The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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Introduction

The *Delegated legislation monitor* (the monitor) is the regular report of the Senate Standing Committee on Regulations and Ordinances (the committee). The monitor is published at the conclusion of each sitting week of the Parliament, and provides an overview of the committee's scrutiny of instruments of delegated legislation for the preceding period.[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 **24 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.

This report considers all disallowable instruments tabled between 8 August 2014 and 5 September 2014. All instruments tabled in this period are listed on the Senate Disallowable Instruments List.[1]

New matters

Work Health and Safety Exemption (Construction Induction Training Card - Workers) (August 2014) [F2014L01078]

Purpose	Exempts workers on overseas construction work within the responsibility of the Department of Foreign Affairs and Trade from the requirement to keep a general construction induction training card available for inspection
Last day to disallow[2]	28 November 2014
Authorising legislation	*Work Health and Safety Regulations 2011*
Department	Employment

Issue:

No 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

1 Senate Disallowable Instruments List, available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List

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

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 explanatory statement (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. **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***.

Civil Aviation Order (Flight Crew Licensing) Repeal and Amendment Instrument 2014 (No. 1) [F2014L01177]

Purpose	Amends the Civil Aviation Orders (CAOs) to take into account the commencement of Parts 61, 64, 141 and 142 of the Civil Aviation Safety Regulations 1998, repeals other CAOs that will no longer be required when those parts commence, and provides related transitional provisions to allow continuation of aviation activities by qualified individuals
Last day to disallow	25 November 2014
Authorising legislation	*Civil Aviation Act 1988; Civil Aviation Regulations 1988; Civil Aviation Safety Regulations 1998*
Department	Infrastructure and Regional Development

Issue:

Retrospectivity

Section 2 of the instrument states that it commences immediately before the commencement of the Civil Aviation Amendment Regulation 2013 (No. 1), which the ES identifies as having commenced on 1 September 2014. However, section 2 of the Civil Aviation Amendment Regulation 2013 (No. 1) states that it commences on 4 December 2013. The committee therefore seeks clarification as to the intended date of commencement of the instrument; and notes that, if the earlier date is to be taken as the commencement date, then the instrument operates retrospectively. In cases where an instrument operates retrospectively, the committee's usual expectation is that the ES for the instrument address the question of whether the retrospective operation of the instrument is consistent with subsection 12(2) of the *Legislative Instruments Act 2003*. Subsection 12(2) provides that an instrument that commences retrospectively is of no effect if it would disadvantage the rights of a person (other than the Commonwealth) or impose a liability on a person (other than the Commonwealth) for an act or omission before the instrument's date of registration. Accordingly, the

committee's usual expectation is that ESs explicitly address the question of whether an instrument with retrospective commencement would disadvantage any person other than the Commonwealth.

The committee therefore seeks the minister's advice on this matter.

Continuing 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	24 September 2014
Authorising legislation	*Corporations Act 2001*
Department	Treasury

[The committee first reported on this instrument in *Delegated legislation monitor* No. 10 of 2014].

Issue:

Matters more appropriate for parliamentary enactment

The 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);
- 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 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). 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.[3]

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.

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 requested the advice of the minister in relation to this matter (*Delegated legislation monitor* No. 10 of 2014)].**

MINISTER'S RESPONSE:

The Minister for Finance and Acting Assistant Treasurer advised:

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

> My response to the first issue raised in *Delegated Legislation Monitor* No. 10 of 2014 (the monitor) is that the magnitude of the burden on the financial advice industry by Labor's reforms warranted swift action. In the lead up to the 2013 federal election, I outlined how Labor's Future of Financial Advice (FOFA) reforms had been too costly to implement and failed to strike the right balance between consumer protection and the need to ensure the ongoing availability, accessibility and affordability of high quality financial advice. From speaking with numerous industry stakeholders, it was clear that the financial services industry was being significantly affected by Labor's FOFA reforms. As such, I stated that we would move quickly to implement changes to FOFA if the Coalition were elected.
>
> It should be noted that Treasury's estimates of the ongoing cost savings of the Regulation are approximately $190 million per year, with one-off implementation savings of approximately $90 million; these estimates represent just over half of the estimated $375 million ongoing costs of complying with FOFA. Further, the Australian Securities and Investments Commission's facilitative compliance approach to FOFA was scheduled to end on 30 June 2014; this provided additional impetus to ensure industry received certainty through legislative change.
>
> As the Committee noted, the Regulation is largely mirrored in the Bill. Those provisions in the Bill have been—and will continue to be—subject to full parliamentary scrutiny. The Bill passed the House of Representatives on 28 August 2014 and was introduced in the Senate on 1 September2014. The interim Regulations will be repealed once the Bill receives Royal Assent. I note that both the Senate Economics Legislation Committee and the Senate Economics Reference Committee are—respectively—conducting inquiries into the Bill and financial advice reforms.

COMMITTEE RESPONSE:

The committee thanks the Minister for Finance and Acting Assistant Treasurer for his response.

However, the minister's response has not satisfactorily addressed the key scrutiny concern raised by both the Scrutiny of Bills committee and this committee—namely, that the regulation makes fundamental legislative change that may be more appropriate for parliamentary enactment (that is, via primary rather than delegated legislation). While the minister cites both the need for 'swift action' and the estimated savings or benefit to industry, the minister has not addressed the committee's concern that such imperatives may not amount to sufficient justification for effecting significant policy change via regulation (and therefore without the full scrutiny and approval of the parliament). The committee notes that the minister's advice as to the scale of the intended effect of the regulation, and the existence and significance of the bill currently being considered by other Senate committees, could be equally taken as supporting a conclusion that the measures are more appropriately subject to the Senate's full deliberative processes. The committee is particularly concerned that the

policy imperatives cited to justify the use of regulation in this case do not appear to be distinguishable from any case in which, in view of the anticipated timeframes and uncertainty applying to the full legislative process, the government might regard it as preferable or convenient to effect policy change via delegated legislation. **The committee therefore seeks further advice from the minister as to whether the legislative changes made by the regulation should be considered appropriate for delegated legislation.**

The committee further notes that, notwithstanding the minister's assurance that the regulation will be repealed once the bill receives Royal Assent, the nature of the full legislative process is such that there remains significant uncertainty as to whether and in what form the bill may eventually be passed. **Given this, the committee also seeks the minister's advice as to whether all or part of the instrument will be repealed in the event that the bill is not passed by the parliament, or is passed with substantive amendments to matters currently provided for in the regulation.**

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 broadly 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 requested the advice of the minister in relation to this matter (*Delegated legislation monitor* No. 10 of 2014)].**

MINISTER'S RESPONSE:

The Minister for Finance and Acting Assistant Treasurer advised:

> In response to the second issue raised in the monitor, the Regulation is made under a number of different regulation-making powers within the Corporations Act, not just subsections 1364(1) and 1364(2). Specific regulation-making powers are included throughout Part 7.7 A of the Act, including: Division 2, the best interests obligation; Division 3, charging ongoing fees to clients; and Division 4, conflicted remuneration. The Australian Government Solicitor has advised that the Regulation has been made in accordance with the specific regulation-making powers in the Corporations Act; importantly, the Regulation is clearly related to the operation of the relevant provisions in the Corporations Act.

COMMITTEE RESPONSE:

The committee thanks the minister for his response.

The committee notes the minister's advice that the regulation 'is made under a number of different regulation-making powers within the Corporations Act, not just subsections 1364(1) and 1364(2)'. Given the minister has referred to other enabling provisions in the Act, the committee understands that in this instance the regulation (which is made under subsection 1364(1) of the Act) is relying on the 'required or permitted' limb of the general regulation-making power rather than the 'necessary or convenient' limb of the power.

In relation to the best interests duty, the committee notes that section 961B(5) provides that regulations may prescribe:

> (a) a step, in addition to or substitution for the steps mentioned in subsection (2), that the provider must, in prescribed circumstances, prove that the provider has taken, to satisfy the duty in subsection (1); or
>
> (b) that the provider is not required, in prescribed circumstances, to prove that the provider has taken a step mentioned in subsection (2), to satisfy the duty in subsection (1); or
>
> (c) circumstances in which the duty in subsection (1) does not apply.

The regulation removes the 'catch-all' provision from the list of steps an advice provider may take to satisfy the best interests obligation. Given that removing the 'catch-all' provision is not 'required' by the Act, the committee understands the regulation is relying on the 'permitted' element of the power. However, a question arises as to whether removing the 'catch-all' provision in its entirety, so that it does not apply in any circumstances, is 'permitted' under the apparently more limited 'prescribed circumstances' in which a step may be altered in section 961B(5) of the Act. Nor is it clear that the power in paragraph 961B(5)(c) to prescribe circumstances in which the duty in subsection (1) does not apply would authorise regulations which,

in practical effect, amount to the repeal of that duty. **The committee therefore seeks further advice from the minister on this matter.**

In addition, it is not clear from the minister's response which regulation-making powers 'throughout Part 7.7A of the Act' are being relied on. **The committee therefore requests the minister's advice as to which specific provisions are being relied on in relation to each of the changes made by the regulation.**

Further, the committee notes the minister refers to legal advice obtained from the Australian Government Solicitor. On past occasions, the committee has sought and been provided with legal advice on matters of relevance to the application of the committee's scrutiny principles. **The committee therefore requests from the minister a copy of the legal advice obtained in relation to 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 *Delegated legislation monitor* No. 8 of 2014, and subsequently in *Delegated legislation monitor* No. 10 of 2014].

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]).[4]

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*].

4 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

> (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 (*Delegated legislation monitor* No. 8 of 2014)].

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 made the following comments and requested the minister's response to the matters outlined below (*Delegated legislation Monitor* No. 10 of 2014)].

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.

MINISTER'S RESPONSE:

The Minister for Infrastructure and Regional Development advised:

> I note that the Committee's concern that consequences and policy guidance around the general rule-making power is not settled. I am advised that since Minister Joyce's response of 5 August 2014 you have met with Mr Peter Quiggin PSM, First Parliamentary Council and Mr John Leahy, Principal Legislative Counsel. Given this issue has much broader application to Commonwealth legislation than the *Farm Household Support Act 2014* (the Act), the resolution of this at a generic level through your interactions with the Office of Parliamentary Counsel would seem the most appropriate course of action.

COMMITTEE RESPONSE:

The committee thanks the Minister for Infrastructure and Regional Development for his response.

As noted by the minister, the committee is pursuing a number of issues arising from the prescribing of matters by legislative rules, and will report on these in due course. **The committee has therefore concluded its examination of this aspect of the instrument.**

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 under section 106(2) may be delegated under section 101 and, if so, what considerations might apply in that case **[the committee therefore requested the advice of the minister in relation to this matter (*Delegated legislation monitor* No. 8 of 2014)].**

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 101, 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 thanked the minister for his response, made the following comments, and requested his response to the matters outlined below (*Delegated legislation monitor* No. 10 of 2014)].

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).[5] The committee therefore seeks the minister's further advice on this matter.

MINISTER'S RESPONSE:

The Minister for Infrastructure and Regional Development advised:

> I note that the general rule-making power was not delegated in relation to the instrument currently being considered by the Committee, as it was made by the Secretary of the Department of Agriculture (secretary).
>
> I also note that, as Minister Joyce advised in his previous response to the Committee of 5 August 2014, in practice the rule making power in section 106 of the Act has not been delegated. As an example, the secretary deliberately chose not to delegate the power to the Chief Executive of Centrelink, which contrasts with most other powers under the Act, which were delegated. In addition to the above, the secretary has informed me that at the current point in time, he has no intention of delegating his rule making powers, or that any such delegation is currently necessary for administration of Farm Household Allowance.

5 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

> I have also been advised that the Office of Parliamentary Counsel has provided the Committee with a draft Drafting Direction that will clarify the issue of delegating the power to make instruments under future legislation. I understand that the Committee has also discussed this broader issue with the First Parliamentary Counsel and the Principal Legislative Counsel.

COMMITTEE RESPONSE:

The committee thanks the Minister for Infrastructure and Regional Development for his response.

As noted by the minister, the committee is pursuing a number of issues arising from the prescribing of matters by legislative rules, including the issue of subdelegation of the general rule-making power.

However, in this case, the committee notes the minister's advice that the delegation of the general rule-making power is neither intended nor necessary. **Taking into account the scrutiny preference, as expressed by the Scrutiny of Bills committee, that the delegation of legislative power be only as broad as strictly required, the committee therefore requests that the *Farm Household Support Act 2014* be amended to specifically exclude the delegation of the general rule-making power.**

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.[6]

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

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

AASB 2014-3 - Amendments to Australian Accounting Standards – Accounting for Acquisitions of Interests in Joint Operations [F2014L01173]

AASB 2014-3 - Amendments to Australian Accounting Standards – Accounting for Acquisitions of Interests in Joint Operations [F2014L01173]

CASA 163/14 - Instructions — GNSS primary means navigation (B787-8 aircraft) [F2014L01060]

Civil Aviation Order 82.3 Amendment Instrument 2014 (No. 2) [F2014L01113]

Civil Aviation Order 82.5 Amendment Instrument 2014 (No. 2) [F2014L01114]

Civil Aviation Order 82.6 Amendment Instrument 2014 (No. 1) [F2014L01169]

Export Control Legislation (Processed Fruits and Vegetables) Repeal Order 2014 [F2014L01185]

Migration Agents Regulations 1998 - Specification - Value of Activities, Fees for Assessments and Standards for Professional Development Activities - IMMI 14/038 [F2014L01092]

Private Health Insurance (Prostheses) Rules 2014 (No. 2) [F2014L01087]

Remuneration Tribunal Determination 2014/13 - Remuneration and Allowances for Holders of Public Office including Judicial and Related Offices [F2014L01083]

Remuneration Tribunal Determination 2014/15 - Official Travel by Office Holders [F2014L01084]

Remuneration Tribunal Determination 2014/17 - Compensation for Loss of Office for Holders of Public Office [F2014L01086]

Remuneration Tribunal Determination 2014/18 - Remuneration and Allowances for Holders of Public Office including Judicial and Related Offices [F2014L01159]

Chapter 2

Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **24 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.

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 requires 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 sought 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].**

MINISTER'S RESPONSE:

The Minister for Finance and Acting Assistant Treasurer advised that ASIC would review the Class Orders after the Australian government had considered recommendations from the Productivity Commission inquiry into the civil dispute resolution system. The minister further advised the Class Orders were necessary to provide continued timely and affordable access to justice for consumers:

> ASIC is an independent statutory authority responsible for the administration of the *National Consumer Credit Protection Act 2009* and the *Corporations Act 2001*, as well as related legislation. Under its governing statute —the *Australian Securities and Investments Commission Act 2001*—ASIC performs its day-to-day functions at arm's-length from the executive government.
>
> I am advised by ASIC that the Class Orders are interim measures that will be reviewed once the Government finalises its policy position on litigation funding. Litigation funding is the subject of the Productivity Commission's inquiry into Australia's system of civil dispute resolution, *Access to Justice Arrangements*. The final report is due to be released in late September and the Government will consider the recommendations in due course.
>
> In deciding to extend the interim relief in the Class Orders, ASIC was also mindful of the Government's Financial System Inquiry—due to report in November 2014—and the current moratorium on any significant financial services regulation. The Government will consider the recommendations from the Financial System Inquiry in due course.
>
> If the interim relief in the Class Orders were not provided, a significant disruption to consumers' ability to access timely and affordable justice could have occurred.

COMMITTEE RESPONSE:

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

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 sought 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].**

MINISTER'S RESPONSE:

The Minister for Finance and Acting Assistant Treasurer advised ASIC would review the Class Orders after the Australian government had considered recommendations from the Productivity Commission inquiry into the civil dispute resolution system. The minister further advised the Class Orders were necessary to provide continued timely and affordable access to justice for consumers:

> ASIC is an independent statutory authority responsible for the administration of the *National Consumer Credit Protection Act 2009* and the *Corporations Act 2001*, as well as related legislation. Under its governing statute —the *Australian Securities and Investments Commission Act 2001*—ASIC performs its day-to-day functions at arm's-length from the executive government.
>
> I am advised by ASIC that the Class Orders are interim measures that will be reviewed once the Government finalises its policy position on litigation funding. Litigation funding is the subject of the Productivity Commission's inquiry into Australia's system of civil dispute resolution, *Access to Justice Arrangements*. The final report is due to be released in late September and the Government will consider the recommendations in due course.
>
> In deciding to extend the interim relief in the Class Orders, ASIC was also mindful of the Government's Financial System Inquiry—due to report in November 2014—and the current moratorium on any significant financial services regulation. The Government will consider the recommendations from the Financial System Inquiry in due course.
>
> If the interim relief in the Class Orders were not provided, a significant disruption to consumers' ability to access timely and affordable justice could have occurred.

COMMITTEE RESPONSE:

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

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 (EM) 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 requested the advice of the minister on this matter].**

MINISTER'S RESPONSE:

The Minister for Industry advised:

> While the *Trade Support Loans Act 2014* contains a general rule-making power by legislative instrument (at section 106), this power is held by me as the responsible Minister, and cannot be delegated. The *Trade Support Loans Act 2014* only allows for delegation of the powers and functions held by the Secretary (at section 101).

COMMITTEE RESPONSE:

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

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
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Australia

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Email: RegOrds.Sen@aph.gov.au

Appendix 2
Correspondence

Minister for Finance
Acting Assistant Treasurer

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

Dear Senator Williams

On 28 August 2014, Mr Ivan Powell, Committee Secretary, wrote on behalf of the Senate Standing Committee on Regulations and Ordinances in relation to the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 (the Regulation). Your letter has been referred to me as I have portfolio responsibility for this matter in my capacity as Acting Assistant Treasurer.

My response to the first issue raised in Delegated Legislation Monitor *No. 10 of 2014* (the monitor) is that the magnitude of the burden on the financial advice industry by Labor's reforms warranted swift action. In the lead up to the 2013 federal election, I outlined how Labor's Future of Financial Advice (FOFA) reforms had been too costly to implement and failed to strike the right balance between consumer protection and the need to ensure the ongoing availability, accessibility and affordability of high quality financial advice. From speaking with numerous industry stakeholders, it was clear that the financial services industry was being significantly affected by Labor's FOFA reforms. As such, I stated that we would move quickly to implement changes to FOFA if the Coalition were elected.

It should be noted that Treasury's estimates of the ongoing cost savings of the Regulation are approximately $190 million per year, with one-off implementation savings of approximately $90 million; these estimates represent just over half of the estimated $375 million ongoing costs of complying with FOFA. Further, the Australian Securities and Investments Commission's facilitative compliance approach to FOFA was scheduled to end on 30 June 2014; this provided additional impetus to ensure industry received certainty through legislative change.

As the Committee noted, the Regulation is largely mirrored in the Bill. Those provisions in the Bill have been – and will continue to be – subject to full parliamentary scrutiny. The Bill passed the House of Representatives on 28 August 2014 and was introduced in the Senate on 1 September 2014. The interim Regulations will be repealed once the Bill receives Royal Assent. I note that both the Senate Economics Legislation Committee and the Senate Economics Reference Committee are – respectively – conducting inquiries into the Bill and financial advice reforms.

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In response to the second issue raised in the monitor, the Regulation is made under a number of different regulation-making powers within the Corporations Act, not just subsections 1364(1) and 1364(2). Specific regulation-making powers are included throughout Part 7.7A of the Act, including: Division 2, the best interests obligation; Division 3, charging ongoing fees to clients; and Division 4, conflicted remuneration. The Australian Government Solicitor has advised that the Regulation has been made in accordance with the specific regulation-making powers in the Corporations Act; importantly, the Regulation is clearly related to the operation of the relevant provisions in the Corporations Act.

I hope this answers your inquiries.

Kind regards

MATHIAS CORMANN

13 September 2014

The Hon Warren Truss MP
Deputy Prime Minister
Minister for Infrastructure and Regional Development
Leader of The Nationals
Member for Wide Bay

16 SEP 2014

PDR ID: MNMC2014-07621

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
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 28 August 2014 in relation to the *Farm Household Support Secretary's Rule 2014* (the Secretary's Rule). The Committee sought further clarification from the Hon. Barnaby Joyce MP, Minister for Agriculture (Minister Joyce), in relation to the Secretary's Rule. These matters are outlined in the Committee's *Delegated legislation monitor No. 10 of 2014* (Monitor 10). I am replying as Acting Minister for Agriculture.

I note the letter seeks further advice about concerns regarding the Secretary's Rule, as outlined in the Committee's *Delegated legislation monitor No. 8 of 2014* (Monitor No. 8), following Minister Joyce's earlier response of 5 August 2014.

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'

'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'.

I note that the Committee's concern that consequences and policy guidance around the general rule-making power is not settled. I am advised that since Minister Joyce's response of 5 August 2014 you have met with Mr Peter Quiggin PSM, First Parliamentary Council and Mr John Lahey, Principal Legislative Counsel. Given this issue has much broader application to Commonwealth legislation than the *Farm Household Support Act 2014* (the Act), the resolution of this at a generic level through your interactions with the Office of Parliamentary Counsel would seem the most appropriate course of action.

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Issue: Potential delegation of general rule-making power

'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 questions 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). The committee therefore seeks the minister's further advice on this matter.'

I note that the general rule-making power was not delegated in relation to the instrument currently being considered by the Committee, as it was made by the Secretary of the Department of Agriculture (secretary).

I also note that, as Minister Joyce advised in his previous response to the Committee of 5 August 2014, in practice the rule making power in section 106 of the Act has not been delegated. As an example, the secretary deliberately chose not to delegate the power to the Chief Executive of Centrelink, which contrasts with most other powers under the Act, which were delegated. In addition to the above, the secretary has informed me that at the current point in time, he has no intention of delegating his rule making powers, or that any such delegation is currently necessary for administration of Farm Household Allowance.

I have also been advised that the Office of Parliamentary Counsel has provided the Committee with a draft Drafting Direction that will clarify the issue of delegating the power to make instruments under future legislation. I understand that the Committee has also discussed this broader issue with the First Parliamentary Counsel and the Principal Legislative Counsel.

I thank you for bringing the Committee's concerns to my attention. I trust this information is of assistance.

Yours sincerely

WARREN TRUSS

Minister for Finance
Acting Assistant Treasurer

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

Dear Senator Williams

On 28 August 2014, Mr Ivan Powell, Committee Secretary, wrote on behalf of the Senate Standing Committee on Regulations and Ordinances in relation to the Australian Securities and Investments Commission (ASIC) Class Orders 14/569 and 14/571. Your letter has been referred to me as I have portfolio responsibility for this matter in my capacity as Acting Assistant Treasurer.

Regarding the issues raised in Delegated Legislation Monitor *No. 10 of 2014* in relation to Class Orders 14/569 and 14/571 (the Class Orders), I note that the Class Orders were extended by ASIC. ASIC is an independent statutory authority responsible for the administration of the *National Consumer Credit Protection Act 2009* and the *Corporations Act 2001*, as well as related legislation. Under its governing statute – the *Australian Securities and Investments Commission Act 2001* – ASIC performs its day-to-day functions at arm's-length from the executive government.

I am advised by ASIC that the Class Orders are interim measures that will be reviewed once the Government finalises its policy position on litigation funding. Litigation funding is the subject of the Productivity Commission's inquiry into Australia's system of civil dispute resolution, *Access to Justice Arrangements*. The final report is due to be released in late September and the Government will consider the recommendations in due course.

In deciding to extend the interim relief in the Class Orders, ASIC was also mindful of the Government's Financial System Inquiry – due to report in November 2014 – and the current moratorium on any significant financial services regulation. The Government will consider the recommendations from the Financial System Inquiry in due course.

If the interim relief in the Class Orders were not provided, a significant disruption to consumers' ability to access timely and affordable justice could have occurred.

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If the Committee requires further information about ASIC's decision to extend the Class Orders, it can contact ASIC.

I hope this answers your inquiries.

Kind regards

MATHIAS CORMANN

13 September 2014

THE HON IAN MACFARLANE MP

MINISTER FOR INDUSTRY

PO BOX 6022
PARLIAMENT HOUSE
CANBERRA ACT 2600

15 SEP 2014

MC14-003074

Mr Ivan Powell
Committee Secretary
Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Mr Powell Ivan

Thank you for your letter of 28 August 2014 concerning the remarks of the Standing Committee on Regulations and Ordinances (the Committee) in the *Delegated legislation monitor No. 10 of 2014* in relation to the Trade Support Loans Rules 2014 [F2014L01007].

In addressing the Trade Support Loans Programme, the Committee asks if the Secretary's general rule-making powers may be delegated, and if so, what considerations might apply in that case. As the report explains, the question is raised in light of the Committee's previous inquiries into the implications of the new general rule-making power for executive exercise and oversight of Parliament's delegated legislative powers.

I also note that the Committee refers to its discussion of the Australian Jobs (Australian Industry Participation) Rule 2014, which examines the issue of the new general rule-making power in detail and responds to advice given on the matter by the Office of Parliamentary Counsel.

While the *Trade Support Loans Act 2014* contains a general rule-making power by legislative instrument (at section 106), this power is held by me as the responsible Minister, and cannot be delegated. The *Trade Support Loans Act 2014* only allows for delegation of the powers and functions held by the Secretary (at section 101).

I hope the Committee finds this information of assistance.

Yours sincerely

Ian Macfarlane

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