The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

Monitor No. 13 of 2014

1 October 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/senate_regord_ctte

Contents

Introduction

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

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

The committee's terms of reference

Senate Standing Order 23 contains a general statement of the committee's terms of reference:

> (1) A Standing Committee on Regulations and Ordinances shall be appointed at the commencement of each Parliament.
>
> (2) All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the committee for consideration and, if necessary, report.
>
> The committee shall scrutinise each instrument to ensure:
>
> (a) that it is in accordance with the statute;
>
> (b) that it does not trespass unduly on personal rights and liberties;
>
> (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
>
> (d) that it does not contain matter more appropriate for parliamentary enactment.

Work of the committee

The committee scrutinises all disallowable instruments of delegated legislation, such as regulations and ordinances, to ensure their compliance with non-partisan principles of personal rights and parliamentary propriety.

---

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 **1 October 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 5 September 2014 and 12 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 - ASC AWD Shipbuilder Pty Ltd and overseas technical specialists) (September 2014) [F2014L01195]

Purpose	Provides for grant of an exemption under the Work Health and Safety Regulations 2011 from the requirement for ASC AWD Shipbuilder Pty Ltd to ensure certain workers (i.e. technical specialists) have undergone construction induction training, and also grants certain workers (i.e. technical specialists) an exemption from the construction induction training requirement
Last day to disallow[2]	1 December 2014
Authorising legislation	*Work Health and Safety Regulations 2011*
Department	Employment

Issue:

No description regarding consultation

---

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.

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The 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***.

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.[3]

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

Plant Health Australia (Plant Industries) Funding Determination 2014 [F2014L01206]

Australian Passports Amendment Determination 2014 (No. 1) [F2014L01194]

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

Chapter 2

Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **1 October 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.

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

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

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

Issue:

Insufficient description regarding consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The 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 states:

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

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

MINISTER'S RESPONSE:

The Attorney-General advised:

> My Department consulted with all state and territory central authorities responsible for the delivery of intercountry adoption services in Australia prior to the amendments that commenced on 4 March 2014. Given that the purpose of the regulation is to clarify those amendments and the perceived need for clarification was raised by one jurisdiction, limited further consultation was undertaken with only that jurisdiction.

The Attorney-General further advised that the ES had been amended to include the information provided.

COMMITTEE RESPONSE:

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

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 disallow	28 November 2014
Authorising legislation	*Civil Aviation Regulations 1988*
Department	Infrastructure and Regional Development

[The committee initially reported on this instrument in *Delegated legislation monitor* No. 11 of 2014].

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 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 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 sought further information from the minister on the timetable for completing the amendments].

MINISTER'S RESPONSE:

The Minister for Infrastructure and Regional Development advised that the timeframe for amending the current regulatory framework would be guided by the government's consideration of two reports on aviation safety regulation and cabin crew ratios. The minister anticipated that any amendments would occur during 2015–16:

> On 3 June 2014 I tabled in Parliament the independent Aviation Safety Regulation Review Report (the Report) which investigated the structures, effectiveness and processes of all agencies involved in aviation safety in Australia, including ensuring that aviation has an appropriate safety regulatory framework.
>
> I can confirm the Government is carefully considering the 37 recommendations and other matters arising out of the Report. I expect to table the Government's response before the end of the year.
>
> Therefore the timetable for making any amendments to the types of legislative instrument to which the Committee refers will be driven by the Government's response to the Review Report and the Government's response to the report of the House of Representatives Standing Committee on Infrastructure and Communications into cabin crew ratios on Australian aircraft. This latter response did not occur under the previous Government and so is now a matter for consideration by this Government.
>
> It is important that the individual directions currently issued to ten RPT operators to allow for certain aircraft to operate with the 1 :50 cabin crew to

passenger ratio be allowed to continue to operate until the Government tables its responses to these Reports.

The Civil Aviation Safety Authority (CASA) would then be able to proceed with any proposed amendments to current arrangements in accordance with the Government's legislation programme in 2015-16.

In relation to the proposed amendments, I am advised that this may involve changes to Civil Aviation Order 20.16.3, and aligning this to proposed Part 91 (General operating and flight rules) and Part 121 (air transport operators - large aeroplanes) of the Civil Aviation Safety Regulations 1998.

COMMITTEE RESPONSE:

The committee thanks the minister for his response and has concluded its interest in 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* Nos 10 and 12 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]).[1]

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

> *Minister's rules*
>
> (1) The Minister may, by legislative instrument, make Minister's rules prescribing matters required or permitted by this Act to be prescribed by the Minister's rules.
>
> *Secretary's rules*
>
> (2) The Secretary may, by legislative instrument, make Secretary's rules prescribing matters:
>
> (a) required or permitted by this Act to be prescribed by the Secretary's rules; or
>
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

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

> As a general rule, where there are 2 instrument-making powers, only one of those powers should contain a power to prescribe necessary or convenient matters. Consequently, 2 rule-making powers would take the following form:
>
> (1) The [*maker e.g. Minister*] may, by legislative instrument, make [*name of legislative instrument*] prescribing matters:
>
> (a) required or permitted by this [*Act/Ordinance*] to be prescribed by the [*name of legislative instrument*]; or
>
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this [*Act/Ordinance*].
>
> (2) The [*maker e.g. Secretary*] may, by legislative instrument, make [*name of legislative instrument*] prescribing matters required or permitted by this Act to be prescribed by the [*name of legislative instrument*].

1 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

> 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 therefore concluded its examination of this aspect of the instrument (*Delegated legislation Monitor* No. 12 of 2014)].**

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).[2] 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.
>
> 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 thanked the minister for his response, made the following comments, and requested his response to the matters outlined below (*Delegated legislation monitor* No. 12 of 2014)].

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.**

---

2 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

MINISTER'S RESPONSE:

The Minister for Agriculture advised that the *Farm Household Support Act 2014* would be amended 'as the opportunity arises' to specifically exclude the delegation of the secretary's general rule-making power.

COMMITTEE RESPONSE:

The committee thanks the minister for his response and undertaking to amend the *Farm Household Support Act 2014*.

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

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

ATTORNEY-GENERAL

CANBERRA

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
PO Box 6100
Parliament House
CANBERRA ACT 2600

22 SEP 2014

Dear Chair John.

I refer to the Committee's letter of 28 August 2014 and request in the *Delegated legislation monitor* No. 10 of 2014, for further information about what consultation was undertaken for the Family Law (Bilateral Arrangements – Intercountry Adoption) Amendment (2014 Measures No.2) Regulation 2014, and an updated Explanatory Statement.

The purpose of the regulation is to clarify the operation of the Family Law (Bilateral Arrangements – Intercountry Adoption) Amendment (2014 Measures No.1) Regulation 2014, which commenced on 4 March 2014, and provides for automatic recognition of overseas adoption orders issued in Taiwan, South Korea and Ethiopia. The regulation was intended to recognise such orders made both prior to and after its commencement.

The purpose of the regulation referred to in the Committee's letter is to clarify the retrospective operation of the earlier amendments.

My Department consulted with all state and territory central authorities responsible for the delivery of intercountry adoption services in Australia prior to the amendments that commenced on 4 March 2014. Given that the purpose of the regulation is to clarify those amendments and the perceived need for clarification was raised by one jurisdiction, limited further consultation was undertaken with only that jurisdiction.

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

I enclose an updated Explanatory Statement which includes the advice about consultation on the regulation that I have provided in this letter.

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7300 Facsimile: (02) 6273 4102

The responsible advisor in my Office is Dr Susan Cochrane, who can be contacted on (02) 6277 7300.

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

Encl: Updated Explanatory Statement – Family Law (Bilateral Arrangements-Intercountry Adoption) Amendment (2014 Measures No. 2) Regulation 2014 [F2014L00857]

Cc: regords.sen@aph.gov.au

EXPLANATORY STATEMENT

Select Legislative Instrument 2014 No.

Issued by the authority of the Attorney-General

Family Law Act 1975

Family Law (Bilateral Arrangements—Intercountry Adoption) Amendment (2014 Measures No. 2) Regulation 2014

Subsection 125(1) of the *Family Law Act 1975* (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that the Act requires or permits to be prescribed or are necessary or convenient to be prescribed for carrying out and giving effect to the Act. Subsection 111C(3) of the Act permits regulations to be made to make provision as is necessary or convenient to give effect to any bilateral agreement or arrangement on the adoption of children made between Australia, or a state or territory, and a prescribed overseas jurisdiction.

The purpose of the Regulation is to amend the Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998 (the Principal Regulations) to clarify its operation. The Regulation clarifies that adoptions of children through Australia's intercountry adoption programs with Taiwan, the Republic of Korea (South Korea) and the Federal Democratic Republic of Ethiopia (Ethiopia) are recognised for the purpose of Commonwealth, state and territory laws whether the adoption took effect in the overseas jurisdiction before or after the overseas jurisdiction was prescribed. The Regulation also clarifies that adoptions that have been already recognised by an Australian court will not be recognised by the Principal Regulations, as the adoption is already recognised and given effect under Commonwealth, state and territory laws.

The Commonwealth Government has committed to delivering reform on intercountry adoption, including streamlining adoption processes. As a result of amendments to the Principal Regulations that commenced on 4 March 2014 (the Family Law (Bilateral Arrangements – Intercountry Adoption) Amendment (2014 Measures No.1) Regulation 2014), the intercountry adoptions of children from Taiwan, South Korea and Ethiopia are automatically recognised under Commonwealth, state and territory laws, removing the need for families to finalise their adoptions through a state or territory court. The Regulation amends subregulation 5(1) to clarify that the intercountry adoptions recognised include those that took place in an overseas jurisdiction prior to or after it was prescribed, where the adoption has not been already recognised by an Australian court. Recognition by an Australian court involves either: the court recognising the adoption order issued by the overseas country as valid; or the court issuing a state or territory adoption order, naming the same child/ren as in the adoption order issued by the overseas country.

The Regulation achieves this by: clarifying that adoptions recognised under the Principal Regulations include those that took place in an overseas jurisdiction before and after the overseas jurisdiction was prescribed, provided that all of the requirements outlined in subregulation 5(1) are met; and inserting a new requirement in subregulation 5(1), which requires that the adoption must not have been already recognised by an Australian court.

The Attorney-General's Department consulted with all state and territory central authorities responsible for the delivery of intercountry adoption services in Australia prior to the amendments to the Principal Regulations that commenced on 4 March 2014. Given that the purpose of the

Regulation is to clarify those amendments and the perceived need for clarification was raised by one jurisdiction, limited further consultation was undertaken with only that jurisdiction.

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

The Regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

This Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation will commence on the day after it is registered.

Authority: Subsection 125(1) of the *Family Law Act 1975*.

Statement of Compatibility with Human Rights

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

Family Law (Bilateral Arrangements—Intercountry Adoption) Amendment (2014 Measures No. 2) Regulation 2014

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Regulation

The Regulation amends the *Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 1998* (the Principal Regulations) to clarify that intercountry adoptions taking place in an overseas jurisdiction prior to its being prescribed are automatically recognised where the adoption has not been already recognised by an Australian court.

Human rights implications

The Regulation has a positive impact on those rights concerned with upholding the best interests of the child as the paramount consideration and the protection of the institution of family, as outlined in the *Convention on the Rights of Child* and the *International Covenant on Civil and Political Rights*.

The amendments do not limit any human rights, and do not establish any new offences or penalties.

Conclusion

This Regulation is compatible with human rights. It does not raise any human rights issues.

Attorney-General Senator the Hon George Brandis QC

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

25 SEP 2014

PDR ID: MC14-003167

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

Dear Senator ~~Williams~~ John

Thank you for your letter dated 4 September 2014 regarding legislative instrument CASA 170/14 - Direction — number of cabin attendants (National Jet Systems) made under regulation 208 of the Civil Aviation Regulations 1988.

I noted the Committee's concerns regarding the timetable for any proposed amendments to remove the need for this type of individual legislative instrument being issued to regular public transport (RPT) operators.

On 3 June 2014 I tabled in Parliament the independent Aviation Safety Regulation Review Report (the Report) which investigated the structures, effectiveness and processes of all agencies involved in aviation safety in Australia, including ensuring that aviation has an appropriate safety regulatory framework.

I can confirm the Government is carefully considering the 37 recommendations and other matters arising out of the Report. I expect to table the Government's response before the end of the year.

Therefore the timetable for making any amendments to the types of legislative instrument to which the Committee refers will be driven by the Government's response to the Review Report and the Government's response to the report of the House of Representatives Standing Committee on Infrastructure and Communications into cabin crew ratios on Australian aircraft. This latter response did not occur under the previous Government and so is now a matter for consideration by this Government.

It is important that the individual directions currently issued to ten RPT operators to allow for certain aircraft to operate with the 1:50 cabin crew to passenger ratio be allowed to continue to operate until the Government tables its responses to these Reports.

Suite MG 41, Parliament House
CANBERRA ACT 2600
Phone: 02 6277 7680
Fax: 02 6273 4163

The Civil Aviation Safety Authority (CASA) would then be able to proceed with any proposed amendments to current arrangements in accordance with the Government's legislation programme in 2015-16.

In relation to the proposed amendments, I am advised that this may involve changes to Civil Aviation Order 20.16.3, and aligning this to proposed Part 91 (General operating and flight rules) and Part 121 (air transport operators – large aeroplanes) of the Civil Aviation Safety Regulations 1998.

Thank you for raising this matter and I trust this will provide the Committee with the requested clarification relating to the current necessity for these legislative instruments.

Yours sincerely

WARREN TRUSS

The Hon. Barnaby Joyce MP

Minister for Agriculture
Federal Member for New England

Ref: MNMT2014-08113

Senator John Williams
Chair
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 25 September 2014 in relation to the Farm Household Support Secretary's Rule 2014 [F2014L00614] (the Secretary's Rule). The letter from the Committee sought a legislative amendment in relation to the secretary's general rule-making power under the *Farm Household Support Act 2014* (the Act), which are outlined in the Committee's *Delegated legislation monitor No.12* of 2014 (the Monitor).

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'

'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.'

I note the Committee has concluded its examination of this aspect of the instrument.

Issue: Potential delegation of general rule-making power

'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'.

I note the Committee has requested the Act be amended to specifically exclude the delegation of the secretary's general rule-making power.

In line with the Committee's request, I have instructed my department to pursue an amendment to the Act to achieve this outcome as the opportunity arises.

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7520 Facsimile: 02 6273 4120 Email: minister@maff.gov.au

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

Yours sincerely

Barnaby Joyce MP

30 SEP 2014