

The Senate

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Standing  
Committee on  
Regulations and  
Ordinances

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Delegated legislation monitor

Monitor No. 8 of 2014

9 July 2014

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# Membership of the committee

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# 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.<sup>1</sup>

## 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

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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](http://www.comlaw.gov.au).

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*.<sup>2</sup>

## **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*.
- Appendix 3 contains correspondence relating to concluded matters.

## **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 John Williams**

**Chair**

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2 For further information on the disallowance process and the work of the committee see *Odger's Australian Senate Practice*, 13<sup>th</sup> Edition (2012), Chapter 15.



# Chapter 1

## New and continuing matters

This chapter lists new matters identified by the committee at its meeting on **9 July 2014**, 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.

### Farm Household Support Secretary's Rule 2014 [F2014L00614]

<b>Purpose</b>	Prescribes matters the Secretary must take into account in deciding whether a farm enterprise has a significant commercial purpose of character and a person has a reasonable excuse for committing a qualification failure or conduct failure, and kinds of requirements that must not be included in a financial improvement agreement, and classes of activities that may be specified in a financial improvement agreement for which an activity supplement is payable
<b>Last day to disallow<sup>1</sup></b>	17 July 2014
<b>Authorising legislation</b>	<i>Farm Household Support Act 2014</i>
<b>Department</b>	Agriculture

#### Issue:

#### *Prescribing of matters by 'legislative rules'*

This instrument is made by the Secretary of the Department of Agriculture (the secretary). Amongst other things, it prescribes matters the secretary must take into account in deciding whether a farm enterprise has a significant commercial purpose of character and a person has a reasonable excuse for committing a qualification failure or conduct failure.

In *Delegated Legislation Monitor* (Monitor) Nos 2, 5 and 6 of 2014, the committee noted a novel approach (since 2013) in the drafting of Acts to provide for a broadly-

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1 'Last day to disallow' refers to the last day on which notice may be given of a motion for disallowance in the Senate.

expressed power to make legislative rules, and raised a number of significant concerns going to the implementation and implications of the displacing of the regulation-making power by such rules (see comments on Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125]).<sup>2</sup>

Section 106 of the *Farm Household Support Act 2014* provides two general rule-making powers:

*Minister's rules*

- (1) The Minister may, by legislative instrument, make Minister's rules prescribing matters required or permitted by this Act to be prescribed by the Minister's rules.

*Secretary's rules*

- (2) The Secretary may, by legislative instrument, make Secretary's rules prescribing matters:
  - (a) required or permitted by this Act to be prescribed by the Secretary's rules; or
  - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

The committee notes that the Office of Parliamentary Counsel Drafting Direction No. 3.8 advises on the process for incorporating two general rule-making powers in an Act as follows:

As a general rule, where there are 2 instrument-making powers, only one of those powers should contain a power to prescribe necessary or convenient matters. Consequently, 2 rule-making powers would take the following form:

- (1) The [*maker e.g. Minister*] may, by legislative instrument, make [*name of legislative instrument*] prescribing matters:
  - (a) required or permitted by this [*Act/Ordinance*] to be prescribed by the [*name of legislative instrument*]; or
  - (b) necessary or convenient to be prescribed for carrying out or giving effect to this [*Act/Ordinance*].
- (2) The [*maker e.g. Secretary*] may, by legislative instrument, make [*name of legislative instrument*] prescribing matters required or permitted by this Act to be prescribed by the [*name of legislative instrument*].

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2 *Delegated legislation monitor* No. 6 of 2014, 18 June 2014, pp 5–22, available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Monitor](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor)

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The necessary or convenient power should generally be attached to the maker who is likely to make more instruments.

Under section 106 of the *Farm Household Support Act 2014*, both the minister and the secretary have been given the 'required or permitted' power, with the secretary also having the additional 'necessary or convenient' power. In relation to this division of powers, the committee notes that the explanatory memorandum (EM) for the Farm Household Support Bill 2014 states only:

This section provides that both the Minister and the Secretary may prescribe rules by legislative instrument. The rules-making power under section 106 allows the Agriculture Minister or Secretary of the Department of Agriculture to make rules in relation to the Farm Household Support Act 2014.

The committee notes that this issue also arises in relation to Farm Household Support Minister's Rule 2014 [F2014L00687].

**The committee therefore requests the minister's advice on the appropriateness in this case of providing the secretary with broader rule-making powers than the minister, and the criteria used in making this decision.**

**More generally, the committee requests the minister's advice on what policy considerations were taken into account in deciding that the general-rule making power should be granted to persons other than a minister.**

**Issue:**

*Potential delegation of general rule-making power*

Section 106 of the *Farm Household Support Act 2014* provides that the secretary may delegate their powers to officers below the Senior Executive Officer level:

- (1) The Secretary may, by signed writing, delegate to an officer of the Department all or any of his or her powers or functions under this Act, or the Social Security Act or the Social Security Administration Act (as those Acts apply because of Part 5 of this Act).
- (2) The Secretary (the *Agriculture Secretary*) may, in writing, delegate all or any of his or her powers or functions under this Act, or the Social Security Act or the Social Security Administration Act (as those Acts apply because of Part 5 of this Act), to:
  - (a) the Social Security Secretary; or
  - (b) an SES employee or acting SES employee in the Social Security Department; or
  - (c) the Chief Executive Centrelink; or
  - (d) a Departmental employee (within the meaning of the *Human Services (Centrelink) Act 1997*).

The EM for the Farm Household Support Bill 2014 stated:

These delegation powers are intentionally broad, due to the interaction of the Bill with the Social Security Act and the Social Security Administration Act. They are also necessary because payments under the Bill will be delivered by DHS. Case management by DHS is central to FHA and to achieving FHA's objectives of supporting farmers and their partners who are in hardship while improving their capacity for self-reliance. Operationally, this will require DHS officers below the Senior Executive Officer level to have these powers delegated to them.

The committee notes the operational reasons given in the EM for the broad delegation of the secretary's powers. However, noting the committee's previous inquiries regarding the implications of the new general rule-making power for executive exercise and oversight of Parliament's delegated legislative powers (see comments on the Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125]), a question arises as to whether the secretary's general rule-making powers may be delegated under section 106 and, if so, what considerations might apply in that case. **The committee therefore requests the minister's advice on this matter.**

### **Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Amendment List 2014 [F2014L00694]**

<b>Purpose</b>	Amends the Autonomous Sanctions (Designated and Declared Persons - Former Federal Republic of Yugoslavia) List 2012 to list persons designated by the minister for the purpose of paragraph 6(1)(a) of the Autonomous Sanctions Regulations 2011 and persons declared by the minister for the purpose of paragraph 6(1)(b) of the Autonomous Sanctions Regulations 2011.
<b>Last day to disallow</b>	17 July 2014
<b>Authorising legislation</b>	Autonomous Sanctions Regulations 2011
<b>Department</b>	Foreign Affairs and Trade

#### **Issue:**

##### *Drafting*

Section 3 of the instrument states that Schedule 1 amends the Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) List 2012. However, Schedule 1 contains no amendment instruction. While it appears Schedule 1 of the instrument is intended to replace Schedule 1 of the principal instrument, the committee understands standard drafting practice would be to include

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an amending instruction to expressly indicate this. **The committee therefore draws this matter to the attention of the minister.**

**Issue:**

*Insufficient description provided regarding consultation*

Regarding consultation, the explanatory statement (ES) for this instrument states:

The legal framework for the imposition of autonomous sanctions by Australia, of which the Regulations and the FFRY List are part, has been subject to extensive consultation with governmental and non-governmental stakeholders since May 2010.

DFAT conducts ongoing public consultations, including with the Australian financial services sector and broader business community, in relation to these types of measures. Relevant Commonwealth Government departments were consulted prior to and during the drafting of this legislative instrument.

In order to meet the policy objective of prohibiting unauthorised financial transactions involving the persons specified in the FFRY Amendment List, DFAT is satisfied that wider consultations beyond those it has already undertaken would be inappropriate (sub-sections 18 (1) and (2) (e) of the *Legislative Instruments Act 2003*).

Section 17 of the *Legislative Instruments Act 2003* requires that rule-makers undertake appropriate consultation before making a proposed instrument, if an instrument is likely to have a direct, or a substantial indirect, effect on business, or if the instrument is likely to restrict competition. The committee has routinely considered that very bare or overly general descriptions of consultation, such as this, do not in fact describe the nature of the consultation undertaken, as is required by section 26 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*.**

**Multiple instruments identified in Appendix 1**

The committee has identified a number of instruments, marked by an asterisk (\*) in Appendix 1, that appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that the power to make an instrument includes the power to vary or revoke the instrument. If that is the case, the committee considers that it would be preferable for the ES for any such instrument to identify the relevance of subsection 33(3), in the interests of promoting the clarity and intelligibility of the instrument to anticipated users. **The committee therefore draws this issue to the attention of ministers and instrument-makers responsible for the instruments identified in Appendix 1. The committee provides the following example of a form of words which may be included in an ES where subsection 33(3) of the *Acts Interpretation Act 1901* is relevant:**

Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.<sup>3</sup>

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

## **Chapter 2**

### **Concluded matters**

There are no concluded matters arising from the committee's meeting on **9 July 2014**.





# Appendix 1

## Index of instruments scrutinised

The following instruments were considered by the committee at its meeting on **9 July 2014**.

The Federal Register of Legislative Instruments (FRLI) website should be consulted for the text of instruments and explanatory statements, as well as associated information.<sup>1</sup> Instruments may be located on FRLI by entering the relevant FRLI number into the FRLI search field (the FRLI number is shown after the name of each instrument listed below).

Instruments marked with an asterisk (\*) are the subject of the comment on p. 5 of Chapter 1 relating to subsection 33(3) of the *Legislative Instruments Act 2003* (under the heading 'Multiple instruments identified in Appendix 1').

Instruments marked with an 'E' are exempt from disallowance.

### Instruments received week ending 13 June 2014

<b><i>Civil Aviation Regulations 1988</i></b>	
CASA 98/14 - Direction — flight time limitations for helicopter mustering operations F2014L00682	
AD/PHZL/79 Amdt 2 - Propeller Vibration Placard F2014L00670	
<b><i>Currency Act 1965</i></b>	
Currency (Royal Australian Mint) Determination 2014 (No. 4) F2014L00681	
<b><i>Environment Protection and Biodiversity Conservation Act 1999</i></b>	
Amendment to the list of threatened species, ecological communities and key threatening processes under sections 178, 181 and 183 of the Environment Protection and Biodiversity Conservation Act 1999 (157) (28/05/2014) F2014L00692	
<b><i>Farm Household Support Act 2014</i></b>	
Farm Household Support Minister's Rule 2014 F2014L00687	
<b><i>Federal Financial Relations Act 2009</i></b>	
Federal Financial Relations (National Partnership payments) Determination No. 75 (February 2014) F2014L00662	E
Federal Financial Relations (National Partnership payments) Determination No. 76 (March 2014) F2014L00664	E
Federal Financial Relations (National Partnership payments) Determination No. 77 (April 2014) F2014L00667	E
Federal Financial Relations (National Partnership payments) Determination No. 78 (May 2014) F2014L00668	E

1 FRLI is found online at <http://www.comlaw.gov.au/>.

<b><i>Financial Sector (Collection of Data) Act 2001</i></b>	
Financial Sector (Collection of Data) (reporting standard) determination No. 12 of 2014 - SRS 330.1 - Statement of Financial Performance F2014L00674	
Financial Sector (Collection of Data) (reporting standard) determination No. 13 of 2014 - SRS 330.2 - Statement of Financial Performance F2014L00675	
Financial Sector (Collection of Data) (reporting standard) determination No. 14 of 2014 - SRS 800.0 - Financial Statements F2014L00676	
Financial Sector (Collection of Data) (reporting standard) determination No. 15 of 2014 - SRS 801.0 - Investments and Investment Flows F2014L00677	
Financial Sector (Collection of Data) (reporting standard) determination No. 16 of 2014 - SRS 001.0 - Profile and Structure (Baseline) F2014L00678	
<b><i>Higher Education Support Act 2003</i></b>	
Higher Education Support Act 2003 - VET Provider Approval (No. 32 of 2014) F2014L00661	
Higher Education Support Act 2003 - VET Provider Approval (No. 31 of 2014) F2014L00666	
Higher Education Support Act 2003 - VET Provider Approval (No. 39 of 2014) F2014L00671	
Amendment No. 2 to the VET Guidelines 2013 F2014L00672	*
Higher Education Support Act 2003 - Revocation of approval as a VET Provider (Central Queensland Institute of TAFE) F2014L00673	
<b><i>Income Tax Assessment Act 1936 and Taxation Administration Act 1953</i></b>	
Lodgment of income tax returns for the year of income ended 30 June 2014 in accordance with the Income Tax Assessment Act 1936 and the Taxation Administration Act 1953 – Department of Human Services – parents with a child support assessment F2014L00686	
<b><i>Income Tax Assessment Act 1997</i></b>	
Income Tax (Effective Life of Depreciating Assets) Amendment Determination 2014 (No. 1) F2014L00679	
<b><i>Income Tax Assessment Act 1997, Superannuation Industry (Supervision) Act 1993, Income Tax Assessment Act 1936, Income Tax (Transitional Provisions) Act 1997 and Taxation Administration Act 1953</i></b>	
Lodgment of returns for the year of income ended 30 June 2014 in accordance with the Income Tax Assessment Act 1936, the Income Tax Assessment Act 1997, the Taxation Administration Act 1953, the Superannuation Industry (Supervision) Act 1993 and the Income Tax (Transitional Provisions) Act 1997 F2014L00688	
<b><i>Private Health Insurance Act 2007</i></b>	
Private Health Insurance (Registration) Amendment Rules 2014 (No. 1) F2014L00685	*
<b><i>Safety, Rehabilitation and Compensation Act 1988</i></b>	
Safety, Rehabilitation and Compensation (Licence Eligibility – Medibank Private Limited) Declaration 2014 (No. 1) F2014L00665	
Safety, Rehabilitation and Compensation (Licence Eligibility – Medibank Health Solutions) Declaration 2014 (No. 1) F2014L00669	
Safety, Rehabilitation and Compensation (Weekly Interest on the Lump Sum) Notice 2014 F2014L00680	

<b><i>Social Security (Administration) Act 1999</i></b>	
Social Security (Administration) (Schooling Requirements - Person Responsible) Specification 2014 F2014L00663	*
<b><i>Taxation Administration Act 1953</i></b>	
Taxation Administration Act Withholding Schedules 2014 F2014L00689	
Lodgment of account activity statements by First home saver account providers for the year ended 30 June 2014 in accordance with the Taxation Administration Act 1953 F2014L00690	
<b><i>Taxation Administration Act 1953 and Superannuation Industry (Supervision) Act 1993</i></b>	
Lodgment of statements by superannuation providers in relation to superannuation plans (other than self managed superannuation funds) for each financial year ended 30 June in accordance with the Taxation Administration Act 1953 F2014L00691	
<b><i>Therapeutic Goods Act 1989</i></b>	
Therapeutic Goods Order No. 70C - Standards for Export Only Medicine F2014L00683	
Medicines Advisory Statements Specification 2014 F2014L00693	

#### Instruments received week ending 20 June 2014

<b><i>Aged Care Act 1997</i></b>	
Grant Principles 2014 F2014L00697	
Approved Provider Principles 2014 F2014L00698	
<b><i>Agricultural and Veterinary Chemicals (Administration) Act 1992. Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994, Agricultural and Veterinary Chemicals Legislation Amendment Act 2013 and Agricultural and Veterinary Chemicals Code Act 1994</i></b>	
Agricultural and Veterinary Chemicals Legislation Amendment Regulation 2014 [SLI 2014 No. 67] F2014L00714	
<b><i>Australian Citizenship Act 2007 and Migration Act 1958</i></b>	
Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 82] F2014L00726	
<b><i>Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998</i></b>	
Australian Radiation Protection and Nuclear Safety (Licence Charges) Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 77] F2014L00724	
<b><i>Australian Radiation Protection and Nuclear Safety Act 1998</i></b>	
Australian Radiation Protection and Nuclear Safety Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 78]	
F2014L00722	
<b><i>Australian Securities and Investments Commission Act 2001, Corporations Act 2001 and Competition and Consumer Act 2010</i></b>	
Corporations Laws Amendment (2014 Measures No. 2) Regulation 2014 [SLI 2014 No. 88] F2014L00711	
<b><i>Autonomous Sanctions Act 2011</i></b>	
Autonomous Sanctions Amendment (Ukraine) Regulation 2014 [SLI 2014 No. 76] F2014L00720	

<b><i>Autonomous Sanctions Regulations 2011</i></b>	
Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Amendment List 2014 F2014L00694	
<b><i>Carbon Credits (Carbon Farming Initiative) Act 2011</i></b>	
Carbon Credits (Carbon Farming Initiative) Amendment Regulation 2014 (No. 1) [SLI 2014 No. 72] F2014L00710	
<b><i>Civil Aviation Order 82.6 (Night vision goggles - helicopters) 2007</i></b>	
CASA EX37/14 - Exemption — initial NVG pilot flight training prerequisites F2014L00737	
<b><i>Civil Aviation Regulations 1988 and Civil Aviation Safety Regulations 1998</i></b>	
Civil Aviation Order 95.10 Instrument 2014 F2014L00732	
<b><i>Civil Aviation Safety Regulations 1998</i></b>	
AD/BELL 206/99 Amdt 3 - Cyclic Control Stick Assembly F2014L00699	
CASA ADCX 012/14 — Repeal of Airworthiness Directive F2014L00731	
<b><i>Crimes (Currency) Act 1981</i></b>	
Disposal of Forfeited Articles Direction 2014 F2014L00700	*
<b><i>Crimes (Overseas) Act 1964</i></b>	
Crimes (Overseas) (Declared Foreign Countries) Amendment Regulation 2014 [SLI 2014 No. 87] F2014L00718	
<b><i>Crimes Act 1914</i></b>	
Crimes Amendment (Disclosure of Information) Regulation 2014 [SLI 2014 No. 86] F2014L00716	
<b><i>Customs Administration Act 1985, Wine Australia Corporation Act 1980 and Privacy Act 1988</i></b>	
Wine Australia Corporation Legislation Amendment (Wine Labelling) Regulation 2014 [SLI 2014 No. 70] F2014L00707	
<b><i>Defence Act 1908</i></b>	
Defence Determination 2014/26, Post indexes - amendment	
Defence Determination 2014/27, Payment of transfer of recreation leave credit	
Defence Determination 2014/28, Post indexes and summer schools - amendment	
Defence Determination 2014/29, Salary non-reduction - amendment	
Defence Determination 2014/30, Recreation leave - amendment	
<b><i>Education Services for Overseas Students Amendment Act 2014</i></b>	
Education for Overseas Students Amendment Commencement Proclamation 2014 F2014L00709	E
<b><i>Energy Efficiency Opportunities Act 2006</i></b>	
Energy Efficiency Opportunities Repeal Regulation 2014 [SLI 2014 No. 83] F2014L00703	
<b><i>Excise Act 1901</i></b>	
Excise (Blending exemptions) Determination 2014 (No. 1) F2014L00704	*
<b><i>Fair Work Act 2009</i></b>	
Fair Work (State Declarations - employer not to be national system employer) Endorsement 2014 (No. 1) F2014L00684	E

<b><i>Family Law (Superannuation) Regulations 2001</i></b>	
Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2014 F2014L00708	
<b><i>Food Standards Australia New Zealand Act 1991</i></b>	
Australia New Zealand Food Standards Code — Standard 1.4.2 — Maximum Residue Limits Amendment Instrument No. APVMA 6, 2014 F2014L00702	E
<b><i>Hazardous Waste (Regulation of Exports and Imports) Act 1989</i></b>	
Hazardous Waste (Regulation of Exports and Imports) Amendment (Hexachlorobenzene) Regulation 2014 [SLI 2014 No. 74] F2014L00723	
<b><i>Health Insurance Act 1973</i></b>	
Health Insurance (General Medical Services Table) Regulation 2014 [SLI 2014 No. 80] F2014L00713	
Health Insurance (Diagnostic Imaging Services Table) Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 79] F2014L00721	
<b><i>Human Services (Medicare) Act 1973</i></b>	
Human Services (Medicare) Amendment (Aged Care) Regulation 2014 [SLI 2014 No. 81] F2014L00725	
<b><i>Income Tax Assessment Act 1997 and Income Tax Assessment Act 1936</i></b>	
Tax Laws Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 90] F2014L00712	
<b><i>Interstate Road Transport Act 1985</i></b>	
Interstate Road Transport Amendment (Heavy Vehicle National Law) Regulation 2014 [SLI 2014 No. 84] F2014L00719	
<b><i>Marriage Act 1961</i></b>	
Marriage Amendment (Celebrant Fees and Charges) Regulation 2014 [SLI 2014 No. 71] F2014L00715	
<b><i>Marriage Amendment (Celebrant Administration and Fees) Act 2014</i></b>	
Marriage Amendment (Celebrant Administration and Fees) Commencement Proclamation 2014 F2014L00717	
<b><i>Migration Regulations 1994</i></b>	
Migration Regulations 1994 - Specification of Eligible Education Providers and Educational Business Partners - IMMI 14/047 F2014L00706	E
<b><i>National Consumer Credit Protection Act 2009</i></b>	
National Consumer Credit Protection Amendment (Small Amount Credit Contracts) Regulation 2014 [SLI 2014 No. 89] F2014L00701	
<b><i>Private Health Insurance Act 2007</i></b>	
Private Health Insurance (Prostheses) Amendment Rules 2014 (No.2) F2014L00733	*
<b><i>Quarantine Act 1908</i></b>	
Quarantine Service Fees Amendment (Import Clearance Fees) Determination 2014 F2014L00736	
<b><i>Quarantine Charges (Collection) Act 2014</i></b>	
Quarantine Charges (Collection) Regulation 2014 [SLI 2014 No. 68] F2014L00734	

<b><i>Quarantine Charges (Imposition—Customs) Act 2014</i></b>	
Quarantine Charges (Imposition —Customs) Regulation 2014 [SLI 2014 No. 69] F2014L00735	
<b><i>Superannuation (Productivity Benefit) Act 1988</i></b>	
Superannuation (Productivity Benefit) (Continuing Contributions) Amendment Declaration 2014 (No. 1) F2014L00696	*
<b><i>Superannuation Act 1976</i></b>	
Superannuation (CSS) (Eligible Employees – Exclusion ) Amendment Declaration 2014 (No. 1) F2014L00729	*
<b><i>Superannuation Act 1990</i></b>	
Superannuation (PSS) Membership Inclusion Amendment Declaration 2014 (No. 1) F2014L00727	*
<b><i>Superannuation Industry (Supervision) Act 1993</i></b>	
ASIC Class Order [CO 14/541] F2014L00705	
<b><i>Therapeutic Goods Act 1989</i></b>	
Therapeutic Goods Order No. 69D - Amendment to Therapeutic Goods Order No. 69 - General requirements for labels for medicines (23/05/2014) F2014L00695	

# **Appendix 2**

## **Guideline on consultation**







AUSTRALIAN SENATE

## STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

### Addressing consultation in explanatory statements

#### *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***

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

#### *Bodies/groups/individuals consulted*

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

#### *Issues raised in consultations and outcomes*

An ES should identify the nature of any issues raised in consultations, as well as the outcome of the consultation process. For example, an ES could state: 'A number of submissions raised concerns in relation to the effect of the instrument on retirees. An exemption for retirees was introduced in response to these concerns'.

#### ***Explaining why consultation has not been undertaken***

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

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

#### *Specific examples listed in the Act*

Section 18 lists a number of examples where an instrument-maker may be satisfied that consultation is unnecessary or inappropriate in relation to a specific instrument. This list is not exhaustive of the grounds which may be advanced as to why consultation was not undertaken in a given case. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning in support of this conclusion. An ES should avoid bare assertions such as 'Consultation was not undertaken because the instrument is beneficial in nature'.

#### *Timing of consultation*

The Act requires that consultation regarding an instrument must take place before the instrument is made. This means that, where consultation is planned for the implementation or post-operative phase of changes introduced by a given instrument,

that consultation cannot generally be cited to satisfy the requirements of sections 17 and 26 of the Act.

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

***Seeking further advice or information***

Further information is available through the committee's website at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_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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