The Senate

# Standing Committee on Regulations and Ordinances

## Delegated legislation monitor

Monitor No. 10 of 2014

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# Membership of the committee

## Current members

| | |
|---|---|
| Senator John Williams (Chair) | New South Wales, NAT |
| Senator Gavin Marshall (Deputy Chair) | Victoria, ALP |
| Senator Sam Dastyari | New South Wales, ALP |
| Senator Nova Peris OAM | Northern Territory, ALP |
| Senator Linda Reynolds | Western Australia, LP |
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# Contents

# Introduction

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

The Federal Register of Legislative Instruments (FRLI) website should be consulted for the text of instruments and explanatory statements, as well as associated information. 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).

## 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.

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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.

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

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

## 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;
- Appendix 1 contains the committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003*.
- Appendix 2 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**

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

# Chapter 1

## New and continuing matters

This chapter lists new matters identified by the committee at its meeting on **27 August 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.

## New matters

### Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 [F2014L00891]

| | |
|---|---|
| **Purpose** | Amends the Corporations Regulations 2001 to implement various amendments relating to Part 7.7A of the regulations |
| **Last day to disallow**[1] | 24 September 2014 |
| **Authorising legislation** | *Corporations Act 2001* |
| **Department** | Treasury |

**Background:**

**Issue:**

*Matters more appropriate for parliamentary enactment*

The explanatory statement (ES) for the instrument states that the instrument is intended to 'provide clarity to stakeholders' by amending the regulations for the purpose of:

- facilitating scaled advice (applying from the time the regulation commences until 31 December 2015);
- removing the 'catch-all' provision from the list of steps an advice provider may take to satisfy the best interests obligation (applying from the time the Regulation commences until 31 December 2015);

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

- making consequential amendments to the modified best interests duty;
- providing that non-cash payment facilities that are not related to a basic deposit product are included in the definition of a 'basic banking product';
- removing the need for clients to renew their ongoing fee arrangement with their adviser every two years (also known as the 'opt-in' requirement) (applying from the time the regulation commences until 31 December 2015); and
- removing the requirement to provide an annual fee disclosure statement to clients in ongoing fee arrangements prior to 1 July 2013 (applying from the time the regulation commences until 31 December 2015).

Scrutiny principle (d) of the committee's terms of reference require the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This includes legislation which fundamentally changes the law.

The ES for the instrument provides the following reason for introducing the changes via regulation rather than primary legislation:

> …time sensitive FOFA amendments will be dealt with through regulations and then put into legislation. This approach provides certainty to industry and allows industry to benefit from the cost savings of the changes as soon as possible.

However, the committee notes that the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) has expressed doubt as to whether industry certainty (and benefit) amounts to a sufficient justification for effecting significant policy change via regulation. That committee has stated:

> …enabling a regulated industry to benefit from legislative change 'as soon as possible' is not a sufficient justification to achieve policy change through regulations rather than Parliamentary enactment as this justification could be claimed with respect to any proposal. The fact that the changes may subsequently be enacted in primary legislation does not moderate the scrutiny concerns in this regard.[2]

In light of these comments, the committee notes that key elements of the regulation (item 7) may be described as involving 'fundamental change' to the primary legislative scheme, and as 'mirroring' the proposed amendments in the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014.

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2 Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2014*, 16 July 2014, p. 348.

Given this, the committee considers that the changes effected by the regulation may be regarded as more appropriate for parliamentary enactment, in respect of both their substantive effect and temporary or interim character. **The committee therefore requests the advice of the minister in relation to this matter.**

**Issue:**

*Whether instrument is made in accordance with statute*

Scrutiny principle (a) of the committee's terms of reference requires the committee to consider whether an instrument is in accordance with the statute. This principle is interpreted broady as a requirement to ensure that instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements.

The regulation is made under subsection 1364(1) of the *Corporations Act 2001* (the Act), which provides:

> The Governor-General may make regulations prescribing matters:
>
> (a) required or permitted by this Act to be prescribed by regulations; or
> (b) necessary or convenient to be prescribed by such regulations for carrying out or giving effect to this Act.

Without limiting subsection 1364(1), subsection 1364(2) of the Act specifies a number of purposes for which the regulations may make provision.

The ES for the instrument states that the regulation is intended to effect 'interim changes' until the Corporations Amendment (Streamlining of Future of Advice) Bill 2014 passes the Australian Parliament and receives Royal Assent, and that the interim changes will be repealed (to the extent appropriate) following the commencement of the Corporations Amendment (Streamlining of Future of Advice) Bill 2014.

In the committee's view, given that the regulation has been made as an interim measure until the passage of primary legislation, a question arises as to whether the regulation is permitted under subsections 1364(1) and (2) of the Act. **The committee therefore requests the advice of the minister in relation to this matter**

## Financial Management and Accountability Amendment (2014 Measures No. 6) Regulation 2014 [F2014L00841]

| | |
|---|---|
| **Purpose** | Amends the Financial Management and Accountability Regulations 1997 to establish legislative authority for government spending on certain activities across eleven portfolios |
| **Last day to disallow** | 4 September 2014 |
| **Authorising legislation** | *Financial Management and Accountability Act 2001* |
| **Department** | Finance |

**Background:**

The committee has previously determined to examine certain regulations made under the *Financial Management and Accountability Act 1997*, on the basis of concerns regarding the potential erosion of the Senate's constitutional rights with respect to the authorising of expenditure.[3]

**Issue:**

*Addition of matters to Schedule 1AB of the FMA Regulations—previously unauthorised expenditure*

Scrutiny principle (d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

Financial Management and Accountability Amendment (2014 Measures No. 6) Regulation 2014 [F2014L00841] adds 1 item to Part 2 of Schedule 1AB, 3 items to Part 3 of Schedule 1B and 50 items to Part 4 of Schedule 1B, to establish legislative authority for various programmes, grants and arrangements across eleven portfolios.

The committee notes that the regulation differs from previous regulations under Schedule 1AB in that it is the first to allocate funds under Part 3—Grants of financial assistance to persons other than a State or Territory (all previous regulations under Schedule 1AB allocated funds under Part 4—Programs, or Part 2—Grants of financial assistance to a State or Territory).

The committee has examined all 54 items in the regulation. A number appear to authorise additional, continuing or reduced funding of existing measures, or to

3 For background to this issue, see *Delegated legislation monitor*, No. 5 of 2014, 14 May 2014, pp 16–17.

authorise the redirection of existing funding. However, the following items appear to be expenditure not previously authorised by legislation:

- New table item 1 of Part 3 of Schedule 1AB establishes legislative authority for the Commonwealth government to contribute towards meeting the costs of a runway extension and associated capital works at Hobart International Airport. The programme is to be administered by the Department of Infrastructure and Regional Development. Funding of $38 million will be allocated from 2014-15 to 2016-17 for a runway extension of up to 500 metres and associated works at the Hobart International Airport.

- New table item 2 of Part 3 of Schedule 1AB establishes legislative authority for the Commonwealth government to establish Rural and Regional General Practice Teaching Infrastructure Grants to strengthen the rural health workforce and improve health service delivery in rural and regional communities. The programme is to be administered by the Department of Health. Funding of $52.5 million over 3 years was allocated in the 2014-15 Budget.

- New table item 3 of Part 3 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund the Orygen Youth Health Research Centre to establish and operate the National Centre of Excellence in Youth Mental Health. The programme is to be administered by the Department of Health. Funding of $18 million over 4 years was included in the 2014-15 Budget.

- New table item 13 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide support to the manufacturing industry by providing $50 million in assistance over 3 years through Manufacturing Industry Support.

- New table item 15 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to drive business competitiveness by providing, or funding the provision of, support for business improvement and commercialisation of new ideas under the Entrepreneurs' Infrastructure Programme. The Programme, worth $484.2 million, was announced in the 2014-15 Budget.

- New table item 16 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide or arrange for the provision of education and training through the Skills and Training Programme for automotive workers and for automotive workers who become unemployed during their training. The funding is part of the Industry Growth Fund, but the amount is not specified in the ES.

- New table item 17 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to assist Australian automotive supply chain companies through the Automotive Diversification Programme to

diversify their businesses out of the domestic automotive manufacturing sector. Funding of $20 million is allocated as part of the Industry Growth Fund.

- New table item 18 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide financial assistance to Australian manufacturing trading corporations to promote the growth of the non-automotive manufacturing sector in Victoria and South Australia through the Next Generation Manufacturing Investment Programme. Funding of $59.8 million is allocated as part of the Industry Growth Fund.

- New table item 19 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to support and develop infrastructure, stimulate new business activity and enhance economic development through the Regional Infrastructure Programme. Funding of $29.8 million is allocated as part of the Industry Growth Fund.

- New table item 20 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to engage in expenditure for the purpose of enabling the loan, from the government of the United Kingdom, of the original chart of Australia prepared by Captain Matthew Flinders in 1804 during his 1801-03 circumnavigation of the continent, and the exhibition of the Chart in the Australian Capital Territory, for the benefit of the nation. The Commonwealth government has allocated $0.2 million over two years to cover negotiations in 2014-15 and associated costs with the loan in 2015-16.

- New table item 21 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to develop a user friendly insurance aggregator website for the North Queensland market for strata, home building and home contents insurance through the National Insurance Affordability Initiative. No funding amount is specified in the ES. The committee notes that while the ES states that funding details are in *Budget Paper No. 2*, 2014-15 at page 213, the figures are not published 'due to commercial sensitivity'.

- New table item 22 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide funding for the environment and heritage through the Green Army Programme which is the Australian government's primary conservation management programme. The programme will be delivered by an external service provider(s) and managed by the Department of the Environment. Funding of $525 million has been allocated to the programme over 5 years commencing in 2014–15.

- New table item 23 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide funding for Community Heritage and Icons Grants. The funding amount is not specified in the ES.

- New table item 24 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide grant funding as part of its

2013 election commitment of $0.3 million to be provided to Zoos Victoria over 2 years to support the Nyaru Menteng Orangutan Reintroduction Project in Central Kalimantan, Indonesia. Funding of $0.2 million and $0.1 million will be provided to Zoos Victoria over 2014-15 and 2015-16, respectively, through an agreement with the federal Department of the Environment.

- New table item 25 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide funding for continued delivery of the National Climate Change Adaptation Research Facility (NCCARF) at Griffith University to facilitate better climate risk management through research and capacity building. The government is proposing to provide a one-off grant to the NCCARF. The funding amount is not specified in the ES.

- New table item 26 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to make grants totalling $2.1 million through the Solar Towns Programme to community groups, such as sports clubs, seniors' centres and scout groups, to support the installation of solar photovoltaic and solar hot water systems and reduce energy costs. A total of $300,000 is allocated to each of the 7 regions announced at the 2013 election.

- New table item 28 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide a rebate to small exporters for export registration charges. The Financial Rebate for Small Exporters will be for up to 50 per cent of export registration charges, to a maximum of $5,000, and will be available in 2014-15. A total of $15 million has been allocated, and the projects will be administered by the Department of Agriculture.

- New table item 29 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to meet its 2013 marine pest election commitment and undertake a review and strategic analysis of invasive marine species with a view to removal or eradication of marine pests. The Review of Invasive Marine Pests will be supported by $5 million funding over 4 years, administered by the Department of Agriculture.

- New table item 31 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund a one year trial of the Early Language Learning Australia initiative for online language learning for children in a preschool programme. Total funding is capped at $9.8 million over the 2014-15 and 2015-16 financial years.

- New table item 33 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide benefits to certain Newstart Allowance, Youth Allowance and Parenting Payment recipients, in the form of payments of financial assistance to such persons to relocate to other areas of Australia to take up employment. Funding of $16.6 million over five years for the Relocation Assistance to Take Up a Job Programme is outlined in the *Mid-Year Economic and Fiscal Outlook 2013-14* at page 137.

- New table item 35 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund the Jobs, Land and Economy Programme under the Indigenous Advancement Strategy. The programme will be administered by the Department of the Prime Minister and Cabinet. The funding amount is not specified in the ES.

- New table item 36 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund the Children and Schooling Programme under the Indigenous Advancement Strategy. The programme will be administered by the Department of the Prime Minister and Cabinet. The funding amount is not specified in the ES.

- New table item 37 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund the Safety and Wellbeing Programme under the Indigenous Advancement Strategy. The programme will be administered by the Department of the Prime Minister and Cabinet. The funding amount is not specified in the ES.

- New table item 38 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund the Culture and Capability Programme under the Indigenous Advancement Strategy. The programme will be administered by the Department of the Prime Minister and Cabinet. The funding amount is not specified in the ES.

- New table item 39 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund the Remote Australia Strategies Programme under the Indigenous Advancement Strategy. The programme will be administered by the Department of the Prime Minister and Cabinet. The funding amount is not specified in the ES.

- New table item 44 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide funding for the Civil Society programme. The funding amount is not specified in the ES.

- New table item 45 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide funding for the Families and Communities Service Improvement programme to support and encourage the continuous improvement of Commonwealth funded social services. The funding amount is not specified in the ES.

- New table item 55 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide funding for the Stronger Relationships Trial Programme to provide up to 100,000 couples with $200 towards relationship education and counselling provided by authorised family and relationship services.

- New table item 56 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide funding for the Young Carer

Bursary Programme to provide benefits to students through the payment of bursaries to caregivers who are aged 25 and under, and who are currently enrolled in secondary school or in tertiary education. The funding amount is not specified in the ES. Funding of $3 million is outlined in the *Portfolio Budget Statements 2014-15*, Social Services Portfolio at page 34.

- New table item 58 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund the Australian Drug Foundation for the Good Sports Programme, an initiative that provides free support to sporting clubs to change their culture and reduce high risk drinking. Funding of $19 million over 4 years was included in the 2014-15 Budget.

- New table item 59 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide funding support to Life Saving Australia, the Royal Life Saving Society – Australia and AUSTSWIM in their efforts to reduce drowning deaths and promote water safety. Funding of $15 million over 5 years for Water Safety was included in the 2014-15 Budget.

- New table item 62 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to provide grants of financial assistance through the National Stronger Regions Fund for infrastructure to improve liveability and drive economic growth. The Commonwealth has allocated $1 billion to the National Stronger Regions Fund from 2015–16 to 2019–20 for grants of financial assistance.

The committee considers that, prior to the enactment of the *Financial Framework Legislation Amendment Act (No 3) 2012*, the schemes outlined above would properly have been contained within an appropriation bill not for the ordinary annual services of government, and subject to direct amendment by the Senate. The committee will draw these matters to the attention of the relevant portfolio committee.

**The committee therefore draws the attention of the Senate to the expenditure authorised by this instrument relating to the schemes listed below:**

- **Grant to Hobart International Airport Pty Limited**
- **Rural and Regional General Practice Teaching Infrastructure Grant**
- **National Centre of Excellence in Youth Mental Health**
- **Manufacturing Industry Support**
- **Entrepreneurs' Infrastructure Programme**
- **Growth Fund—Skills and Training Programme**
- **Automotive Diversification Programme**
- **Growth Fund—Next Generation Manufacturing Investment Programme**

- **Regional Infrastructure Programme**
- **Matthew Flinders' Chart**
- **National Insurance Affordability Initiative**
- **Green Army Programme**
- **Community Heritage and Icons Grants**
- **Orangutan Reintroduction Project**
- **National Climate Change Adaptation Research Facility**
- **Solar Towns Programme**
- **Financial Rebate for Small Exporters**
- **Review of Invasive Marine Pests**
- **Early Language Learning Australia Trial**
- **Relocation Assistance to Take Up a Job Programme**
- **Indigenous Advancement—Jobs, Land and Economy**
- **Indigenous Advancement—Children and Schooling**
- **Indigenous Advancement—Safety and Wellbeing**
- **Indigenous Advancement—Culture and Capability**
- **Indigenous Advancement—Remote Australia Strategies**
- **Civil Society**
- **Families and Communities Service Improvement**
- **Stronger Relationships Trial Programme**
- **Young Carer Bursary Programme**
- **Good Sports Programme**
- **Water Safety**
- **National Stronger Regions Fund**

**Issue:**

*Addition of matters to Schedule 1AB of the FMA Regulations—authority for expenditure*

Scrutiny principle (a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle is interpreted broady as a requirement to ensure that instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements.

This instrument was made after the High Court's decision in *Williams (No. 2)* ([2014] HCA 23 (19 June 2014)) (Williams No. 2). The committee notes that, as a result of that decision, a question arises as to whether all the items of expenditure provided for by this instrument are supported by a head of power under section 51 of the Constitution. The committee considers that, in light of Williams (No.2), the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Management and Accountability Act 1997* should explicitly state, for each new program, the Constitutional head of power that supports the expenditure. **The committee therefore requests further information from the minister in relation to the Constitutional head of power for each programme, grant, and arrangement specified in the instrument.**

## Family Law (Bilateral Arrangements-Intercountry Adoption) Amendment (2014 Measures No. 2) Regulation 2014 [F2014L00857]

| | |
|---|---|
| **Purpose** | Amends the Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 1998 to clarify that adoptions of children from Taiwan, Ethiopia and South Korea that took place prior to those overseas jurisdictions being prescribed under the Principal Regulation are automatically recognised under Australian laws |
| **Last day to disallow** | 4 September 2014 |
| **Authorising legislation** | *Family Law Act 1975* |
| **Department** | Attorney-General's |

**Issue:**

*Insufficient description regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have

an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the instrument states:

> The Office of Best Practice Regulation was consulted about the Regulation and advised that a Regulatory Impact Statement is not necessary as the amendments were likely to have no or low regulatory impacts on business and individuals or on the economy.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, its usual approach is to consider an overly bare or general description, such as in this case, as not being sufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. **The committee therefore requests further information from the Attorney-General; and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

## Social Security (Administration) (Relocation Assistance) Specification 2014 [F2014L00900]

| | |
|---|---|
| **Purpose** | Ensures that the new Relocation Assistance to Take Up a Job programme is 'relocation assistance' for the purpose of section 42S of the *Social Security (Administration) Act 1999* |
| **Last day to disallow** | 4 September 2014 |
| **Authorising legislation** | *Social Security Administration Act 1999* |
| **Department** | Employment |

**Issue:**

*Insufficient description regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the instrument states:

No consultation was necessary for the purpose of this instrument.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, its usual approach is to consider an overly bare or general description, such as in this case, as not being sufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. **The committee therefore requests further information from the minister; and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

## Communications Legislation (Spent and Redundant Instruments) Instrument of Repeal (No. 1) 2014 [F2014L00953]

| | |
|---|---|
| **Purpose** | Repeals spent and redundant instruments administered by the Minister for Communications |
| **Last day to disallow** | 4 September 2014 |
| **Authorising legislation** | *Australian Communications and Media Authority Act 2005*; *Broadcasting Services Act 1992*; *Radiocommunications Act 1992*; and *Acts Interpretation Act 1901* |
| **Department** | Communications |

**Issue:**

*Repeal of redundant instruments of delegated legislation*

This instrument is made under various specified provisions (including subsection 33(3) of the *Acts Interpretation Act 1901*) and repeals five existing instruments administered by the Minister for Communications. The ES explains the repealed instruments are 'spent or otherwise redundant'. **The committee notes the use of the power to effect mass repeal of redundant instruments to improve the maintenance of FRLI.**

## ASIC Class Order [CO 14/569] [F2014L00976]

| | |
|---|---|
| **Purpose** | Extends the date of ASIC Class Order [CO 13/18] to 12 July 2016 |
| **Last day to disallow** | 25 September 2014 |
| **Authorising legislation** | *National Consumer Credit Protection Act 2009* |
| **Department** | Treasury |

**Background:**

In 2012, the High Court of Australia held in *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45 that the litigation funding agreement in that matter was a 'credit facility' within the meaning of regulation 7.1.06 of the Corporations Regulations 2001. The High Court held the litigation funding agreement was 'credit' because it was a form of financial accommodation provided by the litigation funder to the litigant and its provision 'for any period' will be a 'credit facility'.

**Issue:**

*Timetable for making of substantive amendments to principal legislation*

Scrutiny principle (d) of the committee's terms of reference require the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation). This may include instruments which extend relief from compliance with principal legislation.

The ES for the instrument states that it was made to enable the temporary operation of a litigation funding arrangement and a proof-of-debt funding arrangement, without compliance with the requirements of the *National Consumer Credit Protection Act 2009* (the Credit Act) and the *National Credit Code*, until 12 July 2013.

The instrument effectively extends, until 12 July 2016, the relief provided by a previous order (CO 13/18), to allow time for consideration of whether to exempt litigation funding arrangements and proof-of-debt funding arrangements from the Credit Act (in light of the High Court's finding).

The committee notes that this and previous orders have extended the relief in question first by one year and, now, by a further two years. The committee generally prefers that relief from compliance with an Act effected via legislative instrument does not operate as a de facto amendment to the principal legislation. **The committee therefore seeks the minister's advice as to the progress of consideration of whether to exempt litigation funding arrangements and proof-of-debt funding**

**arrangements from the Credit Act; and the appropriateness of continuing to provide relief from the Credit Act via legislative instrument in this case.**

## ASIC Class Order [CO 14/571] [F2014L00977]

| | |
|---|---|
| **Purpose** | extends the date of ASIC Class Order [CO 13/898] to 12 July 2016 |
| **Last day to disallow** | 25 September 2014 |
| **Authorising legislation** | *Corporations Act 2001* |
| **Department** | Treasury |

**Background:**

In 2009, the Full Court of the Federal Court held in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147 that a funded representative action and solicitors' retainers for two representative proceedings against Brookfield Multiplex Ltd in the Federal Court were a managed investment scheme that should have been registered for the purposes of the *Corporations Act 2001* (the Act).

**Issue:**

*Timetable for making of substantive amendments to principal legislation*

Scrutiny principle (d) of the committee's terms of reference require the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation). This may include instruments which extend relief from compliance with principal legislation.

The ES for the instrument states that it was made to allow time for consideration of whether to exempt representative proceedings and proof-of-debt arrangements that are subject to a conditional costs agreement from the definition of 'managed investment scheme' in certain provisions and parts of the Act.

Class Order [CO 14/571] extends the relief in [CO 13/898] until 12 July 2016 to allow further time for the government to consider its position on whether to exempt litigation funding arrangements and proof-of-debt funding arrangements under similar terms as those in [CO 13/898] (in light of the High Court's finding).

The committee notes that the current order effectively extends the relief from the Act by a further two years. The committee generally prefers that relief from compliance

with an Act effected via legislative instrument does not operate as a de facto amendment to the principal legislation. **The committee therefore seeks the minister's advice as to the progress of consideration of whether to exempt litigation funding arrangements and proof-of-debt funding arrangements; and the appropriateness of continuing to provide relief from the Act via legislative instrument in this case.**

## Family Assistance (Public Interest Certificate Guidelines) (DSS) Determination 2014 [F2014L00973]

| | |
|---|---|
| **Purpose** | Revokes the Family Assistance (Public Interest Certificate Guidelines) (FaHCSIA) Determination 2010 and specifies Guidelines to assist the Secretary (or the delegate) of the Department of Social Services in the exercise of power to disclose information and in the determination of what is considered to be 'the public interest' |
| **Last day to disallow** | 25 September 2014 |
| **Authorising legislation** | *A New Tax System (Family Assistance) (Administration) Act 1999* |
| **Department** | Social Services |

**Issue:**

*Drafting*

This instrument states it is made under subparagraph 169(1)(a)(i) and paragraph 169(1)(b) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Act). The committee notes that the current version of the Act (as registered on FRLI) contains no such provisions. Those provisions were replaced by item 6 of Schedule 4 to the *Family Assistance and Other Legislation Amendment (Child Care and Other Measures) Act 2011* (which commenced on 26 July 2011). The committee notes that, despite reference to an incorrect empowering provision, the law would generally allow the exercise of a power to stand as long as the authorising Act elsewhere contains a provision to support the exercise of the power.[4] However, it is preferable to correctly identify the empowering provisions. **The committee therefore draws this matter to the attention of the minister.**

4 See Pearce and Argument, *Delegated legislation in Australia*, 4th edition, paras [13.20] to [13.24].

## Trade Support Loan Rules 2014 [F2014L01007]

| | |
|---|---|
| **Purpose** | provides for matters relating to qualification for trade support loan, determinations granting trade support loan, application forms and other matters |
| **Last day to disallow** | 28 November 2014 |
| **Authorising legislation** | *Trade Support Loans Act 2014* |
| **Department** | Industry |

**Issue:**

*Potential delegation of general rule-making power*

Section 101(1) of the *Trade Support Loans Act 2014* (the Act) provides that the secretary may delegate his or her powers to an officer:

> The Secretary may, in writing, delegate to an officer all or any of the powers and functions of the Secretary under this Act.

Section 5 of the Act defines an officer:

> *officer* means a person engaged (whether as an employee or otherwise) by any of the following:
>
> (a) an Agency (within the meaning of the *Public Service Act 1999*);
>
> (b) another authority of the Commonwealth;
>
> (c) a person or organisation that performs services for the Commonwealth.

The explanatory memorandum to the Trade Support Loans bill states:

> Some of the functions may be delegated to contracted service providers who may provide a range of other services such as receiving and processing applications for trade support loans as well as other Australian Apprenticeship initiatives. This is appropriate as these functions are of an administrative nature and require a certain level of expertise in understanding the Trade Support Loan Programme. Administrative guidelines will be developed which will provide advice about circumstances under which these delegations will be made.

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 101(1) and, if so, what considerations might apply in that case. **The committee therefore requests the advice of the minister on this matter.**

# Continuing matters

## Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125]

| | |
|---|---|
| **Purpose** | This instrument provides for exceptions under the *Australian Jobs Act 2013*, information required for compliance and notification, and further functions for the Australian Industry Participation Authority |
| **Last day to disallow** | 13 May 2014 |
| **Authorising legislation** | *Australian Jobs Act 2013* |
| **Department** | Industry |

**[The committee first reported on this instrument in Monitor No. 2 of 2014, and subsequently in Monitor Nos 5, 6, and 9 of 2014. The committee raised concerns and sought further information in relation to the prescribing of matters by legislative rules].**

**Issue:**

*Prescribing of matters by 'legislative rules'*

The committee notes that this instrument relies on section 128 of the *Australian Jobs Act 2013*, which allows for various matters in relation to that Act to be prescribed, by the minister, by 'legislative rules'. While the explanatory statement (ES) for the instrument does not address the issue, as far as the committee can ascertain this is a novel approach to the prescribing of matters in Commonwealth legislation, insofar as Acts usually provide for matters to be prescribed, by the Governor-General, by 'regulation'. The committee notes that the latter approach to prescribing matters is consistent with the definition in section 2B of the *Acts Interpretation Act 1901*, which provides that, in any Act, 'prescribed' means 'prescribed by the Act or by regulations under the Act'. This being so, the committee is uncertain as to whether the prescription of matters by 'legislative rules' is also consistent with the *Acts Interpretation Act 1901*.

More generally, the committee notes that the making of regulations is subject to the drafting and approval requirements attached to the Office of Parliamentary Counsel (OPC) and Executive Council, respectively. To the extent that these requirements may

be taken as an additional layer of scrutiny in the prescribing of matters by regulation, it is not clear whether these requirements will also apply to legislative rules and, if not, what the ramifications may be for both the quality of, and level of scrutiny applied to, such instruments **[the committee requested further information from the minister (Monitor No. 2 of 2014)].**

**MINISTER'S RESPONSE:**

*Prescribing of matters by 'legislative rules'*

In relation to the issue of whether the prescribing of matters by legislative rules is novel, First Parliamentary Counsel (FPC) provided a number of examples of legislation allowing matters to be prescribed other than by regulation as the basis for his apparent view that the approach taken in section 128 of the *Australian Jobs Act 2013* is 'longstanding'.

**COMMITTEE RESPONSE:**

**[The committee thanked the minister for his response and made the following comments (Monitor No. 5 of 2014)].**

However, the committee noted that its inquiry regarding the prescribing of matters by 'legislative rules' in the instrument goes firstly to the specific form of the power, as opposed to the more general provision in Acts for the 'making of instruments rather than regulations'. That is, the regulation-making power is commonly provided as a broad power to make regulations required or permitted by the authorising Act, or necessary or convenient for carrying out or giving effect to the Act. For example, section 62 of the *Legislative Instruments Act 2003* provides:

> The Governor-General may make regulations prescribing all matters:
>
> (a) required or permitted by this Act to be prescribed; or
>
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

In the committee's view, the broadly-construed regulation-making power may be contrasted with the usually more specific or constrained provisions allowing for the making of other types of instruments. However, in the present case, section 128 of the *Australian Jobs Act 2013* provides:

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

Further, the *Australian Jobs Act 2013* does not contain a regulation-making power. The committee notes that the broadly-expressed power to make legislative rules in the *Australian Jobs Act 2013* therefore effectively replaces the regulation-making power.

With this context, the committee notes that many of the examples referred to by FPC appear to be distinguishable from this broad power to make legislative rules in the absence of a regulation-making power. A number of these may be distinguished on the basis that:

- the relevant instrument-making power is not expressed in as broad a manner in which the legislative-rule making power is expressed in the present case (for example, they are limited to matters 'required or permitted' by the Act, but not to things 'necessary or convenient');
- the rule-making power is complemented by the inclusion of a broadly defined regulation-making power expressed in the usual terms; and
- the rule-making power is constrained by being permitted only in relation to specific parts or subdivisions of the relevant Act (or to specific items).

However, with the exception of the *Income Tax Assessment Act 1997*, the committee notes that seven of the remaining eight examples listed in paragraph 12 provide analogous powers to the legislative rule-making power in the *Australian Jobs Act 2013*. That is, the following Acts provide for a broad rule-making power that appears to take the place of a general power to make regulations:

- *Asbestos Safety and Eradication Agency Act 2013*;
- *Australia Council Act 2013*;
- *Australian Jobs Act 2013*;
- *International Interests in Mobile Equipment (Cape Town Convention) Act 2013*;
- *Public Governance, Performance and Accountability Act 2013*;
- *Public Interest Disclosure Act 2013*; and
- *Sugar Research and Development Services Act 2013*.

The committee notes that these Acts are all dated 2013 and, according to FPC's advice, were drafted 'since the transfer of the subordinate legislation drafting function to the Office of Parliamentary Counsel in 2012'.

In light of the above, the committee considers that FPC's advice tends to confirm the view that the provision for a broadly-expressed power to make legislative rules in place of the regulation-making power is a novel approach, employed in the drafting of Acts only since 2013. Further, the committee notes that on 6 March 2014 (subsequent to the committee's initial comments on this matter), OPC circulated revised Drafting Direction No. 3.8, which included the addition of extensive instruction on the use of

'general instrument-making powers' of this kind. The committee notes that Drafting Direction No. 3.8 appears to confirm the inclusion of such powers in delegated legislation as a novel approach. It states:

> It has long been the practice to include general regulation making powers in Acts.
>
> More recently, an approach has been taken to adapt that practice for other legislative instruments.

With the exception of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), the committee is not aware of any reference to the inclusion of a general rule-making power in place of the regulation-making power in the explanatory memorandums (EMs) for these Acts. The EM for the PGPA Act stated (p. 58):

> Using rules, rather than regulations, as the form of legislative instrument is consistent with current drafting practice. The Office of Parliamentary Counsel reserves the use of regulations to a limited range of matters that are more appropriately dealt with in regulations made by the Governor-General than in an instrument made by some other person. Matters in this category include offence provisions, powers of arrest or detention, entry provisions and search or seizure provisions. The rules will be legislative instruments subject to disallowance by Parliament and will sunset under the provisions of the LI Act.

In the committee's view, the EMs for these Acts did not provide a sufficient opportunity for the Parliament to identify and consider the potential consequences of the introduction of a general rule-making power in place of the regulation-making power. The committee's current inquiries seek to provide that opportunity.

While the committee acknowledges that agencies must seek to best use often limited resources, the committee considers that what appears to be a potentially significant change or addition to the use of the general regulation-making power should not be effected solely through agency policy.

*Ramifications for the quality and scrutiny of legislative rules*

The committee notes that the broader thrust of its comments on the prescribing of matters by the general instrument-making power relate to the ramifications of this approach for the quality and level of executive and Parliamentary scrutiny applied to such instruments.

FPC's advice notes that instruments made under the general instrument-making making power may now be drafted by agencies (unlike regulations, which are required to be drafted by OPC). OPC may, however, draft or assist agencies 'within the limits of available resources'. In the committee's experience, regulations are characterised by the highest drafting standards, and it seems unlikely that agencies are equipped to achieve the same standards in the drafting of instruments under the general instrument-making power. In particular, the committee notes that regulations may be lengthy and complex, covering a range of matters as permitted by the general power on which they are based. Given this, the Parliament's ability to scrutinise instruments

that are of a similar character, but not drafted, and subject to only limited oversight, by OPC, may be adversely affected where the highest standards are not maintained.

**[The committee requested the minister's advice on the matters outlined above, and on the particular questions set out below:**

- **Regarding FPC's advice that 'some types of provisions should be included in regulations and be drafted by OPC [without] strong justification for prescribing those provisions in another type of legislative instrument', in the event that such provisions are required for the Acts listed on page 3 above, how will the required measures be introduced in the absence of a regulation-making power?**

- **Will the drafting of complex and lengthy instruments by departments and agencies based on the general instrument-making power achieve the same levels of quality and accuracy as achieved by OPC in its drafting of regulations?**

- **What is the minister's understanding of the fundamental or original reason for requiring regulations to be drafted by OPC and made by the Governor-General? Do such requirements ensure higher standards in such instruments by mandating greater executive responsibility and scrutiny?]**

**MINISTER'S RESPONSE:**

*Minister's concerns*

In addition, the minister prefaced FPC's advice by noting that 'the committee's queries do not relate to the substance of the rule itself, but rather to the underlying power authorising the making of the instrument'. The minister also expressed his concern that the rule:

> …has become the vehicle by which the Committee is exploring OPC's drafting practice of including a rule-making power in primary legislation as opposed to the more traditional regulation-making power.

The minister requested that the committee give consideration to the offer of a meeting with FPC to facilitate resolution of this matter, noting that the committee's concerns 'relate to the appropriateness of the provision in the Act that creates a general rule-making power, which is an issue that cannot be resolved in the context of scrutiny of this rule'.

**COMMITTEE RESPONSE:**

**[The committee thanked the minister for his response and agreed to a meeting to discuss the committee's concerns; and made the following comments (Monitor No. 6 of 2014)].**

The committee notes that the content of any such meeting will form part of the committee's public scrutiny of the instrument, and be included in subsequent reports on this matter (in addition to further written responses to the committee's comments below).

In relation to the minister's view that the matters in question 'cannot be resolved in the context of scrutiny of this rule', the committee notes that the question of whether the Parliament regards the new general rule-making power as appropriate to the exercise of the Parliament's delegated legislative powers goes fundamentally to the committee's institutional role and the principles which inform its operation.

The delegation of the Parliament's legislative power to executive government involves a 'considerable violation of the principle of separation of powers, the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government'.[5] This principle is effectively preserved through the committee's work scrutinising delegated legislation, and the power of the Parliament to disallow delegated legislation.

In accordance with this critical role, the committee's scrutiny principles are 'interpreted broadly to include every possible deficiency in delegated legislation affecting parliamentary propriety and personal rights'.[6]

It follows from this understanding of the committee's role, and the powers and procedures through which it operates, that the committee could make no practical distinction between the substance and form of the rules if it were to conclude that the general rule-making power did not accord with the committee's scrutiny principles, in relation to the proper exercise and oversight of the Parliament's delegated powers by the executive.

More generally, the committee notes that, notwithstanding its concerns in relation to the current instrument, recent bills for proposed Acts continue to make provision for a general-rule making power. The management of risk attendant on use of the general rule-making power while the committee's concerns remain unresolved is a consideration falling outside the scope of the committee's scrutiny functions.

*Prescribing of matters by 'legislative rules'*

**MINISTER'S RESPONSE:**

FPC's advice stated:

> As discussed in my previous letter, Commonwealth Acts have provided for the making of instruments rather than regulations for many years. The use of a general rule-making power in place of a general regulation-making power is a development of this long-standing approach, and has been

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

6 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 438.

adopted by OPC for the reasons discussed below. In my view, over time this approach will enhance, and not diminish, the overall quality of legislative instruments (in particular, the quality of instruments that have the most significant impacts on the community) and will accordingly facilitate the Committee's scrutiny role.

**COMMITTEE RESPONSE:**

**[The committee made the following comment (Monitor No. 6 of 2014)].**

The committee notes FPC's acknowledgement that the use of a general rule-making power to displace the use of the general regulation-making power is a 'development' in longstanding practice, a view which supports the committee's initial characterisation of the approach as 'novel' (since 2013). The mis-characterisation of the approach taken in section 128 of the *Australian Jobs Act 2013* as 'longstanding' provided no basis for a response to the concerns raised by the committee. The committee hopes that clarity as to the nature of the change will facilitate a full appreciation of the committee's concerns.

*Ramifications for the quality and scrutiny of legislative rules*

**MINISTER'S RESPONSE:**

FPC's advice stated:

4 Before turning to the particular questions raised by the Committee, it may be helpful to deal with some general issues.

***1. OPC's drafting functions***

**(a) OPC's drafting functions generally**

5 The *Parliamentary Counsel Act 1970* gives OPC a broad range of functions in relation to the drafting and publishing of legislation. Since the transfer of functions of the former Office of Legislative Drafting and Publishing (OLDP) to OPC in October 2012, these functions have included the drafting of subordinate legislation. Subordinate legislation is broadly defined in the Act and includes all legislative instruments.

**(b) Who may provide drafting services for Government?**

6 The fact that an activity is within the functions of OPC does not itself exclude other persons or bodies from engaging in the activity. However, the Legal Services Directions 2005 made under section 55ZF of the *Judiciary Act 1903* provide for the extent to which other persons or bodies may engage in drafting work.

7 The Legal Services Directions provide that certain drafting work is tied so that only OPC is to undertake the work (or arrange for it to be undertaken). This work consists of the drafting of government Bills, government amendments of Bills,

regulations, Ordinances and regulations of non-self-governing Territories, and other legislative instruments made or approved by the Governor-General.

8 The explanatory statement for the Legal Services Directions provides the following general policy background to the Directions:

> The Directions offer important tools to manage, in a whole-of-government manner, legal, financial and reputational risks to the Commonwealth's interests. They give agencies the freedom to manage their particular risks, which agencies are in the best position to judge, while providing a supportive framework of good practice.

9 In relation to the provision of the Directions providing for tied work, the explanatory statement provides the following explanation:

> This paragraph creates categories of Commonwealth legal work that must be carried out by one of a limited group of legal services providers, namely the Attorney-General's Department, the Australian Government Solicitor, the Department of Foreign Affairs and Trade, and the Office of Parliamentary Counsel, depending on the category of work. These areas of legal work are known as 'tied work'. The provision recognises that certain kinds of work have particular sensitivities, create particular risks or are otherwise so bound to the work of the executive that it is appropriate that they be subject to centralised legal service provision.

10 Outside these tied areas of legal work the Directions give agencies the responsibility of managing the risks involved in their legal work and, in the case of their drafting work, the freedom to choose whether their legislative instruments will be drafted in-house or will be drafted by OPC or another legal services provider.

**(c) Basis for tying instrument drafting work to OPC**

11 The drafting of legislative instruments to be made or approved by the Governor-General is an important function of OPC. However, even a cursory examination of the Select Legislative Instruments series (in which most of these instruments are published) makes it clear that many provisions of legislative instruments presently made by the Governor-General do not have particular sensitivities, or create particular risks for the Commonwealth, such that it could be said that it is appropriate that their drafting should be subject to centralised legal service provision and thus tied to OPC. The reason that the drafting of these instruments is tied to OPC under the Legal Services Directions is that they are made or approved by the Governor-General and not by another rule-maker, rather than because of their content.

12 Under section 61 of the Constitution the Governor-General exercises the executive power of the Commonwealth. It seems reasonable that the drafting of legislative instruments to be made or approved by the Governor-General is "otherwise so bound to the work of the executive" that it should be subject to centralised legal service provision and thus tied to OPC. The special constitutional status of the

Governor-General as a rule-maker of legislative instruments is recognised in the *Legislative Instruments Act 2003* (see paragraph 4(3)(a)).

### *2. Rationalisation of Instrument-making powers*

13 Drafting Direction No.3.8—subordinate legislation (DD3.8) sets out OPC's approach to instrument-making powers, including the cases in which it is appropriate to use legislative instruments (as distinct from regulations). The development of DD3.8 involved consideration of the following matters.

#### (a) First Parliamentary Counsel's statutory responsibilities

14 Under section 16 of the *Legislative Instruments Act 2003*, I have a responsibility to take steps to promote the legal effectiveness, clarity, and intelligibility to anticipated users of legislative instruments.

15 I am also required to manage the affairs of OPC in a way that promotes proper use of the Commonwealth resources that OPC is allocated (see section 44 of the *Financial Management and Accountability Act 1997*), including resources allocated for the drafting of subordinate legislation.

16 I consider that DD3.8 is an appropriate response to these responsibilities in relation to the drafting of Commonwealth subordinate legislation.

#### (b) Volume of legislative instruments

17 In 2012 and 2013, Federal Executive Council (ExCo) legislative instruments drafted by OPC (or OLDP before the transfer of functions to OPC in 2012) made up approximately 14% of all instruments registered on the Federal Register of Legislative Instruments (FRLI) and 25% to 30% of the number of pages of instruments registered. In addition, in 2013 OPC drafted approximately 4% of all non-ExCo legislative instruments registered and 13% of the number of pages of non-ExCo legislative instruments registered. This meant that in 2013 OPC drafted approximately 35% of all the pages of legislative instruments registered on FRLI.

18 As mentioned in my previous letter, OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so.

19 The question of the centralisation of drafting of all Commonwealth subordinate legislation was considered by the Administrative Review Council in its 1992 report "Rule Making by Commonwealth Agencies". The Council stated that:

> 4.10. The Council does not believe that the drafting of all delegated legislative instruments can be centralised in the Office of Legislative Drafting. The resources are not presently available to cope with such a drafting load, although they could be developed in time. Nor is it necessarily desirable that drafting be centralised. Delegated instruments are not uniform. They comprise a diverse range of instruments covering subject

> matters of widely differing kinds. Their preparation needs an extensive contribution from the agencies themselves.

20 In my view, the Council's statement is still accurate today.

21 It is correct that departments and agencies have a choice under the Legal Services Directions to draft untied instruments in-house or to engage OPC or another legal service provider to draft them. This is consistent with departments and agencies managing their risks, including in relation to the drafting of their legislative instruments, except in areas where for policy reasons it is appropriate to tie the work to OPC. OPC has no difficulty with having to compete for untied instrument drafting work in accordance with the Legal Services Directions and the Competitive Neutrality Principles.

22 My view is that OPC should use its limited resources to draft the subordinate legislation that will have the most significant impacts on the community. This would comprise the narrower band of regulations as specified in DD3.8, which only OPC could draft and which would also receive the highest level of executive scrutiny because of the special nature of the matters dealt with, as well as a range of other more significant instruments. The narrowing of the band of regulations will mean that OPC resources do not have to be committed to drafting instruments dealing with matters that have in the past often been included in regulations but that are of no great significance. Drafting resources will therefore be freed up to work on other more significant instruments, or to assist agencies to draft them.

23 OPC has a strong reputation among Commonwealth Departments and agencies, and I strongly believe that they will recognise the benefits of having significant instruments drafted by OPC and will direct a greater proportion of this work to OPC, or will at least seek OPC's assistance. OPC will also actively seek more of this work. Because this work is billable, OPC will be in a better position to increase its overall drafting resources and to take further steps to raise the standard of instruments that it does not draft. All this will contribute to raise the standard of legislative instruments overall.

**(c) Division of material between regulations and legislative instruments**

24 Before the issue of DD3.8, the division of material between regulations and other legislative instruments seems largely to have been decided without consideration of the nature of the material itself. This has resulted in the inclusion of inappropriate material in regulations and the inclusion of material that should have been professionally drafted in other instruments. This in turn has meant that the resources of OPC and the Federal Executive Council have been taken up with matters that are presently inappropriately included in regulations, while more significant matters have been drafted in other instruments outside of OPC.

25 DD3.8 addresses this matter by outlining the material that should (in the absence of a strong justification to the contrary) be included in regulations and so be drafted by OPC and considered by the Federal Executive Council. I would welcome

any views that the Committee may have on the appropriate division of material between regulations and other legislative instruments and would be happy to review DD3.8 to take account of any views the Committee may have.

**(d) Proliferation of number and kinds of legislative instruments**

26 As long ago as 1992, the Administrative Review Council, in its report "Rule Making by Commonwealth Agencies", stated:

> The Council is concerned at the astonishing range of classes of legislative instrument presently in use, apparently without any particular rationale.

27 To address this, the Council recommended:

> The Office of Parliamentary Counsel, in consultation with the Office of Legislative Drafting, should seek to reduce the number of classes of legislative instruments authorised by statute and to establish consistency in nomenclature.

28 The Council also suggested the use of "rule" as an appropriate description for delegated legislative instruments.

29 Before the issue of DD3.8, it was not unusual for Acts to contain a number of specific instrument-making powers (in addition to a general regulation-making power). These may have resulted in a number of separate instruments of different kinds being made under an Act (for example determinations, declarations and directions, as well as regulations).

30 DD3.8 notes that the inclusion of a general instrument-making power in an Act means that it is not then necessary to include specific provisions conferring the power to make particular instruments covered by the general power. DD3.8 notes that the approach of providing for legislative instruments has a number of advantages including:

(a) it facilitates the use of a single type of legislative instrument (or a reduced number of types of instruments) being needed for an Act; and

(b) it enables the number and content of the legislative instruments under the Act to be rationalised; and

(c) it simplifies the language and structure of the provisions in the Act that provide the authority for the legislative instruments; and

(d) it shortens the Act.

31 In my view, a general instrument-making power also simplifies the task of drafting instruments under the power. Instruments drafted under a general instrument-making power will not necessarily be complex or lengthy. Nor will a general instrument-making power necessarily broaden substantially the power to make

instruments under an Act. The power given by a general instrument-making power in an Act is shaped and constrained by the other provisions of the Act and is not a power at large. A general instrument-making power in an Act may add little to the power to make instruments under the Act, but will add substantially to the ability to rationalise the number and type of instruments under an Act.

**(e) OPC's aim is to raise legislative instrument standards and support Parliamentary scrutiny**

32 In response to the material in my previous letter the Committee has stated:

> While the committee acknowledges that agencies must seek to best use often limited resources, the committee considers that what appears to be a potentially significant change or addition to the use of the general regulation-making power should not be effected solely through agency policy.

33 I remain of the view that OPC's drafting approach to instrument-making powers is measured and appropriate and will, over time, raise standards in the drafting of legislative instruments and support the ability of the executive and Parliament to scrutinise instruments appropriately.

34 I should also emphasise that I would be happy to consider any views that the Committee has in relation to the material that should (or should not) be included in regulations, or any alternative approach the Committee may have in mind.

**COMMITTEE RESPONSE:**

**[The committee made the following comment (Monitor No. 6 of 2014)].**

The committee notes the advice of FPC regarding the basis for tying the drafting of regulations to OPC, and particularly the view that:

> The reason that the drafting of these instruments is tied to OPC under the Legal Services Direction is that they are made or approved by the Governor-General and not by another rule-maker, rather than because of their content.

As noted previously, the committee's inquiry regarding the prescribing of matters by 'legislative rules' goes firstly to the specific form of the power, being a broadly expresed power which enables the executive to make laws covering a range of matters necessary or convenient, or required or permitted, to achieve the objects of an Act. The committee notes that today, and increasingly, Acts commonly provide the 'skeleton' of a legislative scheme, with the general regulation-making power relied on to provide for a vast range of matters required to effectively implement and support the operation of the Act.

The committee notes that for some considerable time, and up until the implementation of a general rule-making power by OPC in 2013, the executive exercise of the

Parliament's delegated legislative power via a broadly expressed regulation-making power has been accompanied by the concomitant responsibility of close executive oversight. The requirements for such instruments to be made by the Governor-General, and the tying of the drafting of such instruments to OPC, may therefore be seen as a necessary accompaniment to the exercise of the broadly expressed delegated power to make regulations, given its nature and critical role in informing the operation of primary legislation. Clearly, such a view stands in contrast to the proposition that the requirement for OPC to draft regulations is a mere consequence of their being made by the Governor-General.

With reference to FPC's advice regarding the Legal Services Drafting Directions (at paragraph 1b), the making of regulations via a broadly expressed power to effect and implement the objects of primary legislation may therefore be properly seen as being so bound to the work of the executive as to justify the longstanding procedural and drafting requirements (effectively to be removed by FPC's implementation of legislative rules). Further, any one case aside, the nature of the power and its intended purpose to broadly effect and implement the objects of primary legislation may reasonably be said to carry potentially significant sensitivities and risks, appropriate to the tying of the drafting of such instruments to OPC.

*Drafting quality and executive and Parliamentary scrutiny of legislative instruments*

**MINISTER'S RESPONSE:**

FPC's advice stated:

35 The Committee has stated:

> The committee notes that the broader thrust of its comments on the prescribing of matters by the general instrument-making power relate to the ramifications of this approach for the quality and level of executive and Parliamentary scrutiny applied to such instruments.

**(a) Drafting quality and executive and Parliamentary scrutiny of the Rule**

36 The Committee has not raised any issues with the content of the Rule. The Rule was drafted by OPC and deals only with matters for which there are specific authorising powers in the *Australian Jobs Act 2013*.

37 There appears to be nothing in the content of the Rule that would suggest that a higher level of executive scrutiny should have been applied to its making, nor that the Rule should have been made by the Governor-General rather than the Minister. The Rule is subject to Parliamentary scrutiny in the same way as any other disallowable legislative instrument. In short, in this case I do not see any adverse effects on the quality of drafting or the level of executive or Parliamentary scrutiny flowing from this instrument being a Rule rather than a regulation.

**(b) Particular questions raised by the Committee**

- **Regarding FPC's advice that 'some types of provisions should be included in regulations and be drafted by OPC [without] strong justification for prescribing those provisions in another type of legislative instrument', in the event that such provisions are required for the Acts listed on page 3 above, how will the required measures be introduced in the absence of a regulation-making power?**

38 The types of provisions referred to above that should be included in regulations include provisions dealing with offences and powers of arrest, detention, entry, search or seizure. Such provisions are not authorised by a general rule-making power (or a general regulation-making power). If such provisions are required for an Act that includes only a general rule-making power, it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions.

- **Will the drafting of complex and lengthy instruments by departments and agencies based on the general instrument-making power achieve the same levels of quality and accuracy as achieved by OPC in its drafting of regulations?**

39 The quality and accuracy of the drafting of an instrument not tied to OPC under the Legal Services Directions is a matter for the responsible agency (and the rule-maker). As discussed above, in my view, the approach taken in DD3.8 will contribute to raise the standard of legislative instruments overall.

- **What is the minister's understanding of the fundamental or original reason for requiring regulations to be drafted by OPC and made by the Governor-General? Do such requirements ensure higher standards in such instruments by mandating greater executive responsibility and scrutiny?**

40 Regulations are required to be drafted by OPC because they are made by the Governor-General: see paragraphs 11 and 12. Commonwealth Acts have traditionally provided for regulations to be made by the Governor-General and not any other rule-maker.

41 In relation to the second part of the question, requiring regulations to be drafted by OPC and made by the Governor-General provides for higher drafting standards and an additional level of executive scrutiny. However, OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so, and the approach taken in DD3.8 ensures that the resources of OPC and the Federal Executive Council Secretariat are directed at the matters that most warrant the application of OPC's drafting expertise and the Council's attention.

**COMMITTEE RESPONSE:**

**[The committee made the following comments and requested a response to the views outlined below (Monitor No. 6 of 2014)].**

The committee notes the advice of FPC that, where provisions that should continue to be included in regulations (according to the recent OPC drafting directions relating to the use of legislative rules) are required, 'it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions'.

However, the committee notes that there is no absolute requirement for such matters to be included in regulations, and it is unclear how, and by whom, decisions will be made regarding whether or not there is a 'strong justification' for not including such matters in regulations. The committee notes that the stated effect of implementing legislative rules is to make agencies and departments responsible for the drafting of such instruments; and that FPC has previously advised that OPC will draft or assist agencies only 'within the limits of available resources'. The committee considers that, on its face, the new arrangement carries a significant risk that drafting standards may suffer, and that matters will be improperly included in rules. This is particularly so given FPC's advice that 'requiring regulations to be drafted by OPC and made by the Governor-General provides for higher drafting standards and an additional level of executive scrutiny'.

The committee notes that, to the extent that the implementation of the general rule-making power leads to a diminution in the quality of drafting standards, there is likely to be a corresponding increase in the level of scrutiny required to be applied by the Parliament. Such an outcome would effectively fracture the longstanding requirement of direct executive control of, and responsibility for, the standards of drafting in relation to the exercise of the broadly expressed power delegated by the Parliament to the executive.

The committee notes FPC's general assurance that ceding responsibility for the drafting of significant instruments to departments and agencies (unless provided to OPC as billable work) will enable OPC to 'take steps' to 'contribute to raise [sic] the standard of legislative instruments overall'. However, in the committee's view, it is incumbent on FPC to properly substantiate how, in practice, such outcomes will be achieved with OPC drafting fewer such instruments and providing only limited oversight to agencies and departments.

**FIRST PARLIAMENTARY COUNSEL'S RESPONSE:**

***Information provided to the committee from Mr Peter Quiggin, First Parliamentary Counsel, Office of Parliamentary Counsel [Monitor No. 9 of 2014].***

***Basis for tying drafting of regulations to OPC***

**General regulation and rule-making powers**

It may be helpful if I were to make some brief comments on the form and breadth of the standard general rule-making power set out in Drafting Direction 3.8 (DD3.8). The power follows the standard general regulation-making power that has been used for some time. The principles applying to its interpretation are, therefore, well established.

4 The standard general rule-making power is as follows:

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

Paragraph (a) is commonly called the "required or permitted" power and paragraph (b) is commonly called the "necessary or convenient" power.

5 It is important to stress that the scope of each of these powers in the general rule-making power is dependent on the other provisions of the Act.

6 This point is perhaps clearest in relation to the "required or permitted" power. The scope of this power depends on the existence and terms of other provisions of the Act that require or permit the making of rules. Put simply, the "required or permitted" power gives no power to make rules beyond that authorised by the other provisions of the Act. If there is no other provision of the Act that requires or permits the making of rules, the "required or permitted" power does not authorise the making of rules.

7 Again, the "necessary or convenient" power is not a power at large. The scope of the power varies according to the content of the other provisions of the Act. To be valid, a rule (or regulation) made under the power must "complement" rather than "supplement" the other provisions of the Act. "(A)n examination of the Act…will usually indicate whether an attempt is being made to add something to the operation of the Act which cannot be related to the specific provisions of the Act, or whether the regulation-making power has been used merely to fill out the framework of the Act in such a way as to enable the legislative intention to operate effectively." (Pearce, D and

Argument, S *Delegated Legislation in Australia, 4th Edition*, 2012 at 14.5). Only a provision of the latter kind is valid.

8 Thus, the form of a general rule-making power of an Act is not conclusive of the scope of the power. In my view it is, therefore, not correct to suggest that it is the form of the power itself that enables the making of laws "covering a range of matters". For what is commonly called "skeleton legislation", it is also not correct to suggest that a general rule-making power can necessarily be relied on to provide for "a vast range of matters" required to effectively implement and support the operation of the Act. In each case the scope of the power conferred by a general rule-making power depends on the exact terms of the other provisions of the Act. In some cases the power may be extensive. In other cases the power will be limited.

9 In my view, it is not appropriate to focus solely (or unduly) on the form of any power in deciding its scope. For a general rule-making power this is particularly the case because the scope of the power can be decided only in the context of the other provisions of the Act.

**Tying of drafting work to OPC not dependent on the form of the power or type of instrument**

10 There is, in my view, no basis for suggesting that it is the form of the general regulation-making power that is the basis for tying regulation drafting work to OPC. First, as I have explained, the form of the power is not conclusive of its scope. A general regulation-making power may give only a limited power to make regulations. Second, broad non-regulation subordinate legislation-making powers have existed in the Commonwealth for many years and these instruments are not tied to OPC. Finally, the drafting of all legislative instruments (not just regulations) made or approved by the Governor-General is tied to OPC. The tying of these instruments to OPC is not dependent on the form of the power under which the legislative instruments are made nor indeed the type of legislative instrument concerned. They are tied to OPC because they are legislative instruments made or approved by the Governor-General.

***Drafting quality and executive and parliamentary scrutiny of legislative instruments***

**Drafting standards**

11 As mentioned in my previous letters, OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so.

12 In my view, the approach set out in DD3.8 will allow OPC to ensure that it has the capacity to draft the instruments that have the most significant impacts on the community. It will enable OPC to draft the most significant instruments itself and allow it either to draft or assist agencies to draft other instruments. OPC can provide a range of services to assist agencies in drafting instruments. These services include instrument design and template development, editing, commenting on draft

instruments and providing advice. In my view this approach will enhance, and not diminish, the overall quality of legislative instruments and ensure that the most significant matters receive the highest level of drafting expertise and executive scrutiny.

**Division of material between regulations and other legislative instruments**

13 In the past there has been no clear guidance about the appropriate division of material between regulations and other legislative instruments. As a result, material seems to have been allocated between regulations and other legislative instruments without any consideration of the nature of the material itself. Less important matters of detail have sometimes been included in regulations while more important matters have been included in a wide range of other types of legislative instruments. DD3.8 deals with this lack of guidance as well as the previous proliferation of the number and kinds of legislative instruments.

14 DD3.8 outlines the material that should, in OPC's view, be included in regulations (in the absence of a strong justification to the contrary) and so be drafted by OPC and considered by the Federal Executive Council. However, any decision in a particular case is, of course, a decision for the Government, and ultimately the Parliament, to make.

15 I would welcome any views that the Committee (or the Senate Standing Committee on the Scrutiny of Bills) may have on the appropriate division of material between regulations and other legislative instruments and would be happy to review DD3.8 to take account of them.

**Scope of general rule-making power and likelihood of matters being inappropriately included in rules**

16 I note that in *Alert Digest No. 6 of 2014* the Senate Standing Committee on the Scrutiny of Bills has queried whether a general rule-making power would permit a rule-maker to make the following types of provisions:

- offence provisions
- powers of arrest or detention
- entry provisions
- search provisions
- seizure provisions
- provisions which make textual modifications to Acts
- provisions where the operation of an Act is modified

- civil penalty provisions
- provisions which impose (or set or amend the rate) of taxes
- provisions which set the amount to be appropriated where an Act provides the appropriation and the authority to set the amount of the appropriation.

17 I note that this list differs only slightly from the list in DD3.8 and is substantially similar to the list included by the Australian Government Solicitor in Legal Briefing Number 102 dated 26 February 2014 (http://www.ags.gov.au/publications/legal-briefing/br102.html).

18 In my view, and taking into account the view expressed in that Legal Briefing, none of the kinds of provisions mentioned in the list would be authorised by either a general regulation-making power or a general rule-making power. Provisions of any of these kinds would require an express provision to authorise their inclusion in a regulation or any other kind of subordinate legislation. Accordingly, I think that there is no real risk of such provisions being inappropriately included in rules or regulations. Any such provision included without express legislative authority would be invalid.

19 However, it may be possible to make the matter even more certain. For example, the standard form of rule-making power (as set out in paragraph 4) could be revised so that it expressly provides that the power does not enable the making of rules dealing with provisions of these kinds. This would ensure that the scope of rule-making powers in relation to these kinds of provisions was clear on the face of the provisions themselves, regardless of whether the resulting rule were to be drafted by OPC, in-house or by another legal services provider.

20 Depending on the Committee's views on the matters that should be included in regulations rather than other types of legislative instruments, other measures may also be appropriate. For example, if any of the matters were inappropriate to be dealt with in express provisions of the kind that I have outlined, it may be possible to deal with them through the issue of drafting standards under the *Legislative Instruments Act 2003* and the introduction of a requirement for explanatory statements to include a statement about compliance with the standards. This would achieve a high level of transparency and should facilitate the Committee's scrutiny function.

21 I would be happy to consider any views that the Committee has about this or other measures the Committee may have in mind.

**Volume of OPC drafted instruments**

22 I note that the Committee seems to assume that the approach in DD3.8 will lead to OPC drafting fewer instruments. I do not think that this will be the case (see paragraph 17 of my letter of 23 May 2014 on the volume of OPC drafted instruments).

OPC will continue to be available to draft, and assist agencies to draft, instruments that are not tied to OPC. OPC will be actively seeking more of this work and I expect that it will continue to draft a substantial proportion of all legislative instruments, including the most significant and sensitive of them.

**COMMITTEE RESPONSE:**

**[The committee made the following comments and requested a response to the views outlined below (Monitor No. 9 of 2014)].**

*Drafting quality and executive and Parliamentary scrutiny of legislative instruments*

As the advice of FPC notes, the scope of the general regulation and rule-making powers is governed by the provisions of the Act under which they are made, and the exercise of such powers to fill out the framework of an Act may in some cases be 'extensive'. This goes to one of the key concerns raised by the committee in relation to the general rule-making, which is the question of whether it is appropriate for Parliament's delegated legislative power to be exercised without the longstanding requirements for close executive oversight.

While the committee notes FPC's view that 'broad non-regulation subordinate legislation-making powers have existed in the Commonwealth for many years', the committee's inquiries have been directed at the apparent consequences of the new general rule-making power. In particular, the committee has noted that, while regulations have traditionally been subject to formal requirements for its exercise and making (that is, have been required to be made by the Governor-General and drafted by OPC), legislation made under the general rule-making power will not be subject to the same level of executive oversight. Notwithstanding FPC's view that these requirements do not relate to the general form of the regulation-making power, the question remains as to whether it is appropriate that the new general power should not be similarly subject to close executive oversight. With particular reference to cases where the provisions of an Act effectively provide an extensive power to make rules, the thrust of the committee's inquiries has gone to the extent to which the making and drafting of such rules by persons other than the Governor-General and OPC, respectively, could lead to a diminution in the quality of drafting standards. The committee has previously noted its concern that such an outcome would see a corresponding increase in the level of scrutiny required to be applied by the Parliament.

On this question, the committee notes that FPC's view and assurances that the new general-rule making power will 'enhance, and not diminish, the overall quality of legislative instruments'. However, it remains unclear to the committee how this outcome will be achieved in practice, given that departments and agencies will have responsibility for the drafting of rules. With reference to FPC's advice that the general rule-making power will not lead to OPC drafting fewer instruments, the committee has understood that one of the aims of instigating the general rule-making power was

to reduce the number of instruments required to be drafted by OPC. In particular, FPC has advised:

> OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so.
>
> 12 In my view, the approach set out in DD3.8 will allow OPC to ensure that it has the capacity to draft the instruments that have the most significant impacts on the community.

In addition to these questions, it is unclear to the committee what mechanisms are available to OPC to monitor the quality of drafting of instruments based on the new general rule-making power; and what resources and mechanisms may be available to OPC to respond in the event that drafting standards do in fact suffer.

*Division of material between regulations and other legislative instruments*

The committee notes FPC's statement that certain types of provisions such as offence, entry, search, seizure, and civil penalty provisions would not be authorised by either a general regulation-making power or a general rule-making power:

> Provisions of any of these kinds would require an express provision to authorise their inclusion in a regulation or any other kind of subordinate legislation. Accordingly, I think that there is no real risk of such provisions being inappropriately included in rules or regulations. Any such provision included without express legislative authority would be invalid.

However, FPC's statement leaves open the question of whether the inclusion of these types of provisions in a rule is both generally appropriate, and appropriate in a given case, thus supporting the inclusion of an express power in a rule to allow for the prescribing of such matters. The determination of this question appears to turn on the policy considerations which will inform judgements as to what is a 'strong justification' as provided for in Drafting Direction 3.8. The committee's inquiries to date have shed little light on would constitute a 'strong justification' for the inclusion of such matters in rules or, indeed, who will be responsible for the making of such judgements.

**The committee notes that these questions are particularly pertinent in light of its inquiries in relation to the Jervis Bay Territory Rural Fires Ordinance 2014 [F2014L00443]. The committee's report on that instrument below outlines a number of matters on which the committee seeks a response from OPC.**

**The committee notes that, due to the Parliamentary program, the committee was unable to meeting with FPC and officers of the Department of Industry in July as previously scheduled. The committee will seek to reschedule that meeting and, in addition, seeks the written response of FPC to the matters outlined above.**

**Noting the continued engagement of FPC with the committee over this matter, and the proposals for resolving the committee's concerns in FPC's most recent**

**correspondence (at paragraph 19 and 20), the committee agreed at its meeting on 9 July 2014 to withdraw the 'protective' notice of motion on the Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125].**[7]

**FIRST PARLIAMENTARY COUNSEL'S RESPONSE:**

***Information provided to the committee from Mr Peter Quiggin, First Parliamentary Counsel, Office of Parliamentary Counsel–extract***

**Prescribing of matters by legislative rules**

1 In Delegated Legislation Monitor No. 9 of 2014 the Committee sought my written response to matters outlined in the Committee's response to my letter of 2 July 2014 and to comments of the Committee in relation to the Jervis Bay Territory Rural Fires Ordinance 2014. I note the foreshadowed briefing for the Committee has now been rescheduled for 3 September 2014. I will, therefore, keep my response relatively brief. However, I would be happy to provide any additional information or explanation at the briefing.

***Division of material between regulations and other legislative instruments***

2 The majority of Commonwealth subordinate legislation is not made by the Governor-General or drafted by the Office of Parliamentary Counsel (OPC). Given existing limited resources it would not be possible, nor in my view would it be appropriate anyway, to have all subordinate legislation made by the Governor-General or drafted by OPC. OPC agrees that it should draft all legislative instruments made by the Governor-General, but does not agree that all material presently required to be in legislative instruments made by the Governor-General needs to be in instruments made by the Governor-General or drafted by OPC. The question then is what legislative instruments should be required to be made by the Governor-General and drafted by OPC.

3 OPC Drafting Direction No.3.8 Subordinate legislation (DD3.8) addresses this question by setting out a list of matters that should be included in regulations and not another type of legislative instrument. If these matters are included in regulations, they will be required to be drafted by OPC, subject to Executive Council processes and made by the Governor-General. In my view, DD3.8 represents a significant improvement over the previous practice of including material in different types of legislative instruments without a systematic consideration of the nature of the material and the consequences of using different types of instruments for different types of material.

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7 For details on the disallowance of instruments, see the Disallowance Alert at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts

4 The previous practice has led to the inclusion of material in regulations that, having regard to the nature of the material, does not need to be drafted by OPC, subject to Executive Council processes or made by the Governor-General. Conversely the previous practice has led to the inclusion of material in other types of instruments that, having regard to the nature of the material, should perhaps have been included in regulations.

5 The previous practice has also contributed to the fragmentation of the Commonwealth's statute book by encouraging an unnecessary proliferation in the number and types of legislative instruments (see paragraphs 26 to 31 of my letter of 23 May 2014 attached to the letter from the Minister for Industry to the Chair of the Committee on 5 June 2014). The approach in DD3.8 will address these issues and, over time, ensure that a core of material (listed in DD3.8) is drafted by OPC, subject to Executive Council processes and made by the Governor-General unless there is a strong justification to the contrary. This will support the ability of the Executive and the Parliament to ensure that instruments dealing with this important core material are scrutinised appropriately.

6 DD3.8 focuses on nature of the matters to be dealt with in subordinate legislation (that is, the content or substance of the subordinate legislation), rather than the form (that is, the type) of the subordinate legislation or the form of the power under which it is made. In my view, this is the correct approach. The treatment of delegated legislation should reflect matters of substance and not just matters of form.

7 The form of a general power under which material is prescribed is an inappropriate basis for deciding the type of instrument in which the material should be included because the form of the power may give no real indication of the nature of the material itself. Taken by itself the form of the power also gives no real indication of the scope of the power nor the difficulty in drafting instruments under it.

8 As I explained in my letter of 2 July 2014 to the Committee, the scope of a necessary or convenient power in an Act can only be decided in the context of the other provisions of that Act. It seems to me illogical to suggest then that, because the scope of the power may in some cases be "extensive", all exercises of the power are treated in the same way and required to be subject to the same drafting processes and the same "close executive oversight". Such a mechanical approach ignores not just the nature of the material itself, but also the actual scope to the power in the particular case.

9 I accept, however, that there could be differing views about details of the matters that should, either generally or in particular cases, be included in regulations and so drafted by OPC, subject to Executive Council processes and made by the Governor-General. As I mentioned in my letter of 23 May 2014, I would welcome any views the Committee may have on the appropriate division of material between regulations and other types of legislative instrument and would be happy to review DD3.8 to take account of any views the Committee may have.

***Quality of legislative instruments***

10 As I also explained in my letter of 2 July 2014, the standard general rule-making power consists of 2 powers: a "required or permitted" power and a "necessary or convenient" power.

11 A "required or permitted" rule-making power in an Act gives no power to make rules beyond that authorised by the other provisions of the Act. This power would not, therefore, seem to be relevant to the Committee's inquiries about drafting quality and executive and Parliamentary scrutiny under general rule-making powers. It does not add to the powers provided by other provisions of the Act, but merely provides a single source for the exercise of those powers.

12 A "necessary or convenient" power is a limited power. It is not an open-ended power nor necessarily an extensive power. The rules for the interpretation of a "necessary or convenient" power are well established. In particular, the fact that a matter might be regarded as necessary or convenient does not necessarily mean that provision can be made about the matter under the power. A rule cannot supplement the Act. It can only complement the Act and prescribe matters that are confined to the same field of operation of the Act.

13 It follows that I do not agree there is anything intrinsic in the standard general rule-making power that represents a real threat to the quality of Commonwealth subordinate legislation. My view seems to be supported by the Committee’s own inquiries. In the rules commented on to date by the Committee, these inquiries do not seem to have established any diminution in drafting quality or lack of executive oversight. In fact all the rules commented on by the Committee were drafted by OPC and relied on the "necessary or convenient" power in a very limited way (if at all).

14 Since the function of drafting subordinate legislation was transferred to OPC some 2 years ago, OPC has taken a broad range of measures to promote high drafting standards for all legislative instruments. I would be happy to brief the Committee on these measures.

15 Although substantial progress has already been made, more can be done to promote high drafting standards for legislative instruments. However, this will take resources and time and perhaps legislative changes. DD3.8 is only a relatively small, but nevertheless important, part of the measures that OPC is already pursuing. If the use of general rule-making powers raises any risks to drafting standards at all, these risks are likely to be minimal and substantially outweighed by the benefits. The risks can, in any event, be effectively mitigated by other strategies to promote high drafting standards that OPC is already pursuing.

16 In short, my view remains that the use of general rule-making powers, taken with the other measures OPC is already pursuing, will enhance, and not diminish, the overall quality of legislative instruments and support the scrutiny of legislative instruments by the Parliament.

***Volume of instruments drafted by OPC***

17 In developing the current version of DD3.8 OPC took into account the need to ensure that OPC's limited budget-funded drafting resources are appropriately managed and applied and, in particular, remain sufficient to draft the Government's legislative program as well as drafting the subordinate legislation that will have the most significant impacts on the community. However, this does not mean that DD3.8 will lead to OPC drafting fewer instruments. In my view, the opposite will be the case.

18 OPC will continue actively seeking drafting and publishing work that is not tied to it. OPC competes and charges for this work in accordance with the Competitive Neutrality Principles. Because the work is billable, OPC will be in a better position to increase its drafting resources, increase the number of instruments that it drafts and further develop its services to assist agencies to draft the instruments drafted by them. This will contribute to raising the standard of all legislative instruments, not just those drafted under a general rule-making power.

***Monitoring the quality of legislative instruments***

19 It follows from what I have already said that I do not agree that the use of general rule-making powers raises risks that require special monitoring. Nevertheless, monitoring mechanisms are already available and could be extended if necessary.

20 OPC is responsible for maintaining the Federal Register of Legislative Instruments. (FRLI). All legislative instruments, explanatory statements and legislative instrument compilations are required to be registered on FRLI. Legislative instruments, explanatory statements and legislative instrument compilations are already checked for compliance with registration requirements. As part of these checks, issues of a drafting or formal nature are frequently detected and pointed out to the rule-making agency.

21 For example, the Committee would be aware that issues with the drafting of the Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2014 discussed in Delegated Legislation Monitor No. 9 had already been detected by OPC and drafting advice provided to the administering Department by the relevant OPC client adviser. OPC client advisers are Parliamentary Counsel from whom agencies can obtain quick, informal advice about matters in which OPC has expertise that may not be readily available in an agency. These matters include matters necessary, desirable or acceptable for inclusion in instruments and options for improving the standard of instruments.

***Decisions about inclusion of listed material in instruments other than regulations***

22 DD3.8 represents a statement of the policy followed by OPC in the drafting of Bills and subordinate legislation. It is not directly binding on other agencies, but OPC’s advice on drafting matters is generally accepted by the Government and departments and agencies. In this regard DD3.8 is no different to the numerous other policies and practices followed by OPC in the drafting and publishing of

Commonwealth legislation. These policies and practices are documented in Drafting Directions and other documents published by OPC and are available on OPC's website.

23 DD3.8 requires OPC drafters to include certain listed matters in regulations unless there is a strong justification for prescribing them in another type of instrument. From OPC's point of view, decisions about whether a strong justification exists would be made personally by me as First Parliamentary Counsel. To date, I have not found a case in which I consider that a sufficiently strong justification exists for an exception to be made. If such a case exists, it is likely to be highly unusual.

24 In drafting legislation OPC acts on the instructions of its clients and it is, of course, open to the Government and OPC's other clients to instruct it to follow a drafting approach that is different to OPC's usual drafting policies and practices. OPC may, for example, be instructed to provide for matters listed in DD3.8 to be prescribed by an instrument other than a regulation. Parliament may agree or disagree with the approach taken in a particular case and in making such a decision may choose to apply a "strong justification" exception or some other approach. DD3.8 has no direct application to the making of decisions of that kind.

25 In my view, the "strong justification" exception in DD3.8 is likely to have limited application. Nevertheless, I would welcome any views the Committee may have on the exception.

Peter Quiggin PSM
First Parliamentary Counsel

**COMMITTEE RESPONSE:**

**The committee thanks FPC for his response. The response will inform the committee's deliberations and briefing with officers of OPC on this matter.**

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

| | |
|---|---|
| **Purpose** | 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 |
| **Last day to disallow** | 17 July 2014 |
| **Authorising legislation** | *Farm Household Support Act 2014* |
| **Department** | Agriculture |

**[The committee first reported on this instrument in Monitor No. 8 of 2014. The committee raised concerns and sought further information in relation to the prescribing of matters by legislative rules, and the potential delegation of a general rule-making power].**

**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, 6 and 9 of 2014, the committee noted a novel approach (since 2013) in the drafting of Acts to provide for a broadly-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]).[8]

8 See Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 6 of 2014, 18 June 2014, Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125], pp 5–22, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor

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*].
>
> 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 requested 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 requested 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].**

## MINISTER'S RESPONSE:

The Minister for Agriculture advised:

> In considering my response to the issues raised by the Committee set out below, the following explanation of the *Farm Household Support Act 2014* (the Act) provides the Committee with some context. The Act is complex in that it notionally modifies how the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* operate, so that those Acts can apply in relation to payments made under this Act. Section 90, Simplified outline of this Part, explains how this works.
>
> > The Farm Household Allowance (FHA) is generally treated in the same way as newstart and youth allowance. This means that where there is a reference in the Social Security Act or the Social Security Administration Act to newstart or youth allowance, it is as if there were also a reference to farm household allowance. The farm household allowance, the activity supplement and the farm financial assessment supplement are all treated as if they were social security payments. As a result, the general rules in the Social Security Act and the Social Security Administration Act relating to how to make claims, how payments are made and review of decisions apply in relation to payments under this Act.
>
> While the Act is comprehensive, in forming the policy settings that support farmers in hardship it was clear to me that overly prescriptive legislation could prevent a farmer in need from accessing support as intended, as has been the case in the past. The Secretary's Rule relating to 'whether a farm enterprise has a significant commercial purpose or character' provides a good example of the flexibility I sought in implementing the payment. The significant commercial purpose or character test is based on a ruling of the Taxation Commissioner (TR97/11 Income tax: am I carrying on a business of primary production) which has changed from time to time. Equally, the

Secretary's Rule on the 'kinds of requirements not to be included in financial improvement agreements' is modelled on existing social security law, but deals with the special circumstances relevant to farmers rather than job seekers or students. Both of these matters relate to the day-to-day operation of the Act.

The Secretary's broad rule making power takes into account both the nature of the rules that would be necessary and the frequency with which rules would be made. The anticipated operational nature of the matters to which the rules will relate, and the likelihood that rules will be required to facilitate the alignment of the FHA with mainstream social security payments has been considered by the Senate Standing Committee for the Scrutiny of Bills, and agreed by the Parliament, indicating the nature of the breadth of the power is appropriate.

I also note that the matters dealt with in the Secretary's Rule all relate to matters which are 'required or permitted'. This shows the Act and rules that relate to matters which are 'required or permitted' deal with foreseeable issues, suggesting the use of the necessary and convenient power will be infrequent.

My response to the specific issues raised by the Committee in relation to the Secretary's Rule is set out below.

In its correspondence to me dated 20 March 2014, the Senate Standing Committee on the Scrutiny of Bills also raised issue with the delegation of legislative power under section 106 of the Act. The First Parliamentary Counsel, Mr Peter Quiggin PSM, provided me with advice on the general application and use of rule-making powers in response to that letter. This advice was provided to the Scrutiny of Bills Committee and relevantly states that [extract included below]:

> OPC's view is that some types of provisions should be included in regulations and be drafted by OPC as the Commonwealth's principal drafting office, unless there is a strong justification for prescribing these provisions in another type of legislative instrument. These include the following provisions:
>
> (a) offence provisions;
>
> (b) powers of arrest or detention;
>
> (c) entry provisions;
>
> (d) search provisions;
>
> (e) seizure provisions.

I note the First Parliamentary Counsel's comments on OPC's approach to the making of instruments rather than regulation and the consistency of this approach with the *Legislative Instruments Act 2003* (the LIA) and the First Parliamentary Counsel functions and responsibilities under the Act. I also

note instrument-making powers are commonly in the form of (or include) a power to "prescribe" particular matters. For example, the rule-making power in subsection 59(1) of the *Federal Court of Australia Act 1976* (which was included when that Act was enacted in 1976). In this respect neither the Farm Household Support Secretary's Rule 2014 nor the Farm Household Support Minister's Rule 2014 [F2014L00687] are inconsistent with other legislative instruments. Accordingly I am satisfied the use of rules, as opposed to primary legislation or regulation, is appropriate.

In response to the question of the appropriateness of the Secretary having broader rule-making powers than the minister, the Monitor already notes OPC Drafting Direction 3.8 states that the 'necessary and convenient power should generally be attached to the maker who is likely to make more instruments' .The vast majority of decisions that may need to be taken under the Act relate to its day-to-day operation. As the Secretary is the delegate for these decisions, it is appropriate that the 'necessary and convenient' power is also held by the Secretary. This will allow for rules to be made in relation to matters which are not readily foreseeable but necessary for the smooth and timely operation of the scheme. I also note that the 'necessary or convenient' rule making power is limited to prescribing matters for carrying out or giving effect to this Act. In this respect I consider the power to be appropriately limited.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response, which will inform the committee's deliberations and the upcoming briefing with FPC and officers from OPC.**

**However, in relation to FPC's advice on the general rule-making power cited by the minister, the committee notes that significant issues regarding the consequences and policy guidance for the use of the general rule-making power are not settled.**

**Issue:**

*Potential delegation of general rule-making power*

Section 101 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 requested the minister's advice on this matter].**

## MINISTER'S RESPONSE:

The Minister for Agriculture advised:

> The committee notes that section 101 of the Act provides that the Secretary may delegate his powers to officers below the Senior Executive Officer level. It notes the operational reasons given in the explanatory memorandum for the broad delegation of the Secretary's power and seeks clarification as to whether the general rule-making powers may be delegated under section 106, and, if so, what considerations might apply in that case.
>
> My advice is that there is no legal impediment to the Secretary delegating any or all of his powers or functions under the Act (section 101 Delegation of powers). While legally this rule-making power could be delegated, in practice, this delegation is not exercised. This is reflected in the Secretary's instrument of delegation to the Chief Executive of Centrelink and to senior executives within the Department of Agriculture (the department) where this power has been specifically retained. Additionally, in line with the Administrative Arrangements under the Administrative Arrangements Order, the department is responsible for 'rural adjustment and drought issues'. Given this responsibility I do not foresee any circumstances where

the general rule making power would be delegated to an employee outside of the department or below the senior executive level within the department.

**COMMITTEE RESPONSE:**

The committee thanks the minister for his response.

However, the committee notes the Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills committee) has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the Scrutiny of Bills committee prefers to see a limit set either on the sorts of powers that might be delegated or on the categories of people to whom those powers may be delegated. The Scrutiny of Bills committee's preference is that delegates be confined to the holders of nominated offices or to members of the senior executive service.

The committee also notes the operational justification given for the delegation of certain powers to officers below senior executive service level, and the minister's advice that he does 'not foresee any circumstances where the general rule making power would be delegated to an employee outside of the department or below the senior executive level within the department'.

**In the committee's view, notwithstanding the minister's advice that there is no legal impediment to the delegation of the rule-making power in this case, there remains a question as to whether it is appropriate in any case that the general rule-making power be delegated (noting in particular the committee's concerns regarding the extent to which the general rule-making power diminishes the requirement for close executive oversight of the exercise of Parliament's delegated legislative powers).[9] The committee therefore seeks the minister's further advice on this matter.**

## Multiple instruments that appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*

The committee has identified a number of instruments 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 it would be preferable for the ES for any such

9 See Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 6 of 2014, 18 June 2014, Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125], pp 5–22, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor

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 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.[10]

**The committee therefore draws this issue to the attention of ministers and instrument-makers responsible for the following instruments:**

AASB 2014-2 - Amendments to AASB 1053 – Transition to and between Tiers, and related Tier 2 Disclosure Requirements - June 2014 [F2014L00937] (section 334, *Corporations Act 2001*)

Agricultural and Veterinary Chemicals Code (Application Fees – Revocation) Instrument 2014 [F2014L00839] (no empowering provision is identified)

Agricultural and Veterinary Chemicals Code (Listed Chemical Product – Joint Health Products for Dogs and Horses) Standard 2014 [F2014L00863] (subsection 8U(2), Agricultural and Veterinary Chemicals Code (contained in Schedule to the *Agricultural and Veterinary Chemicals Code Act 1994*))

Agricultural and Veterinary Chemicals Code (Manufacturing Principles) Determination 2014 [F2014L00859] (subsection 23(1), *Agricultural and Veterinary Chemicals Act 1994*)

Agricultural and Veterinary Chemicals Code (Modular Assessment Fees – Revocation) Instrument 2014 [F2014L00853] (no empowering provision is identified)

Agricultural and Veterinary Chemicals Code (Repeal of Instrument No. 3 of 2008) Instrument 2014 [F2014L00855] (no empowering provision is identified)

ASIC Class Order [CO 14/569] [F2014L00976] (subsection 6(17), National Credit Code set out in Schedule 1 to the National Consumer Credit Protection Act 2009)

ASIC Class Order [CO 14/571] [F2014L00977] (paragraphs 601QA(1)(b), 926A(2)(a), 992B(1)(a) and 1020F(1)(a), Corporations Act 2001)

ASIC Class Order [CO 14/592] [F2014L00923] (subsection 332(1), *Superannuation Industry (Supervision) Act 1993*)

ASIC Class Order [CO 14/648] [F2014L00920] (paragraphs 601QA(1)(a) and 911A(2)(l), *Corporations Act 2001*)

Australian National Audit Office (ANAO) Auditing Standards (01/07/2014) [F2014L00944]

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

(section 24, *Auditor-General Act 1997*)

Australian Prudential Regulation Authority (Commonwealth Costs) Determination 2013 (Revised) [F2014L00858] (paragraph 50(1)(a) and subsection 50(1A), *Australian Prudential Regulation Authority Act 1998*)

Australian Prudential Regulation Authority (Commonwealth Costs) Determination 2014 [F2014L00952] (paragraph 50(1)(a) and subsection 50(1A), *Australian Prudential Regulation Authority Act 1998*)

Continence Aids Payment Scheme Variation 2014 (No. 1) [F2014L00826] (section 12, *National Health Act 1953*)

Continence Aids Payment Scheme Variation 2014 (No. 2) [F2014L00833] (section 12, *National Health Act 1953*)

Declared Hearing Services Amendment Determination 2014 (No. 2) [F2014L00827] (subsection 8(7), *Australian Hearing Services Act 1991*)

Disability Services Act (National Standards for Disability Services) Determination 2014 [F2014L00864] (paragraphs 5A(1)(b), (ba) and (c) and subsection 5A (2), *Disability Services Act 1986*)

Education Services for Overseas Students (Calculation of Refund) Specification 2014 [F2014L00907] (subsections 46D(7) and 47E(4), *Education Services for Overseas Students Act 2000*)

Export Control (Fees) Amendment (2014 Measures No. 1) Order 2014 [F2014L00825] (regulation 3, Export Control (Orders) Regulations 1982)

Family Assistance (Public Interest Certificate Guidelines) (DSS) Determination 2014 [F2014L00973] (subparagraph 169(1)(a)(i) and paragraph 169(1)(b), A New Tax System (Family Assistance) Administration) Act 1999)

Family Tax Benefit (Meeting the Health Check Requirement) Amendment Determination 2014 [F2014L00819] (subsections 61A(5) and (7), *A New Tax System (Family Assistance) Act 1999*)

First Home Saver Account Providers Supervisory Levy Imposition Determination 2014 [F2014L00945] (subsection 7(5), *First Home Saver Account Providers Supervisory Levy Imposition Act 2008*)

Hearing Services (Eligible Persons) Amendment Determination 2014 (No. 1) [F2014L00821] (subsection 5(3), *Hearing Services Administration Act 1997*)

National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2014 [F2014L00902] (section 23, *National Disability Insurance Scheme Act 2014*)

National Disability Insurance Scheme (Protection and Disclosure of Information) Amendment Rules 2014 [F2014L00903] (section 58, *National Disability Insurance Scheme Act 2014*)

National Disability Insurance Scheme (Timeframes for Decision Making) Amendment Rules 2014 [F2014L00901] (section 204, *National Disability Insurance Scheme Act 2014*)

National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2014

(No. 1) [F2014L00828] (sections 7B and 10, *National Greenhouse and Energy Reporting Act 2007*)

National Health (Subsection 84C(7)) Amendment Determination 2014 (No. 1) [F2014L00964] (subsection 84C(7), *National Health Act 1953*)

Radiocommunications (Compliance Labelling—Electromagnetic Radiation) Notice 2014 [F2014L00965] (section 182, *Radiocommunications Act 1992*)

Schoolkids Bonus Amendment Determination 2014 [F2014L00820] (section 35UC, *A New Tax System (Family Assistance) Act 1999*)

Social Security (Reasonable Excuse — Participation Payment Obligations) (Employment) Determination 2014 (No. 1) [F2014L00887] (subsection 42U(1), *Social Security (Administration) Act 1999*)

Social Security (Special Disability Trust - Discretionary Spending) Determination 2014 [F2014L00868] (subsection 1209RA(3), *Social Security Act 1991*)

Superannuation Supervisory Levy Imposition Determination 2014 [F2014L00946] (subsection 7(3), *Superannuation Supervisory Levy Imposition Act 1998*)

Therapeutic Goods (Excluded purposes) Amendment Specification 2014 (No. 1) [F2014L00968] (section 41BEA, *Therapeutic Goods Act 1989*)

# Chapter 2

# Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **27 August 2014**. The committee has concluded its interest in these matters on the basis of responses received from ministers or relevant instrument-makers.

Correspondence relating to these matters is included at Appendix 2.

## Jervis Bay Territory Rural Fires Ordinance 2014 [F2014L00443]

| | |
|---|---|
| **Purpose** | Updates the legislative framework for providing effective and efficient rural fire services in the Jervis Bay Territory |
| **Last day to disallow** | 15 July 2014 |
| **Authorising legislation** | *Jervis Bay Territory Acceptance Act 1915* |
| **Department** | Infrastructure and Regional Development |

**[The committee first reported on this instrument in Monitor No. 6 of 2014, and subsequently in Monitor No. 9 of 2014. The committee raised concerns and sought further information in relation to the prescribing of matters by legislative rules].**

**Issue:**

*Prescribing of offences by rules*

The ordinance repeals and replaces the Rural Fires Ordinance 2001. The *Jervis Bay Territory Acceptance Act 1915* (the authorising legislation) provides for the making of ordinances (section 4F), and regulations, rules and by-laws (section 4L). It is based on the *NSW Rural Fires Act 1997* and Rural Fires Regulations 2008 with modifications to reflect the Jervis Bay Territory's jurisdictional and administrative circumstances.

In *Delegated Legislation Monitor* (Monitor) Nos 2 and 5 of 2014, the committee noted a novel approach (since 2013) in the drafting of Acts to provide for a broadly-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]). One of the issues currently under consideration in relation to this matter relates to the advice of FPC that 'some types of provisions should be included in regulations and be drafted by OPC [without] strong justification for prescribing those provisions in another type of legislative instrument'.

In response to the committee's inquiry as to how such matters would be provided for in the absence of a regulation-making power, FPC advised:

> If such provisions are required for an Act that includes only a general rule-making power, it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions.

In relation to this issue, the committee notes that section 98 of the ordinance creates a broadly-construed rule-making power:

> The Minister may, by legislative instrument, make rules prescribing matters:
> (a) required or permitted by this Ordinance to be prescribed by the rules; or
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this Ordinance.

Subsection 98(3) provides:

> The rules may create offences punishable by a penalty not exceeding 50 penalty units.

The ES for the ordinance states that section 98:

> …prescribes the matters to which the Minister may make rules. This section limits the penalty for offences created under the rules to a maximum of 50 penalty units.

In light of FPC's view that certain types of provisions (including offence provisions) require an express regulation-making power in the authorising Act and should be drafted by OPC, the committee notes that the accompanying ES contains no justification for the authorising of offence provisions via rules rather than via regulation **[the committee requested further information from the minister].**

**ASSISTANT MINISTER'S RESPONSE:**

The Assistant Minister for Infrastructure and Regional Development advised that the drafting of the Ordinance:

> …ran in parallel to the Office of Parliamentary Counsel's development of its formal policy on the preparation of subordinate legislative instruments, including in relation to regulation-making powers and the appropriateness of offence provisions to be included under a rule-making power.
>
> The Department of Infrastructure and Regional Development will work with the Office of Parliamentary Counsel to address the comments made by the Committee, including amending the Ordinance to expressly create a regulation-making power, amending the Rule to remove all offence provisions and drafting Regulations with the offence provisions.

**COMMITTEE RESPONSE:**

**[The committee thanked the assistant minister for his response and undertaking to amend the Ordinance, and sought the response of FPC to the matters outlined below (Monitor No. 9 of 2014)].**

The committee monitors the progress of undertakings, and would be grateful for the assistant minister's advice once the amendments are made.

However, the committee notes that the assistant minister's advice raises a number of questions regarding the committee's inquiries in relation to the Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125].

In particular, the committee notes the assistant minister's advice that the drafting of the Ordinance, and the inclusion of offences in the rules (authorised by express provision), ran 'in parallel' to OPC's development of its formal policy on the appropriateness of offence provisions to be included under a rule-making power.

As the committee has previously noted, on 6 March 2014 (subsequent to the committee's initial comments on the matter), OPC circulated revised Drafting Direction No. 3.8, which included the addition of extensive instruction on the use of 'general instrument-making powers' of this kind. The direction included the guidance that 'some types of provisions should be included in regulations and be drafted by OPC [without] strong justification for prescribing those provisions in another type of legislative instrument'. The committee understood this to be a settled statement of the policy on the use of the general rule-making power.

With reference to these points, the committee notes that the assistant minister's undertaking appears to suggest that, while the inclusion of offence provisions in the rules satisfied legal criteria for validity, there was not a sufficiently 'strong justification' for making provision for the prescribing of offences by rules in this case. This is of particular interest to the committee because, as noted above, the committee's inquiries to date have shed little light on what would constitute a 'strong justification' for the inclusion of such matters in rules or, indeed, who will be responsible for the making of such judgements.

The assistant minister's advice also gives rise to questions regarding the policy development process in relation to the general-rule making power, and whether the implementation of the power has been done on the basis of a sufficiently well developed and articulated policy on its use.

**These matters relate directly to the committee's inquiries in relation the Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125]. The committee will have the opportunity to discuss these matters in its upcoming meeting with FPC and, in addition, seeks the written response of FPC to the matters outlined above.**

**FIRST PARLIAMENTARY COUNSEL'S RESPONSE**

First Parliamentary Counsel (FPC) advised:

> Instructions for the drafting of this Ordinance were received in April 2013. By the time DD3.8 was reissued in March 2014 the then draft Ordinance had been the subject of extensive consultation by the administering Department and the drafting of the Ordinance was substantially complete. The Ordinance was made on 24 April 2014. In this case, I agree that it may have been better to have applied DD3.8 to the Ordinance before it was made, even though drafting of the Ordinance started before, and was

substantially complete, when DD3.8 was reissued. This will be done if any similar transitional cases arise in the future.

**COMMITTEE RESPONSE:**

**The committee thanks FPC for his response and has concluded its interest in the Rule, subject to the undertakings given by the assistant minister. The response will inform the committee's deliberations and upcoming briefing with officers of OPC on this matter.**

## Jervis Bay Territory Rural Fires Rule 2014 [F2014L00533]

| | |
|---|---|
| **Purpose** | Prescribes matters required or permitted by the Jervis Bay Territory Rural Fires Ordinance 2014 |
| **Last day to disallow** | 17 July 2014 |
| **Authorising legislation** | Jervis Bay Territory Rural Fires Ordinance 2014 |
| **Department** | Infrastructure and Regional Development |

**[The committee first reported on this instrument in Monitor No. 6 of 2014. The committee raised concerns and sought further information in relation to the prescribing of matters by legislative rules].**

**Issue:**

*Prescribing of offences by rule*

This instrument is made by the Assistant Minister for Infrastructure and Regional Development under section 98 of the Jervis Bay Rural Fires Ordinance 2014. Subsection 98(1) of the ordinance provides that the minister may make 'rules' prescribing matters 'required or permitted by', or 'necessary of convenient for', the ordinance. The ES notes that subsection 98(3) of the ordinance provides that rules can be made prescribing offences punishable by a penalty not exceeding 50 penalty units.

In *Delegated Legislation Monitor* (Monitor) Nos 2 and 5 of 2014, the committee noted a novel approach (since 2013) in the drafting of Acts to provide for a broadly-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]). One of the issues currently under consideration in relation to this matter relates to the advice of FPC that 'some types of provisions should be included in regulations and be drafted by OPC [without] strong justification for prescribing those provisions in another type of legislative instrument'.

In response to the committee's inquiry as to how such matters would be provided for in the absence of a regulation making power, FPC advised:

> If such provisions are required for an Act that includes only a general rule-making power, it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions.

The committee notes that the accompanying ES contains no justification for the authorising of offence provisions via rules rather than via regulation **[the committee requested further information from the minister].**

**ASSISTANT MINISTER'S RESPONSE:**

The Assistant Minister for Infrastructure and Regional Development advised that the drafting of the Rule:

> …ran in parallel to the Office of Parliamentary Counsel's development of its formal policy on the preparation of subordinate legislative instruments, including in relation to regulation-making powers and the appropriateness of offence provisions to be included under a rule-making power.
>
> The Department of Infrastructure and Regional Development will work with the Office of Parliamentary Counsel to address the comments made by the Committee, including amending the Ordinance to expressly create a regulation-making power, amending the Rule to remove all offence provisions and drafting Regulations with the offence provisions.

**COMMITTEE RESPONSE:**

**[The committee thanked the assistant minister for his response and undertaking to amend the Rule (Monitor No. 9 of 2014)].**

The committee monitors the progress of undertakings, and would be grateful for the assistant minister's advice once the amendments are made.

The committee's comments on the preceding instrument, Jervis Bay Territory Rural Fires Ordinance 2014 [F2014L00443], apply equally to this instrument.

**FIRST PARLIAMENTARY COUNSEL'S RESPONSE**

First Parliamentary Counsel (FPC) advised:

> Instructions for the drafting of this Ordinance were received in April 2013. By the time DD3.8 was reissued in March 2014 the then draft Ordinance had been the subject of extensive consultation by the administering Department and the drafting of the Ordinance was substantially complete. The Ordinance was made on 24 April 2014. In this case, I agree that it may have been better to have applied DD3.8 to the Ordinance before it was made, even though drafting of the Ordinance started before, and was substantially complete, when DD3.8 was reissued. This will be done if any similar transitional cases arise in the future.

**COMMITTEE RESPONSE:**

**The committee thanks FPC for his response and has concluded its interest in the Rule, subject to the undertakings given by the assistant minister. The response**

**will inform the committee's deliberations and upcoming briefing with officers of OPC on this matter.**

## Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2014 (No.3) [F2014L00563]

| | |
|---|---|
| **Purpose** | Amends the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) in relation to Chapters 1, 4, 5, 8, 9, 15 and 30, and to update privacy notices |
| **Last day to disallow** | 17 July 2014 |
| **Authorising legislation** | *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* |
| **Department** | Attorney-General's |

**[The committee first reported on this instrument in *Delegated legislation monitor* No. 6 of 2014].**

**Issue:**

*Application of offences by rule*

Amongst other things, the instrument (rule) applies the offences in sections 136 (false or misleading information) and 137 (producing false or misleading documents) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the Act) to existing Chapter 4 and new Chapter 15 of the Anti-Money Laundering and Counter-Terrorism Financing Rules (AML/CTF Rules). The committee notes that application of offences via rules is authorised by subsection 137(1)(c) of the Act:

> (ii) a provision of the regulations or of the AML/CTF Rules, if the regulations or Rules (as applicable) state that this section applies to that provision.

The committee understands that the authorisation of the application of offences by subsection 137(1)(c) follows amendments to the Act in 2013.[1]

In *Delegated Legislation Monitor* (Monitor) Nos 2 and 5 of 2014, the committee noted a novel approach (since 2013) in the drafting of Acts to provide for a broadly-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]). One of the issues currently under consideration in relation to this matter relates to the advice of FPC that 'some types of

[1] See Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Act 2013.

provisions should be included in regulations and be drafted by OPC [without] strong justification for prescribing those provisions in another type of legislative instrument'. In response to the committee's inquiry as to how such maters would be provided for in the absence of a regulation making power, FPC advised:

> If such provisions are required for an Act that includes only a general rule-making power, it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions.

It is unclear to the committee whether the application of offence provisions to the rules by the present rule is to be regarded in strict terms as the prescribing of an offence by rule (with reference to OPC guidance on what matters are appropriate for inclusion in regulations as opposed to rules).

However, noting that this approach may be regarded as effectively prescribing offences by rule, in light of FPC's view that certain types of provisions (including offence provisions) should be effected via regulation, the committee notes that the ES contains no justification for the authorising of offence provisions via rules rather than via regulation. The committee notes also that the explanatory memorandum (EM) for the Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill 2013 contains no justification for this approach **[the committee requested the minister's advice on this matter].**

**MINISTER'S RESPONSE:**

The Minister for Justice advised:

> Section 229 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML/CTF Act) was enacted as part of the original Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (AML/CTF Bill). It provides for rule-making by the Australian Transaction Reports and Analysis Centre (AUSTRAC) CEO in relation to matters required or permitted by any other provision of the AML/CTF Act to be prescribed by AML/CTF Rules.
>
> The inclusion of a rule-making power in addition to a regulation-making power (provided for in section 252 of the AML/CTF Act) provides the AUSTRAC CEO with the ability to respond to the level of threat in various industry sectors; for example, by exempting low-risk entities or classes of entities from all or part of the regime, or by imposing particular requirements as permitted by the AML/CTF Act. It was explicitly intended to include offence provisions, with the Replacement Explanatory Memorandum (EM) to the AML/CTF Bill stating that '[i]n some offence provisions the AML/CTF Rules will prescribe some of the content of the offence.'
>
> Subsection 229(2) of the AML/CTF Act provides that the AML/CTF Rules are legislative instruments. Consequently, the Replacement EM noted that under the *Legislative Instruments Act 2003*, the Rules are required to be registered on the Federal Register of Legislative Instruments and are subject to Parliamentary scrutiny. The Replacement EM drew a clear distinction between the power to prescribe by rules and the power to prescribe by regulation under the provisions of the AML/CTF Act.

Part 2 of the AML/CTF Act specifies that details of the customer identification and verification procedures with which reporting entities must comply are to be specified in the AML/CTF Rules. The related chapters in the AML/CTF Rules are among those amended by the Rules Instrument.

The prescription of these details in rules is considered appropriate for several reasons, consistent with the Commonwealth Attorney-General's Department publication, *A guide to framing Commonwealth offences*, infringement notices and enforcement powers. In particular, the relevant content covered by the AML/CTF Rules:

- involves detailed, technical content relating to the systems and controls reporting entities must have to identify their customers
- is subject to change, in line with changing domestic and international money laundering and terrorism financing risks and AML/CTF capabilities, and
- is determined by reference to international instruments with which Australia must comply, in particular, the Financial Action Task Force (FATF) Recommendations.

It is important to note that the rule-making power is subject to several safeguards under the AML/CTF Act. In addition to the status of the AML/CTF Rules as legislative instruments, the performance of the AUSTRAC CEO's functions, including the making of AML/CTF Rules, is subject to a requirement to undertake consultation and to have regard to a number of prescribed matters under section 212 of the Act. The making of AML/CTF Rules may also be subject to ministerial direction under subsections 229(3) and 229(4) of the Act.

In accordance with these statutory requirements, the Rules Instrument was made following an extensive public consultation process undertaken over a 10 month period from 20 May 2013 to 19 March 2014. The process included a high level discussion paper on broad policy objectives and an industry roundtable to discuss current practice. These consultations resulted in two sets of draft rules for public comment with formal invitations to comment provided to all AUSTRAC's regulated entities. In addition AUSTRAC held industry specific forums as well as individual meetings with key stakeholders to discuss issues relevant to those entities.

**COMMITTEE RESPONSE:**

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

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

| | |
|---|---|
| **Purpose** | 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. |
| **Last day to disallow** | 17 July 2014 |
| **Authorising legislation** | Autonomous Sanctions Regulations 2011 |
| **Department** | Foreign Affairs and Trade |

**[The committee first reported on this instrument in *Delegated legislation monitor* No. 8 of 2014].**

**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 an amending instruction to expressly indicate this **[the committee drew the matter to the attention of the minister].**

**MINISTER'S RESPONSE:**

The Minister for Foreign Affairs advised the instrument 'was drafted in accordance with standard drafting practice for these types of instruments under the Autonomous Sanctions Regulations 2011'. The minister further advised:

> On the basis of recent advice from the Office of Parliamentary Counsel and the comments of the Committee in the Monitor, DFAT has updated its drafting practices to ensure that future instruments include an express amendment instruction to indicate how the Principal Instrument will be amended.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for her response.**

**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 requested further information from the minister; and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*].**

**MINISTER'S RESPONSE:**

The Minister for Foreign Affairs advised:

> DFAT conducts extensive outreach on Australian sanction laws. We undertake two national outreach tours a year to major Australian cities, including open seminars for Australian businesses, financial institutions, universities and individuals. We also undertake ad hoc, tailored outreach to Australian businesses or sectors that are particularly affected by Australian sanction laws. We manage a sanctions e-mail list to notify subscribers immediately of amendments to Australian sanction laws and of updates to the Consolidated List of persons and entities designated for the purposes of all sanctions regimes.
>
> Although DFAT has not conducted specific consultations on sanctions in relation to the former Federal Republic of Yugoslavia (FFRY), it continues to engage the diaspora communities identifying with the eight states that were formed from the FFRY, both on contemporary and long-standing foreign policy matters including war crimes and alleged war crimes considered by the judicial processes that followed the break-up of FFRY. DFAT continues to engage these diaspora communities on legal issues (such as allegations of war crimes and compensation) and on international and FFRY-national transitional justice mechanisms and proceedings. This includes arrests and extradition requests concerning dual-national Australians in (and between) former FFRY states, and in Australia, who stand accused of war crimes during the 1990s. DFAT also continues to

> engage regularly individual communities' concerns about high-level visits from, and recognition of, other former FFRY states.

The minister further advised that the ES would be updated in accordance with the committee's request.

**COMMITTEE RESPONSE:**

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

## Social Security (Declaration of Visa in a Class of Visas – Special Benefit Activity Test) Determination 2014 [F2014L00781]

| | |
|---|---|
| **Purpose** | Provides that a person who is a Subclass 449 (Humanitarian Stay (Temporary)) visa holder may be required to satisfy the activity test in order to be qualified for Special Benefit under the *Social Security Act 1991* |
| **Last day to disallow** | 02 September 2014 |
| **Authorising legislation** | *Social Security Act 1991* |
| **Department** | Social Services |

**[The committee first reported on this instrument in *Delegated legislation monitor* No. 9 of 2014].**

**Issue:**

*Insufficient description regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the instrument states:

> No consultation was considered necessary for the purpose of this Determination.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, its usual approach is to consider an overly bare or general description, such as in this case, as not being sufficient to satisfy the requirements of the *Legislative Instruments Act 2003* **[the committee requested further information from the minister; and requested that the ES be**

**updated in accordance with the requirements of the *Legislative Instruments Act 2003*.**

**MINISTER'S RESPONSE:**

The Minister for Social Security provided the committee with an updated ES containing the requested information on consultation:

> The Department of Employment, Department of Human Services and Department of Immigration and Border Protection were consulted in relation to this Determination to ensure a consistent approach between Australian Government agencies.
>
> Public consultation was considered to be unnecessary as this Determination ensures that Subclass 449 (Humanitarian Stay (Temporary)) visa holders who are qualified for Special Benefit are treated in the same manner as other visa holders who are qualified for Special Benefit.

**COMMITTEE RESPONSE:**

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

## Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2014 [F2014L00784]

| | |
|---|---|
| **Purpose** | Provides that a person who is a Subclass 449 (Humanitarian Stay (Temporary)) visa holder is exempted from the newly arrived resident's waiting period for Special Benefit under the *Social Security Act 1991* |
| **Last day to disallow** | 02 September 2014 |
| **Authorising legislation** | *Social Security Act 1991* |
| **Department** | Social Services |

**[The committee first reported on this instrument in *Delegated legislation monitor* No. 9 of 2014].**

**Issue:**

*Insufficient description regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken

(section 26). With reference to these requirements, the committee notes that the ES for the instrument provides no explanation as to why consultation was considered unnecessary in this case. While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, its usual approach is to consider an overly bare or general description, such as in this case, as not being sufficient to satisfy the requirements of the *Legislative Instruments Act 2003* **[the committee requested further information from the minister; and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**MINISTER'S RESPONSE:**

The Minister for Social Security provided the committee with an updated ES containing the requested information on consultation:

> The Department of Employment, Department of Human Services and Department of Immigration and Border Protection were consulted in relation to this Determination to ensure a consistent approach between Australian Government agencies.
>
> Public consultation was considered to be unnecessary as this Determination is purely beneficial in character.

**COMMITTEE RESPONSE:**

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

## Social Security (Class of Visas – Qualification for Special Benefit) Determination 2014 [F2014L00783]

| | |
|---|---|
| **Purpose** | Provides that a person who is a Subclass 449 (Humanitarian Stay (Temporary)) visa holder is qualified for Special Benefit under subparagraph 729(2)(f)(v) of the *Social Security Act 1991* |
| **Last day to disallow** | 02 September 2014 |
| **Authorising legislation** | *Social Security Act 1991* |
| **Department** | Social Services |

**[The committee first reported on this instrument in *Delegated legislation monitor* No. 9 of 2014].**

**Issue:**

*Insufficient description regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have

an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the instrument provides no description of the nature of the consultation undertaken. While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, its usual approach is to consider an overly bare or general description that does not describe the nature of any consultation, such as in this case, as not being sufficient to satisfy the requirements of the *Legislative Instruments Act 2003* **[the committee requested further information from the minister; and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**MINISTER'S RESPONSE:**

The Minister for Social Security provided the committee with an updated ES containing the requested information on consultation:

> The Department of Employment and the Department of Immigration and Border Protection (DIBP) was consulted in relation to this Determination to ensure a consistent approach between Australian Government agencies.
>
> DIBP advised that a person must be the holder of a Subclass 449 (Humanitarian Stay (Temporary)) visa in order to be eligible for the grant of a Subclass 786 (Temporary (Humanitarian Concern)) visa. The Social Security (Class of Visas – Qualification for Special Benefit) Determination 2009 determines that a Subclass 786 visa is in a class of visas for the purpose of subparagraph 729(2)(f)(v) of the Act. In consultation with DIBP it was agreed that another determination should be made under subparagraph 729(2)(f)(v) of the Act to determine a Subclass 449 visa.
>
> Public consultation was considered to be unnecessary as this Determination is purely beneficial in character, extending a payment to a visa class.

**COMMITTEE RESPONSE:**

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

# Appendix 1
# Guideline on consultation

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## Standing Committee on Regulations and Ordinances
## Addressing consultation in explanatory statements

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***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 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 or by contacting the committee secretariat at:

Committee Secretary
Senate Regulations and Ordinances Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Phone: +61 2 6277 3066
Fax: +61 2 6277 5881
Email: RegOrds.Sen@aph.gov.au

# Appendix 2
## Correspondence

Australian Government
Office of Parliamentary Counsel

**First Parliamentary Counsel**

Our ref: C14/21

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
Canberra ACT 2600

Dear Senator Williams

## Prescribing of matters by legislative rules

1 In Delegated Legislation Monitor No. 9 of 2014 the Committee sought my written response to matters outlined in the Committee's response to my letter of 2 July 2014 and to comments of the Committee in relation to the *Jervis Bay Territory Rural Fires Ordinance 2014*. I note the foreshadowed briefing for the Committee has now been rescheduled for 3 September 2014. I will, therefore, keep my response relatively brief. However, I would be happy to provide any additional information or explanation at the briefing.

### *Division of material between regulations and other legislative instruments*

2 The majority of Commonwealth subordinate legislation is not made by the Governor-General or drafted by the Office of Parliamentary Counsel (OPC). Given existing limited resources it would not be possible, nor in my view would it be appropriate anyway, to have all subordinate legislation made by the Governor-General or drafted by OPC. OPC agrees that it should draft all legislative instruments made by the Governor-General, but does not agree that all material presently required to be in legislative instruments made by the Governor-General needs to be in instruments made by the Governor-General or drafted by OPC. The question then is what legislative instruments should be required to be made by the Governor-General and drafted by OPC.

3 OPC *Drafting Direction No.3.8 Subordinate legislation* (DD3.8) addresses this question by setting out a list of matters that should be included in regulations and not another type of legislative instrument. If these matters are included in regulations, they will be required to be drafted by OPC, subject to Executive Council processes and made by the Governor-General. In my view, DD3.8 represents a significant improvement over the previous practice of including material in different types of legislative instruments without a systematic consideration of the nature of the material and the consequences of using different types of instruments for different types of material.

4 The previous practice has led to the inclusion of material in regulations that, having regard to the nature of the material, does not need to be drafted by OPC, subject to Executive Council processes or made by the Governor-General. Conversely the previous practice has led to the inclusion of material in other types of instruments that, having regard to the nature of the material, should perhaps have been included in regulations.

5 The previous practice has also contributed to the fragmentation of the Commonwealth's statute book by encouraging an unnecessary proliferation in the number and types of legislative instruments (see paragraphs 26 to 31 of my letter of 23 May 2014 attached to the letter from the Minister for Industry to the Chair of the Committee on 5 June 2014). The approach in DD3.8 will address these issues and, over time, ensure that a core of material (listed in DD3.8) is drafted by OPC, subject to Executive Council processes and made by the Governor-General unless there is a strong justification to the contrary. This will support the ability of the Executive and the Parliament to ensure that instruments dealing with this important core material are scrutinised appropriately.

6 DD3.8 focuses on nature of the matters to be dealt with in subordinate legislation (that is, the content or substance of the subordinate legislation), rather than the form (that is, the type) of the subordinate legislation or the form of the power under which it is made. In my view, this is the correct approach. The treatment of delegated legislation should reflect matters of substance and not just matters of form.

7 The form of a general power under which material is prescribed is an inappropriate basis for deciding the type of instrument in which the material should be included because the form of the power may give no real indication of the nature of the material itself. Taken by itself the form of the power also gives no real indication of the scope of the power nor the difficulty in drafting instruments under it.

8 As I explained in my letter of 2 July 2014 to the Committee, the scope of a necessary or convenient power in an Act can only be decided in the context of the other provisions of that Act. It seems to me illogical to suggest then that, because the scope of the power may in some cases be "extensive", all exercises of the power are treated in the same way and required to be subject to the same drafting processes and the same "close executive oversight". Such a mechanical approach ignores not just the nature of the material itself, but also the actual scope to the power in the particular case.

9 I accept, however, that there could be differing views about details of the matters that should, either generally or in particular cases, be included in regulations and so drafted by OPC, subject to Executive Council processes and made by the Governor-General. As I mentioned in my letter of 23 May 2014, I would welcome any views the Committee may have on the appropriate division of material between regulations and other types of legislative instrument and would be happy to review DD3.8 to take account of any views the Committee may have.

## *Quality of legislative instruments*

10 As I also explained in my letter of 2 July 2014, the standard general rule-making power consists of 2 powers: a "required or permitted" power and a "necessary or convenient" power.

11 A "required or permitted" rule-making power in an Act gives no power to make rules beyond that authorised by the other provisions of the Act. This power would not, therefore, seem to be relevant to the Committee's inquiries about drafting quality and executive and Parliamentary scrutiny under general rule-making powers. It does not add to the powers provided by other provisions of the Act, but merely provides a single source for the exercise of those powers.

12 A "necessary or convenient" power is a limited power. It is not an open-ended power nor necessarily an extensive power. The rules for the interpretation of a "necessary or convenient" power are well established. In particular, the fact that a matter might be regarded as necessary or convenient does not necessarily mean that provision can be made about the matter under the power. A rule cannot *supplement* the Act. It can only *complement* the Act and prescribe matters that are confined to the same field of operation of the Act.

13 It follows that I do not agree there is anything intrinsic in the standard general rule-making power that represents a real threat to the quality of Commonwealth subordinate legislation. My view seems to be supported by the Committee's own inquiries. In the rules commented on to date by the Committee, these inquiries do not seem to have established any diminution in drafting quality or lack of executive oversight. In fact all the rules commented on by the Committee were drafted by OPC and relied on the "necessary or convenient" power in a very limited way (if at all).

14 Since the function of drafting subordinate legislation was transferred to OPC some 2 years ago, OPC has taken a broad range of measures to promote high drafting standards for all legislative instruments. I would be happy to brief the Committee on these measures.

15 Although substantial progress has already been made, more can be done to promote high drafting standards for legislative instruments. However, this will take resources and time and perhaps legislative changes. DD3.8 is only a relatively small, but nevertheless important, part of the measures that OPC is already pursuing. If the use of general rule-making powers raises any risks to drafting standards at all, these risks are likely to be minimal and substantially outweighed by the benefits. The risks can, in any event, be effectively mitigated by other strategies to promote high drafting standards that OPC is already pursuing.

16 In short, my view remains that the use of general rule-making powers, taken with the other measures OPC is already pursuing, will enhance, and not diminish, the overall quality of legislative instruments and support the scrutiny of legislative instruments by the Parliament.

## *Volume of instruments drafted by OPC*

17 In developing the current version of DD3.8 OPC took into account the need to ensure that OPC's limited budget-funded drafting resources are appropriately managed and applied and, in particular, remain sufficient to draft the Government's legislative program as well as drafting the subordinate legislation that will have the most significant impacts on the community. However, this does not mean that DD3.8 will lead to OPC drafting fewer instruments. In my view, the opposite will be the case.

18 OPC will continue actively seeking drafting and publishing work that is not tied to it. OPC competes and charges for this work in accordance with the Competitive Neutrality Principles. Because the work is billable, OPC will be in a better position to increase its

drafting resources, increase the number of instruments that it drafts and further develop its services to assist agencies to draft the instruments drafted by them. This will contribute to raising the standard of all legislative instruments, not just those drafted under a general rule-making power.

## *Monitoring the quality of legislative instruments*

19 It follows from what I have already said that I do not agree that the use of general rule-making powers raises risks that require special monitoring. Nevertheless, monitoring mechanisms are already available and could be extended if necessary.

20 OPC is responsible for maintaining the Federal Register of Legislative Instruments. (FRLI). All legislative instruments, explanatory statements and legislative instrument compilations are required to be registered on FRLI. Legislative instruments, explanatory statements and legislative instrument compilations are already checked for compliance with registration requirements. As part of these checks, issues of a drafting or formal nature are frequently detected and pointed out to the rule-making agency.

21 For example, the Committee would be aware that issues with the drafting of the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2014* discussed in Delegated Legislation Monitor No. 9 had already been detected by OPC and drafting advice provided to the administering Department by the relevant OPC client adviser. OPC client advisers are Parliamentary Counsel from whom agencies can obtain quick, informal advice about matters in which OPC has expertise that may not be readily available in an agency. These matters include matters necessary, desirable or acceptable for inclusion in instruments and options for improving the standard of instruments.

## *Decisions about inclusion of listed material in instruments other than regulations*

22 DD3.8 represents a statement of the policy followed by OPC in the drafting of Bills and subordinate legislation. It is not directly binding on other agencies, but OPC's advice on drafting matters is generally accepted by the Government and departments and agencies. In this regard DD3.8 is no different to the numerous other policies and practices followed by OPC in the drafting and publishing of Commonwealth legislation. These policies and practices are documented in Drafting Directions and other documents published by OPC and are available on OPC's website.

23 DD3.8 requires OPC drafters to include certain listed matters in regulations unless there is a strong justification for prescribing them in another type of instrument. From OPC's point of view, decisions about whether a strong justification exists would be made personally by me as First Parliamentary Counsel. To date, I have not found a case in which I consider that a sufficiently strong justification exists for an exception to be made. If such a case exists, it is likely to be highly unusual.

24 In drafting legislation OPC acts on the instructions of its clients and it is, of course, open to the Government and OPC's other clients to instruct it to follow a drafting approach that is different to OPC's usual drafting policies and practices. OPC may, for example, be instructed to provide for matters listed in DD3.8 to be prescribed by an instrument other than a regulation. Parliament may agree or disagree with the approach taken in a particular case

and in making such a decision may choose to apply a "strong justification" exception or some other approach. DD3.8 has no direct application to the making of decisions of that kind.

25 In my view, the "strong justification" exception in DD3.8 is likely to have limited application. Nevertheless, I would welcome any views the Committee may have on the exception.

## *Jervis Bay Territory Rural Fires Ordinance 2014*

26 Instructions for the drafting of this Ordinance were received in April 2013. By the time DD3.8 was reissued in March 2014 the then draft Ordinance had been the subject of extensive consultation by the administering Department and the drafting of the Ordinance was substantially complete. The Ordinance was made on 24 April 2014. In this case, I agree that it may have been better to have applied DD3.8 to the Ordinance before it was made, even though drafting of the Ordinance started before, and was substantially complete, when DD3.8 was reissued. This will be done if any similar transitional cases arise in the future.

Yours sincerely

Peter Quiggin PSM
First Parliamentary Counsel
6 August 2014

The Hon. Barnaby Joyce MP

**Minister for Agriculture**
**Federal Member for New England**

Ref: MNMC2014-06199

Senator John Williams
Chair
Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Williams,

I refer to the letter from the Senate Standing Committee on Regulations and Ordinances (the Committee) dated 10 July 2014 in relation to the Farm Household Support Secretary's Rule 2014 [F2014L00614] (the Secretary's Rule). The letter from the Committee sought clarification on matters in relation to the Rule, which are outlined in the Committee's *Delegated legislation monitor No. 8* of 2014 (the Monitor).

In considering my response to the issues raised by the Committee set out below, the following explanation of the *Farm Household Support Act 2014* (the Act) provides the Committee with some context. The Act is complex in that it notionally modifies how the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* operate, so that those Acts can apply in relation to payments made under this Act. Section 90, Simplified outline of this Part, explains how this works.

> The Farm Household Allowance (FHA) is generally treated in the same way as newstart and youth allowance. This means that where there is a reference in the Social Security Act or the Social Security Administration Act to newstart or youth allowance, it is as if there were also a reference to farm household allowance. The farm household allowance, the activity supplement and the farm financial assessment supplement are all treated as if they were social security payments. As a result, the general rules in the Social Security Act and the Social Security Administration Act relating to how to make claims, how payments are made and review of decisions apply in relation to payments under this Act.

While the Act is comprehensive, in forming the policy settings that support farmers in hardship it was clear to me that overly prescriptive legislation could prevent a farmer in need from accessing support as intended, as has been the case in the past. The Secretary's Rule relating to 'whether a farm enterprise has a significant commercial purpose or character' provides a good example of the flexibility I sought in implementing the payment. The significant commercial purpose or character test is based on a ruling of the Taxation Commissioner (TR97/11 Income tax: am I carrying on a business of primary production) which has changed from time to time. Equally, the Secretary's Rule on the 'kinds of requirements not to be included in financial improvement agreements' is modelled on existing social security law, but deals with the special circumstances relevant to farmers

rather than job seekers or students. Both of these matters relate to the day-to-day operation of the Act.

The Secretary's broad rule making power takes into account both the nature of the rules that would be necessary and the frequency with which rules would be made. The anticipated operational nature of the matters to which the rules will relate, and the likelihood that rules will be required to facilitate the alignment of the FHA with mainstream social security payments has been considered by the Senate Standing Committee for the Scrutiny of Bills, and agreed by the Parliament, indicating the nature of the breadth of the power is appropriate.

I also note that the matters dealt with in the Secretary's Rule all relate to matters which are 'required or permitted'. This shows the Act and rules that relate to matters which are 'required or permitted' deal with foreseeable issues, suggesting the use of the necessary and convenient power will be infrequent.

My response to the specific issues raised by the Committee in relation to the Secretary's Rule is set out below.

*Issue: Prescribing of matters by 'legislative rules'*

***"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"***

In its correspondence to me dated 20 March 2014, the Senate Standing Committee on the Scrutiny of Bills also raised issue with the delegation of legislative power under section 106 of the Act. The First Parliamentary Counsel, Mr Peter Quiggin PSM, provided me with advice on the general application and use of rule-making powers in response to that letter. This advice was provided to the Scrutiny of Bills Committee and relevantly states that [extract included below]:

> OPC's view is that some types of provisions should be included in regulations and be drafted by OPC as the Commonwealth's principal drafting office, unless there is a strong justification for prescribing these provisions in another type of legislative instrument. These include the following provisions:
>
> (a) offence provisions;
>
> (b) powers of arrest or detention;
>
> (c) entry provisions;
>
> (d) search provisions;
>
> (e) seizure provisions.

I note the First Parliamentary Counsel's comments on OPC's approach to the making of instruments rather than regulation and the consistency of this approach with the *Legislative Instruments Act 2003* (the LIA) and the First Parliamentary Counsel functions and

responsibilities under the Act. I also note instrument-making powers are commonly in the form of (or include) a power to "prescribe" particular matters. For example, the rule-making power in subsection 59(1) of the *Federal Court of Australia Act 1976* (which was included when that Act was enacted in 1976). In this respect neither the Farm Household Support Secretary's Rule 2014 nor the Farm Household Support Minister's Rule 2014 [F2014L00687] are inconsistent with other legislative instruments. Accordingly I am satisfied the use of rules, as opposed to primary legislation or regulation, is appropriate.

In response to the question of the appropriateness of the Secretary having broader rule-making powers than the minister, the Monitor already notes OPC Drafting Direction 3.8 states that the 'necessary and convenient power should generally be attached to the maker who is likely to make more instruments'.The vast majority of decisions that may need to be taken under the Act relate to its day-to-day operation. As the Secretary is the delegate for these decisions, it is appropriate that the 'necessary and convenient' power is also held by the Secretary. This will allow for rules to be made in relation to matters which are not readily foreseeable but necessary for the smooth and timely operation of the scheme. I also note that the 'necessary or convenient' rule making power is limited to prescribing matters for carrying out or giving effect to this Act. In this respect I consider the power to be appropriately limited.

*Issue: Potential delegation of general rule-making power*

The committee notes that section 106 of the Act provides that the Secretary may delegate his powers to officers below the Senior Executive Officer level. It notes the operational reasons given in the explanatory memorandum for the broad delegation of the Secretary's power and seeks clarification as to whether the general rule-making powers may be delegated under section 106, and, if so, what considerations might apply in that case.

My advice is that there is no legal impediment to the Secretary delegating any or all of his powers or functions under the Act (section 101 Delegation of powers). While legally this rule-making power could be delegated, in practice, this delegation is not exercised. This is reflected in the Secretary's instrument of delegation to the Chief Executive of Centrelink and to senior executives within the Department of Agriculture (the department) where this power has been specifically retained. Additionally, in line with the Administrative Arrangements under the Administrative Arrangements Order, the department is responsible for 'rural adjustment and drought issues'. Give this responsibility I do not foresee any circumstances where the general rule making power would be delegated to an employee outside of the department or below the senior executive level within the department.

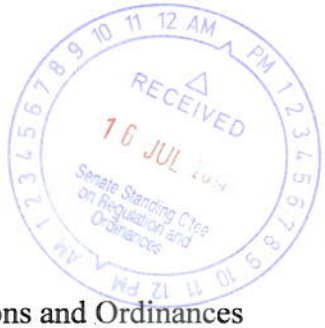
Thank you for bringing the Committee's concerns to my attention. I trust this information is of assistance. An officer from my department can provide the Committee with additional briefing if required.

Yours sincerely

Barnaby Joyce MP

05 AUG 2014

# THE HON MICHAEL KEENAN MP
## Minister for Justice





MC14/14298

Senator Sean Edwards
Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
PARLIAMENT HOUSE ACT 2600

regords.sen@aph.gov.au

Dear Senator Sean

**Response to issues identified in the *Delegated legislation monitor* No. 6 of 2014 concerning the *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2014 (No. 3)***

Thank you for your letter of 20 June 2014 to the Attorney-General, Senator the Hon George Brandis QC, regarding the *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2014 (No. 3)* (the Rules Instrument).

Your letter was referred to me as the matter you raised falls within my portfolio responsibilities. I welcome the opportunity to provide the Senate Standing Committee on Regulations and Ordinances with advice on the application of offences by rule in these circumstances.

***Rule-making under the AML/CTF Act***

Section 229 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML/CTF Act) was enacted as part of the original Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (AML/CTF Bill). It provides for rule-making by the Australian Transaction Reports and Analysis Centre (AUSTRAC) CEO in relation to matters required or permitted by any other provision of the AML/CTF Act to be prescribed by AML/CTF Rules.

The inclusion of a rule-making power in addition to a regulation-making power (provided for in section 252 of the AML/CTF Act) provides the AUSTRAC CEO with the ability to respond to the level of threat in various industry sectors; for example, by exempting low-risk entities or classes of entities from all or part of the regime, or by imposing particular requirements as permitted by the AML/CTF Act. It was explicitly intended to include offence provisions, with the Replacement Explanatory Memorandum (EM) to the AML/CTF Bill stating that '[i]n some offence provisions the AML/CTF Rules will prescribe some of the content of the offence.'

Subsection 229(2) of the AML/CTF Act provides that the AML/CTF Rules are legislative instruments. Consequently, the Replacement EM noted that under the *Legislative Instruments Act 2003*, the Rules are required to be registered on the Federal Register of Legislative Instruments and are subject to Parliamentary scrutiny. The Replacement EM drew a clear distinction between the power to prescribe by rules and the power to prescribe by regulation under the provisions of the AML/CTF Act.

Part 2 of the AML/CTF Act specifies that details of the customer identification and verification procedures with which reporting entities must comply are to be specified in the AML/CTF Rules. The related chapters in the AML/CTF Rules are among those amended by the Rules Instrument.

The prescription of these details in rules is considered appropriate for several reasons, consistent with the Commonwealth Attorney-General's Department publication, *A guide to framing Commonwealth offences, infringement notices and enforcement powers.* In particular, the relevant content covered by the AML/CTF Rules:

- involves detailed, technical content relating to the systems and controls reporting entities must have to identify their customers
- is subject to change, in line with changing domestic and international money laundering and terrorism financing risks and AML/CTF capabilities, and
- is determined by reference to international instruments with which Australia must comply, in particular, the Financial Action Task Force (FATF) Recommendations.

It is important to note that the rule-making power is subject to several safeguards under the AML/CTF Act. In addition to the status of the AML/CTF Rules as legislative instruments, the performance of the AUSTRAC CEO's functions, including the making of AML/CTF Rules, is subject to a requirement to undertake consultation and to have regard to a number of prescribed matters under section 212 of the Act. The making of AML/CTF Rules may also be subject to ministerial direction under subsections 229(3) and 229(4) of the Act.

In accordance with these statutory requirements, the Rules Instrument was made following an extensive public consultation process undertaken over a 10 month period from 20 May 2013 to 19 March 2014. The process included a high level discussion paper on broad policy objectives and an industry roundtable to discuss current practice. These consultations resulted in two sets of draft rules for public comment with formal invitations to comment provided to all AUSTRAC's regulated entities. In addition AUSTRAC held industry specific forums as well as individual meetings with key stakeholders to discuss issues relevant to those entities.

***Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2014 (No. 3)***

As a matter of accuracy, the committee is advised that the Rules Instrument amended the existing Chapter 15 of the AML/CTF Rules, which was not a new chapter.

Thank you for the opportunity to clarify these matters.

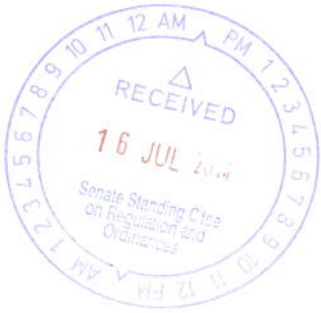
Yours sincerely

**Michael Keenan**

15 JUL 2014

**THE HON JULIE BISHOP MP**

Minister for Foreign Affairs




Senator John Williams
Chairman
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Chairman

I write in regard to the *Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Amendment List 2014* (**'the Instrument'**).

The Senate Standing Committee on Regulations and Ordinances has raised two issues in the Delegated legislation monitor No. 8 of 2014 (9 July 2014) (**'the Monitor'**): first, that the Instrument could have been drafted more clearly to explain its effect; and second, that the Explanatory Statement to the Instrument did not adequately explain the domestic consultations conducted by the Department of Foreign Affairs and Trade (**'DFAT'**) on the Instrument. The Committee also requested that the Explanatory Statement be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.

In relation to the first issue, the Instrument, which amends the *Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) List 2012* (**'the Principal Instrument'**), was drafted in accordance with standard drafting practice for these types of instruments under the *Autonomous Sanctions Regulations 2011*. On the basis of recent advice from the Office of Parliamentary Counsel and the comments of the Committee in the Monitor, DFAT has updated its drafting practices to ensure that future instruments include an express amendment instruction to indicate how the Principal Instrument will be amended.

In relation to the second issue, in addition to the information provided in the Explanatory Statement for the Instrument, I can advise the Committee that DFAT communicates regularly with the Australian business community about changes to Australian sanctions laws.

DFAT conducts extensive outreach on Australian sanction laws. We undertake two national outreach tours a year to major Australian cities, including open

seminars for Australian businesses, financial institutions, universities and individuals. We also undertake ad hoc, tailored outreach to Australian businesses or sectors that are particularly affected by Australian sanction laws. We manage a sanctions e-mail list to notify subscribers immediately of amendments to Australian sanction laws and of updates to the Consolidated List of persons and entities designated for the purposes of all sanctions regimes

Although DFAT has not conducted specific consultations on sanctions in relation to the former Federal Republic of Yugoslavia (FFRY), it continues to engage the diaspora communities identifying with the eight states that were formed from the FFRY, both on contemporary and long-standing foreign policy matters including war crimes and alleged war crimes considered by the judicial processes that followed the break-up of FFRY. DFAT continues to engage these diaspora communities on legal issues (such as allegations of war crimes and compensation) and on international and FFRY-national transitional justice mechanisms and proceedings. This includes arrests and extradition requests concerning dual-national Australians in (and between) former FFRY states, and in Australia, who stand accused of war crimes during the 1990s. DFAT also continues to engage regularly individual communities' concerns about high-level visits from, and recognition of, other former FFRY states.

I have requested that DFAT ensure that the Explanatory Statement to the Instrument is updated in accordance with the legislative requirements and that it is made available to the Committee.

I trust that this information will be of assistance to the Committee.

Yours sincerely

Julie Bishop

16 JUL 2014

# The Hon Kevin Andrews MP
# Minister for Social Services

*Parliament House*
*CANBERRA ACT 2600*

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MN14-000820

2 0 AUG 2014

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

Thank you for the letter of 17 July 2014 from the Committee Secretary, Mr Ivan Powell, on behalf of the Standing Committee on Regulations and Ordinances requesting a response in relation to issues raised in the Delegated legislation monitor No. 9 of 2014, concerning the explanatory statements for the following legislative instruments:

- Social Security (Declaration of Visa in a Class of Visas – Special Benefit Activity Test) Determination 2014; and
- Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2014; and
- Social Security (Class of Visas – Qualification for Special Benefit) Determination 2014.

Please find enclosed the amended explanatory statements for each instrument addressing the issues raised.

Thank you again for writing.

Yours sincerely

**KEVIN ANDREWS MP**

Encl.

# EXPLANATORY STATEMENT

## Social Security (Class of Visas – Qualification for Special Benefit) Determination 2014

### Purpose

The purpose of this Determination is to grant qualification for Special Benefit under subparagraph 729(2)(f)(v) of the *Social Security Act 1991* (the Act) to holders of a Subclass 449 (Humanitarian Stay (Temporary)) visa.

### Background

A person may be qualified for Special Benefit under the Act if they are:

- in severe financial hardship;
- unable to earn a sufficient livelihood for themselves and dependants due to reasons beyond their control;
- not qualified for any other income support payment; and
- an Australian resident or the holder of a temporary visa in a class of visas determined by the Minister for the purpose of subparagraph 729(2)(f)(v) of the Act.

A number of different visa classes have been determined for the purpose of subparagraph 729(2)(f)(v) of the Act. Those determinations are unaffected by this Determination.

The Subclass 449 visa is a subclass of the Temporary Safe Haven (Class UJ) visa. It is a generic humanitarian visa that provides temporary stay in Australia primarily for a person who:

- is displaced, or likely to be displaced, from his or her place of residence; and
- has grave fears for his or her personal safety because of the circumstances in which, or reasons why he or she was, or may be, displaced from his or her place of residence.

There is no application form for a Temporary Safe Haven (Class UJ) visa; an authorised officer must invite a person to apply for the visa.

A person must be the holder of a Subclass 449 visa in order to be eligible for the grant of a Subclass 786 (Temporary (Humanitarian Concern)) visa. A person must satisfy health, character and security checks before they can be granted a Subclass 786 visa.

The *Social Security (Class of Visas – Qualification for Special Benefit) Determination 2009*, which is currently in effect, determines that a Subclass 786 visa is in a class of visas for the purpose of subparagraph 729(2)(f)(v) of the Act.

A Subclass 449 visa may be granted to a person to whom Australia owes protection obligations under the United Nations 1951 Convention and 1967 Protocol relating to the Status of Refugees but who has not completed the necessary health, character and security checks for the grant of a Subclass 786 visa. A Subclass 449 visa permits its holder to travel to, enter and remain in Australia until a date specified by the Minister for Immigration and Border Protection (or his or her delegate).

**Summary**

This Determination specifies Subclass 449 (Humanitarian Stay (Temporary)) as a class of visa for the purpose of subparagraph 729(2)(f)(v) of the Act.

This Determination will ensure that for the purpose of qualification for Special Benefit, Subclass 449 visa holders are treated in the same way as Subclass 786 visa holders.

This Determination is a legislative instrument for the purpose of the *Legislative Instruments Act 2003*.

**Explanation of the provisions**

**Section 1** sets out the name of the Determination.

**Section 2** provides that the Determination commences on the day after it is registered.

**Section 3** provides that Subclass 449 (Humanitarian Stay (Temporary)) is a class of visa for the purpose of subparagraph 729(2)(f)(v) of the Act. The effect of this is that Subclass 449 visa holders will meet the residence requirements for Special Benefit.

**Consultation**

The Department of Employment and the Department of Immigration and Border Protection (DIBP) was consulted in relation to this Determination to ensure a consistent approach between Australian Government agencies.

DIBP advised that a person must be the holder of a Subclass 449 (Humanitarian Stay (Temporary)) visa in order to be eligible for the grant of a Subclass 786 (Temporary (Humanitarian Concern)) visa. The *Social Security (Class of Visas – Qualification for Special Benefit) Determination 2009* determines that a Subclass 786 visa is in a class of visas for the purpose of subparagraph 729(2)(f)(v) of the Act. In consultation with DIBP it was agreed that another determination should be made under subparagraph 729(2)(f)(v) of the Act to determine a Subclass 449 visa.

Public consultation was considered to be unnecessary as this Determination is purely beneficial in character, extending a payment to a visa class.

**Regulation Impact Analysis**

The Determination does not require a Regulation Impact Statement because the Determination is not regulatory in nature, will not impact on business activity and will have no or minimal compliance costs or competition impact.

# Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

***Social Security (Class of Visas – Qualification for Special Benefit) Determination 2014***

The *Social Security (Class of Visas – Qualification for Special Benefit) Determination 2014* is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

## Overview of the Legislative Instrument

The *Social Security (Class of Visas – Qualification for Special Benefit) Determination* 2014 (the Determination) is made under subparagraph 729(2)(f)(v) of the *Social Security Act 1991*.

The purpose of the Determination is to allow the holders of a Subclass 449 (Humanitarian Stay (Temporary)) visa to qualify for Special Benefit, and consequently, a suite of ancillary social security and family payments such as Family Tax Benefit, Education Entry Payment, Rent Assistance, Health Care Card and Pharmaceutical Allowance.

## Human rights implications

The Determination engages or gives effect to the following human rights:

- the right to social security as recognised in Article 24 of the United Nations (UN)1951 Convention and 1967 Protocol Relating to the Status of Refugees and Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and
- the right to an adequate standard of living in Article 11 of the ICESCR and Article 28 of the Convention on the Rights of Persons with Disabilities (CRPD).

The Determination will assist Australia to meet its international obligations under the UN Refugees Convention and Protocol, the ICESCR and the CRPD by providing that Subclass 449 visa holders meet the residence requirements for qualification for Special Benefit. The Determination will also promote an adequate standard of living for those illegal maritime arrivals whose claims for protection are found to be valid and who are granted a Subclass 449 visa.

## Conclusion

This Determination is compatible with human rights as it promotes the right to social security and an adequate standard of living for Subclass 449 visa holders.

**Kevin Andrews, Minister for Social Services**

# EXPLANATORY STATEMENT

## Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2014

### Purpose

The purpose of this Determination is to exempt holders of a Subclass 449 (Humanitarian Stay (Temporary)) visa from the newly arrived resident's waiting period for Special Benefit.

### Background

A person may be qualified for special benefit if, among other things, they are an Australian resident or the holder of a visa that is in a class of visas determined by the Minister for the purpose of subparagraph 729(2)(f)(v) of the *Social Security Act 1991* (the Act). The *Social Security (Class of Visas – Qualification for Special Benefit) Determination 2014* determines Subclass 449 visas as a class of visas for the purpose of subparagraph 729(2)(f)(v).

Subsection 739A(1) of the Act provides that subject to some exceptions, certain persons are subject to a newly arrived resident's waiting period. This includes a person who enters Australia (paragraph 739A(1)(a)).

Subsection 739A(5) of the Act provides that if a person is subject to a newly arrived resident's waiting period and neither subsection 739A(3) nor (4) apply to the person, then the waiting period starts on the day on which the person first entered Australia or becomes the holder of a permanent visa, whichever occurs last, and ends 104 weeks after that day.

Subsections 739A(3) and (4) apply to persons who have applied for or held certain visas determined by the Minister in a legislative instrument. The Minister has not determined a Subclass 449 visa for the purpose of either subsection 739A(3) or (4). This means that unless an exemption applies, the newly arrived resident's waiting period set out in subsection 739A(5) would apply to the holder of a Subclass 449 visa.

Subsection 739A(6) provides that the newly arrived resident's waiting period in subsection 739A(1) does not apply if the person holds, or was the former holder of, a visa in a class of visas determined by the Minister, by legislative instrument, for the purpose of subsection 739A(6).

### Explanation of the provisions

**Section 1** sets out the name of the Determination.

**Section 2** provides that the Determination commences on the day after it is registered.

**Section 3** provides that Subclass 449 (Humanitarian Stay (Temporary)) is a class of visa for the purpose of subsection 739A(6) of the Act. The effect of this is to exempt Subclass 449 visa holders from the newly arrived resident's waiting period for Special Benefit. This means that if a Subclass 449 visa holder meets the other criteria for the grant of Special Benefit, they will be eligible to be paid Special Benefit immediately.

Other legislative instruments made for the purpose of subsection 739A(6) determine visa classes that are granted for humanitarian reasons. As Subclass 449 visas are also granted for humanitarian reasons, it is appropriate to also exempt the holders of those visas from the newly arrived resident's waiting period for Special Benefit.

**Consultation**

The Department of Employment, Department of Human Services and Department of Immigration and Border Protection were consulted in relation to this Determination to ensure a consistent approach between Australian Government agencies.

Public consultation was considered to be unnecessary as this Determination is purely beneficial in character.

**Regulation Impact Analysis**

The Determination does not require a Regulation Impact Statement because the Determination is not regulatory in nature, will not impact on business activity and will have no or minimal compliance costs or competition impact.

# Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

***Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2014***

The *Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2014* is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Legislative Instrument**

The *Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2014* (the Determination) is made under subsection 739A(6) of the *Social Security Act 1991*.

The purpose of the Determination is to exempt the holders of a Subclass 449 (Humanitarian Stay (Temporary)) visa from the two year newly arrived resident's waiting period for Special Benefit. This will ensure that a Subclass 449 visa holder who meets the payment eligibility criteria for Special Benefit may be paid immediately subsequent to the grant of a Subclass 449 visa.

Australia is obliged under Article 24 of the 1951 Convention Relating to the Status of Refugees (the Refugees Convention) to accord those found to have engaged Australia's protection obligations the same or similar treatment in relation to social security as is afforded to Australian permanent residents and citizens. Providing that Subclass 449 visa holders have an exemption from the Special Benefit Newly Arrived Residents Waiting Period will assist in meeting those obligations.

**Human rights implications**

The Determination engages or gives effect to the following human rights:

- the right to social security as recognised in Article 24 of the Refugees Convention and 1967 Protocol Relating to the Status of Refugees (the Protocol); Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and
- the right to an adequate standard of living in Article 11 of the ICESCR and Article 28 of the Convention on the Rights of Persons with Disabilities (CRPD).

The Determination will assist Australia to meet its international obligations under the Refugees Convention and the Protocol, the ICESCR and the CRPD by providing an exemption to the waiting period in which a Subclass 449 visa holder will be qualified for Special Benefit. The Determination will also ensure an adequate standard of

living for those illegal maritime arrivals whose claims for protection are found to be valid and who require financial assistance by providing more immediate access to social security payments.

**Conclusion**

This Determination is compatible with human rights as it promotes the right to social security and an adequate standard of living for Subclass 449 visa holders.

**Kevin Andrews, Minister for Social Services**

# EXPLANATORY STATEMENT

## Social Security (Declaration of Visa in a Class of Visas – Special Benefit Activity Test) Determination 2014

### Purpose

The purpose of this Determination is to provide that a person who is a Subclass 449 (Humanitarian Stay (Temporary)) visa holder may be required to satisfy the activity test in order to be qualified for Special Benefit.

### Background

A person may be qualified for Special Benefit if, among other things, they are an Australian resident or the holder of a visa that is in a class of visas determined by the Minister for the purpose of subparagraph 729(2)(f)(v) of the *Social Security Act 1991* (the Act). The *Social Security (Class of Visas – Qualification for Special Benefit) Determination 2014* determines Subclass 449 visas as a class of visas for the purpose of subparagraph 729(2)(f)(v).

Paragraph 729(2)(g) of the Act provides a further qualification criterion for Special Benefit where the person is:

(i) the holder of a visa included in a class of visas that is issued for temporary protection, humanitarian, or safe haven purposes which is determined by the Minister for the purposes of that subparagraph; and

(ii) a person to whom subsection 729(2A) applies.

Such a person must meet the additional criteria in subsection 729(2B) of the Act.

Subsection 729(2A) of the Act provides that subparagraph 729(2)(g)(i) applies only if:

- the person would not qualify for a disability support pension if they were an Australian resident;
- the person has attained the minimum age for youth allowance but has not reached pension age; and
- either the claim for Special Benefit is not continuous with any previous grant of Special Benefit or the person had not, before 1 January 2003, attained the minimum age for youth allowance and is receiving a special benefit granted before, or continuous with Special Benefit granted before that date.

The additional criteria in subsection 729(2B) of the Act is that the person will be qualified for Special Benefit only if the person:

- satisfies the activity test in section 731A (unless they are in a class of persons who is not required to satisfy the activity test);

- is prepared to enter into a Special Benefit Employment Pathway Plan (SBEPP), or enter another such plan instead of any existing plan that is in force;
- enters into a SBEPP when required to do so by the Secretary (or delegate); and
- satisfies the Secretary that they are complying with the requirements of a SBEPP that is in force.

Generally, a person satisfies the activity test in section 731A of the Act if the person is:

- actively seeking and willing to undertake paid work in Australia (other than unsuitable work);
- complying with a requirement to undertake particular paid work; or
- in certain circumstances, complying with the requirements of a SBEPP.

Subdivision AB in Part 2.15 of the Act provides for SBEPPs, including the requirement to enter into such plans and the terms of SBEPPs. Generally, an Employment Pathway Plan is an agreement that outlines an individual's requirements and obligations under the activity test.

A person who does not comply with their mutual obligation requirements may be penalised in accordance with Division 3A of Part 3 of the *Social Security (Administration) Act 1999*.

**Summary**

The effect of this Determination is that Subclass 449 visa holders may be required to satisfy the activity test in order to be qualified for Special Benefit. This will ensure that Subclass 449 visa holders are treated in the same way as persons who hold other classes of visas that may qualify them for Special Benefit.

This Determination is a legislative instrument for the purpose of the *Legislative Instruments Act 2003*.

**Explanation of the provisions**

**Section 1** sets out the name of the Determination.

**Section 2** provides that the Determination commences on the day after it is registered.

**Section 3** provides that Subclass 449 (Humanitarian Stay (Temporary)) is a class of visa for the purpose of subparagraph 729(2)(g)(i) of the Act. The effect of this is that Subclass 449 visa holders may be required to satisfy the activity test in order to be qualified for Special Benefit.

**Consultation**

The Department of Employment, Department of Human Services and Department of Immigration and Border Protection were consulted in relation to this Determination to ensure a consistent approach between Australian Government agencies.

Public consultation was considered to be unnecessary as this Determination ensures that Subclass 449 (Humanitarian Stay (Temporary)) visa holders who are qualified for Special Benefit are treated in the same manner as other visa holders who are qualified for Special Benefit.

**Regulation Impact Analysis**

The Determination does not require a Regulation Impact Statement because the Determination is not regulatory in nature, will not impact on business activity and will have no or minimal compliance costs or competition impact.

# Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

***Social Security (Declaration of a Visa in a Class of Visas – Special Benefit Activity Test) Determination 2014***

The *Social Security (Declaration of a Visa in a Class of Visas – Special Benefit Activity Test) Determination 2014* is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Legislative Instrument**

The *Social Security (Declaration of a Visa in a Class of Visas – Special Benefit Activity Test) Determination 2014* (the Determination) is made under subparagraph 729(2)(g)(i) of the *Social Security Act 1991*.

The purpose of the Determination is to provide that Subclass 449 (Humanitarian Stay (Temporary)) visa holders may be subject to mutual obligation arrangements similar to those expected for other temporary protection/humanitarian visa holders, in order to be qualified for Special Benefit. The mutual obligation arrangements generally require that a person:

- satisfies the activity test (unless the person is in a class of persons who is not required to satisfy the activity test);
- is prepared to enter into a Special Benefit Employment Pathway Plan (SBEPP), or enter another such plan instead of any existing plan that is in force;
- enters into a SBEPP when required to do so by the Secretary (or delegate); and
- satisfies the Secretary that they are complying with the requirements of a SBEPP that is in force.

Generally, a person satisfies the activity test if the person is:

- actively seeking and willing to undertake paid work in Australia (other than unsuitable work);
- complying with a requirement to undertake particular paid work; or
- in certain circumstances, complying with the requirements of a SBEPP.

A person who does not comply with their mutual obligation requirements may be penalised in accordance with Division 3A of Part 3 of the *Social Security (Administration) Act 1999*.

**Human rights implications**

The Determination engages or gives effect to the following human rights:

- the right to social security as recognised in Article 24 of the United Nations (UN) 1951 Convention and 1967 Protocol Relating to the Status of Refugees and Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and
- the right to an adequate standard of living in Article 11 of the ICESCR and Article 28 of the Convention on the Rights of Persons with Disabilities (CRPD).

The Determination will assist Australia to meet its international obligations under the UN Refugees Convention and Protocol, the ICESCR and the CRPD. Imposing mutual obligation requirements on Subclass 449 visa holders in order for them to be qualified for Special Benefit is consistent with the mutual obligations imposed on other persons who hold other classes of visas which may qualify the person for Special Benefit.

To the extent that the Determination limits the right to social security and an adequate standard of living by imposing mutual obligations on Subclass 449 visa holders, there is no incompatibility with human rights because the limitation is legitimate, reasonable, necessary and proportionate.

The limitation is legitimate because it supports Subclass 449 visa holders in receipt of social security payments to find employment and facilitates their participation in, and contribution to, Australian society and the economy.

The limitation is reasonable because it is reasonable to expect that recipients of social security payments undertake activities and programmes that will increase their chances of finding and maintaining employment. There are also exemptions from participating in activity testing for those considered to be too aged, those with caring responsibilities and those who have an illness or disability.

The limitation is necessary because without mutual obligations a person is less likely to participate in activities and programmes that will increase their chances of finding and maintaining employment.

The limitation is proportionate because a Subclass 449 visa holder who is qualified for Special Benefit will not have the rate of their payment affected if they comply with their mutual obligations and there are exemptions from complying with the mutual obligations for certain persons.

**Conclusion**

This Determination is compatible with human rights because to the extent that it may have an impact on human rights, that impact is legitimate, reasonable, necessary and proportionate.

**Kevin Andrews, Minister for Social Services**