

The Senate

Standing
Committee on
Regulations and
Ordinances

Delegated legislation monitor

Monitor No. 11 of 2014

3 September 2014

© Commonwealth of Australia 2014

ISSN 2201-8689 (print)

ISSN 1447-2147 (online)

This document was prepared by the Senate Standing Committee on Regulations and Ordinances and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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
Senator Zed Seselja	Australian Capital Territory, LP

Secretariat

Mr Ivan Powell, Secretary
Dr Patrick Hodder, Senior Research Officer

Committee legal adviser

Mr Stephen Argument

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600
Ph: 02 6277 3066
Email: regords.sen@aph.gov.au
Website:

[http://www.aph.gov.au/Parliamentary Business/Committees/Senate/Regulations and Ordinances](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances)

Contents

Membership of the committee	<i>iii</i>
Introduction	<i>vii</i>
Chapter 1 – New and continuing matters	
New matters	
CASA 170/14 - Direction — number of cabin attendants (National Jet Systems) [F2014L01044].....	1
Continuing matters	
Multiple instruments that appear to rely on subsection 33(3) of the <i>Acts Interpretation Act 1901</i>	2
Chapter 2 – Concluded matters	
Veterans' Entitlements (Actuarial Certificate – Life Expectancy Income Stream Guidelines) Determination 2013 [F2013L00671].....	5
Veterans' Entitlements (Actuarial Certificate – Lifetime Income Stream Guidelines) Determination 2013 [F2013L00670].....	5
Appendix 1 – Guideline on consultation	9
Appendix 2 - Correspondence	13

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.

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 **3 September 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

CASA 170/14 - Direction — number of cabin attendants (National Jet Systems) [F2014L01044]

Purpose	Directs National Jet Systems Pty Ltd to operate an Australian registered Boeing 717 series aircraft with not less than 3 cabin attendants
Last day to disallow¹	28 November 2014
Authorising legislation	<i>Civil Aviation Regulations 1988</i>
Department	Infrastructure and Regional Development

Issue:

Timetable for making of substantive amendments to Civil Aviation Orders

In Monitor No. 1 of 2013 (7 February 2013), the committee raised concerns about the timetable for substantive amendments to Civil Aviation Order (CAO) 20.16.3 in light of the exemption granted by CASA 364/12 - Direction - number of cabin attendants (National Jet Systems) [F2012L02169]. The committee noted it generally prefers that exemptions are not used or do not operate as de facto amendments to primary legislation. The committee further noted it had previously written to the then minister about the continued need for exemptions with a similar purpose to the 2012 instrument. To that end, the committee sought further information on the timetable for substantive amendments to CAO 20.16.3. The then minister advised that progress on the issue depended on the progress in developing the proposed Civil Aviation Safety

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

Regulations Part 121 'Air Transport Operations – Large Aeroplanes', and that this would occur in 2013.

The current instrument specifies the minimum number of cabin attendants required on specified aircraft operated by a particular operator. In doing so, the instrument grants an exemption from CAO 20.16.3 until 31 July 2015 (to the same operator operating the same aircraft as the 2012 instrument). The explanatory statement (ES) for the current instrument under the heading, 'Senate committee concerns', states:

The development and preparation of suitable amendments of the Regulations to avoid the need for individual directions and set a suitable standard for cabin crew numbers is continuing.

Noting that CASA still relies on instruments that exempt compliance with CAO 20.16.3, and that development of the amendments are continuing, the committee seeks further information from the minister on the timetable for completing the amendments.

Continuing matters

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 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.²

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

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

ASIC Market Integrity Rules (ASX Market) Amendment 2014 (No. 3) [F2014L01023]
(subsection 798G(1), Corporations Act 2001)

ASIC Market Integrity Rules (APX Market) Amendment 2014 (No. 1) [F2014L01024]
(subsection 798G(1), Corporations Act 2001)

ASIC Market Integrity Rules (Chi-X Australia Market) Amendment 2014 (No. 3)
[F2014L01025] (subsection 798G(1), Corporations Act 2001)

Export Control (Meat and Meat Products) Amendment (2014 Measures No. 1) Order 2014
[F2014L01038] (regulation 3, Export Control (Orders) Regulations 1982)

Chapter 2

Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **3 September 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.

Veterans' Entitlements (Actuarial Certificate – Life Expectancy Income Stream Guidelines) Determination 2013 [F2013L00671]

Veterans' Entitlements (Actuarial Certificate – Lifetime Income Stream Guidelines) Determination 2013 [F2013L00670]

Purpose	Sets out the means by which a life expectancy income stream (superannuation) and a lifetime income stream (superannuation) can be determined to be asset-test exempt for the purposes of the <i>Veterans' Entitlements Act 1986</i>
Last day to disallow	2 December 2013
Authorising legislation	<i>Veterans' Entitlements Act 1986</i>
Department	Veterans' Affairs

[The committee first reported on this instrument in *Delegated legislation monitor (Monitor) No. 5 of 2013*, and subsequently in *Monitor No.2 of 2014*].

Issue:

Incorporation of extrinsic material

The instruments set out the means by which a life expectancy income stream (superannuation) and a lifetime income stream (superannuation) can be determined to be asset-test exempt. Both of the instruments incorporate by reference the Institute of Actuaries of Australia Guidance Note 465 and require that actuarial certificates be prepared in accordance with that guidance note. The *Legislative Instruments Act 2003* provides that extrinsic material may be incorporated into instruments of delegated legislation; however, non-legislative material can generally only be incorporated as in force or existing at a particular date (as opposed to being incorporated as in force or existing 'from time to time').¹ However, neither the instruments nor their ESs provide

¹ See Section 14, *Legislative Instruments Act 2003*.

sufficient detail to determine the basis on which the guidance note is incorporated into the instruments **[the committee sought further information from the former minister]**.

MINISTER'S RESPONSE:

The Minister for Veterans' Affairs acknowledged that the instruments incorporate by reference the Institute of Actuaries of Australia Guidance Note 465, and expressed the view that the *Legislative Instruments Act 2003* does not require an instrument or its ES to specify whether an incorporated document is the version existing at a particular date or a version as in force from time to time. While the minister noted the committee's comments, and provided an undertaking that future instruments would set out the basis on which a document is incorporated, no information was provided regarding the manner of incorporation in relation to the instruments in question.

COMMITTEE RESPONSE:

[The committee thanked the minister for his response (Monitor No. 8 of 2013)].

However, in the committee's view, section 14 of the *Legislative Instruments Act 2003* provides two ways in which extrinsic material may be prescribed by reference: as at either paragraph 14(1)(a) or 14(1)(b). The committee therefore considers that, as made, the instruments do not comply with the requirements of that Act. Further, the committee regards the instruments as potentially uncertain in their operation, as a person subject to the determinations may find it difficult, or may not be able, to ascertain which version of the referenced material was intended to be prescribed by the instruments **[the committee requested that the minister take steps to amend the instruments in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

In relation to ESs, the minister correctly states that ESs are not strictly required to specify the manner in which referenced material has been incorporated. However, the committee regards the inclusion of such information as a best-practice approach in fulfilling the requirement that an ES explain the purpose and operation of the instrument (paragraph 26(1A)(b)).

In addition, the committee notes that paragraph 26(1A)(c) requires an ES to provide information on how an instrument prescribed by reference may be obtained. As the ESs for the two instruments did not contain this information, the committee considers that the ESs do not comply with the requirements of the *Legislative Instruments Act 2003* **[the committee requested that the ESs be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

The committee gave notice of motion to disallow the two instruments on 2 December 2013, as the relevant disallowance period was due to expire on that day. The giving of a 'protective' notice in this way preserves the ability of the Senate to disallow an instrument while there remain issues under consideration.²

2 For further information on the committee's use of notices see *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 432.

MINISTER'S RESPONSE:

In relation to the committee's concern that the ESs for the instruments did not contain information on how the incorporated material may be obtained, the committee acknowledges the minister's advice that this information was in fact contained in the ESs **[the committee apologised for overlooking this information and thanked the minister for his response]**.

In relation to the committee's concern regarding the incorporation of extrinsic material, the minister provided a response, which included a copy of supporting legal advice from the Australian Government Solicitor. In summary, the advice noted that section 14 of the *Legislative Instruments Act 2003* constrains the way in which an instrument may incorporate the contents of another written document, such that a written document not subject to parliamentary scrutiny may be incorporated only as in force at the time the instrument is made. This applies to the instruments in question, meaning that the determinations could not validly incorporate the guidance note provisions as in force from time to time. While the text of the provisions does not make clear whether the determinations in fact purport to do this, section 13(1)(c) of the *Legislative Instruments Act 2003* requires that the determinations must be construed subject to the enabling legislation and so as not to exceed the power of the rule-maker. This provision, in combination with the fact that the determinations did not express the material in question to be incorporated as in force from time to time, supported the conclusion that the provisions must be read as incorporating the material as in force at the time of the making of the instruments, and are therefore consistent with section 14 of the *Legislative Instruments Act 2003*. This conclusion was further supported by the decision in *Comcare v Broadhurst* (2011) 192 FCR 497.

On the matter more generally of the committee's concerns regarding the potentially uncertain operation of the determinations, the advice noted that, as the version of the incorporated guidance note remains unchanged (and in light of the factors above), there is currently no room for confusion as to which version of the note is incorporated by the determinations. There was therefore no immediate need to amend the determinations; however, in the event that the guidance note was updated or superseded, it would be desirable to amend the determinations to clarify which document was being referred to.

The minister further advised that, in the event that the instruments are remade, the opportunity will be taken to specify the manner of incorporation of the guidance note.

COMMITTEE RESPONSE:

[The committee thanked the minister for his response and concluded its interest in the matter (Monitor No.2 of 2014)].

Accordingly, the committee will seek to withdraw the notice of motion to disallow the two instruments, given on 2 December 2013.

However, the committee wishes to emphasise its continued expectation that, where an instrument incorporates extrinsic material by reference, the manner of incorporation is clearly specified. This approach enables persons affected by any such instrument to understand the operation of the instrument without the need to rely on specialist legal

knowledge or advice. To this end, the committee acknowledges the minister's intention to specify the manner of incorporation in the event that the instruments are remade; and, more generally, the typically high standards of drafting and attention to the committee's scrutiny principles in instruments and ESs emanating from the Department of Veterans' Affairs portfolio.

[The committee thanked the minister for the provision of the legal advice which was obtained in relation to this matter and noted that it would publish the legal advice once the minister had been given the opportunity to raise any objections against publication].

No objection from the minister having been received, the legal advice from the Australian Government Solicitor in relation to this matter is included in Appendix 2 to this report.

Appendix 1

Guideline on consultation

Standing Committee on Regulations and Ordinances

Addressing consultation in explanatory statements

Role of the committee

The Standing Committee on Regulations and Ordinances (the committee) undertakes scrutiny of legislative instruments to ensure compliance with [non-partisan principles](#) of personal rights and parliamentary propriety.

Purpose of guideline

This guideline provides information on preparing an explanatory statement (ES) to accompany a legislative instrument, specifically in relation to the requirement that such statements must describe the nature of any consultation undertaken or explain why no such consultation was undertaken.

The committee scrutinises instruments to ensure, inter alia, that they meet the technical requirements of the [Legislative Instruments Act 2003](#) (the Act) regarding the description of the nature of consultation or the explanation as to why no consultation was undertaken. Where an ES does not meet these technical requirements, the committee generally corresponds with the relevant minister seeking further information and appropriate amendment of the ES.

Ensuring that the technical requirements of the Act are met in the first instance will negate the need for the committee to write to the relevant minister seeking compliance, and ensure that an instrument is not potentially subject to [disallowance](#).

It is important to note that the committee's concern in this area is to ensure only that an ES is technically compliant with the descriptive requirements of the Act regarding consultation, and that the question of whether consultation that has been undertaken is appropriate is a matter decided by the rule-maker at the time an instrument is made.

However, the nature of any consultation undertaken may be separately relevant to issues arising from the committee's scrutiny principles, and in such cases the committee may consider the character and scope of any consultation undertaken more broadly.

Requirements of the Legislative Instruments Act 2003

Section 17 of the Act requires that, before making a legislative instrument, the instrument-maker must be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business.

Section 18 of the Act, however, provides that in some circumstances such consultation may be 'unnecessary or inappropriate'.

It is important to note that section 26 of the Act requires that explanatory statements describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, to explain why none was undertaken.

It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the Act in relation to consultation. This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met. However, consultation that has been undertaken under a RIS process will generally satisfy the requirements of the Act, provided that that consultation is adequately described (see below).

If a RIS or similar assessment has been prepared, it should be provided to the committee along with the ES.

Describing the nature of consultation

To meet the requirements of section 26 of the Act, an ES must *describe the nature of any consultation that has been undertaken*. The committee does not usually interpret this as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement of the fact that consultation has taken place may be considered insufficient to meet the requirements of the Act.

Where consultation has taken place, the ES to an instrument should set out the following information:

Method and purpose of consultation

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



Senator the Hon. Michael Ronaldson

Minister for Veterans' Affairs

Minister Assisting the Prime Minister for the Centenary of ANZAC

Special Minister of State

Ref: M13/3180

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

RECEIVED

13 FEB 2014
Senate Standing C'ttee
on Regulations
and Ordinances


Dear Senator Edwards,

I refer to the Committee's *Delegated Legislation Monitor* No. 8 of 2013 and in particular to the Committee's comments in respect of the *Veterans' Entitlements (Actuarial Certificate—Lifetime Income Stream Guidelines) Determination 2013* and the *Veterans' Entitlements (Actuarial Certificate—Life Expectancy Income Stream Guidelines) Determination 2013*.

The Committee had two concerns with the instruments. Firstly, that the instruments appeared to have infringed s.14 of the *Legislative Instruments Act 2003* in that the instruments incorporated a non-legislative document (Institute of Actuaries of Australia Guidance Note 465 (Guidance Note)) but "...neither the instruments nor their ESs provide sufficient detail to determine the basis on which the guidance note is incorporated into the instruments" (Committee). Secondly, the Explanatory Statements for the relevant instruments appeared to have infringed s.26(1A)(c) of the *Legislative Instruments Act 2003* because they did not provide information on how the Guidance Note 465 could be obtained.

Regarding the second concern, I understand that in discussions between officials of our respective organisations your officials agreed the Committee made an error on this point and that the Explanatory Statements do contain information as to how the Guidance Note could be obtained. Presumably the Committee will be publishing an erratum in this regard.

Turning to the main issue of whether the instruments infringe s.14 of the *Legislative Instruments Act 2003*, my legal advice from the Australian Government Solicitor (copy enclosed) is that they do not. Indeed it is settled law that a legislative instrument in the position of the instruments in question will be read so as not to exceed the power of the instrument-maker. In this case this means regarding the Guidance Note as being the version in force on the date the relevant instrument commenced: *see Comcare v Broadhurst* (2011) 192 FCR 497; s.13(1)(c) and s.13(2) of the *Legislative Instruments Act 2003*.

On a practical level the Institute of Actuaries of Australia has advised that the Guidance Note has not changed since its introduction and when it is changed, as planned, it will be called a Professional Standard. In other words, the Guidance Note is "frozen" in the form in which it is referred to in the Explanatory Statements for the relevant instruments and so there would appear to be very little scope for a person affected by the instruments to be misled as to the version of the Guidance Note that applied to the person's actions.

Finally, although the relevant instruments would not appear to infringe the *Legislative Instruments Act 2003* there is another potential legal issue with the instruments, unconnected to the issue raised by the Committee, and the Department of Veterans' Affairs is in the process of resolving it. It may be that ultimately the instruments are remade in which case the opportunity will be taken to refer to the Guidance Note as it exists at a specific date.

I hope this information is of assistance to you.

Yours sincerely,



SENATOR THE HON. MICHAEL RONALDSON

ENCL

- 4 FEB 2014



Our ref. 13210642

20 January 2014

Mark Collins
Senior Legal Officer
Department of Veterans' Affairs

Australian Government Solicitor
4 National Circuit Barton ACT 2600
Locked Bag 7246 Canberra Mail Centre ACT 2610
T 02 6253 7000 DX 5678 Canberra
www.ags.gov.au

Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

BY EMAIL: Mark.Collins@dva.gov.au

Dear Mr Collins

**Advice regarding certain determinations made under ss 5JA and 5JB of the
Veterans' Entitlements Act 1986**

1. Thank you for your email of 12 December 2013 requesting advice concerning the validity of the *Veterans' Entitlements (Actuarial Certificate—Lifetime Income Stream Guidelines) Determination 2013* (the Lifetime Determination) and the *Veterans' Entitlements (Actuarial Certificate-Life Expectancy Income Stream Guidelines) Determination 2013* (the Expectancy Determination). These Determinations have purportedly been made under the *Veterans' Entitlements Act 1986* (the VE Act).
2. Your request concerns, more specifically, the provisions in the Lifetime Determination and the Expectancy Determination that purport to incorporate the Institute of Actuaries of Australia Guidance Note 465 (the Institute; the Guidance Note). For simplicity, we will refer to these provisions as 'the Guidance Note provisions'.

SUMMARY OF ADVICE

3. You have asked us to advise on certain issues arising from the concerns expressed in relation to the Guidance Note provisions by the Senate Standing Committee on Regulations and Ordinances (SSCRO).

Are the Guidance Note provisions consistent with s 14 of the *Legislative Instruments Act 2003*?

4. In our view, assuming that the Guidance Note provisions are otherwise valid, these provisions are also consistent with s 14 of the *Legislative Instruments Act 2003* (the LI Act). While the Guidance Note provisions would be inconsistent with s 14 if they sought to incorporate the Guidance Note as in force from time to time, we do not think that the provisions would be interpreted as purporting to do this. In our view, the Guidance Note provisions must be read as incorporating only the version of the Guidance Note that was in force when these provisions were first made.

Are the SSCRO's uncertainty concerns merely illusory?

5. The SSCRO has expressed concern that the Determinations are 'uncertain in their operation'. Given that the version of the Guidance Note that was in force when the Determinations were first made is the current version of this document, we do not think that there is any immediate need to amend these Determinations – their operation, in our view, is sufficiently clear for now. The Institute may, at some future point in time, wish to issue a new version of the Guidance Note or to replace it with a different document altogether (eg, a 'Standard' rather than a 'Guidance Note'). If this happens, to avoid confusion, it would be desirable to amend the Determinations to clarify exactly which document is being referred to.

BACKGROUND

6. The SSCRO has expressed the following concerns in relation to the Lifetime Determination and the Expectancy Determination:
- The SSCRO considers the determinations refer to the Guidance Note in a way that is prohibited under s 14 of the LI Act.
 - The SSCRO considers the Determinations to be potentially uncertain in their operation; in the SSCRO's view, a person subject to either one the Determinations may find it difficult to ascertain which version of the Guidance Note the relevant Determination is referring to.
7. You have asked us to advise, in this context, on the following 2 issues:
- Will the Determinations be read as violating s 14 of the LI Act? (**Issue 1**)
 - Is the SSCRO's uncertainty concern justified? (**Issue 2**)
8. You inform us that the Institute has provided you with the following information in relation to the Guidance Note:
- The Note has not changed since 2002.
 - The document that is expected to supersede the current version of the Guidance Note will not be merely a new version of this note – rather, it will be a completely different form of document.

DISCUSSION

Outline of key legislative provisions and the decision in *Comcare v Broadhurst*

Key provisions under the Veterans' Entitlements Act

9. The Lifetime Determination is made under s 5JA of the VE Act and the Expectancy Determination is made under s 5JB of this Act. Sections 5JA and 5JB set out what constitutes an 'asset-test exempt income stream' for the purposes of the VE Act.
10. Sections 5JA(1)(b) and s 5JB(1A)(b) refer to 'current actuarial certificates' that are 'in force'. Section 5JA(1B) relates to actuarial certificates referred to in s 5JA(1)(b) and states as follows:

The Commission may determine, by legislative instrument, guidelines to be complied with when determining whether an actuarial certificate is in force.
11. Section 5JB(1C) relates to actuarial certificates referred to in s 5JB(1A)(b) and states as follows:

The Commission may determine, by legislative instrument, guidelines to be complied with when determining whether an actuarial certificate is in force.
12. The 'Commission' being referred to in these provisions is the Repatriation Commission (see definition in s 5A).

Key provisions under the Determinations

13. Sections 2.1 and 2.2 of the Lifetime Determination relate to actuarial certificates provided for the purposes of s 5JA of the VE Act. Sections 2.1 and 2.2 relevantly state that such certificates 'must be prepared in accordance with the Institute of Actuaries of Australia Guidance Note 465' (see ss 2.1(2)(a) and 2.2(2)(a)).
14. The Expectancy Determination contains identical provisions in relation to actuarial certificates provided for the purposes of s 5JB of the VE Act (see ss 2.1(2)(a) and 2.2(2)(a)).

Key provisions under the Legislative Instruments Act

15. Section 13(1)(c) of the LI Act relevantly states:

13 Construction of legislative instruments

- (1) If enabling legislation confers on a rule-maker the power to make a legislative instrument, then, unless the contrary intention appears:

...

 - (c) any legislative instrument so made is to be read and construed subject to the enabling legislation as in force from time to time, and so as not to exceed the power of the rule-maker.

16. Section 14 of the Act states:

14 Prescribing matters by reference to other instruments

- (1) If enabling legislation authorises or requires provision to be made in relation to any matter in a legislative instrument, the legislative instrument may, unless the contrary intention appears, make provision in relation to that matter:
- (a) by applying, adopting or incorporating, with or without modification, the provisions of any Act, or of any disallowable legislative instrument, as in force at a particular time or as in force from time to time; or
- (b) subject to subsection (2), by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or writing as in force or existing at the time when the first-mentioned legislative instrument takes effect.
- (2) Unless the contrary intention appears, the legislative instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

The decision in Comcare v Broadhurst

17. You have suggested that the Full Federal Court's decision in *Comcare v Broadhurst* (2011) 192 FCR 497 might be relevant to the s 14 issue.
18. *Comcare v Broadhurst* relevantly concerned the construction of Principle 12 of the *Guide to the Assessment of Permanent Impairment* (the Comcare Guide). The Comcare Guide had been made under s 28 the *Safety, Rehabilitation and Compensation Act 1998* and was a legislative instrument. Principle 12 required certain assessments to be made, for the purposes of the parent Act, 'under the edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* [the American Guide] current at the time of assessment'. When the Comcare Guide first took effect, the 5th edition of the American Guide was the current edition of this document. The 5th edition, however, was subsequently superseded by a 6th edition. The issue was whether Principle 12 of the Comcare Guide should be read to refer to the 5th or to the 6th edition of the American Guide.
19. The Court (per Tracey and Flick JJ) held that Principle 12 should be read to refer to the 5th edition (at [73]). The Court held that, notwithstanding any assumption that may have been made on the part of the draftsman, s 14(2) of the LI Act applied to the Comcare Guide to prevent it from incorporating the American Guide as in force from time to time (at [68], [71]). This effectively meant that, in order for Principle 12 to be valid, it had to be construed as referring to the 5th (and not the 6th) edition. The Court noted that s 13(1)(c) of the LI Act required it to construe Principle 12 so as not to exceed the power of the rule-maker. The Court held that this principle precluded it from reading Principle 12 as referring to the 6th edition – ie the Court read down Principle 12 so as to bring it within power (at [70]-[72]).

Advice regarding certain determinations made under ss 5JA and 5JB of the Veterans' Entitlements Act 1986
20 January 2014
A2816649

Issue 1 – s 14 of the *Legislative Instruments Act 2003*

20. You have asked us to advise on whether the Guidance Note provisions are consistent with s 14 of the LI Act. We have assumed – for present purposes – that the Guidance Note provisions are valid in all other respects.
21. Section 14 of the LI Act constrains the way in which a legislative instrument may incorporate the contents of another written document. Under s 14, the instrument can generally incorporate the contents of another written document which is not subject to parliamentary scrutiny only as those contents are in force when the legislative instrument is made; the instrument generally cannot incorporate the document as in force from time to time. For example, assuming that it is authorised to do so by its parent Act, a legislative instrument could make the renewal of a licence contingent on compliance with an industry code that is in force at the time when the instrument was made; the instrument generally could not, however, require compliance with subsequent versions of this code that take effect later on.
22. The prohibition in s 14 of the LI Act is subject to the following 2 exceptions:
- The prohibition does not apply to the incorporation of content found in an Act or in another disallowable legislative instrument – ie s 14 does not prohibit the incorporation of such content by reference to the Act/instrument as in force from time to time.
 - The prohibition operates subject to a 'contrary intention' – ie the prohibition will not apply to a legislative instrument where the parent Act under which it is made indicates that the prohibition should not apply to such instruments.
23. In our view, the prohibition in s 14 of the LI Act will apply to determinations made under ss 5JA(1B) and 5JB(1C) of the VE Act (ss 5JA(1B) and 5JB(1C) expressly state that such determinations are legislative instruments). In our view, the VE Act does not reflect a 'contrary intention' of the sort referred to above with respect to such determinations – the Act does not expressly indicate such an intention and we do not think that there are good grounds for arguing that it does so implicitly. Hence, in our view, ss 5JA(1B) and 5JB(1C) determinations cannot incorporate material found in another written source as it exists from time to time unless that written source is an Act or a disallowable legislative instrument.
24. The Guidance Note provisions within the Determinations have purportedly been made pursuant to ss 5JA(1B) and 5JB(1C) of the VE Act.¹ It follows that these provisions cannot incorporate the material in the Guidance Note as in force from time to time. The issue, therefore, is whether the Guidance Note provisions do in fact purport to do this.

25. The text of the provisions does not, on its face, provide an immediately clear answer to this question. Construing these provisions on their face, the following 2 readings appear to be possible:
- The provisions could be read to refer to the Guidance Note as in force from time to time (we will refer to this as the 'time-to-time reading'). Under the time-to-time reading, the Guidance Note provisions would violate s 14 of the LI Act and be invalid accordingly.
 - The provisions could be read to refer to the Guidance Note as it was in force when these provisions were first made (we will refer to this as the 'fixed-time reading'). Under the fixed-time reading, the Guidance Note provisions would not violate s 14 of the LI Act.
26. In deciding which of these 2 readings is correct, the rule in s 13(1)(c) of the LI Act is important – this provision requires the Determinations to be construed subject to their enabling legislation and so as not to exceed the power of the rule-maker. As noted above, the Guidance Note provisions would be valid under the fixed-time reading but invalid under the from time-to-time reading. The rule in s 13(1)(c), accordingly, requires that the fixed-time reading be adopted insofar as the Determinations will allow this – that is, if the Determinations sustain the fixed-time reading, this must be preferred to the time-to-time alternative. The issue, therefore, becomes whether or not the Determinations can sustain the fixed-time reading.
27. In our view, the Determinations can indeed sustain this reading. We do not think that the fixed-time reading contradicts the terms of the Guidance Note provisions as construed on their face – these provisions are not expressed to refer to the Guidance Note as in force from time to time. Further, we have not identified anything in the broader legislative context to the Guidance Note provisions that mandate the time-to-time reading. Applying the rule in s 13(1)(c) of the LI Act, therefore, we think that the fixed-time reading of the Guidance Note provisions is the correct reading; we do not think, conversely, that the time-to-time reading is legally permissible. It follows that, in our view, the Guidance Note provisions in the Determinations are consistent with s 14 of the LI Act.
28. This conclusion is supported by the decision in *Comcare v Broadhurst* (see above at paragraphs 17-19). The provisions considered in *Comcare v Broadhurst* expressly referred to the edition of the American Guide 'current at the time of assessment'. The Court held that – despite this wording – these provisions could be read to refer only the version of the American Guide that was in force when these provisions were made. Unlike the provisions considered in *Comcare v Broadhurst*, the Guideline Note provisions in the Determinations are expressed to refer simply to 'the Institute of Actuaries of Australia Guidance Note 465' – they are not expressed to refer to a version of this note that is current at a particular time. A fixed-time reading equivalent to that adopted by the Court in *Comcare v Broadhurst* could thus be arrived at all the more easily.

Issue 2 – SSCRO concerns regarding uncertainty

29. The SSCRO has expressed concern that the Guidance Note provisions are 'uncertain in their operation'. While the SSCRO's uncertainty concerns are not entirely without merit, we do not think that they give rise to an immediate need to amend these provisions. We understand that the version of the Guidance Note that was in force when the Determinations were first made remains current. This leaves no room for confusion as to which version of this note the Determinations are currently referring to.
30. The Institute may, at some point in time, wish to issue a new version of the Guidance Note or to replace it with an altogether new kind of document (we understand the Institute to have expressed a preference for the latter option). If this happens, to avoid confusion, it would be desirable to amend the Determinations to clarify exactly which document is being referred to.
31. Please contact us if we can be of any further assistance.

Yours sincerely



Joel Gilbourd
Counsel
T 02 6253 7412 F 02 6253 7304
joel.gilbourd@ags.gov.au



Jenny Burnett
Deputy General Counsel
T 02 6253 7199 F 02 6253 7304
jenny.burnett@ags.gov.au