrument – lodgement of income tax returns	2
regulation	3
<b><i>Income Tax Assessment Act 1997</i></b>	
determination	1
regulation	4
rules	2
<b><i>Income Tax (Transitional Provisions) Act 1997</i></b>	
exemption	1
regulation	1
<b><i>Independent Contractors Act 2006</i></b>	
regulation	1
<b><i>Independent National Security Legislation Monitor Act 2010</i></b>	
regulation	1
<b><i>Indigenous Education (Targeted Assistance) Act 2000</i></b>	
regulation	1
<b><i>Industrial Chemicals (Notification and Assessment) Act 1989</i></b>	
regulation	1
<b><i>Insurance Act 1973</i></b>	
declaration	1
determination	10
regulation	2
<b><i>International Arbitration Act 1974</i></b>	
regulation	1
<b><i>Interstate Road Transport Act 1985</i></b>	
determination	3

<b><i>Interstate Road Transport Charge Act 1985</i></b>	
regulation	1
<b><i>Judiciary Act 1903</i></b>	
High Court of Australia – rules of court	1
legal services amendment directions	1
<b><i>Law Enforcement Integrity Commissioner Act 2006</i></b>	
regulation	1
<b><i>Legislative Instruments Act 2003</i></b>	
regulation	2
<b><i>Life Insurance Act 1995</i></b>	
determination – prudential rule	6
determination – prudential standard	7
<b><i>Life Insurance Supervisory Levy Imposition Act 1998</i></b>	
determination	1
<b><i>Maritime Transport and Offshore Facilities Security Act 2003</i></b>	
regulation	2
<b><i>Marriage Act 1961</i></b>	
determination	1
regulation	1
<b><i>Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010</i></b>	
rules	1
<b><i>Migration Act 1958</i></b>	
migration agents registration application (MARA) notice	41
regulation	6
specification of United Nations Security Council Resolutions	1
<b><i>Military Rehabilitation and Compensation Act 2004</i></b>	
specification	2
treatment principles	5
<b><i>Motor Vehicles Standards Act 1989</i></b>	
vehicle standard	7
<b><i>Mutual Assistance in Criminal Matters Act 1987</i></b>	
regulation	1
<b><i>National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009</i></b>	
Australian Securities and Investments Commission (ASIC) class order	6

<b><i>National Consumer Credit Protection Act 2009</i></b>	
regulation	10
<b><i>National Environment Protection Council Act 1994</i></b>	
variation to the national environment protection measures	2
<b><i>National Greenhouse and Energy Reporting Act 2007</i></b>	
determination	1
<b><i>National Health Act 1953</i></b>	
continence aid payment scheme	3
determination	17
instrument – pharmaceutical benefits	85
regulation	6
rules	1
special arrangement	15
<b><i>National Health Security Act 2007</i></b>	
determination	2
regulation	1
temporary suspension of provisions of part 3 of the Act	1
<b><i>National Measurement Act 1960</i></b>	
regulation	2
<b><i>Native Title Act 1993</i></b>	
determination	2
recognition of Representative Aboriginal/Torres Strait Islander Body	4
regulation	1
<b><i>Navigation Act 1912</i></b>	
marine order	9
<b><i>Norfolk Island Act 1979</i></b>	
order	1
<b><i>Northern Territory National Emergency Response Act 2007</i></b>	
guidelines	1
<b><i>Nuclear Non-Proliferation (Safeguards) Act 1987</i></b>	
regulation	1
<b><i>Occupational Health and Safety Act 1991</i></b>	
notice	2
regulation	2
<b><i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i></b>	
regulation	1

<b><i>Offshore Petroleum and Greenhouse Gas Storage (Safety Levies) Act 2003</i></b>	
regulation	1
<b><i>Ozone Protection and Synthetic Greenhouse Gas Management Act 1989</i></b>	
regulation	1
<b><i>Paid Parental Leave Act 2010</i></b>	
rules	1
<b><i>Parliamentary Entitlements Act 1990</i></b>	
determination	2
regulation	2
<b><i>Patents Act 1990</i></b>	
regulation	2
<b><i>Payment Systems (Regulation) Act 1998</i></b>	
regulation	1
<b><i>Personal Property Securities Act 2009</i></b>	
regulation	1
<b><i>Plant Health Australia (Plant Industries) Funding Act 2002</i></b>	
determination	1
<b><i>Primary Industries and Energy Research and Development Act 1989</i></b>	
regulation	3
<b><i>Primary Industries (Customs) Charge Act 1999</i></b>	
regulation	3
<b><i>Primary Industries (Excise) Levies Act 1999</i></b>	
regulation	8
<b><i>Primary Industries Levies and Charges Collection Act 1991</i></b>	
regulation	2
<b><i>Private Health Insurance Act 2007</i></b>	
rules	29
<b><i>Privacy Act 1988</i></b>	
public interest determination	3
tax file number guidelines	1
regulation	1
<b><i>Proceeds of Crime Act 1987</i></b>	
regulation	1
<b><i>Public Lending Right Act 1985</i></b>	
scheme modification	2

<b><i>Public Service Act 1999</i></b>	
Public Service Commissioner's direction	1
regulation	1
<b><i>Public Works Committee Act 1969</i></b>	
regulation	1
<b><i>Quarantine Act 1908</i></b>	
determination	1
<b><i>Radiocommunications Act 1992</i></b>	
class licence variation	4
declaration	1
determination	11
guidelines	1
notice	2
plan	1
rules	1
standard	3
<b><i>Radiocommunications (Transmitter Licence Tax) Act 1983</i></b>	
determination	2
<b><i>Remuneration Tribunal Act 1973</i></b>	
determination	21
regulation	1
<b><i>Renewable Energy (Electricity) Act 2000</i></b>	
determination	1
regulation	11
<b><i>Retirement Savings Account Providers Supervisory Levy Imposition Act 1998</i></b>	
determination	1
<b><i>Retirement Savings Accounts Act 1997</i></b>	
regulation	3
<b><i>Safety, Rehabilitation and Compensation Act 1998</i></b>	
notice	5
regulation	1
<b><i>Schools Assistance Act 2008</i></b>	
determination	3
regulation	2

<b><i>Social Security Act 1991</i></b>	
determination	14
principles	1
Rural Tertiary Hardship Fund Scheme	1
specification	2
<b><i>Social Security (Administration) Act 1999</i></b>	
determination	7
principles	2
specification	3
<b><i>Social Security (International Agreements) Act 1999</i></b>	
regulation	1
<b><i>Student Assistance Act 1973</i></b>	
determination	4
<b><i>Superannuation Act 1976</i></b>	
approval	2
declaration	2
<b><i>Superannuation Act 1990</i></b>	
declaration	2
trust deed	1
<b><i>Superannuation (Financial Assistance Funding) Levy Act 1993</i></b>	
regulation	1
<b><i>Superannuation (Productivity Benefit) Act 1988</i></b>	
declaration	3
determination	1
<b><i>Superannuation (Self Managed Superannuation Funds) Supervisory Levy Imposition Act 1991</i></b>	
regulation	1
<b><i>Superannuation Guarantee (Administration) Act 1992</i></b>	
regulation	1
<b><i>Superannuation Industry (Supervision) Act 1993</i></b>	
regulation	2
<b><i>Superannuation Supervisory Levy Imposition Act 1998</i></b>	
determination	1
regulation	1
<b><i>Sydney Harbour Federation Trust Act 2001</i></b>	
management plan	1

<b><i>Tax Agents Services Act 2009</i></b>	
regulation	2
<b><i>Taxation Administration Act 1953</i></b>	
instrument	3
regulation	6
<b><i>Telecommunications (Carrier Licence Charges) Act 1997</i></b>	
determination	2
<b><i>Telecommunications (Consumer Protection and Service Standards) Act 1999</i></b>	
determination	4
specification	1
standard	1
<b><i>Telecommunications (Interception and Access) Act 1979</i></b>	
instrument	2
declaration	1
<b><i>Telecommunications (Numbering Charges) Act 1997</i></b>	
determination	1
<b><i>Telecommunications Act 1997</i></b>	
instrument	1
standard	10
declaration	2
notice	2
plan	1
determination	2
<b><i>Television Licence Fees Act 1964</i></b>	
regulation	1
<b><i>Textile, Clothing and Footwear Investment and Innovation Programs Act 1999</i></b>	
regulation	1
<b><i>Therapeutic Goods Act 1989</i></b>	
instrument	4
regulation	9
<b><i>Torres Strait Fisheries Act 1984</i></b>	
prohibition	4
notice	1
regulation	1

<b><i>Trade Marks Act 1995</i></b>	
regulation	1
<b><i>Trade Practices Act 1974</i></b>	
consumer product standard	4
consumer protection notice	18
notice of permanent ban	1
regulation	8
<b><i>Tradex Scheme Act 1999</i></b>	
regulation	1
<b><i>Veterans' Entitlements Act 1986</i></b>	
determination	7
guidelines	1
instrument	5
specification	1
statement of principles	136
<b><i>Water Act 2007</i></b>	
rules	3
<b><i>Witness Protection Act 1994</i></b>	
declaration	1
<b>Total regulations</b>	<b>295</b>
<b>Total other</b>	<b>1514</b>
<b>Total</b>	<b>1809</b>



## Appendix 2

### Undertakings

*Table 1: Undertakings implemented in 2010-11*

Instrument	Date of undertaking	Undertaking	Implemented by
<b>Department of Agriculture, Fisheries and Forestry</b>			
Quarantine Service Fees Amendment Determination 2009 (No. 2) [F2009L02996]	15 October 2009	Amend section 7C to prescribe factors to guide DAFF secretary when exercising discretion under section 7C(5) relating to forfeiture of a deposit for services	Quarantine Services Fees Amendment Determination 2010 (No. 1) [F2010L03257] [8 December 2010]
<b>Attorney-General's Department</b>			
Customs (Prohibited Exports) Amendment Regulations 2010 (No. 1) [Select Legislative Instrument 2010 No. 15] [F2010L00538]	3 June 2010	Amend the regulations to limit the authorisation to give permissions for the import and export of arms or related matériel to or from Eritrea to senior departmental employees	Customs (Prohibited Exports) Amendment Regulations 2010 (No. 3) [Select Legislative Instrument 2010 No. 314] [F2010L03171] [8 December 2010]
Customs (Prohibited Imports) Amendment Regulations 2010 (No. 1) [Select Legislative Instrument 2010 No. 14] [F2010L00540]	3 June 2010	Amend the regulations to limit the authorisation to give permissions for the import and export of arms or related matériel to or from Eritrea to senior departmental employees	Customs (Prohibited Imports) Amendment Regulations 2010 (No. 3) [Select Legislative Instrument 2010 No. 315] [F2010L03172] [8 December 2010]
<b>Department of Education, Employment and Workplace Relations</b>			
Student Assistance (Public Interest Certificate Guidelines) Determination 2008 [F2008L01262]	16 September 2008	Amend paragraph 10(c) of the guidelines to remove the reference to 'an incorrectly held opinion'	Student Assistance (Public Interest Certificate Guidelines) Determination 2011 [F2011L00138] [13 January 2011]

Instrument	Date of undertaking	Undertaking	Implemented by
<b>Department of Health and Ageing</b>			
Therapeutic Goods Amendment Regulations 2009 (No. 6) [Select Legislative Instrument 2009 No. 374] [F2009L04018]	15 March 2010	Amend paragraph 41C(1)(d) to remove 'inefficiency' as a ground for the termination of advisory board members	Therapeutic Goods Amendment Regulations 2011 (No. 2) [Select Legislative Instrument 2011 No. 102] [F2011L01100] [16 June 2011]
Therapeutic Goods (Medical Devices) Amendment Regulations 2010 (No. 3) [Select Legislative Instrument 2010 No. 267] [F2010L02787]	14 December 2010	Amend clause 11 in Schedule 3A to clarify the person responsible for destroying unused emergency medical devices where the owner of the devices fails to comply with a provision of the schedule	Therapeutic Goods (Medical Devices) Amendment Regulations 2011 (No. 2) [Select Legislative Instrument 2011 No. 104] [F2011L01102] [16 June 2011]
<b>Department of Infrastructure and Transport</b>			
Marine Orders - Part 21: Safety of navigation and emergency procedures, Issue 7 (Order No. 6 of 2010) [F2010L01898]	16 November 2010	Amend clause 14.3.3 to make reference to five degrees in the text of the provision, thereby omitting the need for the note; and review part 21 to ensure substantive material is contained within provisions of the part	Marine Orders - Part 21: Safety of Navigation and Emergency Procedures - Amendment (Order No. 3 of 2011) [F2011L00947] [1 June 2011]
<b>Department of Industry, Innovation, Science, Research and Tertiary Education</b>			
Automotive Transformation Scheme Regulations 2010 [Select Legislative Instrument 2010 No. 82] [F2010L01201]	12 July 2010	Amend the regulations to clarify the provision concerning the way a cartel or price-fixing arrangement is determined (regulation 1.29); correct a typographical error in regulation 2.28; and require the minister to advise an applicant in writing of a decision to refuse an application in the national interest (regulations 2.8, 2.25)	Automotive Transformation Scheme Amendment Regulations 2010 (No. 1) [Select Legislative Instrument 2010 No. 329] [F2010L03200] [8 December 2010]

Instrument	Date of undertaking	Undertaking	Implemented by
<b>Department of Resources, Energy and Tourism</b>			
Offshore Petroleum and Greenhouse Gas Storage (Management of Greenhouse Gas Well Operations) Regulations 2010 [Select Legislative Instrument 2010 No. 28] [F2010L00441]	26 March 2010	Amend subregulations 3.2(1) and 3.5(1) to provide for a time limit of 30 days for decisions concerning the acceptance, rejection or variation of well operations management plans or the acceptance or rejection of a titleholder's objection	Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011 [Select Legislative Instrument 2011 No. 54] [F2011L00647] [21 April 2011]
<b>The Treasury</b>			
ASIC Market Integrity Rules (ASX Market) 2010 [F2010L02211]	17 January 2011	Amend rule 2.1.4(2)(b)(i) to remove the reference to a person being 'charged with an offence' to ensure the rule provides only for a person to have been convicted of an offence	ASIC Market Integrity Rules (ASX Market) Amendment 2011 (No. 1) [F2011L00217] [7 February 2011]

**Table 2: Undertakings outstanding at 30 June 2011**

Instrument	Date of undertaking	Undertaking
<b>Department of Agriculture, Fisheries and Forestry</b>		
Export Control (Animals) Amendment Order 2006 (No. 1) [F2006L02382]	13 September 2006	Amend subregulation 3.07(4) to clarify that a notice may be subject to conditions  Amend regulations 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 (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 (Wild Game Meat and Wild Game Meat Products) Orders 2010 [F2010L03050]	14 June 2011	Amend the orders to specify that the scope of an audit is to be determined prior to its commencement
<b>Attorney-General's Department</b>		
Australian Federal Police Amendment Regulations 2000 (No. 2) [Statutory Rules 2000 No. 138] [F2000B00146]	28 September 2000	Amend the regulations to clarify from whom salary deductions are to be made for judgment debts
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
<b>Department of Broadband, Communications and the Digital Economy</b>		
Telecommunications Service Provider (Mobile Premium Services) Determination 2010 No. 1 [F2010L00639]	23 November 2010	Amend section 13 of the determination to clarify compliance timeframes

Instrument	Date of undertaking	Undertaking
<b>Department of Defence</b>		
Defence Determination 2010/8 made under section 58B of the <i>Defence Act 1903</i>	2 December 2010	Amend subclause 5.4.10.1 to read 'A member must report to the Defence Health Service when she believes she is pregnant'  Amend subclause 5.4.10.2 to permit the requirement for some form of evidence to be provided by the member, or someone on her behalf, six weeks after the end of the pregnancy
<b>Department of Families, Community Services and Indigenous Affairs</b>		
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>
<b>Department of Health and Ageing</b>		
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'
Therapeutic Goods Amendment Regulations 2011 (No. 1) [Select Legislative Instrument 2011 No. 30] [F2011L00434]	31 May 2011	Amend subregulation 10H(11) to make the offence of failing to return a certificate to the secretary one of strict liability (consistent with another offence)

Instrument	Date of undertaking	Undertaking
<b>Department of Infrastructure and Transport</b>		
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
Airports (Environment Protection) Amendment Regulations 1998 (No.3) [Statutory Rules 1998 No. 349] [F1998B00366]	16 March 1999	Amend the regulations to provide for a reasonable period for reporting (regulation 6.03(1))
Civil Aviation Amendment Regulations 2002 (No.2) [Statutory Rules 2002 No. 167] [F2002B00162]	26 September 2002	Amend the strict liability offence in regulation 65.060 of the Civil Aviation Safety Regulations 1998 to include an appropriate defence
Civil Aviation Amendment Regulations 2003 (No.4) [Statutory Rules 2003 No. 189] [F2003B00198]	18 September 2003	Amend regulation 173.175 of the Civil Aviation Safety Regulations to include similar provisions to subregulation 173.340(4) concerning information that CASA intends to rely on when considering appointments of certified designers or the Chief Designer
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)
Civil Aviation Safety Regulations 1998 [F2012C00363]	14 August 2003	Amend regulation 139.875 to require records to be kept for a maximum of seven years to align with Airservices Australia National Operating Standard Document 001
Marine Orders - Part 6: Marine Radio Qualifications, Issue 5 (Order No. 5 of 2000) [F2006B0027]	27 October 2000	Amend to clarify the intent of paragraph 8.4.1 and to remove the reference to paragraph 8.4.2 being a penal provision

Instrument	Date of undertaking	Undertaking
<b>Department of Sustainability, Environment, Water, Population and Communities</b>		
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 paragraph 10.02AD(a) and (b) to clarify the intent of the provision
<b>The Treasury</b>		
Excise Regulations (Amendment) [Statutory Rules 1995 No. 425] [F1996B03088]	16 May 1996	Amend the <i>Excise Act 1901</i> to provide for Administrative Appeals Tribunal review of decisions made under s. 61C of that Act
<b>Department of Veterans' Affairs</b>		
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
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**





## 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***

Further information is available through the committee's website at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=regord\\_ctte/index.htm](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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