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Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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Membership of the committee

Current members

Senator Sean Edwards (Chair)	South Australia, LP
Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator the Hon Ron Boswell	Queensland, NAT
Senator Sam Dastyari	New South Wales, ALP
Senator Nova Peris OAM	Northern Territory, ALP
Senator Zed Seselja	Australian Capital Territory, LP

Secretariat

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

Committee legal adviser

Mr Stephen Argument

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600
Ph: 02 6277 3066
Email: regords.sen@aph.gov.au
Website:
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances

Contents

Membership of the committee ... *iii*

Introduction ... *xi*

Chapter 1 - New and continuing matters

Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125] ... 1

Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 [F2013L02102] (with reference to Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155 [F2013L02105]) ... 6

Financial Management and Accountability Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00160] ... 15

Financial Management and Accountability Amendment (2014 Measures No. 2) Regulation 2014 [F2014L00199] ... 18

Financial Management and Accountability Amendment (2014 Measures No. 3) Regulation 2014 [F2014L00284] ... 19

Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089] ... 20

Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286] ... 22

Migration Regulations 1994 - Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas - IMMI 14/009 [F2014L00327] ... 23

Parliamentary Service Amendment (Public Interest Disclosure and Other Matters) Determination 2014 [F2014L00368] ... 24

AASB 2013-9 - Amendments to Australian Accounting Standards - Conceptual Framework, Materiality and Financial Instruments - December 2013 [F2014L00370] ... 24

Anti-Money Laundering and Counter-Terrorism Financing (Iran Countermeasures) Regulation 2014 [F2014L00371] ... 25

Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2014 [F2014L00411] ... 26

Migration Amendment (Credit Card Surcharge) Regulation 2014 [F2014L00421] ... 27

Foreign Affairs and Trade (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00266] ... 28

Immigration and Border Protection (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00267] ... 28

Infrastructure and Regional Development (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00268] 28

Social Services (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00269] 28

Veterans' Affairs (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00270] 28

Employment (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00271] 29

Defence (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00273] 29

Spent and Redundant Instruments Repeal Regulation 2014 [F2014L00274] 29

Environment (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00275] 29

Education (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00276] 29

Health (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00277] 29

Finance (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00278] 29

Civil Aviation (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00279] 29

Chapter 2 - Concluded matters

Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Various Matters) Regulation 2013 [F2013L02135] 31

Amendment to the list of migratory species under section 209 of the Environment Protection and Biodiversity Conservation Act 1999 (26/11/2013) [F2013L02109] 33

Crimes Amendment (X-ray) Regulation 2013 [Select Legislative Instrument No. 199, 2013] [F2013L01448] 34

Australian Meat and Live-stock Industry (Beef Export to the USA-Quota Year 2014) Order 2013 [F2013L01966] 35

Australian Meat and Live-stock Industry (Sheepmeat and Goatmeat Export to the European Union—Quota Year 2014) Order 2013 [F2013L01965] 35

Environment Protection and Biodiversity Conservation Amendment (Fees for Wildlife Trade Permits) Regulation 2013 [Select Legislative Instrument No. 122, 2013] [F2013L01007] 36

Australian Sports Anti-Doping Authority Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 189, 2013] [F2013L01443] 37

Private Health Insurance (Health Benefits Fund Administration) Amendment Rule 2013 (No. 1) [F2013L01684] 38

Private Health Insurance (Council Administration Levy) Amendment Rules 2013 (No. 2) [F2013L01504] 39

Private Health Insurance (Prostheses) Amendment Rules 2013 (No. 4) [F2013L01839] 40

Customs Act 1901 - Specified Percentage of Total Factory Costs Determination No. 1 of 2013 [F2013L02198] 41

MRCA Treatment Principles (No. MRCC 53/2013) [F2013L02016] 43

CASA 158/13 - Direction - number of cabin attendants in Boeing 737-800 series aircraft, Qantas Airways Limited [F2013L01491] 44

Appendix 1 – Index of instruments scrutinised 59

Appendix 2 – Guideline on consultation 61

Appendix 3 - Correspondence 67

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 committee's terms of reference

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

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

Work of the committee

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

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

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.

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; related (non-confidential) correspondence is included at Appendix 3;
- Appendix 1 provides an index listing all instruments scrutinised in the period covered by the report;
- Appendix 2 contains the committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003*.
- Appendix 3 contains correspondence relating to concluded matters.

Acknowledgement

The committee wishes to acknowledge the cooperation of the ministers, instrument-makers and departments who assisted the committee with its consideration of the issues raised in this report.

Senator Sean Edwards

Chair

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

Chapter 1

New and continuing matters

This chapter lists new matters identified by the committee at its meeting on **14 May 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.

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

Purpose	This instrument provides for exceptions under the *Australian Jobs Act 2013*, information required for compliance and notification, and further functions for the Australian Industry Participation Authority
Last day to disallow[1]	13 May 2014
Authorising legislation	*Australian Jobs Act 2013*
Department	Industry

Issue:

Prescribing of matters by 'legislative rules'

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

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

More generally, the committee notes that the making of regulations is subject to the drafting and approval requirements attached to the Office of Parliamentary Counsel and Executive Council, respectively. To the extent that these requirements may be taken as an additional layer of scrutiny in the prescribing of matters by regulation, it is not clear whether these requirements will also apply to legislative rules and, if not, what the ramifications may be for both the quality of, and level of scrutiny applied to, such instruments **[the committee requested further information from the minister].**

MINISTER'S RESPONSE:

Prescribing of matters by 'legislative rules'

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

COMMITTEE RESPONSE:

The committee thanks the minister for his response.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ramifications for the quality and scrutiny of legislative rules

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

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

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

The committee therefore requests the minister's advice on the matters outlined above, and on the particular questions set out below:

- **Regarding the FPC's advice that 'some types of provisions should be included in regulations and be drafted by OPC [without] strong justification for prescribing those provisions in another type of legislative instrument', in the event that such provisions are required for the Acts listed on page 3 above, how will the required measures be introduced in the absence of a regulation-making power?**
- **Will the drafting of complex and lengthy instruments by departments and agencies based on the general instrument-making power achieve the same levels of quality and accuracy as achieved by OPC in its drafting of regulations?**
- **What is the minister's understanding of the fundamental or original reason for requiring regulations to be drafted by OPC and made by the Governor-General? Do such requirements ensure higher standards in such instruments by mandating greater executive responsibility and scrutiny?**

Prescribing matters by legislative rules and the definition of 'prescribed' in the Acts Interpretation Act 1901

MINISTER'S RESPONSE:

Regarding the issue of the relationship between prescribing matters by legislative rules and the definition of 'prescribed' in section 2B of the *Acts Interpretation Act 1901*, the FPC's advice states that '[t]here is no legislative principle or practice that requires the word 'prescribe' to be used only in relation to regulations.' FPC advised that the definition of 'prescribed' is a 'facilitative' definition intended to assist in the shortening of Acts. FPC then stated that 'current legislative drafting practice is to rely on the definition sparingly (even for regulations) because the definition appears not to be widely known by users of legislation, it has no application to the making of instruments apart from regulations and can be uncertain in its application.'

COMMITTEE RESPONSE:

The committee thanks the minister for his response.

However, while this matter may not ultimately bear relevance to the important matters raised above, the committee considers that the advice of the FPC raises a number of issues potentially relevant to the committee's functions, and which require clarification.

The committee therefore seeks the minister's advice as to the following:

- **the specific meaning and import of the term 'facilitative definition', and the legal or policy considerations that guide the interpretation of specific definitions as being facilitative as opposed to, for example, restrictive;**
- **specific cases in which the definition is uncertain in its application; and**
- **specific cases which demonstrate that the definition is not widely known by identified classes of 'users of legislation', and the specific consequences of such cases.**

Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 [F2013L02102] (with reference to Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155 [F2013L02105])

Purpose	Amends the Migration Regulations 1994 to establish an enforceable code of behaviour for certain Bridging E (Class WE) visa holders (instrument F2013L02105 specifies the code of behaviour for applicants seeking to satisfy the criteria for the grant of a Subclass 050 Bridging (General) visa)
Last day to disallow	13 May 2014
Authorising legislation	Migration Regulations 1994
Department	Immigration and Border Protection

Background

Together, these two instruments establish and specify an enforceable code of behaviour as a visa condition for certain Bridging E (Class WE) visa (BVE) holders.

The first instrument (the regulation) provides that the minister must approve a code of behaviour (the code), compliance with which is made a condition of the BVE. The failure of a relevant visa holder to comply with the code enables the minister to cancel the visa. The consequence of cancellation is that the person 'will be returned to immigration detention and may be transferred to an offshore processing centre'. A person whose visa is cancelled in such circumstances is unable to apply for a further BVE.

The code of behaviour (the code) subsequently made under the authority of the regulation requires BVE holders to comply with the laws of Australia and prescribes certain behaviour, including that a BVE holder must not 'harass, intimidate or bully any other person or group of people or engage in anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other

members of the community [sic]'. The committee notes that the code is itself not disallowable. However, the committee notes that the content of the code has informed its assessment of the regulation for compliance with the committee's scrutiny principles.

Issue:

(a) Matters more appropriate for parliamentary enactment

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 are intended or would have the effect of bringing about 'radical changes in relationships or community attitudes'.[2]

It is noted that, while visa BVE holders do not enjoy the full rights of Australian citizens, such persons are equally subject to Australian law. However, the regulation appears to create potential for such persons to be subject to behavioural standards not applicable to Australian citizens. To this extent, there would appear to be a reasonable possibility that the application of such a code could have the effect of bringing about significant changes in the relationship of Australian citizens to BVE holders. Further, the application of the code to BVE holders could conceivably influence community attitudes if, for example, the community were to regard BVE holders as being subject to standards of behaviour other than might be countenanced or expected of fellow citizens. In light of these considerations, the committee considers there is a question as to whether the changes effected by this instrument are appropriate for inclusion in delegated legislation, and should instead be contained in primary legislation. **[the committee requested further information from the minister]**.

MINISTER'S RESPONSE:

> The committee has raised concerns about whether the legislative instrument contains matters more appropriate for parliamentary enactment. In particular, it has raised concerns that the regulation appears to create the potential for Bridging E (Class WE) visa (BVE) holders to be subjected to behavioural standards not applicable to Australian citizens and that the application of the Code of Behaviour (the Code) could have the effect of bringing about significant changes in the relationship of Australian citizens to BVE holders as being subject to standards of behavior other than might be countenanced or expected of fellow citizens.
>
> The wording contained within the Code was made into a legislative instrument to provide for greater flexibility in its contents and to allow me to respond and change its content where I consider it necessary. The

2 Senate Standing Committee on Regulations and Ordinances website, ' Application of the committee's scrutiny principles', http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/guidelines/principles, accessed 10 February 2013.

cancellation powers, prescribed grounds and visa condition framework that support the Code of Behaviour amendment already exist within the Migration Regulations 1994 (the Regulations).

Under the *Migration Act 1954* (the Act), unlawful non-citizens (i.e. non-citizens who do not hold a valid visa) are subject to mandatory detention. In general, IMAs (who, under the Act, are referred to as Unauthorised Maritime Arrivals) are barred by the Act from making a valid application for a visa. If I wish to grant a BVE to such non-citizens in detention, I must use my personal, non-delegable powers under section 195A of the Act where I think it is in the public interest to do so.

The grant of a BVE in these circumstances is not a right, and there is no right for such BVEs to be renewed where they expire. They are granted to non-citizens in the expectation that they will abide by the law, will respect the values important in Australian society, participate in resolving their status, and will not cause or threaten harm to individuals or groups in the Australian community. These considerations contribute to my judgement as to whether it is in the public interest to use my powers to allow these people to hold a BVE.

Since November 2011, BVEs have been granted to more than 20,000 IMAs in immigration detention, significantly increasing the numbers of BVE holders in the community and resulting in IMAs comprising the majority of BVE holders in Australia. I am of the view that it is reasonable to hold these non-citizens to a higher standard of behaviour than was previously the case, where I have granted them a BVE in the public interest. This is because, if not for my decision, these individuals would continue to be unlawful non-citizens subject to mandatory detention under the Act. They do not hold and have not been assessed as meeting the statutory criteria for grant of any substantive visa.

There are already other longstanding areas of migration legislation which apply constraints to non-citizens, which do not apply more broadly to members of the community, for example relating to study, work and reporting of address information. I consider it reasonable that these non-citizens, particularly persons who have not lived in the Australian community previously, are given clear guidance on our expectation of them and I maintain that if we are going to release or allow people to remain in the community from a range of backgrounds, language groups and cultures we should have a process in place that explains what is expected of them, and be prepared to remove them from the community if those expectations are not met.

The Code provides a mechanism for the education of BVE holders on behavioural expectations, the importance of following public health related directives made by my department and to encourage ongoing engagement and compliance with my department whilst their immigration status is being resolved. The Code also provides for early warning and preventative measures through education on behavioral expectations before more serious behavioural problems arise that could otherwise threaten the safety of the

> Australian community, something that was previously not available. In addition, the Code provides a mechanism to ensure the protection of the Australian community through visa cancellation and re-detention of a person who engages in certain types of behaviour generally not considered to be acceptable in the Australian community.
>
> There is no evidence that the Code is having an adverse impact on the treatment of BVE holders in the community, or that it will have an adverse impact in the future. I would be briefed accordingly should any such evidence be received by my department and I would consider any appropriate action at that time. There is evidence through media and public expression of concern over instances where BVE holders in the community might have posed a risk to the community or a member of the community.
>
> The Code provides a valuable form of reassurance to the community that risks associated with placing non-citizens in the community instead of in detention can be responded to expeditiously.

COMMITTEE RESPONSE:

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

Issue:

(b) Insufficiently defined power

As noted above, the regulation provides that the minister must approve a code of behaviour. However, the regulation provides no criteria for any such code, effectively establishing a broad power for executive regulation of the behaviour of relevant visa holders. This concern is informed by scrutiny of the code, which prescribes a number of potentially vague and subjective behaviours, such as behaviour which is 'anti-social', 'disruptive', 'inconsiderate' or 'disrespectful', or which 'threatens the peaceful enjoyment of other members of the community [sic]'. Given the serious consequences which may flow from a breach of the code, a question arises as to whether the regulation should provide specific criteria in relation to the content of any code approved by the minister **[the committee requested further information from the minister]**.

MINISTER'S RESPONSE:

> The committee raised concerns that the Code prescribes a number of potentially vague and subjective behaviours such as 'anti-social', 'disruptive', 'inconsiderate' or 'disrespectful' behaviour, or behaviour which 'threatens the peaceful enjoyment of other members of the community'. The committee questions whether, given the serious consequences which may flow from a breach of the Code, the specific criteria in relation to content of the Code should be provided for in the Regulations.
>
> The terms used in the Code such as 'anti-social', 'disruptive', 'inconsiderate' and 'disrespectful' are commonly used terms in the Australian community

and the supporting Code of Behaviour framework provides clear descriptions on the definition of these terms and how a breach of these elements would be assessed and a decision on a breach applied.

The existing visa condition framework within the Regulations also already contains subjective elements. For example, condition 8303 requires the holder must not become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group with the Australian community. Much decision making in relation to visas is based on subjective judgments relating to terms set out in the Regulations. The codified natural justice processes for visa decision making provide an opportunity for the visa holder to challenge and/ or respond to potentially adverse conclusions.

As noted in my media release after the BVE Regulation commenced, similar behaviour codes are currently enforced in held and community detention under the Act and it makes sense that a similar code he applied to those living in the community on a BVE whose status is also not yet determined.

Although the Regulations provide scope to cancel BVEs held by non-citizens where they were charged or convicted of a criminal offence, this does not adequately capture repeated anti-social activities that do not attract a charge or conviction, hut which interfere with the right of the community to peaceful enjoyment. Issues already emerging relate to, for example, intimidation and harassment of service provider staff members.

The Code now addresses such broader issues and focusses on such public safety issues as harassment, intimidation and bullying, as behaviours that may now invoke visa cancellation consideration.

As stated previously, the Code is both an enforceable tool providing a basis for visa cancellation and an educative tool for BVE holders to make behavioural expectations clear. The Code is not written in such a way as to regulate a BVE holder's legitimate freedom of expression and religion. It does, however, identify that certain types of behaviour could be viewed as harassment, intimidation or a form of bullying of other persons or groups of persons and are not considered to be tolerable in Australian society, and therefore could be seen as a breach of the Code. One of the important purposes of the Code is to provide the opportunity for early warning and for preventative measures to be taken in relation to less than criminaI matters, before more serious behavioural problems may arise. In that regard, I consider it reasonable that BVE holders are given clear guidance about the behaviours that are considered acceptable and reasonable in Australian society.

My department has put in place a number of processes to ensure that the Code is clearly understood prior to the need to sign the Code. For example, IMAs in held and community detention have been assisted by case managers and interpreters when signing the Code to ensure that they understand the Code and what it contains. Supporting information

explaining key terms used in the Code is being translated into twelve community languages and people in the community can seek support from my department to sign the Code where necessary. In addition, an initial information session has been held for IMA BVE holders who receive Community Assistance Support (CAS) services or Asylum Seeker Assistance Scheme (ASAS) services through the Adult Multicultural Education Services in Melbourne, with further information sessions planned for other locations.

Although the legislation provides a trigger for considering cancellation of the visa, the decision to cancel a bridging visa remains discretionary, allowing the decision maker to take into account the individual merits of a case. The discretionary cancellation process requires that a visa holder be notified if there appear to be grounds for cancellation and given particulars of those grounds and the information because of which the grounds appear to exist under the principle of natural justice. The visa holder must be provided with the opportunity to show that the grounds do not exist, or that there are other reasons why the visa should not be cancelled.

In addition, while the cancellation ground may be enlivened, there are a number of other responses that can be applied where a breach of the Code has occurred (or is alleged to have occurred), which can be tailored to suit individual circumstances and allow for flexible application. These responses include the use of counselling and warning letters for less serious matters, which are aimed at educating BVE holders further on the terms of the Code and reinforcing behavioural expectations.

COMMITTEE RESPONSE:

The committee thanks the minister for his detailed response.

However, the committee notes that the minister's department has prepared 'supporting information explaining key terms used in the Code'. Given the committee's concerns regarding the subjective nature of the terms used in the code, the committee requests from the minister a copy of any such supporting information.

The committee also requests the minister's advice as to whether departmental policy manuals and/or guidance material contain guidance for decision-makers on the application of key terms in decision-making, consistent with the supporting information provided to visa holders.

Issue:

(c) Exemption of instrument from disallowance

As noted above, the regulation provides that the minister must approve a code of behaviour for BVE holders. The code is to be made by instrument in writing. The authority for the making of such an instrument has been provided for by the addition of Part 4.1 to Schedule 4 of the migration regulations. Instruments made under this schedule are exempt from disallowance. Despite the apparently legislative character of

such an instrument, and the potentially significant consequences for individuals affected by the code, the committee notes that the ES contains no information on the exemption of the code from disallowance, including:

- the broader justification for the exemption of instruments made under Schedule 4;
- the extent to which any such justification applies to the code; and
- whether, taking into account the nature of the code, it is appropriate to exempt such an instrument from disallowance (and therefore remove it from the effective oversight of the Parliament).

[the committee requested further information from the minister].

MINISTER'S RESPONSE:

> The committee has noted that the Explanatory Statement contains no information on the exemption of the Code from disallowance. Under item 26 of section 44 of the Legislative Instruments Act 2003, legislative instruments under Part 1, 2, or 5 or Schedule 1, 2, 4, 5A, 6, 6A, or 8 of the Regulations made under the Act are not subject to disallowance. As the Code is made under Schedule 4 to the Regulations it is not subject to disallowance by operation of the Legislative Instruments Act 2003.

COMMITTEE RESPONSE:

The committee thanks the minister for his response. However, the committee notes that the minister's response did not address the issues raised. **The committee therefore requests further information from the minister regarding:**

- **the broader justification for the exemption of instruments made under Schedule 4;**
- **the extent to which any such justification applies to the code; and**
- **whether, taking into account the nature of the code, it is appropriate to exempt such an instrument from disallowance (and therefore remove it from the effective oversight of the Parliament).**

Issue:

(d) Retrospective effect of instrument

The application of the new visa criterion relating to the code of behaviour applies to applications for BVEs made, but not finally determined, before the commencement of the instrument (14 December 2013), as well as applications made on or after that day. This means that otherwise valid applications not determined at 14 December 2013 may, by virtue of the new criterion, now be invalid, giving the instrument an element of retrospectivity in its effect. The ES provides no justification for this apparent

removal of the entitlement in relation to current applications for BVEs **[the committee requested further information from the minister]**.

MINISTER'S RESPONSE:

> The committee raised concerns about the retrospective effect of the BVE Regulation and the Explanatory Statement's justification for the apparent removal of pre-existing entitlements in relation to applications for a BVE. In particular, the Committee noted that this Instrument introduced new visa criterion relating to the Code which has the effect of invalidating otherwise valid BVE applications not determined on the commencement date (14 December 2013).
>
> The BVE Regulation has no effect on the validity of otherwise valid applications. Under the migration legislation, a visa application is assessed against validity criteria and where that application is valid, against criteria that is to be met at the time of the visa application and at the time of the visa decision. This instrument introduces a new visa criterion related to the time of decision criteria only. Consistent with the government's policy intention to ensure that people who were granted a BVE as a result of the exercise of my powers under section 195A of the Act are held to a higher level of accountability, the new time of decision criterion requires certain persons being considered for the grant of a BVE to have signed a Code of Behaviour. This new criterion does not affect the validity of a BVE application. Any applications that were determined to be valid prior to the commencement of the Instrument remain valid after the commencement of the Instrument. The Explanatory Statement does not contain justifications about the apparent retrospectivity of the Instrument given it only affects decisions made after the date of the regulation.
>
> Under this amendment any person who has had a BVE cancelled for reason of failure to comply with condition 8564 or 8566, or where the visa was cancelled under a ground specified in 2.43(l)(p) or (q) is barred from applying for a further BVE.

COMMITTEE RESPONSE:

The committee thanks the minister for his response. However, the committee notes that its inquiry related to the retrospective effect of the instrument, as opposed to retrospectivity in the strict sense. Although the instrument is not strictly retrospective, the new criterion (signing the code) prescribes a rule for the future based on antecedent facts (that is, the existence of an earlier visa application). As a consequence, it appears that an otherwise valid application not determined at 14 December 2013 may now be subject to a new criterion (the code) at the time of the visa decision. The committee's usual approach to such cases is to regard them as being retrospective in effect, and to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)). **The committee therefore requests further information from the minister (as to the justification for this approach).**

Issue:

(e) Consultation

The ES for the regulation states that consultation was not undertaken because the changes were considered to be 'of a machinery nature as they add to the existing cancellation framework under the migration legislation'. Given the substantive effect and consequences which may arise from the application of a code of behaviour on BVE holders, the characterisation of the instrument as machinery in nature on this basis is open to question. This gives rise to a concern that the minister's determination that consultation was unnecessary or inappropriate in this case may not have taken account of, or provided appropriate opportunity for comment by, persons likely to be affected by the instrument. The committee notes that, while the ES states that 'continuing consultation on the draft code' was being undertaken, the ES for the code indicates that consultation was only undertaken internally and with other government departments and agencies, and did not involve consultation with persons likely to be affected by the instrument or with stakeholders more generally **[the committee requested further information from the minister]**.

MINISTER'S RESPONSE:

> The committee is concerned that my determination that consultation was unnecessary or inappropriate in this case may not have taken account of, or provided appropriate opportunity for comment by, persons likely to be affected by the instrument.
>
> Relevant government departments and the Australian Federal Police were consulted about the Code of Behaviour and where possible I have taken these agency's comments and concerns into account when crafting the content of the instruments. Contracted service providers are involved in ongoing consultation with my department with regards to the implementation process.
>
> The Code of Behaviour amendment reflects community concerns and the policy articulated by the government prior to the election. Ongoing media coverage continues to reflect the community's concerns to ensure IMA BVE holders arc given clear guidance on the behaviours expected of them and that government has enforceable powers to remove IMA BVE holders to immigration detention where these expectations are breached.
>
> Under the existing visa framework most temporary visa holders, including BVE holders, in Australia are subject to a variety of visa conditions set out in the Regulations. Many of these set out requirements that the visa holder must abide by or which set restrictions on what the visa holder is permitted to do while in Australia. As noted in my media release after the instruments commenced, similar behaviour codes are currently enforced in held and community detention and it makes sense that a similar code be applied to those living in the community whose status is also not yet determined.
>
> An IMA in detention can only be granted a BVE where I exercise my personal powers to grant a visa in the public interest. Given that I grant

these visas using my personal powers it is appropriate that I determine the conditions under which these people may live in the community. The grant of a visa in these circumstances is not a right, and is conferred on these non-citizens in the expectation that they will be law abiding, considerate, compliant, and will not cause or threaten harm to the Australian community. Without my intervention these non-citizens would remain in immigration detention and would return to immigration detention at the expiry of their BVEs.

When I announced the implementation of the Code on Friday 20 December 2013, I noted that an average of two IMAs had been charged with criminal offences every week since the election. Charges laid against IMAs at that time included murder, assault, acts of indecency, stalking, rape, shoplifting and drink-driving. As at 31 January 2014, 50 IMAs have had their BVEs cancelled and been re-detained, and 24 whose BVE had ceased have been re-detained following involvement in a criminal matter.

I consider it reasonable that non-citizens being released into the community on a BVE, particularly where they have not lived in the Australian community previously, are given clear guidance about the behaviours that are considered acceptable and reasonable in Australian society.

The Code is designed to support BVE holders whilst they live in the community by educating them in acceptable standards of behaviour. Information sessions have been held for IMA BVE holders who receive CAS services or ASAS services through the Adult Multicultural Education Services in Melbourne, with further information sessions planned for other locations. IMA BVE holders who are receiving support under the CAS and/or ASAS programmes are given orientation to Australian society by their service providers. The Code will reinforce information provided during these orientation sessions. The educative aspect of the Code is intended to assist people to understand the behaviour expected of them while they live lawfully in the community and to encourage cooperation with authorities while they are awaiting resolution of their visa status.

The Code of Behaviour amendment does not affect the capacity of all IMAs to choose not to sign the Code.

COMMITTEE RESPONSE:

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

Financial Management and Accountability Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00160]

Purpose	Amends the Financial Management and Accountability Regulations 1997 to add two items to Schedule 1AB to establish legislative authority for certain spending activities in the Department of Education and the Department of Employment
Last day to disallow	16 June 2014
Authorising legislation	*Financial Management and Accountability Act 1997*
Department	Finance

Background:

In March 2014, the committee received a letter from the President of the Senate and Chair of the Senate Standing Committee on Appropriations and Staffing (Appropriations and Staffing Committee), Senator the Hon. John Hogg.[3] As Chair of the Appropriations and Staffing Committee, the President requested that the committee monitor executive expenditure made by regulation under the *Financial Framework Legislation Amendment Act (No 3) 2012* (Financial Framework Amendment Act), and report on such expenditure to the Senate.

The President noted that it is a fundamental role of Parliament to approve appropriations and authorise revenue and expenditure proposals. The committee notes that section 83 of the Constitution provides that no money shall be drawn from consolidated revenue 'except under appropriation made by law'. Under section 53 of the Constitution, the Senate may not amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. However, an appropriation bill not for the ordinary annual services of the government may be directly amended by the Senate. Section 54 of the Constitution provides that an appropriation bill for ordinary annual services must contain only those appropriations.

The committee notes that, in June 2010, the Senate reaffirmed its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. The resolution stated, amongst other things, that appropriations for expenditure on new policies not previously authorised by special legislation are not appropriations for the ordinary annual services of the government, and that proposed laws for the appropriation of revenue or moneys for expenditure on matters such as new expenditure shall be

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3 Correspondence from the President of the Senate and Chair of the Senate Standing Committee on Appropriations and Staffing, Senator the Hon. John Hogg, to the Standing Committee on Regulations and Ordinances, 17 March 2014. See Appendix 1.

presented to the Senate in a separate appropriation bill subject to amendment by the Senate.[4]

The importance of adequate parliamentary control of executive government was a key theme of the High Court's judgment in *Williams v Commonwealth* (2012) 248 CLR 156. The decision cast doubt on the validity of government expenditure involving direct payments to persons other than a state or territory, the only authority for which was the appropriation acts. In response to the High Court decision, the Financial Framework Amendment Act added section 32B to the *Financial Management and Accountability Act 1997*. Section 32B established a regulation-making mechanism whereby the executive can authorise expenditure on programs by amending Schedule 1AB of the Financial Management and Accountability (FMA) Regulations, rather than including those matters in primary legislation.[5]

In light of the above considerations, the President drew the committee's attention to the need to monitor a deficiency in the process of scrutinising items of expenditure which appear to have been inappropriately classified as the ordinary annual services of the government. The President noted that previously, such items were drawn to the attention of the Appropriations and Staffing Committee, and to legislation committees examining estimates of expenditure, and a list of such items was also drawn to the attention of the Minister for Finance. However, since the passage of the Financial Framework Amendment Act, items that previously may have been inappropriately classified as ordinary annual services of the government may now be included in FMA Regulations without direct parliamentary approval. The President pointed out that the authorising of expenditure in this way has effectively reduced the scope of the Senate's scrutiny of government expenditure, and therefore proposed that the committee's scrutiny of legislative instruments specifically include an assessment of the nature of executive expenditure (in accordance with the committee's scrutiny principle (d)).

Issue:

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

Scrutiny principle (d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary

4 The complete resolution is contained in *Journals of the Senate*, No. 127—22 June 2010, pp 3642-3643.

5 Schedule 1AB was added to the Financial Management and Accountability (FMA) Regulations on 20 December 2013 by the FMA Amendment (2013 Measures No. 1) Regulation 2013. Prior to this, section 32B of the FMA Act authorised arrangements, grants and programs to be listed in Schedule 1AA of the FMA Regulations. See Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089], explanatory statement, pp 1–2.

enactment (that is, matters that should be enacted via principal rather than delegated legislation).

Financial Management and Accountability Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00160] adds two items to Schedule 1AB to establish legislative authority for spending activities related to two programs in the Department of Employment and the Department of Education respectively. The first item allocates $6.9 million over three years to the Tasmanian Jobs program to establish a 'wage subsidy pilot for Tasmanian job seekers'.[6] The second item allocates $2.0 million over two years to the Students First—Agriculture in Education program to develop resources to help teachers better understand food and fibre production.[7]

In the committee's view, both items appear to be expenditure not previously authorised by legislation. The committee considers that, prior to the enactment of the Financial Framework Amendment Act, both items should properly have been contained within an appropriation bill not for the ordinary annual services of the government, and subject to direct amendment by the Senate. The committee will draw this matter to the attention of the relevant portfolio committee.

The committee therefore draws the attention of the Senate to the expenditure authorised by this instrument relating to the Tasmanian Jobs program and the Students First—Agriculture in Education program.

Financial Management and Accountability Amendment (2014 Measures No. 2) Regulation 2014 [F2014L00199]

Purpose	Amends the Financial Management and Accountability Regulations 1997 to add two items to Schedule 1AB to establish legislative authority for certain spending activities in the Department of Agriculture and the Department of Foreign Affairs and Trade
Last day to disallow	17 June 2014
Authorising legislation	*Financial Management and Accountability Act 1997*
Department	Finance

6 *Mid-Year Economic and Fiscal Outlook 2013-14,* Appendix A: Policy decisions taken since the 2013-14 Budget, Tasmanian Jobs programme — pilot, p. 139.

7 *Mid-Year Economic and Fiscal Outlook 2013-14,* Appendix A: Policy decisions taken since the 2013-14 Budget, Students First — Agriculture in Education, p. 132.

Background:

The committee has previously determined to examine certain regulations made under the *Financial Management and Accountability Act 1997*, on the basis of concerns regarding the potential erosion of the Senate's constitutional rights with respect to the authorising of expenditure.[8]

Issue:

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

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

Financial Management and Accountability Amendment (2014 Measures No. 2) Regulation 2014 [F2014L00199] adds two items to Schedule 1AB to establish legislative authority for spending activities related to two programs in the Department of Agriculture and the Department of Foreign Affairs and Trade respectively. The second item allocates $100.0 million over five years to establish a New Colombo Plan, an Australian undergraduate study and internship program aimed at lifting knowledge of Asia and the Pacific in Australia.[9]

In the committee's view, this item appears to be expenditure not previously authorised by legislation. The committee considers that, prior to the enactment of the Financial Framework Amendment Act, the New Colombo Plan should properly have been contained within an appropriation bill not for the ordinary annual services of government, and subject to direct amendment by the Senate. The committee will draw this matter to the attention of the relevant portfolio committee.

The committee therefore draws the attention of the Senate to the expenditure authorised by this instrument relating to the New Colombo Plan.

8 For background to this issue, see above, pp 16–17.

9 *Mid-Year Economic and Fiscal Outlook 2013-14*, Appendix A: Policy decisions taken since the 2013-14 Budget, The New Colombo Plan, p. 151.

Financial Management and Accountability Amendment (2014 Measures No. 3) Regulation 2014 [F2014L00284]

Purpose	Amends the Financial Management and Accountability Regulations 1997 to add an item to Schedule 1AB to establish legislative authority for a spending activity in the Department of Education
Last day to disallow	7 July 2014
Authorising legislation	*Financial Management and Accountability Act 1997*
Department	Finance

Background:

The committee has previously determined to examine certain regulations made under the *Financial Management and Accountability Act 1997*, on the basis of concerns regarding the potential erosion of the Senate's constitutional rights with respect to the authorising of expenditure.[10]

Issue:

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

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

Financial Management and Accountability Amendment (2014 Measures No. 3) Regulation 2014 [F2014L00284] adds an item to Schedule 1AB to establish legislative authority for spending activity related to a program in the Department of Education. The item allocates $15 million over four years to establish the Australia–Indonesia Centre at Monash University to 'strengthen and deepen Australia–Indonesia business, cultural, educational, research and community links, as well as promote a greater understanding of contemporary Indonesia'.[11]

In the committee's view, this item appears to be expenditure not previously authorised by legislation. The committee considers that, prior to the enactment of the Financial Framework Amendment Act, the Australia–Indonesia Centre should properly have

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10 For background to this issue, see above, pp 16–17.

11 Financial Management and Accountability Amendment (2013 Measures No. 3) Regulation 2013 [F2013L00284], explanatory statement; see also *Mid-Year Economic and Fiscal Outlook 2013-14*, Appendix A: Policy decisions taken since the 2013-14 Budget, Australia–Indonesia Centre — establishment, p.127.

been contained within an appropriation bill not for the ordinary annual services of government, and subject to direct amendment by the Senate. The committee will draw this matter to the attention of the relevant portfolio committee.

The committee therefore draws the attention of the Senate to the expenditure authorised by this instrument relating to the Australia–Indonesia Centre.

Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089][12]

Purpose	Amends the Financial Management and Accountability Regulations 1997 to add the Australian Aged Care Quality Agency as a prescribed agency in Schedule 1, insert a new Schedule 1AB to establish legislative authority for new or significantly changed spending activities for the purposes of section 32B and establish legislative authority for certain spending activities in the Departments of Agriculture, Communications and the Prime Minister and Cabinet
Last day to disallow	13 May 2014
Authorising legislation	*Financial Management and Accountability Act 1997*
Department	Finance

Background:

The committee has previously determined to examine certain regulations made under the *Financial Management and Accountability Act 1997*, on the basis of concerns regarding the potential erosion of the Senate's constitutional rights with respect to the authorising of expenditure.[13]

Issue:

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

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

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12 This instrument was previously considered in *Monitor 1 of 2014*, p. 5, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor.

13 For background to this issue, see above, pp 16–17.

Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089] adds six items to Schedule 1AB to establish legislative authority for spending activity related to programs in the Department of Communications, the Department of Agriculture (two items), and the Department of the Prime Minister and Cabinet (three items) respectively. The first item involves one-off grant payments under the Digital Productivity—Telehealth Trial with Townsville-Mackay Medicare Local. The second item allocates $10 million over ten years to the Red Meat and Cattle sector—International Co-operation and Investment Programme. Item 3 makes provision for ad hoc expenditure related to the 'Support for national expositions relating to primary industry [such as Beef Australia]'. Item 4 allocates $5 million for the design phase of the Empowered Communities initiative, including $1.5 million to Jawun Indigenous Corporate Partnerships. Item 5 allocates an unspecified amount to Better Employment Outcomes for Indigenous Australians. Item 6 allocates an unspecified amount to the Remote School Attendance Strategy.

In the committee's view, the items appear to be expenditure not previously authorised by legislation. The committee considers that, prior to the enactment of the Financial Framework Amendment Act, the six items noted above should properly have been contained within an appropriation bill not for the ordinary annual services of government, and subject to direct amendment by the Senate. The committee will draw these matters to the attention of the relevant portfolio committee.

The committee therefore draws the attention of the Senate to the expenditure authorised by this instrument relating to the Digital Productivity—Telehealth Trial with Townsville-Mackay Medicare Local, the Red Meat and Cattle sector—International Co-operation and Investment Programme, the Support for national expositions relating to primary industry, the Empowered Communities initiative, the Better Employment Outcomes for Indigenous Australians, and the Remote School Attendance Strategy.

Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286]

Purpose	Amends the Migration Regulations 1994 requirements relating to public interest criterion 4020, English requirements for applicants of the Subclass 457 (Temporary Work (Skilled)) visa, requirements in Part 202 of Schedule 2 and provisions dealing with disclosure of information under regulation 5.34F
Last day to disallow	26 June 2014
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection

Issue:

Retrospective effect of instrument

Schedules 2 and 5 of this instrument add new criteria to the Subclass 202 and Subclass 457 visas, respectively. Under Schedule 6 of the instrument, the amendments made by the schedules apply to applications for the relevant visas made, but not finally determined, before the commencement of the instrument (22 March 2014), as well as applications made on or after that day. This means that otherwise valid applications not determined at 22 March 2014 are, by virtue of the new criteria, now invalid, giving the instrument an element of retrospectivity in its effect. The ES provides no justification for this apparent removal of the entitlement in relation to current applications for the visas in question.

Similarly, the amendments made by Schedules 1 and 3 make amendments in relation to Public Interest Criterion (PIC) 4020 and the application of PIC 4020, to introduce ‘a specific identity requirement’ in relation to the grant of certain visas. Again, the amendments made by the schedules apply to applications for the relevant visas made, but not finally determined, before the commencement of the instrument (22 March 2014), as well as applications made on or after that day. This means that otherwise valid applications not determined at 22 March 2014 are, by virtue of the new requirements, now invalid, giving the instrument an element of retrospectivity in its effect. Again, the ES provides no justification for this apparent removal of the entitlement in relation to current applications for the visas in question. **The committee therefore seeks further information from the minister.**

Migration Regulations 1994 - Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas - IMMI 14/009 [F2014L00327]

Purpose	Specifies the tests that can be undertaken; the required scores for each of the tests; the period in which the test must have been undertaken; an annual salary at a base rate of pay which is equal to, or greater than, the applicable base salary and the classes of applicants who are 'exempt applicants'
Last day to disallow	7 July 2014
Authorising legislation	Migration Regulations 1994
Department	Immigration and Border Protection

Issue:

No information regarding consultation

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

Parliamentary Service Amendment (Public Interest Disclosure and Other Matters) Determination 2014 [F2014L00368]

Purpose	Amends the Parliamentary Service Determination 2013 to give effect to provisions of the *Public Interest Disclosure (Consequential Amendments) Act 2013*
Last day to disallow	14 July 2014
Authorising legislation	*Parliamentary Service Act 1999*
Department	Prime Minister and Cabinet

Issue:

Retrospectivity

This instrument makes a number of amendments to the Parliamentary Service Determination 2013. Schedules 2 and 3 of the instrument contain amendments relating to public interest disclosures and the consequential change arising from the commencement of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*. These schedules commence retrospectively on 15 January 2014 and 12 March 2014, respectively. Subsection 12(2) of the *Legislative Instruments Act 2003* 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 further information from the President of the Senate.**

AASB 2013-9 - Amendments to Australian Accounting Standards – Conceptual Framework, Materiality and Financial Instruments - December 2013 [F2014L00370]

Purpose	Amends numerous instruments as a consequence of the issue of Accounting Framework AASB CF 2013 1
Last day to disallow	14 July 2014
Authorising legislation	*Corporations Act 2001*
Department	Treasury

Issue:

Retrospectivity

This instrument is dated 13 December 2013, and amends a number of instruments as a consequence of previous amendments to the Australian Accounting Standards Board's (AASB) Framework for the Preparation and Presentation of Financial Statements. The preface to the instrument notes that Part A applies to annual reporting periods ending on or after 20 December 2013, and that the amendments made by Part A may be applied to periods beginning on or after 1 January 2005 but ending before 20 December 2013. Subsection 12(2) of the *Legislative Instruments Act 2003* 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 explanatory statements explicitly address the question of whether an instrument with retrospective effect would disadvantage any person other than the Commonwealth. **The committee therefore seeks further information from the minister.**

Anti-Money Laundering and Counter-Terrorism Financing (Iran Countermeasures) Regulation 2014 [F2014L00371]

Purpose	Regulates the entering into of transactions with residents of a prescribed foreign country
Last day to disallow	14 July 2014
Authorising legislation	*Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
Department	Attorney-General's

Issue:

No information regarding consultation

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

Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2014 [F2014L00411]

Purpose	Amends the Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) List 2012 to give effect to the decision of the Foreign Minister to remove 26 individuals from the list of those subject to Australia's autonomous sanctions in relation to Zimbabwe
Last day to disallow	14 July 2014
Authorising legislation	Autonomous Sanctions Regulations 2011
Department	Foreign Affairs and Trade

Issue:

(a) Drafting

Section 3 of this instrument states that Schedule 1 instrument amends the Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) List 2012. However, Schedule 1 of the instrument contains no amendment instruction to indicate how it amends the principal instrument. While it appears clear that the intention is that Schedule 1 of this instrument is intended to replace Schedule 1 of the principal instrument, the committee understands that standard drafting practice would be to include an amending instruction to expressly indicate this. **The committee therefore draws this matter to the attention of the minister.**

Issue:

(b) Insufficient description provided regarding consultation

Regarding consultation, the ES for this instrument states:

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

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

Migration Amendment (Credit Card Surcharge) Regulation 2014 [F2014L00421]

Purpose	Amends the Migration Regulations 1994 to allow the department to recover the cost of certain administrative fees, by charging a credit card surcharge on applicants who pay an instalment, or part of an instalment, of their visa application charge with a credit card
Last day to disallow	14 July 2014
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection

Issue:

(a) Drafting

Item 2 of Schedule 1 of this instrument inserts a new regulation 5.43 into the Migration Regulations 1994, at the end of Division 5.7 of Part 5. The committee notes that there appears to be a current regulation 5.43 in the Migration Regulations, at the beginning of Division 5.8 of Part 5. As a consequence, there are now two regulations numbered 5.43 in the regulations, and the committee notes that the existence of two regulations with the same number could impact on the clarity and useability of the

regulations. **The committee therefore draws this matter to the attention of the minister.**

Issue:

(b) Subdelegation of legislative power

New regulation 5.43 creates a liability for visa applicants to pay a credit card surcharge for visa applications. New subregulation 5.43(4) provides that the minister may specify, in a legislative instrument, circumstances in which the credit card surcharge (a) must be waived, (b) may be waived, (c) must be refunded or (d) may be refunded.

The committee notes that section 504 of the *Migration Act 1958* delegates to the Governor-General the Parliament's power to make regulations under the Act. Paragraph 504(1)(a) provides a specific power to make regulations in relation to the charging of fees, and paragraph 504(1)(b) provides a specific power to make regulations providing for the remission, refund or waiver of specified fees (or for exempting persons from the payment of such fees). In new regulation 5.43 the Governor-General has provided for the imposition of a credit card surcharge. In new subregulation 5.43(4), however, the Governor-General subdelegates to the minister the power (in effect) to determine circumstances in which the credit card surcharge will not apply. In the committee's view, there is a question as to whether this goes to the heart of the power to impose the credit card surcharge (and so offends the rule against subdelegation).

The committee notes that, while subdelegation can be authorised by an empowering Act, there does not appear to be any power in the Migration Act to subdelegate as in the his case. **The committee therefore seeks further information from the minister.**

Foreign Affairs and Trade (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00266]

Immigration and Border Protection (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00267]

Infrastructure and Regional Development (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00268]

Social Services (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00269]

Veterans' Affairs (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00270]

Employment (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00271]

Defence (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00273]

Spent and Redundant Instruments Repeal Regulation 2014 [F2014L00274]

Environment (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00275]

Education (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00276]

Health (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00277]

Finance (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00278]

Civil Aviation (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00279]

Issue:

Mass repeal of redundant instruments under the Legislative Instruments Act 2003

The 11 instruments listed above repeal 156, 270, 774, 287, 336, 118, 1,103, 220, 866, 61, 1192, 1168 and 3327 instruments respectively that are either spent or not otherwise required. They include amending and repealing instruments and commencement instruments that have no further effect, because they have fulfilled their purpose. Mass repeal of such instruments was enabled by amendments to the *Legislative Instruments Act 2003* in 2012. **The committee therefore draws the attention of the Senate to the mass repeal of redundant legislative instruments.**

Multiple instruments identified in Appendix 1

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

Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.[14]

14 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 **14 May 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 3.

Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Various Matters) Regulation 2013 [F2013L02135]

Purpose	Amends the Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995 to require licence records relating to the import, export or manufacture of ozone depleting substances or synthetic greenhouse gas to be kept at the licensee's principal place of residence, align the fit and proper person test in the principal regulations with the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*, establish a framework for issuing and administering infringement notices under the principal regulations, and insert a reference to the Exemption List for Non-Quarantine and Pre-Shipment Applications of Methyl Bromide for 2014
Last day to disallow[1]	15 May 2014
Authorising legislation	*Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*
Department	Environment

Issue:

Insufficient information regarding infringement notice regime

This instrument makes a number of amendments to the Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995, including to establish a framework for issuing and administering infringement notices under the regulations. The ES states that new regulation 911 provides that payment of an infringement notice discharges all liability for an alleged contravention. However, it goes on to state that

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

'payment does not discharge liability if the notice is subsequently withdrawn and the penalty amount refunded'. Regulation 911 states that in such cases the person may be prosecuted in a court in relation to the alleged contravention. The committee considers that the ability for a notice to be withdrawn and for prosecution to proceed following payment of a penalty amount raises a question of double jeopardy, to the extent that the payment of a fine would normally finalise matters. While there may be a regulatory justification for this element of the infringement notice scheme, the ES does not provide any information as to the need for this provision **[the committee requested further information from the minister]**.

MINISTER'S RESPONSE:

The Minister for the Environment advised that subregulation 911(1):

> …sets out the effect of payment of an infringement notice namely, that its payment discharges all liability for the alleged contravention, without constituting an admission of fault. This is appropriate for an administrative remedy that may be discharged without abjudication [sic] by the courts. However, subregulation 911(2) of the Regulations provides that subregulation 911(1) does not apply if the notice is subsequently withdrawn pursuant to subregulation 910(2) of the regulations.

The minister further advised that Regulations 910 and 911 are consistent with the Attorney-General's *A Guide to Framing Commonwealth Offence, Infringement Notice and Enforcement Powers* (the Guide) that allow infringement notices to be withdrawn for a variety of reasons. The minister noted:

> Subregulation 910(3) of the Regulations sets out the factors the Secretary may consider when deciding whether or not to withdraw an infringement notice. These include whether a court has previously imposed a penalty on the person for a contravention of an infringement notice provision, the circumstances of the alleged contravention, whether the person has paid an earlier infringement notice penalty relating to the same, or substantially the same, conduct, and any other matter that the secretary considers relevant.

COMMITTEE RESPONSE:

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

Amendment to the list of migratory species under section 209 of the Environment Protection and Biodiversity Conservation Act 1999 (26/11/2013) [F2013L02109]

Purpose	Amends the List of Migratory Species (13/07/2000) by deleting 82 species from the migratory list
Last day to disallow	15 May 2014
Authorising legislation	*Environment Protection and Biodiversity Conservation Act 1999*
Department	Environment

Issue:

No information regarding consultation

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

MINISTER'S RESPONSE:

The Minister for the Environment advised that the department had undertaken 'targeted consultation with Birdlife Australia, avian expert Professor Stephen Garnett of Charles Darwin University and migratory shorebird researcher Dr Danny Rogers of the Arthur Rylah Institute'. The minister stated that 'the amendments were strongly supported as these species do not meet the migratory species listing criteria'.

The minister noted that the ES had been amended to include the information provided.

COMMITTEE RESPONSE:

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

Crimes Amendment (X-ray) Regulation 2013 [Select Legislative Instrument No. 199, 2013] [F2013L01448]

Purpose	Amends the principal regulations to remove the reference to wrist X-rays to accord with current practice in procedures for determining whether people smuggling crew are minors
Last day to disallow	4 March 2014
Authorising legislation	*Crimes Act 1914*
Department	Attorney-General's

Issue:

No information regarding consultation

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

MINISTER'S RESPONSE:

The Minister for Justice advised that consultation on this regulation was considered unnecessary because it is unlikely to impact on business or restrict competition. However, the minister noted that the use of X-rays in the context of age determination has been considered in a series of public inquiries including:

- the Senate Legal and Constitutional Affairs References Committee report into the Detention of Indonesian minors in Australia;
- the Senate Legal and Constitutional Affairs Legislation Committee report into the Crimes Amendment (Fairness of Minors) Bill 2011; and
- the Australian Human Rights Commission (AHRC) Inquiry into the treatment of individuals suspected of people smuggling offences who say they are children.

The minister also noted that the content of the regulation was discussed in the context of the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the

Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill 2013.

The minister also advised that he had been informed that the regulation implements part of Recommendation 1 of the Senate Legal and Constitutional Affairs References Committee report, and Recommendations 5 and 6 of the AHRC's report.

COMMITTEE RESPONSE:

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

Australian Meat and Live-stock Industry (Beef Export to the USA-Quota Year 2014) Order 2013 [F2013L01966]

Australian Meat and Live-stock Industry (Sheepmeat and Goatmeat Export to the European Union—Quota Year 2014) Order 2013 [F2013L01965]

Purpose	These instruments set the conditions and amount under which beef, sheepmeat and goatmeat can be exported for the period 1 January 2014 to 31 December 2014
Last day to disallow	17 March 2014
Authorising legislation	*Australian Meat and Live-stock Industry Act 1997*
Department	Agriculture

Issue:

Drafting/Availability of review of decisions by AAT

The first instrument mentioned above expressly provides that an exporter may apply to the Administrative Appeals Tribunal (AAT) for a review of 'a decision of the Secretary relating to amendment of an approval issued under this order'. The second instrument, which appears to be setting similar quotas to the first instrument, but relating to a different market and to different meat products, contains no such provision. However, note 4 to section 8 of the second instrument states that '[c]ertain decisions by the Secretary about a quota are reviewable by the Administrative Appeals Tribunal: see section 30 of the Act'. There is no equivalent note in the first instrument. The reason for the absence of an equivalent note in the first instrument is not apparent **[the committee requested further information from the minister]**.

MINISTER'S RESPONSE:

The Minister for Agriculture advised that the discrepancies between the Australian Meat and Live-stock Industry (Beef Export to the USA-Quota Year 2014) Order 2013

[F2013L01966] and the Australian Meat and Live-stock Industry (Sheepmeat and Goatmeat Export to the European Union—Quota Year 2014) Order 2013 [F2013L01965] regarding the review of decisions by the AAT are 'due to a drafting anomaly'.

The minister advised that the discrepancies 'do not impinge in any way' on the AAT review process pertaining to the decision made under the orders, and that appeals to the AAT may be made regarding decisions made under both orders. The minister further advised that 'the discrepancy in referencing in the notes will be rectified in drafting of future quota orders under the Act'.

COMMITTEE RESPONSE:

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

Environment Protection and Biodiversity Conservation Amendment (Fees for Wildlife Trade Permits) Regulation 2013 [Select Legislative Instrument No. 122, 2013] [F2013L01007]

Purpose	Amends the Environment Protection and Biodiversity Conservation Regulations 2000 to update fees for wildlife trade permits
Last day to disallow	11 September 2013
Authorising legislation	*Environment Protection and Biodiversity Conservation Act 1999*
Department	Environment

Issue:

Unclear basis for determining fees

Various provisions of this instrument increase fees for wildlife trade permits. While there is reference to analysis set out in a 'Wildlife Trade Permits Cost Recovery Impact Statement July 2013-June 2018', the ES does not itself explain the basis on which the new fees have been calculated or set. The committee's usual expectation in cases where an instrument of delegated legislation carries financial implications via the imposition or adjustment of a charge, fee, levy or scale of costs (as the case may be) is that the relevant ES makes clear the basis on which the imposition or change has been calculated **[the committee requested further information from the minister]**.

MINISTER'S RESPONSE:

The Minister for the Environment advised that in August 2011, the then government 'agreed to investigate increased fees for wildlife trade regulation, to better reflect the

cost of providing this service'. This was followed by a departmental consultation paper which 'sought stakeholder feedback on the impact of full cost recovery of these activities'. The minister noted that several submitters stated that full cost recovery 'would have a significant impact' and would potentially reduce or prohibit sales. The minister advised that the consultation paper and all public submissions are available on the department's website.

The minister stated that in taking account of stakeholder feedback:

> …the then Australian Government agreed that the maximum increase that would not have a significant impact on the viability of relevant stakeholders was a doubling of fees, rather than introducing full cost recovery as originally proposed.

The department then conducted further consultation on the revised approach, and no concerns were raised about the revised fee increases. The minister advised that the consultation document outlined the full costs of permit application and support services, and that the new fees that commenced on 1 July 2013 'do not fully recover the costs of delivering the services'.

COMMITTEE RESPONSE:

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

Australian Sports Anti-Doping Authority Amendment Regulation 2013 (No. 1) [Select Legislative Instrument No. 189, 2013] [F2013L01443]

Purpose	Implements changes to Australia's anti-doping arrangements that are contained in the *Australian Sports Anti-Doping Authority Amendment Act 2013*
Last day to disallow	4 March 2014
Authorising legislation	*Australian Sports Anti-Doping Authority Act 2006*
Department	Regional Australia, Local Government, Arts and Sport

Issue:

No information regarding consultation

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

out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the ES for the instrument makes no reference to consultation **[the committee requested further information from the minister; and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

MINISTER'S RESPONSE:

The Minister for Health advised that the then Department of Regional Australia, Local Government, Arts and Sport consulted with the Coalition of Major Professional and Participation Sports and the Australian Athletes Alliance. The minister stated:

> The input provided by these bodies assisted in developing a Regulation that, while improving Australian Sports Anti-Doping Authority's capacity to collect information in relation to possible anti-doping rule violations, respects the protections afforded to athletes under the anti-doping arrangements.

The minister further advised that the non-reporting of these consultations was 'an oversight' and that an updated explanatory statement would be registered shortly.

COMMITTEE RESPONSE:

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

Private Health Insurance (Health Benefits Fund Administration) Amendment Rule 2013 (No. 1) [F2013L01684]

Purpose	Replaces and updates the solvency and capital adequacy standards
Last day to disallow	4 March 2014
Authorising legislation	*Private Health Insurance Act 2007*
Department	Health

Issue:

Incorporation of extrinsic material

This instrument makes a number of amendments to the Private Health Insurance (Health Benefits Fund Administration) Rules 2007, and incorporates certain extrinsic material, including the Private Health Insurance (Risk Equalisation Policy) Rules 2007. While the *Legislative Instruments Act 2003* allows for extrinsic material to be incorporated into instruments, the provisions of disallowable legislative instruments (as in this case) can be incorporated either (a) as in force or existing at a particular

date or (b) as in force or existing 'from time to time'.[2] In this case, neither the instrument nor the ES provides sufficient detail to determine the basis on which the material is intended to be incorporated into the instrument **[the committee requested further information from the minister]**.

MINISTER'S RESPONSE:

The Minister for Health advised that the Private Health Insurance (Risk Equalisation Policy) Rules 2007 were incorporated as in force at the commencement of the instrument. The minister advised that the basis for the incorporation of extrinsic material 'will be more clearly articulated the next time the Private Health Insurance (Health Benefits Fund Administration) Rules 2007 are amended'.

COMMITTEE RESPONSE:

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

Private Health Insurance (Council Administration Levy) Amendment Rules 2013 (No. 2) [F2013L01504]

Purpose	Corrects a 'drafting error' noted in the denominator used to calculate the Council Administration Levy
Last day to disallow	4 March 2014
Authorising legislation	*Private Health Insurance (Council Administration Levy) Act 2003*
Department	Health

Issue:

Whether any person disadvantaged by previous error

This instrument corrects a 'drafting error' noted in the 'denominator used to calculate the Council Administration Levy' (CAL), which is intended to meet the general administrative costs of the Private Health Insurance Administration Council (PHIAC). While the exact nature of the error is not described, the ES states that the instrument is intended to 'properly increase the CAL for the next three financial years'. Given this, it appears unlikely that any person has been disadvantaged by the error being corrected. However, the committee's usual approach where an instrument corrects a previous error, as in this case, is that the ES for the instrument address the question of whether any person was disadvantaged by the error and, if so, whether and what steps have

2 See section 14, *Legislative Instruments Act 2003*.

been taken to address that disadvantage **[the committee requested further information from the minister].**

MINISTER'S RESPONSE:

The Minister for Health advised that 'the correction of the drafting error did not cause any disadvantage or have a negative impact on any person or business' because 'the error was picked up before the quarterly invoice process was conducted and thus the amendment had no detrimental effect'.

COMMITTEE RESPONSE:

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

Private Health Insurance (Prostheses) Amendment Rules 2013 (No. 4) [F2013L01839]

Purpose	Corrects drafting errors in the principal rules
Last day to disallow	4 March 2014
Authorising legislation	*Private Health Insurance Act 2007*
Department	Health

Issue:

Whether any person disadvantaged by previous error

This instrument was made to correct a number of drafting errors in the Private Health Insurance (Prostheses) Rules 2013 (No.1) (the principal rules), which lists the kinds of prostheses in relation to which specified (minimum and maximum) benefits will be paid. The ES for the instrument states that these include:

- the correcting of errors in the product details for billing code WC312;
- the correcting of the amount of minimum benefit payable by insurers for billing codes BS082, MH014, MH015, BS171, OL009, WC213, OL010, ST884, BR005, BR006, SHV01, SHV02 and SHV03;
- the reinsertion of a number of billing codes inadvertently deleted from the principal rules;
- the moving of billing code HW517 to its correct product group; and
- the addition of a number of billing codes incorrectly omitted from the principal rules.

The committee's usual approach where an instrument corrects drafting errors of this nature is that the ES address the question of whether any person was disadvantaged by

any of the errors and, if so, whether and what steps have been taken to address that disadvantage **[the committee therefore requested further information from the minister].**

MINISTER'S RESPONSE:

The Minister for Health advised that 'there was a low risk that the correction of drafting errors would be disadvantageous to persons'. The minister stated that the department had taken steps 'to mitigate the risk of disadvantage' and 'notified stakeholders of the changes in advance of the rules commencing' by circulating Private Health Insurance Circular (PHI 72/13) on 1 November 2013.

COMMITTEE RESPONSE:

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

Customs Act 1901 - Specified Percentage of Total Factory Costs Determination No. 1 of 2013 [F2013L02198]

Purpose	Determines that the specified percentage of the total factory cost of wiring harnesses claimed to be the manufacture of Samoa is 40% where the wiring harnesses: (a) are classified to subheading 8544.30.00 of Schedule 3 to the *Customs Tariff Act 1995*; and (b) are of a kind used in, and are for use in, passenger motor vehicles, as defined in Chapter 87 of the *Customs Tariff Act 1995*
Last day to disallow	15 May 2014
Authorising legislation	*Customs Act 1901*
Department	Immigration and Border Protection

Issue:

Insufficient description regarding consultation

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

> A reduction in the specified percentage of 10% in respect of the goods included in the Determination granted to Samoa may affect elements of the Australian automotive industry. However, consultation with industry has established that the majority of the Australian automotive industry indicated their support to the continuation of the derogation.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it usually regards an overly general description, as in this case, is not sufficient to satisfy the requirements of the *Legislative Instruments Act 2003* **[the committee requested further information from the minister; and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

MINISTER'S RESPONSE:

The Minister for Immigration and Border Protection advised that the Department of Industry consulted with the Australian vehicle manufacturers and the Federation of Automotive Products Manufacturers (the peak industry body representing the automotive supply chain). The minister stated that stakeholders 'indicated their support for the continuation of the derogation, with only one submission opposing the derogation on the basis that it had the potential to adversely affect its business'. The minister further noted that the consultation 'was undertaken on a commercial-in-confidence basis'. The minister further advised that an updated explanatory statement would be re-tabled in both Houses.

COMMITTEE RESPONSE:

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

Treatment Principles (Australian Participants in British Nuclear Tests) 2006 (No. R54/2013) [F2013L02031]

Purpose	Modifies the Treatment Principles (No. R52/2013) under the Veterans' Entitlements Act 1986 (VEA TPs) in the application of the VEA TPs to persons eligible for treatment under the Australian Participants in British Nuclear Tests (Treatment) Act 2006
Last day to disallow	19 March 2014
Authorising legislation	*Australian Participants in British Nuclear Tests (Treatment) Act 2006*
Department	Veterans' Affairs

Issue:

Drafting

Item 12 of the schedule to this instrument provides:

> 12. ...

Unlike the other numbered items in the schedule, there is no amendment specified in the item. The same occurs in relation to items 7 and 23, and within item 59 of the schedule. It is not clear whether this formulation is intentional. **[the committee requested further information from the minister]**.

MINISTER'S RESPONSE:

The Minister for Veterans' Affairs advised that the blank items in the schedule of incorporated documents are intentional. The minister noted that the overarching schedule is prepared for the *Veterans' Entitlements Act 1986* Treatment Principles and then also used for the *Military Rehabilitation and Compensation Act 2004* Treatment Principles and the *Australian Participants in British Nuclear Tests (Treatment) Act 2006* Nuclear Treatment Principles. The minister noted that:

> …not all of the documents mentioned in the template-schedule are relevant for one or both of the other two sets of Treatment Principles. Accordingly the template-schedule is modified by leaving a blank item for the un-needed document as an "alert" to a difference between the set of Treatment Principles for which the document is not needed and the other sets of Treatment Principles.

COMMITTEE RESPONSE:

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

MRCA Treatment Principles (No. MRCC 53/2013) [F2013L02016]

Purpose	Determines the places at which, the circumstances in which, and the conditions subject to which, a particular kind or class of treatment may be provided under Part 3 of Chapter 6 of the *Military Rehabilitation and Compensation Act 2004*; and determines the matters in paragraphs 286(1)(d), (e) (f) and (g) of that Act
Last day to disallow	19 March 2014
Authorising legislation	*Military Rehabilitation and Compensation Act 2004*
Department	Veterans' Affairs

Issue:

Drafting

Item 7 of Schedule 1 to this instrument provides:

> 7. ...

Unlike the other numbered items in Schedule 1, there is no amendment specified in the item. It is not clear whether this formulation is intentional **[the committee requested further information from the minister]**.

MINISTER'S RESPONSE:

The Minister for Veterans' Affairs advised that the blank items in the schedule of incorporated documents are intentional. The minister noted that the overarching schedule is prepared for the *Veterans' Entitlements Act 1986* Treatment Principles and then also used for the *Military Rehabilitation and Compensation Act 2004* Treatment Principles and the *Australian Participants in British Nuclear Tests (Treatment) Act 2006* Nuclear Treatment Principles. The minister noted that:

> …not all of the documents mentioned in the template-schedule are relevant for one or both of the other two sets of Treatment Principles. Accordingly the template-schedule is modified by leaving a blank item for the un-needed document as an "alert" to a difference between the set of Treatment Principles for which the document is not needed and the other sets of Treatment Principles.

COMMITTEE RESPONSE:

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

CASA 158/13 - Direction - number of cabin attendants in Boeing 737-800 series aircraft, Qantas Airways Limited [F2013L01491]

Purpose	Permits Qantas Airways Limited to operate, subject to conditions, an Australian registered Boeing 737-800 series aircraft engaged in regular public transport or charter operations with one cabin attendant for every 50 passenger seats
Last day to disallow	4 March 2014
Authorising legislation	Civil Aviation Safety Regulations 1988
Department	Infrastructure and Regional Development

Issue:

Insufficient information regarding consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the instrument states that consultation has taken place but does not identify who was consulted and the nature of the consultation. While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description, as in this case, is not sufficient to satisfy the requirements of the *Legislative Instruments Act 2003* **[the committee therefore requested further information from the minister; and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

MINISTER'S RESPONSE:

The Minister for Infrastructure and Regional Development advised that consultation was undertaken with aviation industry participants through the issue of the CASA Notice of Proposed Rule Making on Cabin Crew Ratios relating to the proposed amendment to Civil Aviation Order Section 20.16.3. The minister advised that the consultation occurred 'in February 2010 prior to the issue of this and similar instruments'.

COMMITTEE RESPONSE:

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

Appendix 1

Index of instruments scrutinised

The following instruments were considered by the committee at its meeting on **14 May 2014**.

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

Instruments marked with an asterisk (*) are the subject of the comment on p. 29 of Chapter 1 relating to subsection 33(3) of the *Legislative Instruments Act 2003* (under the heading 'Multiple instruments identified in Appendix 1').

Instruments received week ending 14 March 2014

Agricultural and Veterinary Chemicals Code Act 1994	
Agricultural and Veterinary Chemicals Code Instrument No. 4 (MRL Standard) Amendment Instrument 2014 (No. 3) [F2014L00236]	E
Australian Film, Television and Radio School Act 1973	
Determination of Degrees, Diplomas and Certificates No. 2014/1 [F2014L00228]	
Civil Aviation Regulations 1988	
CASA 47/14 - Permission - flying over a public gathering at the 2014 Tyabb Air Show, Tyabb, Victoria - Permission - flying below minimum height at the 2014 Tyabb Air Show, Tyabb, Victoria [F2014L00235]	
Corporations Act 2001	
ASIC Market Integrity Rules (Competition in Exchange Markets) Amendment 2014 (No. 1) [F2014L00233]	
Fisheries Management Act 1991 and Southern and Eastern Scalefish and Shark Fishery Management Plan 2003	
Southern and Eastern Scalefish and Shark Fishery Total Allowable Catch (Non-Quota Species) Determination 2014 [F2014L00232]	
Southern and Eastern Scalefish and Shark Fishery Overcatch and Undercatch Determination 2014 [F2014L00234]	
Southern and Eastern Scalefish and Shark Fishery Total Allowable Catch (Quota Species) Determination 2014 [F2014L00230]	
Fisheries Management Act 1991 and Western Tuna and Billfish Fishery Management Plan 2005	
Western Tuna and Billfish Fishery Overcatch and Undercatch Determination 2014 [F2014L00231]	

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

Motor Vehicle Standards Act 1989	
Vehicle Standard (Australian Design Rule 4/05 – Seatbelts) 2012 Amendment 1 [F2014L00227]	
Privacy Act 1988	
Privacy (Persons Reported as Missing) Rule 2014 [F2014L00229]	
Taxation Administration Act 1953	
Taxation Administration Act 1953 – Provision of further time for lodgment of the 2014 Minerals Resource Rent Tax (MRRT) Return – Low volume non-payers' Instrument (No. 1) 2014 [F2014L00237]	

Instruments received week ending 21 March 2014

Aged Care Act 1997	
Aged Care (Residential Care Subsidy — Amount of Respite Supplement) Determination 2014 (No. 1) [F2014L00288]	*
Aged Care (Residential Care Subsidy — Amount of Transitional Supplement) Determination 2014 (No. 1) [F2014L00289]	*
Aged Care (Residential Care Subsidy — Amount of Transitional Accommodation Supplement) Determination 2014 (No. 1) [F2014L00290]	*
Aged Care (Residential Care Subsidy — Amount of Pensioner Supplement) Determination 2014 (No. 1) [F2014L00291]	*
Aged Care (Residential Care Subsidy — Amount of Concessional Resident Supplement) Determination 2014 (No. 1) [F2014L00292]	*
Aged Care (Residential Care Subsidy — Amount of Accommodation Supplement) Determination 2014 (No. 1) [F2014L00293]	*
User Rights Amendment (March Indexation Measures) Principle 2014 [F2014L00287]	*
ASIC Market Integrity Rules (Competition in Exchange Markets) 2011	
ASIC Class Rule Waiver [CW 14/6] [F2014L00239]	
Australian Education Act 2013	
Australian Education (SES Scores) Amendment Determination 2014 (No. 1) [F2014L00252]	
Australian Prudential Regulation Authority Act 1998	
Australian Prudential Regulation Authority (confidentiality) determination No. 2 of 2014 [F2014L00258]	
Broadcasting Services Act 1992	
Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 2 of 2014) [F2014L00262]	
Civil Aviation Safety Regulations 1998	
CASA EX10/14 - Exemption - Requirement for conversion training to be in a Qualified Synthetic Training Device (QSTD) [F2014L00246]	
CASA EX13/14 - Exemption — take-off with traces of frost [F2014L00247]	
Competition and Consumer Act 2010, Corporations Act 2001, Payment Systems and Netting Act 1998, and Australian Securities and Investments Commission Act 2001	
Corporations Laws Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 33][F2014L00261	

Corporations Act 2001	
AASB 1048 - Interpretation of Standards - December 2013 [F2014L00238]	*
Crimes Act 1914	
Crimes Amendment (Prescribed Law) Regulation 2014 [SLI 2014 No. 14] [F2014L00282]	
Currency Act 1965	
Currency (Perth Mint) Determination 2014 (No. 1) [F2014L00263]	
Currency (Perth Mint) Determination 2014 (No. 2) [F2014L00265]	
Customs Act 1901	
Customs Amendment (Maritime Powers Consequential Amendments) Regulation 2014 [SLI 2014 No. 29] [F2014L00285]	
Customs Administration Act 1985	
Specification of Prohibited Drugs No. 1 of 2014 [F2014L00264]	
Customs Amendment (Anti-Dumping Commission Transfer) Act 2013	
Customs Amendment (Anti-Dumping Commission Transfer) Commencement Proclamation 2014 [F2014L00281]	E
Defence Act 1903	
Defence Determination 2014/13, Post indexes – amendment	
Financial Management and Accountability Act 1997	
Financial Management and Accountability Amendment (2014 Measures No. 3) Regulation 2014 [SLI 2014 No. 34] [F2014L00284]	
Fisheries Management Act 1991	
Northern Prawn Fishery (Closures) Direction No. 166 [F2014L00253]	
Northern Prawn Fishery (Closures) Direction No. 167 [F2014L00254]	
Northern Prawn Fishery (Closures) Direction No. 168 [F2014L00255]	
Health Insurance Act 1973	
Health Insurance Amendment (Specialist Trainee Program) Regulation 2014 [SLI 2014 No. 28] [F2014L00280]	
Higher Education Support Act 2003	
Higher Education Support Act 2003 - VET Provider Approval (No. 12 of 2014) [F2014L00248]	
Higher Education Support Act 2003 - VET Provider Approval (No. 14 of 2014) [F2014L00249]	
Higher Education Support Act 2003 - VET Provider Approval (No. 15 of 2014) [F2014L00250]	
Higher Education Support Act 2003 - VET Provider Approval (No. 16 of 2014) [F2014L00251]	
Legislative Instruments Act 2003	
Foreign Affairs and Trade (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 20] [F2014L00266]	
Immigration and Border Protection (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 22] [F2014L00267]	
Infrastructure and Regional Development (Spent and Redundant Instruments) Repeal	

Regulation 2014 [SLI 2014 No. 23] [F2014L00268]	
Social Services (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 24] [F2014L00269]	
Veterans' Affairs (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 26] [F2014L00270]	
Employment (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 17] [F2014L00271]	
Defence (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 15] [F2014L00273]	
Spent and Redundant Instruments Repeal Regulation 2014 [SLI 2014 No. 25] [F2014L00274]	
Environment (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 18] [F2014L00275]	
Education (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 16] [F2014L00276]	
Health (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 21] [F2014L00277]	
Finance (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 19] [F2014L00278]	
Civil Aviation (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 13] [F2014L00279]	
Maritime Powers Act 2013	
Maritime Powers Regulation 2014 [SLI 2014 No. 31] [F2014L00283]	
Migration Act 1958	
Migration Amendment (Redundant and Other Provisions) Regulation 2014 [SLI 2014 No. 30] [F2014L00272]	
Migration Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 32] [F2014L00286]	
Military Rehabilitation and Compensation Act 2004	
Military Rehabilitation and Compensation Act Education and Training Scheme (Income Support Bonus) Repeal Determination 2014 [F2014L00256]	
Privacy Act 1988 and Privacy Amendment (Enhancing Privacy Protection) Act 2012	
Privacy Public Interest (Enhancing Privacy Protection) Amendment and Repeal Determination 2014 [F2014L00240]	
Privacy Act 1988	
Privacy (International Money Transfers) Temporary Public Interest Determination 2014 (No. 1) [F2014L00241]	
Privacy (International Money Transfers) Generalising Determination 2014 (No. 1) [F2014L00242]	
Approval of guidelines issued under Section 95A of the Privacy Act 1988 [F2014L00243]	
Approval of guidelines issued under Section 95AA of the Privacy Act 1988 [F2014L00244]	*
Issuing of guidelines under section 95 of the Privacy Act 1988 [F2014L00245]	*
Renewable Energy (Electricity) Act 2000	
Renewable Energy (Electricity) Amendment (Percentages) Regulation 2014 [SLI 2014 No. 27] [F2014L00259]	

Telecommunications (Carrier Licence Charges) Act 1997	
Telecommunications (Carrier Licence Charges) Act 1997 - Determination Under Paragraph 15(1)(d) No. 1 of 2014 [F2014L00260]	
Veterans' Entitlements Act 1986	
Veterans' Children Education Scheme (Income Support Bonus) Repeal Instrument 2014 [F2014L00257]	

Instruments received week ending 28 March 2014

Administration Ordinance 1990 (Jervis Bay Territory)	
Water and Wastewater Services Fees Determination 2014 (Jervis Bay Territory) [F2014L00328]	*
Administration Ordinance 1990 (Jervis Bay Territory)	
Electricity Supply Fees Determination 2014 (Jervis Bay Territory) [F2014L00329]	*
Australian Meat and Live-stock Industry Act 1997	
Australian Meat and Live-stock Industry (Export of Live-stock to Egypt) Repeal Order 2014 [F2014L00312]	*
Australian Prudential Regulation Authority Act 1998	
Australian Prudential Regulation Authority (confidentiality) determination No. 4 of 2014 [F2014L00346]	
Australian Research Council Act 2001	
Australian Research Council Funding Rules for schemes under the Linkage Program 2015 - Linkage Infrastructure, Equipment and Facilities [F2014L00324]	E
Bankruptcy Act 1966	
Bankruptcy Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 36] [F2014L00350]	
Broadcasting Services Act 1992	
Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 3 of 2014) [F2014L00295]	
Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 4 of 2014) [F2014L00325]	
Civil Aviation Safety Regulations 1998	
CASA ADCX 005/14 - Repeal of Airworthiness Directives [F2014L00319]	
CASA EX20/14 - Exemption — single-pilot operations in Cessna 500 series aeroplanes [F2014L00338]	
Competition and Consumer Act 2010	
Australian Competition and Consumer Commission (Accounting Separation—Telstra Corporation Limited) Direction (No. 1) 2003 Instrument of Revocation 2014 [F2014L00333]	
Defence Act 1903	
Defence Determination 2014/15, International campaign allowance - amendment	
Defence Force (Superannuation) (Productivity Benenfit) Amendment (Interest Factor) Determination 2014 [F2014L00310]	E

Defence Service Homes Act 1918, Financial Management and Accountability Act 1997, Commonwealth Authorities and Companies Act 1997, High Court of Australia Act 1979, Natural Heritage Trust of Australia Act 1997, Aboriginal and Torres Strait Islander Act 2005	
Finance Minister's Amendment Orders (Financial Statements for reporting periods ending on or after 1 July 2013) [F2014L00294]	
Environment Protection and Biodiversity Conservation Act 1999	
Amendment of List of Exempt Native Specimens - New South Wales Ocean Trawl Fishery (25/03/2014) [F2014L00347]	
Federal Financial Relations Act 2009	
Federal Financial Relations (National Specific Purpose Payments) Determination 2012-13 [F2014L00323]	
Federal Financial Relations (National Health Reform Payments) Determination 2012-13 [F2014L00317]	E
Financial Sector (Collection of Data) Act 2001	
Financial Sector (Collection of Data) (reporting standard) determination No. 7 of 2014 - SRS 520.0 - Responsible Persons Information [F2014L00343]	
Financial Sector (Collection of Data) (reporting standard) determination No. 8 of 2014 - SRS 530.1 - Investments and Investment Flows [F2014L00345]	
Financial Sector (Collection of Data) (reporting standard) determination No. 9 of 2014 - SRS 533.0 - Asset Allocation [F2014L00348]	
Financial Sector (Collection of Data) (reporting standard) determination No. 5 of 2014 - SRS 320.0 - Statement of Financial Position [F2014L00351]	
Financial Sector (Collection of Data) (reporting standard) determination No. 10 of 2014 - SRS 702.0 - Investment Performance [F2014L00353]	
Financial Sector (Collection of Data) (reporting standard) determination No. 6 of 2014 - SRS 330.0 - Statement of Financial Performance [F2014L00354]	
Migration Act 1958	
Migration Act 1958 - Instrument of Revocation - IMMI 13/160 [F2014L00326]	E
Migration Regulations 1994	
Migration Regulations 1994 - Specification of Evidence of Further Funds and Living Costs - IMMI 14/004 [F2014L00316]	*
Migration Regulations 1994 - Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas - IMMI 14/009 [F2014L00327]	*
Migration Regulations 1994 - Specification of Student Visa Assessment Levels - IMMI 14/003 [F2014L00315]	E
Migration Regulations 1994 - Specification of Alternative English Language Proficiency Tests to the International English Language Testing System for Student Visa Purposes - IMMI 14/002 [F2014L00318]	E
Migration Regulations 1994 - Specification of Types of Courses for Student Visas - IMMI 14/015 [F2014L00320]	E
Migration Regulations 1994 - Specification of Classes of Persons - IMMI 14/017 [F2014L00321]	E

Migration Regulations 1994 - Specification of Countries - IMMI 13/161 [F2014L00322]	E
Migration Regulations 1994 - Specification of Class of Persons - IMMI 14/032 [F2014L00344]	E
National Health Act 1953	
National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2014 (No. 3) - PB 17 of 2014 [F2014L00342]	
National Health (Pharmaceutical Benefits - Early Supply) Amendment Instrument 2014 (No. 1) - specification under subsection 84AAA(2) (No. PB 25 of 2014) [F2014L00355]	
National Health (Price and Special Patient Contribution) Amendment Determination 2014 (No. 2) (No. PB 18 of 2014) [F2014L00356]	
Private Health Insurance Act 2007	
Private Health Insurance (Benefit Requirements) Amendment Rules 2014 (No. 1) [F2014L00309]	*
Private Health Insurance (Complying Product) Amendment Rules 2014 (No. 2) [F2014L00311]	*
Quarantine Act 1908	
Quarantine Legislation Amendment (2014 Measures No. 1) Proclamation 2014 [F2014L00352]	E
Safety, Rehabilitation and Compensation Act 1988	
Safety, Rehabilitation and Compensation (Licence Eligibility - BWA Group Services Pty Ltd) Declaration 2014 (No. 1) [F2014L00341]	
Social Security Act 1991	
Social Security (Exempt Lump Sum) (HILDA Survey Lump Sum Participant Payment) Determination 2014 [F2014L00298]	*
Social Security Foreign Currency Exchange Rate Determination 2014 (No. 1) [F2014L00339]	
Telecommunications (Carrier Licence Charges) Act 1997	
Telecommunications (Carrier Licence Charges) Revocation Determination 2014 [F2014L00301]	
Telecommunications (Numbering Charges) Act 1997, Telecommunications (Consumer Protection and Service Standards) Act 1999, Telecommunications Act 1997, Radiocommunications Act 1992	
Australian Communications and Media Authority Omnibus Revocation Instrument 2014 [F2014L00297]	
Telecommunications Act 1997	
Carrier Licence Conditions (Optus Mobile Pty Ltd) Declaration 1997 Instrument of Revocation 2014 [F2014L00330]	
Carrier Licence Conditions (Telstra Corporation Limited) Declaration 1997 (Amendment No. 1 of 2014) [F2014L00331]	
Carrier Licence Conditions (Vodafone Pty Limited) Declaration 1997 Instrument of Revocation 2014 [F2014L00332]	
Carrier Licence Conditions (Optus Networks Pty Ltd) Instrument of Revocation 2014 [F2014L00340]	

Therapeutic Goods Act 1989	
Therapeutic Goods (Medical Devices) Amendment (Auditing Applications) Regulation 2014 [SLI 2014 No. 38] [F2014L00349]	
Veterans' Entitlements Act 1986	
Veterans’ Entitlements Income (Exempt Lump Sum – Thalidomide Class Action Payment) Determination No. R19 of 2014 [F2014L00296]	
Statement of Principles concerning somatic symptom disorder No. 25 of 2014 [F2014L00299]	
Statement of Principles concerning allergic rhinitis No. 23 of 2014 [F2014L00300]	
Amendment Statement of Principles concerning ischaemic heart disease No. 33 of 2014 [F2014L00302]	
Amendment Statement of Principles concerning chronic lymphoid leukaemia No. 28 of 2014 [F2014L00303]	
Statement of Principles concerning somatic symptom disorder No. 24 of 2014 [F2014L00304]	
Amendment Statement of Principles concerning ischaemic heart disease No. 34 of 2014 [F2014L00305]	
Statement of Principles concerning allergic rhinitis No. 22 of 2014 [F2014L00306]	
Statement of Principles concerning restless legs syndrome No. 20 of 2014 [F2014L00307]	
Statement of Principles concerning restless legs syndrome No. 21 of 2014 [F2014L00308]	
Statement of Principles concerning periodic limb movement disorder No. 26 of 2014 [F2014L00313]	
Statement of Principles concerning periodic limb movement disorder No. 27 of 2014 [F2014L00314]	
Amendment Statement of Principles concerning substance use disorder No. 31 of 2014 [F2014L00334]	
Amendment Statement of Principles concerning alcohol use disorder No. 29 of 2014 [F2014L00335]	
Amendment Statement of Principles concerning alcohol use disorder No. 30 of 2014 [F2014L00336]	
Amendment Statement of Principles concerning substance use disorder No. 32 of 2014 [F2014L00337]	

Instruments received week ending 4 April 2014

Anti-Money Laundering and Counter-Terrorism Financing Act 2006	
Anti-Money Laundering and Counter-Terrorism Financing (Iran Countermeasures) Regulation 2014 [SLI 2014 No. 35] [F2014L00371]	
Bankruptcy Act 1966	
Bankruptcy (Fees and Remuneration) Determination 2014 [F2014L00367]	
Civil Aviation Safety Regulations 1998	
CASA ADCX 006/14 - Repeal of Airworthiness Directives [F2014L00362]	
Competition and Consumer Act 2010	

Competition and Consumer (Corded Internal Window Coverings) Safety Standard 2014 [F2014L00363]	
Corporations Act 2001	
AASB 2013-9 - Amendments to Australian Accounting Standards – Conceptual Framework, Materiality and Financial Instruments - December 2013 [F2014L00370]	*
Environment Protection and Biodiversity Conservation Act 1999	
Environment Protection and Biodiversity Conservation Amendment (Heard Island and McDonald Islands) Proclamation 2014 [F2014L00361]	E
Health Insurance Act 1973	
Health Insurance (Pharmacogenetic Testing Kirsten ras (KRAS)) Determination 2014 [F2014L00369]	
Higher Education Support Act 2003	
Higher Education Provider Approval No. 2 of 2014 [F2014L00373]	
Migration Regulations 1994	
Migration Regulations 1994 - Specification of Specified Place - IMMI 14/030 [F2014L00364]	E
National Health Act 1953	
National Health (Listed drugs on F1 or F2) Amendment Determination 2014 (No. 2) (No. PB 22 of 2014) [F2014L00358]	
National Health (Pharmaceutical Benefits - Therapeutic Groups) Amendment Determination 2014 (No. 1) (No. PB 23 of 2014) [F2014L00359]	
National Health (Efficient Funding of Chemotherapy) Special Arrangement Amendment Instrument 2014 (No. 3) (No. PB 21 of 2014) [F2014L00360]	
National Health (Highly specialised drugs program for hospitals) Special Arrangement Amendment Instrument 2014 (No. 3) (No. PB 20 of 2014) [F2014L00372]	
Parliamentary Service Act 1999	
Parliamentary Service Amendment (Public Interest Disclosure and Other Matters) Determination 2014 [F2014L00368]	*
Workplace Gender Equality Act 2012	
Workplace Gender Equality (Minimum Standards) Instrument 2014 [F2014L00365]	
Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Amendment Instrument 2014 (No. 1) [F2014L00366]	*

Instruments received week ending 11 April 2014

Agricultural and Veterinary Chemicals Code Act 1994	
Agricultural and Veterinary Chemicals Code Instrument No. 4 (MRL Standard) Amendment Instrument 2014 (No. 4) [F2014L00386]	E
Australian Prudential Regulation Authority Act 1998	
Australian Prudential Regulation Authority instrument fixing charges No. 1 of 2014 [F2014L00383]	
Bankruptcy (Estate Charges) Act 1997	
Bankruptcy (Estate Charges) (Amount of Charge Payable) Determination 2014 [F2014L00377]	
Charter of the United Nations Act 1945	

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2014 (No. 1) [F2014L00378]	
Civil Aviation Regulations 1988	
CASA 66/14 - Authorisation and permission — helicopter winching operations [F2014L00387]	
CASA EX26/14 - Exemptions — compliance with SIDs in the maintenance of Cessna aircraft [F2014L00388]	
Corporations Act 2001	
ASIC Instrument [14/0234] [F2014L00374]	
Currency Act 1965	
Currency (Royal Australian Mint) Determination 2014 (No. 2) [F2014L00384]	
Financial Management and Accountability Act 1997	
FMA Act Determination 2014/05 — Section 32 (Transfer of Functions from DEEWR to Social Services) [F2014L00376]	E
FMA Act Determination 2014/06 — Section 32 (Transfer of Functions from Health to Social Services) [F2014L00390]	E
Higher Education Support Act 2003	
Higher Education Support Act 2003 - VET Provider Approval (No. 17 of 2014) [F2014L00380]	
Higher Education Support Act 2003 - VET Provider Approval (No. 18 of 2014) [F2014L00381]	
Higher Education Support Act 2003 - VET Provider Approval (No. 19 of 2014) [F2014L00382]	
Higher Education Support Act 2003 - VET Provider Approval (No. 20 of 2014) [F2014L00385]	
Motor Vehicle Standards Act 1989	
Vehicle Standard (Australian Design Rule 58/00 – Requirements for Omnibuses Designed for Hire and Reward) 2006 Amendment 2 [F2014L00391]	*
National Health Act 1953	
National Health Determination under paragraph 98C(1)(b) Amendment 2014 (No. 3) (No. PB 19 of 2014) [F2014L00357]	
Personal Property Securities Act 2009	
Personal Property Securities Amendment (Motor Vehicles) Regulation 2014 [SLI 2014 No. 37] [F2014L00375]	
Taxation Administration Act 1953	
Taxation Administration Act 1953 - Pay as you go withholding - Variation to remove the requirement to withhold from payments for certain US resident entertainers and sport persons [F2014L00379]	
Veterans' Entitlements Act 1986	
Veterans' Entitlements Income (Exempt Lump Sum – HILDA Survey Lump Sum Participant Payment) Determination No. R21 of 2014 [F2014L00389]	*

Instruments received week ending 18 April 2014

A New Tax System (Australian Business Number) Act 1999	
A New Tax System (Australian Business Number) Amendment (Display of Trading Names) Regulation 2014 [SLI 2014 No. 41] [F2014L00419]	
Anti-Money Laundering and Counter-Terrorism Financing Act 2006	
Anti-Money Laundering and Counter-Terrorism Financing (Iran Countermeasures) Amendment (Transitional) Regulation 2014 [SLI 2014 No. 42] [F2014L00409]	
Australian Research Council Act 2001	
Australian Research Council Funding Rules for schemes under the Linkage Program for 2014 – Special Research Initiatives and Learned Academies Special Projects [F2014L00403]	E
Autonomous Sanctions Regulations 2011	
Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2014 [F2014L00411]	*
Banking Act 1959	
Banking (prudential standard) determination No. 1 of 2014 - Prudential Standard APS 111 - Capital Adequacy: Measurement of Capital [F2014L00416]	
Broadcasting Services Act 1992	
Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 5 of 2014) [F2014L00395]	
Civil Aviation Act 1988	
Civil Aviation Legislation Amendment (Part 21) Regulation 2014 [SLI 2014 No. 40] [F2014L00414]	
Civil Aviation Safety Regulations 1998	
CASA ADCX 007/14 - Repeal of Airworthiness Directives [F2014L00405]	
Civil Aviation Safety Regulations 1998, Civil Aviation Regulations 1988	
CASA 26/14 - Repeal — Directions, Exemptions and Civil Aviation Orders [F2014L00406]	
Currency Act 1965	
Currency (Royal Australian Mint) Determination 2014 (No. 3) [F2014L00394]	
Defence Act 1903	
Defence Determination 2014/14, Reserve employer support payments - amendments	
Defence Determination 2014/16, Post indexes - amendment	
Defence Determination 2014/17, Living-in accommodation - amendment	
Defence Determination 2014/18, Dependants, overseas travel costs and psot indexes - amendment	
Environment Protection and Biodiversity Conservation Act 1999	
Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (159) (02/04/2014) [F2014L00418]	
Amendment - List of Specimens Taken to be suitable for Live Import (25/03/2014) [F2014L00420]	E
Federal Financial Relations Act 2009	
Federal Financial Relations Act 2009 - Determination of the GST Revenue Sharing Relativity for 2014-15 [F2014L00407]	E
Financial Sector (Collection of Data) Act 2001	

Financial Sector (Collection of Data) (reporting standard) determination No. 2 of 2014 - ARS 210.0 - Liquidity [F2014L00404]	
Food Standards Australia New Zealand Act 1991	
Australia New Zealand Food Standards Code — Standard 1.4.2 — Maximum Residue Limits Amendment Instrument No. APVMA 3, 2014 [F2014L00417]	E
Greenhouse and Energy Minimum Standards Act 2012	
Instrument under Section 37 of the Greenhouse and Energy Minimum Standards Act 2012 - Stolway Pty Ltd [F2014L00415]	
Higher Education Support Act 2003	
Higher Education Support Act 2003 - Revocation of approval as a VET Provider (Navitas Professional Training Pty Ltd) [F2014L00410]	
National Health Act 1953	
National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2014 (No. 4) (No. PB 27 of 2014) [F2014L00399]	*
National Health (Price and Special Patient Contribution) Amendment Determination 2014 (No. 3)(No. PB 28 of 2014) [F2014L00400]	
National Health Determination under paragraph 98C(1)(b) Amendment 2014 (No. 4) (No. PB 29 of 2014) [F2014L00401]	
National Health (Pharmaceutical Benefits - Early Supply) Amendment Instrument 2014 (No. 2) - specification under subsection 84AAA(2) (No. PB 34 of 2014) [F2014L00402]	
Amendment Determination under section 84AH of the National Health Act 1953 (2014) (No. 2) (No. PB 33 of 2014) [F2014L00412]	
National Health (Listed drugs on F1 or F2) Amendment Determination 2014 (No. 3) (No. PB 32 of 2014) [F2014L00413]	
Private Health Insurance Act 2007	
Private Health Insurance (Complying Product) Amendment Rules 2014 (No. 3) [F2014L00392]	*
Private Health Insurance (Incentives) Amendment Rules 2014 (No. 1) [F2014L00397]	*
Private Health Insurance (Complying Product) Amendment Rules 2014 (No. 4) [F2014L00398]	*
Social Security (Administration) Act 1999	
Social Security (Administration) - Queensland Commission (Family Responsibilities Commission) Specification 2014 [F2014L00408]	
Superannuation Industry (Supervision) Act 1993	
Superannuation Industry (Supervision) modification declaration No. 1 of 2014 [F2014L00393]	
Self Managed Superannuation Funds (Limited Recourse Borrowing Arrangements – In-House Asset Exclusion) Determination 2014 [F2014L00396]	E

Instruments received week ending 25 April 2014

Migration Act 1958	
Migration Amendment (Credit Card Surcharge) Regulation 2014 [SLI 2014 No. 39] [F2014L00421]	
Migration Regulations 1994	

Migration Regulations 1994 - Specification of Circumstances in which a Credit Card Surcharge is Waived or Refunded - IMMI 14/033 [F2014L00425]	E
National Health Act 1953	
National Health (Weighted average disclosed price - supplementary disclosure cycle A) Determination 2014 (No. PB 26 of 2014) [F2014L00424]	*
National Health (Paraplegic and Quadriplegic Program) Special Arrangement Amendment Instrument 2014 (No. 5) (No. PB 35 of 2014) [F2014L00427]	
Radiocommunications Act 1992	
Radiocommunications (Allocation of Transmitter Licences – High Powered Open Narrowcasting Licences) Determination 2014 [F2014L00426]	E
Remuneration Tribunal Act 1973	
Remuneration Tribunal Determination 2014/04 - Remuneration and Allowances for Holders of Public Office including Judicial and Related Offices [F2014L00423]	*
Remuneration Tribunal Determination 2014/05 - Members of Parliament - Additional Salary for Parliamentary Office Holders [F2014L00422]	E

Appendix 2

Guideline on consultation

AUSTRALIAN SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Addressing consultation in explanatory statements

Role of the committee

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

Purpose of guideline

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

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

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

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

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

Requirements of the **Legislative Instruments Act 2003**

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

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

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

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

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

Describing the nature of consultation

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

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

Method and purpose of consultation

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 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 <u>not exhaustive</u> of the grounds which may be advanced as to why consultation was not undertaken in a given case. The ES should state <u>why</u> consultation was unnecessary or inappropriate, and <u>explain the reasoning in support of this conclusion</u>. 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 3

Correspondence

PRESIDENT OF THE SENATE

prletcomro_18810

PARLIAMENT HOUSE
CANBERRA

17 March 2014

Senator Sean Edwards
Chair
Standing Committee on Regulations and Ordinances
Parliament House
Canberra ACT 2600

Dear Senator Edwards

I am writing to draw your attention to the need to address a deficiency in the process of scrutinising items of expenditure which appear to have been inappropriately included in the appropriation bill for the ordinary annual services of the government. As you may be aware, this matter is of significance in view of the limitation, in section 53 of the Constitution, on the power of the Senate to amend proposed laws appropriating revenue or moneys "for the ordinary annual services of the Government".

The existing scrutiny practice has been that such items are drawn to the attention of the Appropriations and Staffing Committee, and to legislation committees examining estimates of expenditure. A list of such items is also drawn to the attention of the Finance Minister.

In 2012, the High Court delivered its judgment in *Williams v the Commonwealth* [2012] HCA 23. The effect of that decision was to cast doubt on the validity of all programs involving direct payments to persons other than a State or Territory, the only authority for which was the appropriation acts.

The Commonwealth responded to the judgment by passing the *Financial Framework Legislation Amendment Act (No 3) 2012*. This Act specifically authorised payments under more than 420 programs not previously approved by legislation. Importantly, it also established a mechanism for all such future authorisations to be made by amendment to the Financial Management and Accountability Regulations. This regulation-making

power allows items that previously would have raised questions concerning their classification as ordinary annual services of the government to be included, without direct parliamentary approval. This has had the effect of weakening the Senate's scrutiny powers.

In order to address this weakness, the Appropriations and Staffing Committee proposes that the Regulations and Ordinances Committee monitor the making of regulations under the Financial Framework legislation and report to the Senate on the nature and extent of expenditure approved by this method.

Such an approach is compatible with the Committee's terms of reference, which require it, among other things, to scrutinise legislative instruments to ensure that they do not contain matter more appropriate for parliamentary enactment.

Committee reports would contain an appropriate recommendation for adoption by the Senate, and they could be referred to legislation committees for consideration as part of the estimates process.

The appropriation of money is a fundamental function of the Parliament. Delegating this function to the executive to carry out, in part by regulation, is a matter that would benefit from scrutiny by your Committee.

Yours sincerely

(John Hogg)

THE HON IAN MACFARLANE MP

MINISTER FOR INDUSTRY

PO BOX 6022
PARLIAMENT HOUSE
CANBERRA ACT 2600

C14/1219

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

RECEIVED
19 MAR 2014
Senate Standing C'ttee
on Regulations
and Ordinances

18 MAR 20

Dear Senator

Thank you for your letter of 5 March 2014 concerning the *Australian Jobs (Australian Industry Participation) Rule 2014*. I understand that the Committee has examined the instrument and, as set out in the Committee's *Delegated legislation monitor* No. 2 of 2014, now requests further information about prescribing matters by 'legislative rules'.

I understand that the Committee has questioned the approach of the *Australian Jobs Act 2013* to use 'legislative rules' to prescribe matters, as Commonwealth legislation usually provides for matters to be prescribed by the Governor-General, by regulation. Both the Act and the Rule were drafted by Office of Parliamentary Counsel (OPC) in accordance with their Drafting Directions. As the drafter of the instrument and the Act, my department consulted with OPC in relation to the use of legislative rules instead of regulations. OPC has responded with the enclosed letter, which sets out their views on the matters raised by the Committee.

In particular I understand, from OPC's advice, that there "is no legislative principle or practice that requires the word 'prescribe' to be used only in relation to regulations" and that, in respect of quality and scrutiny of legislative rules, "…all disallowable legislative instruments are subject to the same high-level Parliamentary scrutiny".

Please find enclosed the OPC's letter to me outlining their views on the differing factors relevant to prescribing various matters by "legislative rules" and "regulations".

I trust the information provided is helpful.

Yours sincerely

Ian Macfarlane
Enc

Phone: (02) 6277 7070 Fax: (02) 6273 3662

Australian Government

Office of Parliamentary Counsel

First Parliamentary Counsel

The Hon. Ian MacFarlane MP
Minister for Industry
Parliament House
CANBERRA ACT 2600

Dear Minister

***Australian Jobs (Australian Industry Participation) Rule 2014*—Request for information from Senate Standing Committee on Regulations and Ordinances**

1 The Senate Standing Committee on Regulations and Ordinances has asked you for further information in relation to the *Australian Jobs (Australian Industry Participation) Rule 2014*. This letter sets out the views of the Office of Parliamentary Counsel (OPC) on the matters raised by the Committee.

2 The issue raised by the Committee was as follows:

> *Prescribing of matters by 'legislative rules'*
>
> The committee notes that this instrument relies on section 128 of the *Australian Jobs Act 2013*, which allows for various matters in relation to that Act to be prescribed, by the minister, by 'legislative rules'. While the explanatory statement (ES) for the instrument does not address the issue, as far as the committee can ascertain this is a novel approach to the prescribing of matters in Commonwealth legislation, insofar as Acts usually provide for matters to be prescribed, by the Governor-General, by 'regulation'. The committee notes that the latter approach to prescribing matters is consistent with the definition in section 2B of the *Acts Interpretation Act 1901*, which provides that, in any Act, 'prescribed' means 'prescribed by the Act or by regulations under the Act'. This being so, the committee is uncertain as to whether the prescription of matters by 'legislative rules' is also consistent with the *Acts Interpretation Act 1901*.
>
> More generally, the committee notes that the making of regulations is subject to the drafting and approval requirements attached to the Office of Parliamentary Counsel and Executive Council, respectively. To the extent that these requirements may be taken as an additional layer of scrutiny in the prescribing of matters by regulation, it is not clear whether these requirements will also apply to legislative rules and, if not, what the ramifications may be for both the quality of, and level of scrutiny applied to, such instruments. **The committee therefore requests further information from the Minister for Industry**.

39 Brisbane Avenue Barton ACT 2600

Locked Bag 30 Kingston ACT 2604 • Telephone (02) 6270 1405 • Fax (02) 6270 1402 • ABN 41 425 630 817

fpc@opc.gov.au • www.opc.gov.au

Are the use of "legislative rules" to prescribe matters novel?

3 Commonwealth Acts have provided for the making of instruments rather than regulations for many years. These have included rules (sometimes more recently tagged as "legislative rules"). For example, the following Acts provide for the prescribing of matters by rules:

- *Financial Sector (Business Transfer and Group Restructure) Act 1999*, section 46 (rules made by APRA)
- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, section 229 (rules made by the AUSTRAC CEO)
- *Stronger Futures in the Northern Territory Act 2012*, section 119 (rules made by the Minister).

4 Similarly, the following Acts provide for matters to be prescribed by orders and by-laws:

- *Customs Act 1901*, section 271 (by-laws made by the Customs CEO)
- *Excise Act 1901*, section 165 (by-laws made by CEO (the Commissioner of Taxation))
- *Superannuation Act 1922*, section 93DE (orders made by the Minister)
- *Defence Forces Retirement Benefits Act 1948*, section 80E (orders made by the Minister)
- *Parliamentary Contributory Superannuation Act 1948*, section 22CK (orders made by the Minister)
- *Defence Force Retirement and Death Benefits Act 1973*, section 49F (orders made by the Minister)
- *Superannuation Act 1976*, section 146MH (orders made by the Minister).

5 Commonly, instrument-making powers are 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) provides as follows:

> (1) The Judges of the Court or a majority of them may make Rules of Court, not inconsistent with this Act, making provision for or in relation to the practice and procedure to be followed in the Court (including the practice and procedure to be followed in Registries of the Court) and for or in relation to all matters and things incidental to any such practice or procedure, or necessary or convenient to be <u>prescribed</u> for the conduct of any business of the Court.

(underlining added)

6 Thus, the approach taken in section 128 of the *Australian Jobs Act 2013* is not novel. (See also the examples in paragraph 12.)

Is prescribing matters by legislative rules consistent with the definition of "prescribed" in section 2B of the Acts Interpretation Act 1901?

7 There is no legislative principle or practice that requires the word "prescribe" to be used only in relation to regulations. The definition of "prescribed" in section 2B of the *Acts Interpretation Act 1901* (the AIA) is a facilitative definition that was intended to assist in the shortening of Acts. However, current legislative drafting practice is to rely on the definition sparingly (even for regulations) because the definition appears not to be widely known by users of legislation, it has no application to the making of instruments apart from regulations and can be uncertain in its application. Under the definition matters can be prescribed by the Act itself or by regulations under the Act.

8 Thus, prescription of matters by legislative rules is not inconsistent with the AIA. The definition simply does not apply to rules or other types of instruments other than regulations.

What are the ramifications for quality and scrutiny of legislative rules?

9 Since the transfer of a subordinate legislation drafting function from the Attorney-General's Department to OPC in 2012, OPC has reviewed the cases in which it is appropriate to use legislative instruments (as distinct from regulations). OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so.

10 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 those provisions in another type of legislative instrument. These include the following types of provisions:

(a) offence provisions;

(b) powers of arrest or detention;

(c) entry provisions;

(d) search provisions;

(e) seizure provisions.

11 OPC's view is that it should use its limited resources to best effect and focus its resources in drafting subordinate legislation that would most benefit from its drafting expertise. Further details about OPC's approach are set out in Drafting Direction 3.8, which is available on OPC's website at
http://www.opc.gov.au/about/draft_directions.htm.

12 Since the transfer of the subordinate legislation drafting function to OPC in 2012, the power to prescribe legislative rules has been included in the following Acts:

- *Income Tax Assessment Act 1997*, section 415-100 (rules made by the Minister)
- *Asbestos Safety and Eradication Agency Act 2013*, section 48 (rules made by the Minister)
- *Australia Council Act 2013*, section 52 (rules made by the Minister)
- *Australian Jobs Act 2013*, section 128 (rules made by the Minister)
- *International Interests in Mobile Equipment (Cape Town Convention) Act 2013*, section 10 (rules made by the Minister)
- *National Disability Insurance Scheme Act 2013*, section 209 (rules made by the Minister)
- *Public Governance, Performance and Accountability Act 2013*, section 101 (rules made by the Finance Minister)
- *Public Interest Disclosure Act 2013*, section 83 (rules made by the Minister)
- *Sugar Research and Development Services Act 2013*, section 14 (rules made by the Minister).

13 OPC's approach is consistent with the *Legislative Instruments Act 2003* (the LIA) and the First Parliamentary Counsel's functions and responsibilities under the LIA. Under the LIA all disallowable legislative instruments are subject to the same high-level Parliamentary scrutiny. Also, under the LIA the First Parliamentary Counsel's responsibility to encourage high standards in drafting of legislative instruments applies to all legislative instruments and not just regulations.

14 Whether particular legislative rules are drafted by OPC is a matter for agencies to choose. OPC will continue to be available, within the limits of its available resources, to draft (or assist in the drafting of) legislative rules for agencies as required. In this respect legislative rules are in no different position to the other legislative instruments that are not required to be drafted by OPC.

15 I would be happy to provide further information if that would be of assistance.

Yours sincerely

Peter Quiggin PSM
First Parliamentary Counsel
13 March 2014

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

RECEIVED
21 MAR 2014
Senate Standing C'ttee
on Regulations
and Ordinances

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

Dear Senator Edwards

Thank you for your letter of 12 February 2014 about the Senate Regulations and Ordinances Committee's comments in the *Delegated legislation monitor* No.1 of 2014 concerning:

- *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*; and
- *Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013*.

In accordance with the committee's request, please find below a response to the issues raised.

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 (UMA Regulation)

(a) Whether instrument is the same in substance as disallowed instrument

The committee asked whether legal advice was sought on whether the UMA Regulation is the same in substance as the disallowed *Migration Amendment (Temporary Protection Visas) Regulation 2013*.

I can confirm that legal advice was obtained on that issue and that the instrument was prepared in full cognisance of section 48 of the *Legislative Instruments Act 2003*.

(b) Retrospective effect of instrument

The committee raised concerns about the retrospective effect of this instrument and the Explanatory Statement's justification for the apparent removal of pre-existing entitlements regarding applications for permanent protection visas.

Under the migration legislation, a visa application is assessed against criteria for the validity of the visa application and criteria for the grant of a visa. The UMA Regulation introduces a new criterion for the grant of a Subclass 866 (Protection) visa (Subclass 866 visa). Consistent with the government's policy to encourage people to come to Australia by regular and lawful means, the new criterion provides for a Subclass 866 visa to be granted only to applicants who arrived in Australia lawfully. The new criterion does not affect the criteria for the validity of a Subclass 866 visa application, only the criteria for the grant of a Subclass 866 visa. Any applications that were valid prior to the

commencement of the UMA Regulation remain valid after the commencement of the regulation. Accordingly, the Explanatory Statement does not contain justifications about the apparent retrospectivity of the UMA Regulation given it only affects decisions made after the date of the regulation.

(c) Insufficient information regarding the consultation

The committee noted that consultation was not undertaken for the UMA Regulation because it was required urgently. The committee requested further information about why the regulation was required urgently.

The UMA Regulation was required urgently to implement the government's intention to ensure that persons who arrive in Australia without visas are not granted permanent protection via a Subclass 866 visa. The regulation was required as a 'matter of urgency' to implement the government's commitment to maintain the integrity of Australia's borders and migration system and to protect the national interest. Not granting permanent protection to Illegal Maritime Arrivals (IMAs) is a key element of the government's border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia.

Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013 (BVE Regulation)

(a) Matters more appropriate for parliamentary enactment

The committee has raised concerns about whether the legislative instrument contains matters more appropriate for parliamentary enactment. In particular, it has raised concerns that the regulation appears to create the potential for Bridging E (Class WE) visa (BVE) holders to be subjected to behavioural standards not applicable to Australian citizens and that the application of the Code of Behaviour (the Code) could have the effect of bringing about significant changes in the relationship of Australian citizens to BVE holders as being subject to standards of behavior other than might be countenanced or expected of fellow citizens.

The wording contained within the Code was made into a legislative instrument to provide for greater flexibility in its contents and to allow me to respond and change its content where I consider it necessary. The cancellation powers, prescribed grounds and visa condition framework that support the Code of Behaviour amendment already exist within the *Migration Regulations 1994* (the Regulations).

Under the *Migration Act 1954* (the Act), unlawful non-citizens (i.e. non-citizens who do not hold a valid visa) are subject to mandatory detention. In general, IMAs (who, under the Act, are referred to as Unauthorised Maritime Arrivals) are barred by the Act from making a valid application for a visa. If I wish to grant a BVE to such non-citizens in detention, I must use my personal, non-delegable powers under section 195A of the Act where I think it is in the public interest to do so.

The grant of a BVE in these circumstances is not a right, and there is no right for such BVEs to be renewed where they expire. They are granted to non-citizens in the expectation that they will abide by the law, will respect the values important in Australian society, participate in resolving their status, and will not cause or threaten harm to individuals or groups in the Australian community. These considerations contribute to my judgement as to whether it is in the public interest to use my powers to allow these people to hold a BVE.

Since November 2011, BVEs have been granted to more than 20,000 IMAs in immigration detention, significantly increasing the numbers of BVE holders in the community and resulting in IMAs comprising the majority of BVE holders in Australia. I am of the view that it is reasonable to hold these non-citizens to a higher standard of behaviour than was previously the case, where I have granted them a BVE in the public interest. This is because, if not for my decision, these individuals would continue to be unlawful non-citizens subject to mandatory detention under the Act. They do not hold and have not been assessed as meeting the statutory criteria for grant of any substantive visa.

There are already other longstanding areas of migration legislation which apply constraints to non-citizens, which do not apply more broadly to members of the community, for example relating to study, work and reporting of address information. I consider it reasonable that these non-citizens, particularly persons who have not lived in the Australian community previously, are given clear guidance on our expectation of them and I maintain that if we are going to release or allow people to remain in the community from a range of backgrounds, language groups and cultures we should have a process in place that explains what is expected of them, and be prepared to remove them from the community if those expectations are not met.

The Code provides a mechanism for the education of BVE holders on behavioural expectations, the importance of following public health related directives made by my department and to encourage ongoing engagement and compliance with my department whilst their immigration status is being resolved. The Code also provides for early warning and preventative measures through education on behavioral expectations before more serious behavioural problems arise that could otherwise threaten the safety of the Australian community, something that was previously not available. In addition, the Code provides a mechanism to ensure the protection of the Australian community through visa cancellation and re-detention of a person who engages in certain types of behaviour generally not considered to be acceptable in the Australian community.

There is no evidence that the Code is having an adverse impact on the treatment of BVE holders in the community, or that it will have an adverse impact in the future. I would be briefed accordingly should any such evidence be received by my department and I would consider any appropriate action at that time. There is evidence through media and public expression of concern over instances where BVE holders in the community might have posed a risk to the community or a member of the community. The Code provides a valuable form of reassurance to the community that risks associated with placing non-citizens in the community instead of in detention can be responded to expeditiously.

(b) Insufficiently defined power

The committee raised concerns that the Code prescribes a number of potentially vague and subjective behaviours such as 'anti-social', 'disruptive', 'inconsiderate' or 'disrespectful' behaviour, or behaviour which 'threatens the peaceful enjoyment of other members of the community'. The committee questions whether, given the serious consequences which may flow from a breach of the Code, the specific criteria in relation to content of the Code should be provided for in the Regulations.

The terms used in the Code such as 'anti-social', 'disruptive', 'inconsiderate' and 'disrespectful' are commonly used terms in the Australian community and the supporting Code of Behaviour framework provides clear descriptions on the definition of these terms and how a breach of these elements would be assessed and a decision on a breach applied.

The existing visa condition framework within the Regulations also already contains subjective elements. For example, condition 8303 requires the holder must not become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group with the

Australian community. Much decision making in relation to visas is based on subjective judgments relating to terms set out in the Regulations. The codified natural justice processes for visa decision making provide an opportunity for the visa holder to challenge and/ or respond to potentially adverse conclusions.

As noted in my media release after the BVE Regulation commenced, similar behaviour codes are currently enforced in held and community detention under the Act and it makes sense that a similar code be applied to those living in the community on a BVE whose status is also not yet determined.

Although the Regulations provide scope to cancel BVEs held by non-citizens where they were charged or convicted of a criminal offence, this does not adequately capture repeated anti-social activities that do not attract a charge or conviction, but which interfere with the right of the community to peaceful enjoyment. Issues already emerging relate to, for example, intimidation and harassment of service provider staff members.

The Code now addresses such broader issues and focusses on such public safety issues as harassment, intimidation and bullying, as behaviours that may now invoke visa cancellation consideration.

As stated previously, the Code is both an enforceable tool providing a basis for visa cancellation and an educative tool for BVE holders to make behavioural expectations clear. The Code is not written in such a way as to regulate a BVE holder's legitimate freedom of expression and religion. It does, however, identify that certain types of behaviour could be viewed as harassment, intimidation or a form of bullying of other persons or groups of persons and are not considered to be tolerable in Australian society, and therefore could be seen as a breach of the Code. One of the important purposes of the Code is to provide the opportunity for early warning and for preventative measures to be taken in relation to less than criminal matters, before more serious behavioural problems may arise. In that regard, I consider it reasonable that BVE holders are given clear guidance about the behaviours that are considered acceptable and reasonable in Australian society.

My department has put in place a number of processes to ensure that the Code is clearly understood prior to the need to sign the Code. For example, IMAs in held and community detention have been assisted by case managers and interpreters when signing the Code to ensure that they understand the Code and what it contains. Supporting information explaining key terms used in the Code is being translated into twelve community languages and people in the community can seek support from my department to sign the Code where necessary. In addition, an initial information session has been held for IMA BVE holders who receive Community Assistance Support (CAS) services or Asylum Seeker Assistance Scheme (ASAS) services through the Adult Multicultural Education Services in Melbourne, with further information sessions planned for other locations.

Although the legislation provides a trigger for considering cancellation of the visa, the decision to cancel a bridging visa remains discretionary, allowing the decision maker to take into account the individual merits of a case. The discretionary cancellation process requires that a visa holder be notified if there appear to be grounds for cancellation and given particulars of those grounds and the information because of which the grounds appear to exist under the principle of natural justice. The visa holder must be provided with the opportunity to show that the grounds do not exist, or that there are other reasons why the visa should not be cancelled.

In addition, while the cancellation ground may be enlivened, there are a number of other responses that can be applied where a breach of the Code has occurred (or is alleged to have occurred), which can be tailored to suit individual circumstances and allow for flexible application. These responses include the use of counselling and warning letters for less serious matters, which are aimed at

educating BVE holders further on the terms of the Code and reinforcing behavioural expectations.

(c) Exemption of instrument from disallowance

The committee has noted that the Explanatory Statement contains no information on the exemption of the Code from disallowance. Under item 26 of section 44 of the *Legislative Instruments Act 2003*, legislative instruments under Part 1, 2, or 5 or Schedule 1, 2, 4, 5A, 6, 6A, or 8 of the Regulations made under the Act are not subject to disallowance. As the Code is made under Schedule 4 to the Regulations it is not subject to disallowance by operation of the *Legislative Instruments Act 2003*.

(d) Retrospective effect of instrument

The committee raised concerns about the retrospective effect of the BVE Regulation and the Explanatory Statement's justification for the apparent removal of pre-existing entitlements in relation to applications for a BVE. In particular, the Committee noted that this Instrument introduced new visa criterion relating to the Code which has the effect of invalidating otherwise valid BVE applications not determined on the commencement date (14 December 2013).

The BVE Regulation has no effect on the validity of otherwise valid applications. Under the migration legislation, a visa application is assessed against validity criteria and where that application is valid, against criteria that is to be met at the time of the visa application and at the time of the visa decision. This instrument introduces a new visa criterion related to the time of decision criteria only. Consistent with the government's policy intention to ensure that people who were granted a BVE as a result of the exercise of my powers under section 195A of the Act are held to a higher level of accountability, the new time of decision criterion requires certain persons being considered for the grant of a BVE to have signed a Code of Behaviour. This new criterion does not affect the validity of a BVE application. Any applications that were determined to be valid prior to the commencement of the Instrument remain valid after the commencement of the Instrument. The Explanatory Statement does not contain justifications about the apparent retrospectivity of the Instrument given it only affects decisions made after the date of the regulation.

Under this amendment any person who has had a BVE cancelled for reason of failure to comply with condition 8564 or 8566, or where the visa was cancelled under a ground specified in 2.43(1)(p) or (q) is barred from applying for a further BVE.

(e) Consultation

The committee is concerned that my determination that consultation was unnecessary or inappropriate in this case may not have taken account of, or provided appropriate opportunity for comment by, persons likely to be affected by the instrument.

Relevant government departments and the Australian Federal Police were consulted about the Code of Behaviour and where possible I have taken these agency's comments and concerns into account when crafting the content of the instruments. Contracted service providers are involved in ongoing consultation with my department with regards to the implementation process.

The Code of Behaviour amendment reflects community concerns and the policy articulated by the government prior to the election. Ongoing media coverage continues to reflect the community's concerns to ensure IMA BVE holders are given clear guidance on the behaviours expected of them and that government has enforceable powers to remove IMA BVE holders to immigration detention where these expectations are breached.

Under the existing visa framework most temporary visa holders, including BVE holders, in Australia are subject to a variety of visa conditions set out in the Regulations. Many of these set out requirements that the visa holder must abide by or which set restrictions on what the visa holder is permitted to do while in Australia. As noted in my media release after the instruments commenced, similar behaviour codes are currently enforced in held and community detention and it makes sense that a similar code be applied to those living in the community whose status is also not yet determined.

An IMA in detention can only be granted a BVE where I exercise my personal powers to grant a visa in the public interest. Given that I grant these visas using my personal powers it is appropriate that I determine the conditions under which these people may live in the community. The grant of a visa in these circumstances is not a right, and is conferred on these non-citizens in the expectation that they will be law abiding, considerate, compliant, and will not cause or threaten harm to the Australian community. Without my intervention these non-citizens would remain in immigration detention and would return to immigration detention at the expiry of their BVEs.

When I announced the implementation of the Code on Friday 20 December 2013, I noted that an average of two IMAs had been charged with criminal offences every week since the election. Charges laid against IMAs at that time included murder, assault, acts of indecency, stalking, rape, shoplifting and drink-driving. As at 31 January 2014, 50 IMAs have had their BVEs cancelled and been re-detained, and 24 whose BVE had ceased have been re-detained following involvement in a criminal matter.

I consider it reasonable that non-citizens being released into the community on a BVE, particularly where they have not lived in the Australian community previously, are given clear guidance about the behaviours that are considered acceptable and reasonable in Australian society.

The Code is designed to support BVE holders whilst they live in the community by educating them in acceptable standards of behaviour. Information sessions have been held for IMA BVE holders who receive CAS services or ASAS services through the Adult Multicultural Education Services in Melbourne, with further information sessions planned for other locations. IMA BVE holders who are receiving support under the CAS and/or ASAS programmes are given orientation to Australian society by their service providers. The Code will reinforce information provided during these orientation sessions. The educative aspect of the Code is intended to assist people to understand the behaviour expected of them while they live lawfully in the community and to encourage cooperation with authorities while they are awaiting resolution of their visa status.

The Code of Behaviour amendment does not affect the capacity of all IMAs to choose not to sign the Code.

I hope the information provided is helpful to the committee.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
20 / 3 /2014

Original Sent from Minister's Office

COPY

The Hon Greg Hunt MP

Minister for the Environment

RECEIVED 26 MAR 2014 Senate Standing C'ttee on Regulations and Ordinances

MC14-008279

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

26 MAR 2014

Dear ~~Senator~~ Sean

I refer to your office's letter of 12 February 2014 concerning the Senate Standing Committee on Regulations and Ordinances' request for a response in relation to issues with two instruments in my portfolio identified in the *Delegated Legislation Monitor* No.1 of 2014. I regret the delay in responding.

Firstly, I refer to the Committee's request for further information in relation to the *Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Various Matters) Regulation 2013* [F2013L02135].

Subregulation 911(1) of the *Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995* (the Regulations), as amended by the *Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Various Matters) Regulation 2013*, sets out the effect of payment of an infringement notice penalty namely, that its payment discharges all liability for the alleged contravention, without constituting an admission of fault. This is appropriate for an administrative remedy that may be discharged without adjudication by the courts. However, subregulation 911(2) of the Regulations provides that subregulation 911(1) does not apply if the notice is subsequently withdrawn pursuant to subregulation 910(2) of the Regulations.

The Attorney-General's Department *A Guide to Framing Commonwealth Offence, Infringement Notice and Enforcement Powers* (the Guide) provides that "infringement notice provisions should state that an authorised officer may withdraw a notice by serving written notice on the person served with the notice". The Guide goes on to state that infringement notices may be withdrawn for a variety of reasons including new facts coming to light suggesting the person served with the notice did not commit the offence, the offence is part of more serious criminal conduct that should be prosecuted, or an error in the infringement notice.

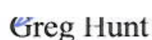
Regulations 910 and 911 are consistent with the Guide as they allow infringement notices to be withdrawn in certain circumstances, such as those specified in the Guide. Subregulation 910(3) of the Regulations sets out the factors the Secretary may consider when deciding whether or not to withdraw an infringement notice. These include whether a court has previously imposed a penalty on the person for a contravention of an infringement notice provision, the circumstances of the alleged contravention, whether the person has paid an earlier infringement notice penalty relating to the same, or substantially the same, conduct, and any other matter that the Secretary considers relevant.

Secondly, I refer to the Committee's request for further information in relation to the *Amendment to the list of migratory species under section 209 of the Environment Protection and Biodiversity Conservation Act 1999 (26/11/2013)* [F2013L02109].

This legislative instrument removes 82 bird species that do not meet the migratory species listing criteria under the EPBC Act (s209(3)). The Department of the Environment (the Department) undertook targeted consultation with Birdlife Australia, avian expert Professor Stephen Garnett of Charles Darwin University and migratory shorebird researcher Dr Danny Rogers of the Arthur Rylah Institute. The amendments were strongly supported as these species do not meet the migratory species listing criteria. The Department has revised the explanatory statement for this instrument and will arrange for its lodgement on the Federal Register of Legislative Instruments as soon as practicable. I have enclosed a copy for your information.

Thank you for the opportunity to comment on this matter.

Yours sincerely



Greg Hunt

Enc

EXPLANATORY STATEMENT

(Issued under the Authority of the Minister for the Environment)

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Instrument under section 209(1)(b), 209(6) and 209(7)

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **Act**) provides for the protection of the environment, especially matters of national environmental significance and the conservation of biodiversity, including the protection and conservation of listed migratory species.

Section 209 of the Act provides for a list of migratory species (the **List**) that are included in Appendices to the Bonn Convention, and in the Annexes to the Japan-Australia Migratory Bird Agreement (**JAMBA**), the China-Australia Migratory Bird Agreement (**CAMBA**) or other international agreements approved by the Minister (Republic of Korea-Australia Migratory Bird Agreement (**ROKAMBA**)).

Sections 209(1)(b), 209(6) and 209(7) of the Act provide that the Minister may, by legislative instrument, amend the List as necessary to correct inaccuracies.

The purpose of this Instrument is to amend the List by:

deleting 82 non-migratory species from the List:

(species from Australia)

- *Aplonis fusca*
- *Cacatua pastinator pastinator*
- *Calyptorhynchus baudinii graptogyne*
- *Columba vitiensis godmanae*
- *Coracina tenuirostris melvillensis*
- *Cyanoramphus novaezelandiae cookii*
- *Cyanoramphus novaezelandiae erythrotis*
- *Cyanoramphus novaezelandiae subflavescens*
- *Dasyornis broadbenti littoralis*
- *Dromaius baudinianus*
- *Dromaius minor*
- *Drymodes superciliaris colcloughi*
- *Erythrura gouldiae*
- *Falcunculus frontatus whitei*
- *Gallicolumba norfolciensis*
- *Geopsittacus occidentalis*
- *Gerygone insularis*
- *Hemiphaga novaeseelandiae spadicea*
- *Leipoa ocellata*
- *Lichenostomus melanops cassidix*
- *Manorina melanotis*
- *Neophema chrysogaster*
- *Nestor productus*
- *Ninox novaeseelandiae albaria*
- *Ninox novaeseelandiae undulata*
- *Notornis alba*
- *Pardalotus quadragintus*
- *Petrophassa smithii blaawi*
- *Pezoporus wallicus flaviventris*
- *Poecilodryas superciliosa cerviniventris*
- *Psephotus chrysopterygius*
- *Psephotus pulcherrimus*

- *Psittaculirostris diophthalma coxeni*
- *Pterodroma leucoptera leucoptera*
- *Rallus pectoralis clelandi*
- *Rallus philippensis maquariensis*
- *Rhipidura cervina*
- *Stipiturus malachurus intermedius*
- *Sula abbotti*
- *Turdus poliocephalus poliocephalus*
- *Turdus xanthopus vinitinctus*
- *Xanthomyza phrygia*
- *Zosterops albogularis*
- *Zosterops strenua*

(species from Japan)

- *Accipiter gentilis fugiyamae*
- *Apalopteron familiare hahasima*
- *Aquila chrysaetos japonica*
- *Branta canadensis leucopareia*
- *Buteo buteo oshiroi*
- *Buteo buteo toyoshimai*
- *Carduelis sinica kittlitzi*
- *Chalcophaps indica yamashinai*
- *Ciconia ciconia boyciana*
- *Columba janthina nitens*
- *Columba janthina stejnegeri*
- *Dendrocopus leucotos owstoni*
- *Diomedea albatrus*
- *Erithacus komadori komadori*
- *Erithacus komadori namiyei*
- *Erithacus komadori subrufus*
- *Falco peregrinus fruitii*
- *Falco peregrinus japanesis*
- *Garrulus lidthi*
- *Grus japonensis*
- *Haliaeetus albicilla albicilla*
- *Haliaeetus pelagicus pelagicus*
- *Ketupa blakistoni blakistoni*
- *Lagopus mutus japonicus*
- *Lunda cirrhata*
- *Megalurus pryeri pryeri*
- *Nipponia nippon*
- *Phalacrocorax urile*
- *Picoides tridactylus inouyei*
- *Pitta brachyura nympha*
- *Rallus okinawae*
- *Sapheopipo noguchii*
- *Scolopax mira*
- *Spilornis cheela perplexus*
- *Spizaetus nipalens orientalis*
- *Tringa guttifer*
- *Turdus dauma amami*
- *Uria aalge inornata*

These species have been deleted from the migratory list as they do not meet any criteria for listing as migratory.

Statement of Compatibility with Human Rights

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

Amendment to the list of migratory species under section 209 of the *Environment Protection and Biodiversity Conservation Act 1999*

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 Legislative Instrument

The purpose of this Instrument is to amend the *Environment Protection and Biodiversity Conservation Act 1999* list of migratory species by deleting 82 species.

These species do not meet the migratory species listing criteria to make them eligible for listing under the EPBC Act (s209(3)) .

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Minister for the Environment

Section 209 of the Act does not require the Minister, when deciding whether to amend the List under section 209(6) of the Act, to obtain and consider advice from the Threatened Species Scientific Committee on the proposed amendment.

In accordance with Article III(2) of JAMBA each government is required to note species or subspecies of birds that are in danger of extinction. The endangered species notes are separate to the agreement's annex, which is reserved for migratory species between the two countries. In 2000, when the EPBC Act migratory list was first created, the endangered species notes were inadvertently included with the annex as migratory species. These endangered species do not meet the migratory species listing criteria (s209(3)) and should be removed.

Targeted consultation on the migratory list amendments was held with BirdLife Australia, Professor Stephen Garnett of Charles Darwin University and Dr Danny Rogers of the Arthur Rylah Institute. The amendments were strongly supported as these species do not meet the migratory species listing criteria.

The Instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (Cth).

The Instrument commenced on the day after it was registered on the Federal Register of Legislative Instruments.

Authority: section 184(1)(b) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

THE HON MICHAEL KEENAN MP
Minister for Justice

RECEIVED
31 MAR 2014
Senate Standing C'ttee
on Regulations
and Ordinances

MC13/30783

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

Dear ~~Senator~~ Sean

Response to *Monitor No. 8 of 2013* (4 December 2013)

I refer to the issue identified by the Senate Standing Committee for Regulations and Ordinances in *Monitor No. 8 of 2013* (4 December 2013) concerning the *Crimes Amendment (X-ray) Regulation 2013* (the Regulation).

In particular, the Committee has requested my advice as to whether consultation had been undertaken in the preparation of the Regulation.

This Regulation was an initiative of the previous Government. I am, however, informed that at the time it was considered unnecessary to consult on this Regulation. As noted in the Explanatory Statement, the Regulation is not likely to impact on business or restrict competition. In addition, the use of X-rays in the context of age determination has been considered by the Senate Legal and Constitutional Affairs References Committee report into the Detention of Indonesian minors in Australia, and the Senate Legal and Constitutional Affairs Legislation Committee's report into the Crimes Amendment (Fairness for Minors) Bill 2011, as well the Australian Human Rights Commission (AHRC) Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children. Each of these inquiries received public submissions and took oral evidence. This content of the Regulation was also discussed in the context of the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill 2013.

I am also informed that this Regulation implements part of Recommendation 1 of the Senate Legal and Constitutional Affairs References Committee report, and Recommendations 5 and 6 of the AHRC's report.

I trust that this information will be of assistance and thank the Committee for its continuing, important work in facilitating the scrutiny of bills brought before the Parliament.

The relevant officer in the Attorney-General's Department is Rachel Antone who can be contacted on 6141 3419.

Yours sincerely

Michael Keenan

27 MAR 2014

The Hon. Barnaby Joyce MP

Minister for Agriculture
Federal Member for New England

Ref: MNMC2014-02968

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

RECEIVED
01 APR 2014
Senate Standing C'ttee on Regulations and Ordinances

Dear Mr Powell

Thank you for your letter of 12 December 2013 about the Senate Regulations and Ordinances Committee monitor regarding the review clauses of the stated quota orders.

I have received advice from my department that the discrepancies between the *Australian Meat and Live-stock Industry (Beef Export to the USA—Quota Year 2014) Order 2013* and the *Australian Meat and Live-stock Industry (Sheepmeat and Goatmeat Export to the European Union—Quota Year 2014) Order 2013* regarding the review of decisions by the Administrative Appeals Tribunal are due to a drafting anomaly.

The discrepancies between the two orders do not impinge in any way the Administrative Appeals Tribunal review process pertaining to decision made under the orders. Appeals to the Administrative Appeals Tribunal about decisions made by the Secretary to vary, refuse to vary or cancel quota are set out in Section 30 of the *Australian Meat and Live-stock Industry Act 1997* (the Act) and apply to decisions made under both orders.

Notes referring to the decision review process under Section 30 of the Act are included to help quota holders better utilise their rights. The discrepancy in referencing in the notes will be rectified in drafting of future annual quota orders under the Act.

I trust this information is of assistance to you.

Yours sincerely

Barnaby Joyce MP

31 MAR 2014

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

The Hon Greg Hunt MP

Minister for the Environment

RECEIVED
04 APR 2014
Senate Standing C'ttee
on Regulations
and Ordinances

MC13-002443

Mr Ivan Powell
Committee Secretary
Standing Committee on Regulations and Ordinances
PO Box 6100
Parliament House
CANBERRA ACT 2600

3 APR 2014

Dear Mr Powell Ivan

Thank you for your letter of 24 October 2013 seeking additional information about the basis of the change to fees for wildlife trade permits under the Environment Protection and Biodiversity Conservation Amendment (Fees for Wildlife Trade Permits) Regulation 2013. I regret the delay in responding.

Fees for most wildlife trade permit activities had not increased since the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* was incorporated into the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) in 2001, and in some cases had not increased since 1993.

In August 2011, the then Australian Government agreed to investigate increased fees for wildlife trade regulation, to better reflect the cost of providing this service. Subsequently in September 2011, the then Department of Sustainability, Environment, Water, Population and Communities released a consultation paper which outlined the full cost of delivering the range of wildlife trade regulatory functions under the EPBC Act and sought stakeholder feedback on the impact of full cost recovery of these activities.

Several stakeholders noted in their submissions that full cost recovery would have a significant impact for those businesses that rely on these regulated activities, as most of these businesses already operate at small profit margins. Noting other cost pressures for these businesses, full cost recovery would have had the potential of reducing and/or prohibiting sales. The consultation paper and copies of all submissions received (excepting those that were marked confidential) are available on the Department's website at:
www.environment.gov.au/epbc/publications/consultation-draft-cost-recovery-2011.html

Taking account of the stakeholder feedback received, the then Australian Government agreed that the maximum increase that would not have a significant impact on the viability of relevant stakeholders was a doubling of fees, rather than introducing full cost recovery as originally proposed

The Department conducted further consultation on this revised approach to fees through a draft Cost Recovery Impact Statement (the Statement) in May 2012. None of the stakeholder submissions on the Statement raised concern regarding the revised level of increase to fees.

The Statement also explains how the full cost of wildlife trade permit application services were determined, taking into account staff time for processing permit applications and providing advice as needed; as well as the costs of providing necessary support services for those staff including Information Technology support.

The new fees commenced on 1 July 2013. Under the updated charging regime, the fees for wildlife trade regulatory activities do not fully recover the cost of delivering the services.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

THE HON PETER DUTTON MP
MINISTER FOR HEALTH
MINISTER FOR SPORT

Ref No: MC14-003313

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

RECEIVED
15 APR 2014
Senate Standing C'ttee on Regulations and Ordinances

Dear Chair

Thank you for your correspondence regarding the Delegated legislation monitor No. 8 of 2013.

My responses to the issues identified in the monitor are set out below.

Australian Sports Anti-Doping Authority Amendment Regulation 2013 (No. 1) [F2013L01443]

I am advised that at the time of the making of the Regulation, the then Department of Regional Australia, Local Government, Arts and Sport consulted with the Coalition of Major Professional and Participation Sports and the Australian Athletes Alliance about the development of the Regulation. The input provided by these bodies assisted in developing a Regulation that, while improving Australian Sports Anti-Doping Authority's capacity to collect information in relation to possible anti-doping rule violations, respects the protections afforded to athletes under the anti-doping arrangements. The non-reporting of these consultations in the Explanatory Statement was an oversight and an updated Explanatory Statement will be registered shortly to rectify this oversight.

Private Health Insurance (Council Administration Levy) Amendment Rules 2013 (No. 2) [F2013L01504]

I can confirm that the correction of the drafting error did not cause any disadvantage or have a negative impact on any person or business. The error was picked up before the quarterly invoice process was conducted and thus the amendment had no detrimental effect.

Private Health Insurance (Health Benefits Fund Administration) Amendment Rule 2013 (No. 1) [F2013L01684]

This instrument replaces and updates the Solvency and Capital Adequacy Standards for registered private health insurers, and incorporates certain extrinsic material. The Private Health Insurance (Risk Equalisation Policy) Rules 2007 is incorporated into the instrument as in force at the commencement of the instrument. The basis of the incorporation of this extrinsic material will be more clearly articulated the next time the Private Health Insurance (Health Benefits Fund Administration) Rules are amended.

Private Health Insurance (Prostheses) Amendment Rules 2013 (No. 4)
[F2013L01839]

I am advised by my Department that there was a low risk that the correction of drafting errors would be disadvantageous to persons. To mitigate the risk of disadvantage, my Department notified stakeholders of the changes in advance of the rules commencing. A Private Health Insurance Circular (PHI 72/13) was circulated on 1 November 2013, explaining the changes.

Yours sincerely

14/4/14

PETER DUTTON

cc: records.sen@aph.gov.au

The Hon Scott Morrison MP

Minister for Immigration and Border Protection

Ministerial No: 109037

RECEIVED
17 APR 2014
Senate Standing C'ttee on Regulations and Ordinances

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

Dear Chair

Request from the Committee on '*Customs Act 1901 - Specified Percentage of Total Factory Costs Determination No. 1 of 2013 [F2013L02198]*'

Thank you for the Committee's comments on the above matter and the request for information.

You have requested advice regarding the consultation undertaken on the *'Customs Act 1901 - Specified Percentage of Total Factory Costs Determination No. 1 of 2013 [F2013L02198] Determination'* (the Determination) in accordance with s.26 of the *Legislative Instruments Act 2003*. In particular, you have sought additional information on the consultation that was undertaken concerning the Government of Samoa's request for the continued derogation on factory costs of the motor vehicle wiring harnesses prior to the Determination being made.

I am advised by the Australian Customs and Border Protection Service (ACBPS) that the Department of Industry undertook consultation with key industry stakeholders, including the Australian vehicle manufacturers and the peak industry body representing the automotive supply chain (the Federation of Automotive Products Manufacturers). Stakeholders indicated their support for the continuation of the derogation, with only one submission opposing the derogation on the basis that it had the potential to adversely affect its business. The consultation was undertaken on a commercial-in-confidence basis.

I am further advised by the ACBPS that the relevant Explanatory Statement will be updated to reflect this information and will be re-tabled in both Houses of the Parliament. A copy will also be delivered to the Committee.

Yours sincerely,

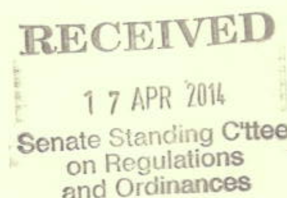
The Hon Scott Morrison MP
Minister for Immigration and Border Protection
17 / 4 /2014

Senator the Hon. Michael Ronaldson

Minister for Veterans' Affairs
Minister Assisting the Prime Minister for the Centenary of ANZAC
Special Minister of State

Ref: M14/0828

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



Dear Senator Edwards,

I refer to the letter from the Committee's Secretary of 12 February 2014 drawing my office's attention to comments in the Committee's *Delegated Legislation Monitor* No. 1 of 2014 in relation to two legislative instruments administered by the Department of Veterans' Affairs, namely:

- the *Treatment Principles (Australian Participants in British Nuclear Tests) 2006*
- the *MRCA Treatment Principles*.

I regret the delay in responding but it is unclear if my office received the Committee's original letter.

TThe Committee has noted there are blank items in the schedule of incorporated documents for the relevant instruments and asked if this was intentional. The answer is yes.

The overarching schedule is prepared for the Treatment Principles under the *Veterans' Entitlements Act 1986* (VEA TPs) and used for the other two sets of Treatment Principles (MRCA TPs and Nuclear TPs) but not all of the documents mentioned in the template-schedule are relevant for one or both of the other two sets of Treatment Principles. Accordingly the template-schedule is modified by leaving a blank item for the un-needed document as an "alert" to a difference between the set of Treatment Principles for which the document is not needed and the other sets of Treatment Principles.

I have been advised that the Department considers there is considerable merit in not renumbering and keeping the relevant items blank because of the unique situation that is involved in relation to the instruments administered by it.

An example of the issue (taken from the *Treatment Principles (Australian Participants in British Nuclear Tests) 2006*) is set out below (incidentally the Committee mistakenly said there was a blank item 12 in the schedule to the *Treatment Principles (Australian Participants in British Nuclear Tests) 2006* when in fact the blank items were 7 and 23):

22. Australian Government Department of Veterans' Affairs Classification System and Schedule of Item Numbers and Fees — Community Nursing Services;
23. ...
24. Rehabilitation Appliances Program (RAP) National Guidelines (paragraph 11.2A.1).

Parliament House, Canberra ACT 2600 Tel: (02) 6277 7820 Fax: (02) 6273 4140

I share the Department's view that the blank space could alert administrators and the public, but particularly administrators, to the fact that a document is not incorporated in the particular legislative instrument. While this probably would not impart any message to the public, it could to administrators.

The administrators are dealing with three virtually identical legislative instruments (Treatment Principles made under the *Veterans' Entitlements Act 1986* (VEA Treatment Principles), Treatment Principles made under the *Military Rehabilitation and Compensation Act 2004* (MRCA Treatment Principles) and Treatment Principles made under the *Australian Participants in British Nuclear Tests (Treatment)Act 2006*) (Nuclear Treatment Principles)) but there are some significant differences between the three sets of Treatment Principles in terms of the treatments available under them and the blank spaces are an indicator of a difference because certain incorporated documents underpin certain treatments.

Noting the example given above for the Nuclear Treatment Principles, the same part of the schedule under the VEA Treatment Principles and the MRCA Treatment Principles is:

22. Australian Government Department of Veterans' Affairs Classification System and Schedule of Item Numbers and Fees — Community Nursing Services (paragraph 6A.4.2(b));
23. Notes for Coordinated Veterans' Care Program Providers (Part 6A); (emp.add.)
24. Rehabilitation Appliances Program (RAP) National Guidelines (paragraph 11.2A.1);

The document known as the "Notes for Coordinated Veterans' Care Program Providers" is incorporated into the VEA Treatment Principles and the MRCA Treatment Principles but not the Nuclear Treatment Principles because the treatment to which the document relates i.e. Co-ordinated Veterans' Care, is not provided to clients under the Nuclear Treatment Principles.

Accordingly there was no need for the document in question to be incorporated into the Nuclear Treatment Principles but leaving the space blank could alert administrators to "a difference" between the three sets of Treatment Principles which in turn could result in an unauthorised treatment not being provided.

The drafting technique of leaving the spaces in question is not necessarily bad drafting and is considered by the Department to be appropriate for the particular situation in question i.e. that of three virtually identical instruments with subtle differences; and that it is not unknown for legislation to have an unusual numbering configuration. For example, and while not totally similar to the situation at hand but nevertheless instructive, the Schedule to the *Excise Tariff Act 1921* has the following drafting:

5		**Tobacco, cigars, cigarettes and snuff**	
	5.1	In stick form not exceeding in weight 0.8 grams per stick actual tobacco content	$0.32775 per stick
	5.5	Other	$409.71 per kilogram of tobacco content
10		**Goods as follows:** **(a) petroleum condensate and stabilised crude petroleum oil for use otherwise than:** **(i) in the recovery, production, pipeline transportation or refining of petroleum**	

The Explanatory Memorandum for the *Excise Tariff Amendment (Fuel Tax Reform and Other Measures) Bill 2006* which substituted the schedule in the *Excise Tariff Act 1921* said:

> 1.20 The current excise tariff is repealed and replaced by a new excise tariff which incorporates a revised numbering system ... Rather than incorporating items, subitem, paragraphs and subparagraphs, the excise tariff incorporates a simpler, two-tier numbering system with only items and subitems. Rather than numbering items and subitems consecutively, some numbers have been omitted from the excise tariff to accommodate the inclusion of additional items and subitems should that be required in the future.

For administrative expedience, I do not believe there is a need for further changes to be made, which are consistent with approaches taken under other legislation.

I hope this information is of assistance to you.

Yours sincerely,

SENATOR THE HON. MICHAEL RONALDSON

7 APR 2014

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

05 MAY 2014

Senator Sean Edwards
Chairman
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Edwards Sean

Thank you for your letter dated 5 December 2013 regarding the Civil Aviation Safety Authority (CASA), legislative instrument CASA 158/13 – Direction – number of cabin attendance in Boeing 737-800 series aircraft, Qantas Airways Limited [F2013L01491] and comments in *Delegated legislation monitor* No. 8 (4 December 2013). I apologise for the long delay in responding.

In relation to the lack of information provided in the explanatory statement for this instrument, I am advised that consultation under section 17 of the *Legislative Instruments Act 2003* was undertaken with aviation industry participants. Specifically through the issue of the CASA Notice of Proposed Rule Making on Cabin Crew Ratios relating to the proposed amendment to Civil Aviation Order Section (CAO) 20.16.3. This took place in February 2010 prior to the issue of this and similar instruments.

Thank you for raising this matter.

Yours sincerely

WARREN TRUSS

Suite MG 41, Parliament House
CANBERRA ACT 2600

Phone: 02 6277 7680
Fax: 02 6273 4163