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Ordinances

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Introduction

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

The 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

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 **18 June 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.

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 SLI 2013 No. 280 [F2013L02104]

Purpose	Amends the Migration Regulations 1994 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 (Protection) visa
Last day to disallow¹	13 May 2014
Authorising legislation	<i>Migration Act 1958</i>
Department	Immigration and Border Protection

Issue:

Whether instrument is the same in substance as disallowed instrument

This instrument introduces a new visa criterion, such that a Subclass 866 (Protection) visa can only be granted to a person who:

- held a visa that was in effect on their last entry to Australia; and
- is not an unauthorised maritime arrival (UMA); and
- was immigration cleared on the applicant's last entry into Australia.

The ES states that the instrument is made in response to the Senate's disallowance of the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 (on

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

2 December 2013), which had reintroduced Temporary Protection Visas (TPVs). Whereas the previous instrument introduced TPVs as the visa to be granted to all UMAs, with a condition that they could not access the Subclass 866 (Protection) visas, the new instrument instead places that condition on the Subclass 866 (Protection) visas.

Section 48 of the *Legislative Instruments Act 2003* places limitations on the remaking of instruments after disallowance, including that an instrument that is 'the same in substance' as a disallowed instrument may not be remade within six months after that disallowance (unless the House that disallowed the instrument rescinds the disallowance resolution or otherwise approved the making of the second instrument).

The concept of 'the same in substance' was considered by the High Court in *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347. In that decision, Chief Justice Latham stated that the question of whether an instrument is the same in substance as a disallowed instrument 'must be applied by the court without any knowledge of the reasons which prompted a House [to disallow it]. The Chief Justice noted that the court should therefore determine whether a new regulation is the same in substance by applying such tests as the court may think proper, and by seeking 'to determine in each case whether such differences as exist between the disallowed regulation and the new regulation are differences in substance'.

Chief Justice Latham concluded that (an equivalent provision to) section 48 of the LIA prevented 'the re-enactment, within six months of disallowance, of any regulation which is substantially the same as the disallowed regulation in the sense that it produces substantially, that is, in large measure, though not in all details, the same effect as the disallowed regulation'.

As to whether the current instrument 'produces substantially, though not in all details, the same effect as the disallowed [instrument]', it may be said that the effect of both instruments is/was to prevent unauthorised maritime arrivals from being eligible for Subclass 866 (Protection) visas. The committee's usual practice where a question of law arises is to seek further information from the relevant instrument maker, and to inquire specifically as to whether legal advice on the legal question was sought. **[the committee requested further information from the minister]**.

MINISTER'S RESPONSE:

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*.

COMMITTEE RESPONSE:

The committee thanks the Minister for Immigration and Border Protection for his response.

However, notwithstanding the Senate's disallowance of the instrument on 27 March 2014, the committee notes the broader relevance of the issue of whether an instrument may be regarded as the 'same in substance' to the committee's ongoing scrutiny function.

Noting the minister's advice that legal advice was obtained on this issue, the committee therefore seeks the minister's view as to whether the UMA Regulation was the same in substance as the disallowed Migration Amendment (Temporary Protection Visas) Regulation 2013.

Further, the committee notes past occasions where it has sought and been provided with legal advice on matters of relevance to the application of the committee's scrutiny principles.

The committee therefore requests from the minister a copy of the legal advice obtained in relation to this matter.

Issue:*Retrospective effect of instrument*

As noted above, this instrument adds a new criterion to the Subclass 866 (Protection) visa, making UMAs ineligible to apply for that visa type. The amendment made by the instrument applies to applications for protection visas 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 are, by virtue of the new criterion, 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 a protection visa. **[the committee requested further information from the minister].**

MINISTER'S RESPONSE:

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.

COMMITTEE RESPONSE:

The committee thanks the minister for his response. Noting that the instrument has been disallowed, the committee has concluded its interest in this matter.

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 (providing for a Subclass 866 visa to be granted only to applicants who arrived in Australia lawfully) prescribed 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 would have been subject to a new criterion (lawful arrival in Australia) at the time of the visa decision.

The committee's usual expectation where an instrument has retrospective effect is that explanatory statements provide an explanation of the justification for the relevant measures, so as to allow the committee to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)).

The committee therefore draws the minister's attention to its expectations regarding the requirement that explanatory statements provide a justification for instruments that are retrospective in effect.

Issue:

Insufficient information regarding consultation

The ES for the instrument states that consultation was not undertaken in this case because the regulation was required as a 'matter of urgency'. While it goes on to state that the urgency is due to the instrument being a 'priority of the Government', there is no information provided as to the facts or circumstances from which the condition of urgency arises. The committee generally seeks further justification in response to effectively unsupported claims of urgency. **[the committee requested further information from the minister]**.

MINISTER'S RESPONSE:

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.

COMMITTEE RESPONSE:

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

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

Purpose	This instrument provides for exceptions under the <i>Australian Jobs Act 2013</i> , information required for compliance and notification, and further functions for the Australian Industry Participation Authority
Last day to disallow²	13 May 2014
Authorising legislation	<i>Australian Jobs Act 2013</i>
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

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

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 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, 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 FPC appear to be distinguishable from this broad power to make legislative rules in the absence of a regulation-making power. A number of these may be distinguished on the basis that:

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

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

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

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

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

It has long been the practice to include general regulation making powers in Acts.

More recently, an approach has been taken to adapt that practice for other legislative instruments.

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

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

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

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

Ramifications for the quality and scrutiny of legislative rules

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

FPC's advice notes that instruments made under the general instrument-making power may now be drafted by agencies (unlike regulations, which are required to be drafted by OPC). OPC may, however, draft or assist agencies 'within the limits of available resources'. In the committee's experience, regulations are characterised by the highest drafting standards, and it seems unlikely that agencies are equipped to achieve the same standards in the drafting of instruments under the general instrument-making power. In particular, the committee notes that regulations may be lengthy and complex, covering a range of matters as permitted by the general power on which they are based. Given this, the Parliament's ability to scrutinise instruments that are of a similar character, but not drafted, and subject to only limited oversight, by OPC, may be adversely affected where the highest standards are not maintained.

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

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

MINISTER'S RESPONSE:

The Minister for Industry provided the committee with a lengthy advice from First Parliamentary Counsel (FPC).

Minister's concerns

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

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

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

COMMITTEE RESPONSE:

The committee thanks the minister for his response and offer of a meeting to discuss the committee's concerns.

The committee will contact FPC directly to progress arrangements for a meeting with officers of the department and OPC. The committee notes that the content of any such meeting will form part of the committee's public scrutiny of the instrument, and be included in subsequent reports on this matter (in addition to further written responses to the committee's comments below).

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

The delegation of the Parliament's legislative power to executive government involves a 'considerable violation of the principle of separation of powers, the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government'.³ This principle is effectively preserved through the committee's work scrutinising delegated legislation, and the power of the Parliament to disallow delegated legislation.

In accordance with this critical role, the committee's scrutiny principles are 'interpreted broadly to include every possible deficiency in delegated legislation affecting parliamentary propriety and personal rights'.⁴

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

More generally, the committee notes that, notwithstanding its concerns in relation to the current instrument, recent bills for proposed Acts continue to make provision for a general-rule making power. The management of risk attendant on use of the general

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

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

rule-making power while the committee's concerns remain unresolved is a consideration falling outside the scope of the committee's scrutiny functions.

Prescribing of matters by 'legislative rules'

MINISTER'S RESPONSE:

FPC's advice stated:

As discussed in my previous letter, Commonwealth Acts have provided for the making of instruments rather than regulations for many years. The use of a general rule-making power in place of a general regulation-making power is a development of this long-standing approach, and has been adopted by OPC for the reasons discussed below. In my view, over time this approach will enhance, and not diminish, the overall quality of legislative instruments (in particular, the quality of instruments that have the most significant impacts on the community) and will accordingly facilitate the Committee's scrutiny role.

COMMITTEE RESPONSE:

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

Ramifications for the quality and scrutiny of legislative rules

MINISTER'S RESPONSE:

FPC's advice stated:

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

1. OPC's drafting functions

(a) OPC's drafting functions generally

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

(b) Who may provide drafting services for Government?

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

7 The Legal Services Directions provide that certain drafting work is tied so that only OPC is to undertake the work (or arrange for it to be undertaken). This work consists of the drafting of government Bills, government amendments of Bills, regulations, Ordinances and regulations of non-self-governing Territories, and other legislative instruments made or approved by the Governor-General.

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

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

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

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

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

(c) Basis for tying instrument drafting work to OPC

11 The drafting of legislative instruments to be made or approved by the Governor-General is an important function of OPC. However, even a cursory examination of the Select Legislative Instruments series (in which most of these instruments are published) makes it clear that many provisions of legislative instruments presently made by the Governor-General do not have particular sensitivities, or create particular risks for the Commonwealth, such that it could be said that it is appropriate that their drafting should be subject to centralised legal

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

12 Under section 61 of the Constitution the Governor-General exercises the executive power of the Commonwealth. It seems reasonable that the drafting of legislative instruments to be made or approved by the Governor-General is "otherwise so bound to the work of the executive" that it should be subject to centralised legal service provision and thus tied to OPC. The special constitutional status of the Governor-General as a rule-maker of legislative instruments is recognised in the *Legislative Instruments Act 2003* (see paragraph 4(3)(a)).

2. Rationalisation of Instrument-making powers

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

(a) First Parliamentary Counsel's statutory responsibilities

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

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

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

(b) Volume of legislative Instruments

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

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

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

4.10. The Council does not believe that the drafting of all delegated legislative instruments can be centralised in the Office of Legislative Drafting. The resources are not presently available to cope with such a drafting load, although they could be developed in time. Nor is it necessarily desirable that drafting be centralised. Delegated instruments are not uniform. They comprise a diverse range of instruments covering subject matters of widely differing kinds. Their preparation needs an extensive contribution from the agencies themselves.

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

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

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

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

(c) Division of material between regulations and legislative instruments

24 Before the issue of DD3.8, the division of material between regulations and other legislative instruments seems largely to have been decided without consideration

of the nature of the material itself. This has resulted in the inclusion of inappropriate material in regulations and the inclusion of material that should have been professionally drafted in other instruments. This in turn has meant that the resources of OPC and the Federal Executive Council have been taken up with matters that are presently inappropriately included in regulations, while more significant matters have been drafted in other instruments outside of OPC.

25 DD3.8 addresses this matter by outlining the material that should (in the absence of a strong justification to the contrary) be included in regulations and so be drafted by OPC and considered by the Federal Executive Council. I would welcome any views that the Committee may have on the appropriate division of material between regulations and other legislative instruments and would be happy to review DD3.8 to take account of any views the Committee may have.

(d) Proliferation of number and kinds of legislative instruments

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

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

27 To address this, the Council recommended:

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

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

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

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

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

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

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

(d) it shortens the Act.

31 In my view, a general instrument-making power also simplifies the task of drafting instruments under the power. Instruments drafted under a general instrument-making power will not necessarily be complex or lengthy. Nor will a general instrument-making power necessarily broaden substantially the power to make instruments under an Act. The power given by a general instrument-making power in an Act is shaped and constrained by the other provisions of the Act and is not a power at large. A general instrument-making power in an Act may add little to the power to make instruments under the Act, but will add substantially to the ability to rationalise the number and type of instruments under an Act.

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

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

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

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

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

COMMITTEE RESPONSE:

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

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

As noted previously, the committee's inquiry regarding the prescribing of matters by 'legislative rules' goes firstly to the specific form of the power, being a broadly expressed power which enables the executive to make laws covering a range of matters necessary or convenient, or required or permitted, to achieve the objects of an Act.

The committee notes that today, and increasingly, Acts commonly provide the 'skeleton' of a legislative scheme, with the general regulation-making power relied on to provide for a vast range of matters required to effectively implement and support the operation of the Act.

The committee notes that for some considerable time, and up until the implementation of a general rule-making power by OPC in 2013, the executive exercise of the Parliament's delegated legislative power via a broadly expressed regulation-making power has been accompanied by the concomitant responsibility of close executive oversight. The requirements for such instruments to be made by the Governor-General, and the tying of the drafting of such instruments to OPC, may therefore be seen as a necessary accompaniment to the exercise of the broadly expressed delegated power to make regulations, given its nature and critical role in informing the operation of primary legislation. Clearly, such a view stands in contrast to the proposition that the requirement for OPC to draft regulations is a mere consequence of their being made by the Governor-General.

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

The committee requests FPC's response to the committee's views outlined above.

Drafting quality and executive and Parliamentary scrutiny of legislative instruments

MINISTER'S RESPONSE:

FPC's advice stated:

35 The Committee has stated:

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

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

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

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

(b) Particular questions raised by the Committee

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

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

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

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

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

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

41 In relation to the second part of the question, requiring regulations to be drafted by OPC and made by the Governor-General provides for higher drafting standards and an additional level of executive scrutiny. However, OPC does not have the resources

to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so, and the approach taken in DD3.8 ensures that the resources of OPC and the Federal Executive Council Secretariat are directed at the matters that most warrant the application of OPC's drafting expertise and the Council's attention.

COMMITTEE RESPONSE:

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

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

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

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

The committee requests FPC's response to the committee's views outlined above.

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

MINISTER'S RESPONSE:

The Committee sought advice on three matters.

- **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.**

43 In my previous letter I said that 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'. To explain this further it may be helpful to say something about the history of the definition and the various meanings that the term "prescribed" has in Commonwealth legislation.

44 In Attachment A, I have set out the history of the definition of "prescribed". From this history, the following points can be drawn.

45 First, the definition was intended as a definition to facilitate the shortening of Acts. It was in this sense that I said that the definition was facilitative. Second, the definition was always able to be displaced by a contrary intention. Third, from the early years of Federation, the definition does not seem to have been regarded as limiting the instruments that could prescribe matters. In particular, it does not appear to have been regarded as inappropriate in legislation to talk of instruments other than regulations (or indeed Acts themselves) prescribing matters.

46 The legislative history, therefore, supports my view that there is no legislative principle or practice that requires the word "prescribe" to be used only in relation to regulations. The purpose of the definition is to enable the language of Acts to be shortened in appropriate cases. Commonwealth legislative drafting practice has always recognised that there will be cases in which it is inappropriate for the definition of "prescribed" to be applied. I am not aware of any specific legal or policy considerations that would lead to the definition being applied or displaced as a general rule. Brevity is, of course, desirable in legislative drafting, but not necessarily desirable at the expense of clarity. The definition of "prescribed" is intended to aid brevity, but there is no justification for its application in inappropriate cases or limiting its use in accordance with its ordinary meaning.

- **Specific cases in which the definition is uncertain in its application.**
- **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.**

47 In my previous letter I mentioned that the definition "can be uncertain in its application" (emphasis added). I pointed to the fact that under the definition matters can be prescribed by the Act itself or by regulations. I also mentioned that the definition appears not to be widely known to users of legislation.

48 There are a number of difficulties with the definition that are likely to cause uncertainty to readers of legislation even if they are aware of the definition. Drafters are generally aware of these difficulties and, as I explained in my previous letter, current legislative drafting practice is to rely on the definition sparingly (even for regulations). There are, therefore, not likely to be a large number of specific cases in which the application of the definition is uncertain.

49 Nevertheless, it may be helpful for me to explain the main difficulties that I see with the definition. First, "prescribe" has an ordinary meaning that is picked up through the definition if the definition applies in a particular case or through the direct application of the ordinary meaning if the definition does not apply. The Macquarie Dictionary (6th ed) defines 'prescribe' as follows:

- verb (t) 1. to lay down, in writing or otherwise, as a rule or a course to be followed; appoint, ordain, or enjoin.

50 This ordinary meaning could, of course, be displaced in a particular case, but this is likely to be rare. There are examples of the application of the ordinary meaning of 'prescribe' in the following provisions of the AJA where the definition does not apply: section 25C, paragraph 33(3AB)(a) and subsection 33(5). The use of a word like "prescribe", which has an ordinary, readily understood meaning, in a restrictive sense through a general definition in the AIA is, in my view, a likely cause of uncertainty for many users of legislation. For example, what would a non-expert reader of legislation make of a provision in an Act that, without any contextual material, required the payment of the "prescribed fee" for an application?

51 Second, "prescribe" is sometimes used in the sense of prescribed (in the ordinary sense of the word) by an Act or instrument (or a particular Act or instrument or particular type of instrument). This is the way in which the definition of "prescribed" in section 28 of the AIA operates.

52 If the definition applies to a general reference to "prescribe" in an Act, the reference will mean prescribed by the Act itself or by regulations made under the Act. The reader will need to read the Act and the regulations made under the Act to work out where the relevant provision is made.

53 If the definition applies to a general reference to "prescribe" in a legislative instrument made under an Act, the reference will mean prescribed by the Act or by regulations made under the Act. If the legislative instrument is not a regulation, the reference cannot mean prescribed by the legislative instrument itself. Again, the reader will need to read the Act and the regulations made under the Act to work out where the relevant provision is made. (Under paragraph 13(1)(a) of *the Legislative Instruments Act 2003* (the LIA), the AIA applies to a legislative instrument if it were an Act.)

54 To me, good drafting practice requires that the reader not be left to work these matters out unaided, but at least be told whether the provision is made in the Act itself (preferably by an appropriate cross-reference to the provision), or in a particular type

of instrument made under the Act. This is why current drafting practice is to rely on the definition of "prescribed" sparingly and to spell out, at least in general terms, where the relevant provision is made. There are examples of this approach in the following provisions of the LIA, where the definition could be relied on, but in fact is not relied on: paragraph (b) of the definition of "original legislative instrument" in subsection 4(1), subsection 7(1) table item 24, paragraph 26(1A)(g), subsection 44(2) table item 44, subsection 54(2) table item 5 1. This approach is common in recent legislation and is, in my view, usually the appropriate one.

COMMITTEE RESPONSE:

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

Jervis Bay Territory Rural Fires Ordinance 2014 [F2014L00443]

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

Issue:

Prescribing of offences by rules

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

In *Delegated Legislation Monitor* (Monitor) Nos 2 and 5 of 2014, the committee noted a novel approach (since 2013) in the drafting of Acts to provide for a broadly-expressed power to make legislative rules, and raised a number of significant concerns going to the implementation and implications of the displacing of the regulation-making power by such rules (see comments on Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125]). One of the issues currently under consideration in relation to this matter relates to the advice of FPC that 'some types of provisions should be included in regulations and be drafted by OPC [without] strong justification for prescribing those provisions in another type of legislative instrument'.

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

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

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

The Minister may, by legislative instrument, make rules prescribing matters:

- (a) required or permitted by this Ordinance to be prescribed by the rules; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Ordinance.

Subsection 98(3) provides:

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

The ES for the ordinance states that section 98:

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

In light of FPC's view that certain types of provisions (including offence provisions) require an express regulation-making power in the authorising Act and should be drafted by OPC, the committee notes that the accompanying ES contains no justification for the authorising of offence provisions via rules rather than via regulation. **The committee therefore requests the minister's advice on this matter.**

Jervis Bay Territory Rural Fires Rule 2014 [F2014L00533]

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

Issue:

Prescribing of offences by rule

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

In *Delegated Legislation Monitor* (Monitor) Nos 2 and 5 of 2014, the committee noted a novel approach (since 2013) in the drafting of Acts to provide for a broadly-expressed power to make legislative rules, and raised a number of significant concerns going to the implementation and implications of the displacing of the regulation-making power by such rules (see comments on Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125]). One of the issues currently under consideration in relation to this matter relates to the advice of FPC that 'some types of provisions should be included in regulations and be drafted by OPC [without] strong justification for prescribing those provisions in another type of legislative instrument'. In response to the committee's inquiry as to how such matters would be provided for in the absence of a regulation making power, FPC advised:

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

The committee notes that the accompanying ES contains no justification for the authorising of offence provisions via rules rather than via regulation. **The committee therefore requests the minister's advice on this matter.**

Aged Care (Conditions for Residential Care Allocations) Determination 2014 [F2014L00433]

Purpose	Removes the distinction between high care and low care residential aged care places from 1 July 2014
Last day to disallow	15 July 2014
Authorising legislation	<i>Aged Care Act 1997</i>
Department	Social Services

Issue:

Insufficient description regarding consultation

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

The Department has consulted on this change as part of the aged care reforms.

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

Financial Management and Accountability Amendment (2014 Measures No. 4) Regulation 2014 [F2014L00436]

Purpose	Amends the Financial Management and Accountability Regulations 1997 to add one item to Schedule 1AB to establish legislative authority to provide grants of financial assistance to the states or territories for matters to be administered by the Department of Agriculture
Last day to disallow	15 July 2014
Authorising legislation	<i>Financial Management and Accountability Act 1997</i>
Department	Finance

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, whether matters should be enacted via principal rather than delegated legislation).

Financial Management and Accountability Amendment (2014 Measures No. 4) Regulation 2014 [F2014L00436] adds an item to Part 2 of Schedule 1AB to establish legislative authority for a scheme administered by the Department of Agriculture. The item allocates \$280 million to the Drought Concessional Loans Scheme from 2013–14 to 2014–15 for grants of financial assistance to the states and territories.

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

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 Legislation Amendment Act (No 3) 2012*, the 'Grants for drought assistance' scheme 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 'Grants for drought assistance' scheme.

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

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

Issue:

Application of offences by rule

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

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

The committee understands that the authorisation of the application of offences by subsection 137(1)(c) follows amendments to the Act in 2013.⁵

In *Delegated Legislation Monitor* (Monitor) Nos 2 and 5 of 2014, the committee noted a novel approach (since 2013) in the drafting of Acts to provide for a broadly-expressed power to make legislative rules, and raised a number of significant concerns going to the implementation and implications of the displacing of the regulation-making power by such rules (see comments on Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125]). One of the issues currently under consideration in relation to this matter relates to the advice of FPC that 'some types of provisions should be included in regulations and be drafted by OPC [without] strong justification for prescribing those provisions in another type of legislative instrument'. In response to the committee's inquiry as to how such matters would be provided for in the absence of a regulation making power, FPC advised:

⁵ See Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Act 2013.

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

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

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

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

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.⁶

6 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 **18 June 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.

Autonomous Sanctions Amendment Regulation 2013 (No. 1) [F2013L01447]

Purpose	Places additional sanctions on Iran as announced by the Minister for Foreign Affairs on 10 January 2013 and includes strict liability offences
Last day to disallow¹	4 March 2014
Authorising legislation	<i>Autonomous Sanctions Act 2011</i>
Department	Foreign Affairs and Trade

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 explanatory statement (ES) which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the 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***].

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

MINISTER'S RESPONSE:

The Minister for Foreign Affairs advised:

The Government consults widely and frequently with the public in relation to both autonomous and United Nations Security Council sanctions. From 22 April to 10 May 2013, the Department of Foreign Affairs and Trade conducted a public consultation on an exposure draft of the Autonomous Sanctions Amendment Regulation 2013 (No. 1) implementing additional autonomous sanctions in relation to Iran. The Department received submissions from the financial services sector and the university sector. The report on the public consultation was distributed through the Department's sanctions mailing list and published on the Department's website.

The minister further advised that the ES would be updated in accordance with legislative requirements.

COMMITTEE RESPONSE:

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

International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013 [F2013L01916]

Purpose	Confers such privileges and immunities on the International Committee of the Red Cross (ICRC) as are required to give effect to the Arrangement of 24 November 2005 between the Government of Australia and the International Committee of the Red Cross on a Regional Headquarters in Australia; and confers upon the ICRC in Australia legal status and such legal capacities as are necessary for the exercise of its powers and the performance of its functions to support the work of the ICRC in Australia and the Pacific region
Last day to disallow	4 March 2014
Authorising legislation	<i>International Organisations (Privileges and Immunities) Act 1963</i>
Department	Foreign Affairs and Trade

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 Foreign Affairs advised:

The Department consulted with relevant Commonwealth departments during September and October 2013 in preparing the International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013. These consultations were in addition to those previously conducted during 2011 and 2012 with relevant Commonwealth departments and Ministers, and with all States and Territories, in relation to proposed amendments to the authorising legislation, the *International Organisations (Privileges and Immunities) Act 1963*. This Act was amended in June 2013 to provide a legislative basis for conferring privileges and immunities on the International Committee of the Red Cross (ICRC).

The consultation process for the Act and the Regulation did not include consultations with the general public, given the Department's assessment that this would be unnecessary under the *Legislative Instruments Act 2003*. The legislative changes involved extending the existing regime for conferring privileges and immunities to international organisations to the ICRC. The changes did not alter the regime fundamentally. In addition, due to the nature of the ICRC's work as an international organisation concerned with the promotion of, and increased compliance with, international humanitarian law, it would be unlikely that the conferring of privileges and immunities to the ICRC would have a direct or a substantial indirect effect on business, or restrict competition (s17(1), *Legislative Instruments Act 2003*). Therefore, consultation with businesses would be unnecessary under s18 of the *Legislative Instruments Act 2003*.

The minister further advised that the ES would be updated in accordance with legislative requirements.

COMMITTEE RESPONSE:

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

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 <i>Public Interest Disclosure (Consequential Amendments) Act 2013</i>
Last day to disallow	14 July 2014
Authorising legislation	<i>Parliamentary Service Act 1999</i>
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 requested further information from the President of the Senate]**.

PRESIDENT'S RESPONSE:

The President of the Senate advised that the *Public Interest Disclosure (Consequential Amendments) Act 2013* (PID Consequential Act) that came into effect on 15 January 2014 repealed the whistleblowing scheme provided for in section 16 of the *Parliamentary Service Act 1999*. The PID Consequential Act inserted new functions for the Parliamentary Service Commissioner (Commissioner) and Parliamentary Service Merit Protection Commissioner (MPC) to inquire into public interest disclosures, subject to determinations. The 2014 Determination will operate alongside the inquiry powers set out in the *Public Interest Disclosure Act 2013* (PID Act).

The President explained:

The amendments will allow public officials to make public interest disclosures to the Commissioner or MPC in circumstances where the Commissioner or MPC is satisfied that it would be inappropriate for the discloser to make their disclosure to a Secretary, or where the discloser has

already made the disclosure to a Secretary and is not satisfied with the outcome. In doing so, the amendments will support the aim of the PID Act that public officials who make disclosures are protected from adverse consequences. The retrospective application of the amendments to the date of the PID Consequential Act is to avoid any gap in the availability of an avenue for disclosure following the repeal of the former whistleblower scheme.

The new mechanism provides greater protection for public employees than the whistleblower scheme it replaces. This enhances, rather than detracts from, the rights of Parliamentary Service employees and there is no detriment caused because of the retrospective application of the new provisions. In any event, no public interest disclosures have been made to the Commissioner or MPC since 15 January 2014.

The President further advised that consequential privacy amendments 'make no practical change' and that there 'is no possible disadvantage to persons other than the Commonwealth arising from the retrospective application of these amendments'.

COMMITTEE RESPONSE:

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

Privacy Amendment (External Dispute Resolution Scheme—Transitional) Regulation 2014 [F2014L00219]

Purpose	Amends the Privacy Regulation 2013 to provide temporary 12 month exemption from the external dispute resolution requirement under subparagraph 21D(2)(a)(i) of the <i>Privacy Amendment (Enhancing Privacy Protection) Act 2012</i> for utilities and commercial credit providers
Last day to disallow	19 June 2014
Authorising legislation	<i>Privacy Amendment (Enhancing Privacy Protection) Act 2012</i>
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 requested further information from the Attorney-General; and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003***].

MINISTER'S RESPONSE:

The Attorney General advised:

In addition to the large number of representations that I received from the credit reporting industry, particularly from commercial credit providers, my department undertook consultation with key credit reporting stakeholders and peak bodies, including the Australian Retail Credit Association and the Australian Finance Conference. Targeted consultation was also undertaken with certain State and Territory energy and water ombudsmen, the Chair of the Australian and New Zealand Ombudsman Association (being the peak body for Ombudsmen in Australia and New Zealand) and the Office of the Australian Information Commissioner (OAIC). Furthermore, consistent with the Government's commitment to reducing regulatory burden on Australian businesses, the Office of Best Practice Regulation and the Treasury were consulted as to the regulation's impact on business.

The Attorney General further advised that the ES would be amended to include a description of the consultation undertaken.

COMMITTEE RESPONSE:

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

Credit Reporting Privacy Code (CR code) [F2014L00170]

Purpose	The CR Code is a written code of practice about credit reporting under s 26N(1) of the <i>Privacy Act 1988</i> , as amended by the. The CR code, on commencement, replaces the Credit Reporting Code of Conduct, issued under s18A of the <i>Privacy Act 1988</i> , and supplements the provisions of Part IIIA of the <i>Privacy Act 1988</i> , as amended by the <i>Privacy Amendment (Enhancing Privacy Protection) Act 2012</i> , and the Privacy Regulation 2013
Last day to disallow	16 June 2014
Authorising legislation	<i>Privacy Act 1988</i>
Department	Attorney-General's

Issue:

Reliance on subsection 33 of the Acts Interpretation Act 1901

The committee identified the instrument as apparently relying 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. Where this is the case, the committee prefers that the ES for any such instrument identify the relevance of subsection 33(3) in the interests of promoting the clarity and intelligibility of the instrument to anticipated users **[the committee drew the matter to the attention of the Attorney-General]**.

MINISTER'S RESPONSE:

The Attorney General advised the *Privacy Act 1988*, as amended by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*, contains provisions in section 26T that deal with future variations of the CR Code. The Attorney-General further advised:

...the CR Code is an essential component of the regulatory arrangements for credit reporting and there is a clear intention in the legislation that there must always be a CR Code in place. Accordingly, it does not appear necessary to rely on the Acts Interpretation Act in relation to any future variation or revocation of the CR Code.

COMMITTEE RESPONSE:

The committee thanks the Attorney-General for his advice.

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	<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>
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 requested further information from the Attorney-General**].

MINISTER'S RESPONSE:

The Minister for Justice advised that the instrument replaced existing countermeasure regulations against Iran that were due to sunset on 1 April 2014 and that the 'Attorney-General's Department had previously undertaken extensive consultation with the public and industry in the development of the existing regulations'. The minister further advised:

The Department and the Australian Transaction Reports and Analysis Centre (AUSTRAC) also engaged extensively with affected reporting entities and relevant peak bodies, through direct contact and through a number of consultative forums both prior to and while the initial regulations were in effect.

The minister noted that the instrument 'did not materially alter the regulatory requirements already in place under the existing regulations' and that 'minor and technical amendments were incorporated into the Regulation following consultation with the Department of Foreign Affairs and Trade. The department also consulted with The Office of Best Practice Regulation. The minister concluded:

In light of this assessment and the extensive public consultation undertaken on the previous iteration of the countermeasures instrument, further consultation was considered unnecessary.

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 **18 June 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. 28 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 2 May 2014

<i>Aged Care Act 1997</i>	
User Rights Amendment (Publication of Accommodation Payment Information) Principles 2014 [F2014L00432]	
Aged Care (Conditions for Residential Care Allocations) Determination 2014 [F2014L00433]	A
<i>Appropriation (Parliamentary Departments) Act (No. 1) 2013-2014, Appropriation (Parliamentary Departments) Act (No. 1) 2012-2013 and Appropriation (Parliamentary Departments) Act (No. 1) 2011-2012</i>	
Instrument to Reduce Appropriations (No. 2 of 2013-2014) [F2014L00429]	
<i>Australian Hearing Services Act 1991</i>	
Declared Hearing Services Amendment Determination 2014 (No. 1) [F2014L00430]	*
<i>Australian Prudential Regulation Authority Act 1998</i>	
Australian Prudential Regulation Authority (confidentiality) determination No. 5 of 2014 [F2014L00453]	
<i>Civil Aviation Regulations 1988</i>	
CASA 80/14 - Instructions — use of Global Navigation Satellite System (GNSS) [F2014L00431]	
<i>Civil Aviation Safety Regulations 1998</i>	
AD/ELECT/74 Amdt 1 - Lermer GmbH Water Boilers [F2014L00462]	
<i>Customs Act 1901 and Customs Administration Act 1985</i>	
CEO Directions No.1 of 2014 [F2014L00428]	*
<i>Environment Protection and Biodiversity Conservation Act 1999</i>	

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

Amendment of List of Exempt Native Specimens - Queensland Eel Fishery (17/04/2014) [F2014L00460]	
Amendment of List of Exempt Native Specimens - Tasmanian Freshwater Eel Fishery (17/04/2014) [F2014L00461]	
Amendment of List of Exempt Native Specimens - Victorian Eel Fishery (17/04/2014) [F2014L00463]	
Inclusion of ecological communities in the list of threatened ecological communities under section 181 of the Environment Protection and Biodiversity Conservation Act 1999 - Kangaroo Island Narrow-leaved Mallee (<i>Eucalyptus cneorifolia</i>) Woodland (EC 102) (10/04/2014) [F2014L00465]	
<i>Export Control (Orders) Regulations 1982</i>	
Export Control (Plants and Plant Products) Amendment (2014 Measures No. 1) Order 2014 [F2014L00434]	*
<i>Financial Management and Accountability Act 1997</i>	
Financial Management and Accountability Amendment (2014 Measures No. 4) Regulation 2014 [SLI 2014 No. 43] [F2014L00436]	
FMA Act Determination 2014/07 — Section 32 (Transfer of Functions from Health to Social Services) [F2014L00435]	E
<i>Fisheries Management Act 1991</i>	
Fisheries Legislation (Management Plans) Amendment 2013 (No. 1) [F2014L00457]	
Small Pelagic Fishery Management Plan Amendment 2013 [F2014L00458]	
<i>Fisheries Management Act 1991 and Small Pelagic Fishery Management Plan 2009</i>	
Small Pelagic Fishery Overcatch and Undercatch Determination 2014 [F2014L00464]	
Small Pelagic Fishery Total Allowable Catch (Quota Species) Determination 2014 [F2014L00452]	
<i>Fisheries Management Act 1991 and Macquarie Island Toothfish Fishery Management Plan 2006</i>	
Macquarie Island Toothfish Fishery Total Allowable Catch Determination 2014 [F2014L00445]	
<i>Food Standards Australia New Zealand Act 1991</i>	
Food Standards (Application A1085 – Food derived from Reduced Lignin Lucerne Line KK179) Variation [F2014L00455]	E
<i>Higher Education Support Act 2003</i>	
Higher Education Support Act 2003 - VET Provider Approval (No. 21 of 2014) [F2014L00437]	
Higher Education Support Act 2003 - VET Provider Approval (No. 22 of 2014) [F2014L00439]	
Higher Education Support Act 2003 - VET Provider Approval (No. 23 of 2014) [F2014L00440]	
Higher Education Support Act 2003 - VET Provider Approval (No. 24 of 2014) [F2014L00441]	
Higher Education Provider Approval No. 3 of 2014 [F2014L00442]	
Higher Education Support Act 2003 - VET Provider Approval (No. 26 of 2014) [F2014L00447]	
<i>Jervis Bay Territory Acceptance Act 1915</i>	

Jervis Bay Territory Rural Fires Ordinance 2014 [F2014L00443]	
<i>Migration Regulations 1994</i>	
Migration Regulations 1994 - Specification of Access to Movement Records - IMMI 14/011 [F2014L00451]	*
Migration Regulations 1994 - Specification of Classes of Persons - IMMI 14/035 [F2014L00444]	E
Migration Regulations 1994 - Specification of Transit Passengers who are Eligible for a Special Purpose Visa - IMMI 14/029 [F2014L00450]	E
<i>National Health Act 1953</i>	
National Health (Efficient Funding of Chemotherapy) Special Arrangement Amendment Instrument 2014 (No. 4) (No. PB 31 of 2014) [F2014L00438]	
National Health (Highly specialised drugs program for hospitals) Special Arrangement Amendment Instrument 2014 (No. 4) (No. PB 30 of 2014) [F2014L00449]	
<i>Privacy Act 1988</i>	
Privacy (Credit Reporting) Code 2014 (Version 1.2) [F2014L00459]	
<i>Private Health Insurance (National Joint Replacement Register Levy) Act 2009</i>	
Private Health Insurance (National Joint Replacement Register Levy) Amendment Rules 2014 (No. 1) [F2014L00454]	
<i>Therapeutic Goods Act 1989</i>	
Therapeutic Goods Information (Sharing of Committee Information) Specification 2014 [F2014L00446]	
Therapeutic Goods Information (Information about Advisory Committee Meetings) Specification 2014 [F2014L00448]	
Therapeutic Goods (Medical Devices) Amendment (Joint Replacements) Regulation 2014 [SLI 2014 No. 44] [F2014L00456]	

Instruments received week ending 9 May 2014

<i>Agricultural and Veterinary Chemicals Code Act 1994</i>	
Agricultural and Veterinary Chemicals Code Instrument No. 4 (MRL Standard) Amendment Instrument 2014 (No. 5) [F2014L00495]	E
<i>ASIC Market Integrity Rules (Competition in Exchange Markets) 2011</i>	
ASIC Class Rule Waiver [CW 14-0322] [F2014L00486]	*
<i>Australian Meat and Live-stock Industry Act 1997</i>	
Australian Meat and Live-stock Industry (High Quality Beef Export to the European Union) Order 2014 [F2014L00506]	*
<i>Australian Participants in British Nuclear Tests (Treatment) Act 2006</i>	
Treatment Principles (Australian Participants in British Nuclear Tests) 2006 (Rehabilitation Appliance Program) Amendment Instrument 2014 [F2014L00497]	
<i>Civil Aviation Regulations 1988 and Civil Aviation Order 40.2.1 - Instrument ratings (02/12/2004)</i>	
CASA 44/14 - Approval — A380 and B737-800 aircraft GLS approach procedures (Qantas) [F2014L00466]	
<i>Civil Aviation Safety Regulations 1998</i> Part 66 Manual of Standards Amendment Instrument 2014 (No. 1) [F2014L00492]	*

AD/CL-600/111 Amdt 1 - Nose Landing Gear Selector Valve [F2014L00496]	
CASA ADCX 008/14 - Repeal of Airworthiness Directive [F2014L00500]	
AD/CFM56/33 - Inspection of Fan Blades with 25 Degree Mid-span Shrouds [F2014L00502]	
<i>Financial Management and Accountability Act 1997</i>	
FMA Act Determination 2014/09 — Section 32 (Transfer of Functions from Immigration to Social Services) [F2014L00489]	E
FMA Act Determination 2014/08 — Section 32 (Transfer of Functions from DRET to Industry) [F2014L00488]	E
FMA Act Determination 2014/10 — Section 32 (Transfer of Functions from Social Services to PM&C) [F2014L00498]	E
FMA Act Determination 2014/11 — Section 32 (Transfer of Functions from DEEWR to PM&C, Education, Employment and Social Services) [F2014L00499]	E
<i>Fisheries Management Act 1991</i>	
Multiple Fishery (Closures) Direction No. 1 2014 [F2014L00487]	
<i>Higher Education Support Act 2003</i>	
Higher Education Support Act 2003 - VET Provider Approval (No. 25 of 2014) [F2014L00504]	
<i>Migration Act 1958</i>	
Migration Act 1958 - Determination of The Collection of the Registration Status Charge - IMMI 14/027 [F2014L00501]	*
<i>Military Rehabilitation and Compensation Act 2004</i>	
MRCAT Treatment Principles (Rehabilitation Appliance Program) Amendment Instrument 2014 [F2014L00494]	
<i>Privacy Act 1988</i>	
Privacy (Credit Related Research) Rule 2014 [F2014L00503]	
<i>Remuneration Tribunal Act 1973</i>	
Remuneration Tribunal Determination 2014/06 - Remuneration and Allowances for Holders of Public Office [F2014L00505]	*
<i>Telecommunications Act 1997</i>	
Carrier Licence Conditions (NT Technology Services Pty Ltd) Declaration 2014 [F2014L00490]	
Carrier Licence Conditions (Urban Renewal Authority Victoria t/a Places Victoria Pty Ltd) Declaration 2014 [F2014L00491]	
<i>Veterans' Entitlements Act 1986</i>	
Statement of Principles concerning Hodgkin's lymphoma No. 35 of 2014 [F2014L00467]	
Statement of Principles concerning Hodgkin's lymphoma No. 36 of 2014 [F2014L00468]	
Statement of Principles concerning acute stress disorder No. 41 of 2014 [F2014L00469]	
Statement of Principles concerning acute stress disorder No. 42 of 2014 [F2014L00470]	
Statement of Principles concerning mitral valve prolapse No. 43 of 2014 [F2014L00471]	
Statement of Principles concerning chronic obstructive pulmonary disease No. 37 of 2014 [F2014L00472]	
Statement of Principles concerning mitral valve prolapse No. 44 of 2014 [F2014L00473]	
Statement of Principles concerning pleural plaque No. 45 of 2014 [F2014L00474]	

Statement of Principles concerning chronic obstructive pulmonary disease No. 38 of 2014 [F2014L00475]	
Statement of Principles concerning malignant neoplasm of the thyroid gland No. 39 of 2014 [F2014L00476]	
Statement of Principles concerning pleural plaque No. 46 of 2014 [F2014L00477]	
Statement of Principles concerning malignant neoplasm of the thyroid gland No. 40 of 2014 [F2014L00478]	
Statement of Principles concerning chronic myeloid leukaemia No. 47 of 2014 [F2014L00479]	
Statement of Principles concerning chronic myeloid leukaemia No. 48 of 2014 [F2014L00480]	
Statement of Principles concerning atrial fibrillation and atrial flutter No. 49 of 2014 [F2014L00481]	
Statement of Principles concerning atrial fibrillation and atrial flutter No. 50 of 2014 [F2014L00482]	
Statement of Principles concerning otitis media No. 51 of 2014 [F2014L00483]	
Statement of Principles concerning otitis media No. 52 of 2014 [F2014L00484]	
Amendment Statement of Principles concerning non-Hodgkin's lymphoma No. 57 of 2014 [F2014L00485]	
Veterans' Entitlements (Treatment Principles – Rehabilitation Appliance Program) Amendment Instrument 2014 [F2014L00493]	

Instruments received week ending 16 May 2014

<i>Defence Act 1903</i>	
Defence Determination 2014/20, Post indexes and benchmark schools - amendment	
Defence Determination 2014/21, Benchmark schools, summer schools, clubs and hardship package - amendment	
<i>Environment Protection and Biodiversity Conservation Act 1999</i>	
Amendment of List of Exempt Native Specimens - New South Wales Ocean Trap and Line Fishery (06/05/2014) (deletion) [F2014L00509]	
Amendment of List of Exempt Native Specimens - New South Wales Ocean Trap and Line Fishery (06/05/2014) (inclusion) [F2014L00510]	
Inclusion in the list of key threatening processes under section 183 of the Environment Protection and Biodiversity Conservation Act 1999 (16) (17/04/2014) [F2014L00512]	
Amendment to the list of threatened species under section 178, 181 and 183 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (160) [F2014L00513]	
Amendment of List of Exempt Native Specimens - Torres Strait Tropical Rock Lobster Fishery (07/05/2014) [F2014L00517]	
<i>Fisheries Management Act 1991</i>	
Heard Island and McDonald Islands Fishery (Closures) Direction No. 1 2014 [F2014L00520]	
Heard Island and McDonald Islands Fishery (Closures) Direction No. 2 2014 [F2014L00521]	
<i>Higher Education Support Act 2003</i>	
Higher Education Support Act 2003 - VET Provider Approval (No. 27 of 2014) [F2014L00526]	

<i>Migration (United Nations Security Council Resolutions) Regulations 2007</i>	
Migration (United Nations Security Council Resolutions) Regulations 2007 - Specification under regulation 4 definition of 'resolution' - Specification of United Nations Security Council Resolutions - IMMI 14/034 [F2014L00516]	*
<i>Public Lending Right Act 1985</i>	
Public Lending Right Scheme 1997 (Modification No. 1 of 2014) [F2014L00519]	
<i>Veterans' Entitlements Act 1986</i>	
Statement of Principles concerning malignant neoplasm of the prostate No. 53 of 2014 [F2014L00522]	
Statement of Principles concerning malignant neoplasm of the prostate No. 54 of 2014 [F2014L00523]	
Statement of Principles concerning chronic multisymptom illness No. 55 of 2014 [F2014L00524]	
Statement of Principles concerning chronic multisymptom illness No. 56 of 2014 [F2014L00525]	

Instruments received week ending 23 May 2014

<i>A New Tax System (Goods and Services Tax) Act 1999</i>	
A New Tax System (Goods and Services Tax) Waiver of Tax Invoice Requirement (Motor Vehicle Incentive Payment Made to Motor Vehicle Dealer) Legislative Instrument 2014 [F2014L00582]	
<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>	
Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2014 (No.3) [F2014L00563]	
<i>Charter of the United Nations Act 1945</i>	
Charter of the United Nations Legislation Amendment (Central African Republic and Yemen) Regulation 2014 [SLI 2014 No. 48] [F2014L00539]	
Charter of the United Nations (Sanctions—Yemen) Regulation 2014 [SLI 2014 No. 49] [F2014L00551]	
Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2014 (No. 2) [F2014L00568]	
<i>Civil Aviation Act 1988</i>	
Civil Aviation Order 82.1 Amendment Instrument 2014 (No. 1) [F2014L00583]	*
Civil Aviation Order 82.3 Amendment Instrument 2014 (No. 1) [F2014L00584]	*
Civil Aviation Order 82.5 Amendment Instrument 2014 (No. 1) [F2014L00585]	*
<i>Civil Aviation Regulations 1988</i>	
CASA 61/14 – Direction – use of ADS-B in foreign aircraft engaged in private operations [F2014L00586]	
<i>Civil Aviation Safety Regulations 1998</i>	
AD/B747/298 Amdt 2 - Thrust Reverser System Locks [F2014L00527]	
CASA ADCX 009/14 - Repeal of Airworthiness Directives [F2014L00530]	
AD/B737/224 Amdt 3 - Horizontal Stabiliser Attachment Pins and Bolts - Inspection [F2014L00536]	
CASA EX23/14 - Exemption — instrument rating flight tests for navigation aid	

endorsements [F2014L00564]	
<i>Commonwealth Places (Application of Laws) Act 1970</i>	
Commonwealth Places (Application of Laws) Regulation 2014 [SLI 2014 No. 46] [F2014L00557]	
<i>Criminal Code Act 1995</i>	
Criminal Code Amendment (Border Controlled Drugs) Regulation 2014 [SLI 2014 No. 47] [F2014L00550]	
<i>Customs Act 1901</i>	
Customs Legislation Amendment (Central African Republic) Regulation 2014 [SLI 2014 No. 51] [F2014L00565]	
<i>Environment Protection and Biodiversity Conservation Act 1999</i>	
Amendment of List of Exempt Native Specimens - South Australia Lakes and Coorong Fishery (15/05/2014) [F2014L00567]	
Amendment of List of Exempt Native Specimens - Pilbara Fish Trawl Interim Managed Fishery (14/05/2014) [F2014L00571]	
<i>Farm Household Support (Consequential and Transitional Provisions) Act 2014</i>	
Farm Household Support (Consequential and Transitional Provisions) Commencement Proclamation 2014 [F2014L00555]	E
<i>Farm Household Support Act 2014</i>	
Farm Household Support Commencement Proclamation 2014 [F2014L00554]	E
<i>Financial Sector (Collection of Data) Act 2001</i>	
Financial Sector (Collection of Data) (reporting standard) determination No. 17 of 2014 - SRS 160.1 - Defined Benefit Member Flows [F2014L00540]	
Financial Sector (Collection of Data) (reporting standard) determination No. 23 of 2014 - SRS 531.0 Investment Flows [F2014L00541]	
Financial Sector (Collection of Data) (reporting standard) determination No. 24 of 2014 - SRS 532.0 Investment Exposure Concentrations [F2014L00542]	
Financial Sector (Collection of Data) (reporting standard) determination No. 21 of 2014 - SRS 530.0 Investments [F2014L00543]	
Financial Sector (Collection of Data) (reporting standard) determination No. 22 of 2014 - SRS 530.1 Investments and Investment Flows [F2014L00544]	
Financial Sector (Collection of Data) (reporting standard) determination No. 18 of 2014 - SRS 320.0 - Statement of Financial Position [F2014L00545]	
Financial Sector (Collection of Data) (reporting standard) determination No. 19 of 2014 - SRS 330.0 - Statement of Financial Performance [F2014L00546]	
Financial Sector (Collection of Data) (reporting standard) determination No. 20 of 2014 - SRS 410.0 - Accrued Default Amount [F2014L00548]	
Financial Sector (Collection of Data) (reporting standard) determination No. 25 of 2014 - SRS 533.0 - Asset Allocation [F2014L00552]	
Financial Sector (Collection of Data) (reporting standard) determination No. 26 of 2014 - SRS 702.0 - Investment Performance [F2014L00553]	
<i>First Home Saver Accounts Act 2008</i>	
First Home Saver Accounts Amendment (Notice of Changes) Regulation 2014 [SLI 2014 No. 53] [F2014L00535]	
<i>Food Standards Australia New Zealand Act 1991</i>	

Food Standards (Application A1087 – Food derived from Insect-protected Soybean Line DAS-81419-2) Variation [F2014L00528]	E
Food Standards (Application A1089 – Food derived from Herbicide-tolerant Canola Line DP-073496-4) Variation [F2014L00529]	E
Australia New Zealand Food Standards Code — Standard 1.4.2 — Maximum Residue Limits Amendment Instrument No. APVMA 4, 2014 [F2014L00537]	E
<i>Health Insurance Act 1973</i>	
Health Insurance (Accredited Pathology Laboratories - Approval) Amendment Principles 2014 (No. 1) [F2014L00538]	
<i>Higher Education Support Act 2003</i>	
Higher Education Support Act 2003 - VET Provider Approval (No. 28 of 2014) [F2014L00531]	
Higher Education Support Act 2003 - VET Provider Approval (No. 29 of 2014) [F2014L00532]	
<i>Income Tax Assessment Act 1997 and Superannuation (Unclaimed Money and Lost Members) Act 1999</i>	
Tax and Superannuation Laws Amendment (2014 Measures No. 2) Regulation 2014 [SLI 2014 No. 52] [F2014L00549]	
<i>Industrial Chemicals (Notification and Assessment) Act 1989</i>	
Industrial Chemicals (Notification and Assessment) Amendment (Fees and Charges) Regulation 2014 [SLI 2014 No. 50] [F2014L00547]	
<i>Jervis Bay Territory Rural Fires Ordinance 2014</i>	
Jervis Bay Territory Rural Fires Rule 2014 [F2014L00533]	
<i>Military Rehabilitation and Compensation Act 2004</i>	
Military Rehabilitation and Compensation (Warlike Service) Determination 2014 (No. 2) [F2014L00575]	E
Military Rehabilitation and Compensation (Non-warlike Service) Determination 2014 (No. 1) [F2014L00579]	E
<i>National Health Act 1953</i>	
National Health (Highly specialised drugs program for hospitals) Special Arrangement Amendment Instrument 2014 (No. 5) (PB 40 of 2014) [F2014L00577]	
National Health (Efficient Funding of Chemotherapy) Special Arrangement Amendment Instrument 2014 (No. 5) (PB 41 of 2014) [F2014L00578]	
National Health (Listed drugs on F1 or F2) Amendment Determination 2014 (No. 4) (PB 43 of 2014) [F2014L00580]	
<i>Primary Industries Research and Development Act 1989</i>	
Fisheries Research and Development Corporation Amendment (Fishing Levy) Regulation 2014 [SLI 2014 No. 45] [F2014L00556]	
<i>Privacy Act 1988</i>	
Privacy (International Money Transfers) Temporary Public Interest Determination 2014 (No. 2) [F2014L00534]	
<i>Private Health Insurance Act 2007</i>	
Private Health Insurance (Levy Administration) Amendment Rules 2014 [F2014L00576]	*
<i>Remuneration Tribunal Act 1973</i>	

Remuneration Tribunal Determination 2014/07 - Specified Statutory Offices - Remuneration and Allowances [F2014L00558]	*
Remuneration Tribunal Determination 2014/08 - Remuneration and Allowances for Holders of Part-Time Public Office [F2014L00559]	*
Remuneration Tribunal Determination 2014/09 - Judicial and Related offices - Remuneration and Allowances [F2014L00560]	*
Remuneration Tribunal Determination 2014/12 - Remuneration and Allowances for Holders of Full-Time Public Office [F2014L00562]	*
Remuneration Tribunal Determination 2014/10 - Members of Parliament - Base Salary, Additional Salary for Parliamentary Office Holders, and Related Matters [F2014L00561]	E
<i>Telecommunications Act 1997</i>	
Telecommunications (Non-refundable Code Development Costs) Determination Variation 2014 (No. 1) [F2014L00569]	
Telecommunications (Approved Auditors and Auditing Requirements) Determination Variation 2014 (No. 1) [F2014L00570]	
<i>Therapeutic Goods Act 1989</i>	
Therapeutic Goods Information (Medicine Shortages Information Initiative) Specification 2014 [F2014L00581]	
Poisons Standard Amendment No. 2 of 2014 [F2014L00566]	E
<i>Veterans' Entitlements Act 1986</i>	
Veterans' Entitlements (Non-warlike Service—Operation Accordion) Determination 2014 [F2014L00572]	E
Veterans' Entitlements (Non-warlike Service—Operation Manitou) Determination 2014 [F2014L00573]	E
Veterans' Entitlements (Warlike Service—Operation Slipper) Determination 2014 [F2014L00574]	E

Instruments received week ending 30 May 2014

<i>Civil Aviation Regulations 1988</i>	
Civil Aviation Order 20.7.1B Amendment Instrument 2014 (No. 1) [F2014L00602]	*
Civil Aviation Order 20.7.4 Amendment Instrument 2014 (No. 1) [F2014L00603]	*
CASA 107/14 - Direction – number of cabin attendants – Jetstar Airways [F2014L00610]	
CASA 110/14 – Direction - number of cabin attendants (Sunstate Airlines) [F2014L00611]	
<i>Civil Aviation Safety Regulations 1998</i>	
CASA EX32/14 - Exemption – recency requirements for night flying – Virgin Australia Regional Airlines [F2014L00604]	
<i>Corporations Act 2001</i>	
ASIC Market Integrity Rules (APX Market-Capital) 2014 [F2014L00590]	*
ASIC Market Integrity Rules (Chi-X Australia Market-Capital) 2014 [F2014L00592]	*
ASIC Class Order [CO 14/443] [F2014L00594]	
ASIC Market Integrity Rules (FEX Market-Capital) 2014 [F2014L00595]	*
ASIC Market Integrity Rules (ASX 24 Market-Capital) 2014 [F2014L00596]	*
ASIC Market Integrity Rules (FEX Market) Amendment 2014 (No. 1) [F2014L00597]	*

ASIC Market Integrity Rules (ASX Market-Capital) 2014 [F2014L00598]	*
ASIC Market Integrity Rules (Competition in Exchange Markets) Amendment 2014 (No. 2) [F2014L00599]	*
ASIC Market Integrity Rules (ASX 24 Market) Amendment 2014 (No. 1) [F2014L00600]	*
ASIC Class Order [CO 14/425] [F2014L00605]	*
<i>Defence Act 1903</i>	
Defence Determination 2014/22, Family assistance for attendance at coronial inquest	
Defence Determination 2014/23, Overseas operations - amendment	
Defence Determination, 2014/24, Member undergoing recategorisation training - amendment	
Defence Determination, 2014/25, Post indexes and summer schools - amendment	
<i>Environment Protection and Biodiversity Conservation Act 1999</i>	
Amendment - List of Specimens taken to be suitable for Live Import (02/05/2014) [F2014L00601]	
<i>Fisheries Management Act 1991</i>	
Bass Strait Central Zone Scallop Fishery Management Plan Amendment 2014 [F2014L00609]	
<i>National Health Act 1953</i>	
National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2014 (No. 5) (No. PB 36 of 2014) [F2014L00588]	
National Health (Price and Special Patient Contribution) Amendment Determination 2014 (No. 4) (No. PB 37 of 2014) [F2014L00589]	
National Health (Pharmaceutical Benefits - Early Supply) Amendment Instrument 2014 (No. 3) - specification under subsection 84AAA(2) (No. PB 39 of 2014) [F2014L00591]	
National Health Determination under paragraph 98C(1)(b) Amendment 2014 (No. 5) (No. PB 38 of 2014) [F2014L00593]	
<i>Navigation Act 2012</i>	
Marine Order 54 (Coastal pilotage) 2014 [F2014L00606]	
Marine Order 15 (Construction — fire protection, fire detection and fire extinction) 2014 [F2014L00607]	

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 not exhaustive of the grounds which may be advanced as to why consultation was not undertaken in a given case. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning in support of this conclusion. An ES should avoid bare assertions such as 'Consultation was not undertaken because the instrument is beneficial in nature'.

Timing of consultation

The Act requires that consultation regarding an instrument must take place before the instrument is made. This means that, where consultation is planned for the implementation or post-operative phase of changes introduced by a given instrument,

that consultation cannot generally be cited to satisfy the requirements of sections 17 and 26 of the Act.

In some cases, consultation is conducted in relation to the primary legislation which authorises the making of an instrument of delegated legislation, and this consultation is cited for the purposes of satisfying the requirements of the Act. The committee may regard this as acceptable provided that (a) the primary legislation and the instrument are made at or about the same time and (b) the consultation addresses the matters dealt with in the delegated legislation.

Seeking further advice or information

Further information is available through the committee's website at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/index.htm or by contacting the committee secretariat at:

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

Phone: +61 2 6277 3066

Fax: +61 2 6277 5881

Email: RegOrds.Sen@aph.gov.au

Appendix 3

Correspondence



THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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



Dear *Sean* Chair

I refer to the letter from the Senate Standing Committee on Regulations and Ordinances regarding the content of the Explanatory Statements accompanying the *Autonomous Sanctions Amendment Regulation 2013 (No. 1)* and the *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013*. I apologise for the delay in replying.

The Government consults widely and frequently with the public in relation to both autonomous and United Nations Security Council sanctions. From 22 April to 10 May 2013, the Department of Foreign Affairs and Trade conducted a public consultation on an exposure draft of the *Autonomous Sanctions Amendment Regulation 2013 (No. 1)* implementing additional autonomous sanctions in relation to Iran. The Department received submissions from the financial services sector and the university sector. The report on the public consultation was distributed through the Department's sanctions mailing list and published on the Department's website.

The Department consulted with relevant Commonwealth departments during September and October 2013 in preparing the *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013*. These consultations were in addition to those previously conducted during 2011 and 2012 with relevant Commonwealth departments and Ministers, and with all States and Territories, in relation to proposed amendments to the authorising legislation, the *International Organisations (Privileges and Immunities) Act 1963*. This Act was amended in June 2013 to provide a legislative basis for conferring privileges and immunities on the International Committee of the Red Cross (ICRC).

The consultation process for the Act and the Regulation did not include consultations with the general public, given the Department's assessment that this would be unnecessary under the *Legislative Instruments Act 2003*. The

legislative changes involved extending the existing regime for conferring privileges and immunities to international organisations to the ICRC. The changes did not alter the regime fundamentally. In addition, due to the nature of the ICRC's work as an international organisation concerned with the promotion of, and increased compliance with, international humanitarian law, it would be unlikely that the conferring of privileges and immunities to the ICRC would have a direct or a substantial indirect effect on business, or restrict competition (s17(1), *Legislative Instruments Act 2003*). Therefore, consultation with businesses would be unnecessary under s18 of the *Legislative Instruments Act 2003*.

I have requested that the Department ensure that the Explanatory Statements for both legislative instruments are updated in accordance with legislative requirements and that they are made available to the Committee.

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

Yours sincerely

Julie Bishop

15 MAY 2014



PRESIDENT OF THE SENATE

3 JUN 2014

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

PARLIAMENT HOUSE
CANBERRA



Dear Senator Edwards

**Parliamentary Service Amendment (Public Interest Disclosure and Other Matters)
Determination 2014 [F2014L00368] Ref 21/2014**

I refer to the Committee's recent comments in its *Delegated legislation monitor* No. 5 of 2014 about the Parliamentary Service Amendment (Public Interest Disclosure and Other Matters) Determination 2014 ('2014 Determination'). The Determination amends the Parliamentary Service Determination 2013 ('2013 Determination').

In particular, the Committee has sought information about the retrospective application of Schedules to the 2014 Determination.

As the Committee may be aware, the *Public Interest Disclosure (Consequential Amendments) Act 2013* ('PID Consequential Act') repealed the whistleblowing scheme provided for in section 16 of the *Parliamentary Service Act 1999* ('Parliamentary Service Act'). The PID Consequential Act also removed the functions of the Parliamentary Service Commissioner ('Commissioner') and Parliamentary Service Merit Protection Commissioner ('MPC') relating to whistleblower reports and inserted new functions for the Commissioner and MPC to inquire into public interest disclosures, subject to determinations. The PID Consequential Act came into effect on 15 January 2014.

The principal purpose of Schedule 2 of the 2014 Determination is to amend the 2013 Determination to set out the operation of the new inquiry powers of the Commissioner and the MPC (under paragraphs 40(1)(c) and 48(1)(a) of the Parliamentary Service Act) that will operate alongside the inquiry powers set out in the *Public Interest Disclosure Act 2013* ('PID Act'). It does this by inserting new clauses 112A and 113A into the 2013 Determination.

The amendments will allow public officials to make public interest disclosures to the Commissioner or MPC in circumstances where the Commissioner or MPC is satisfied that it would be inappropriate for the discloser to make their disclosure to a Secretary, or where the discloser has already made the disclosure to a Secretary and is not satisfied with the outcome. In doing so, the amendments will support the aim of the PID Act that public officials who make disclosures are protected from adverse consequences. The retrospective application of the amendments to the date of the PID Consequential Act is to avoid any gap in the availability of an avenue for disclosure following the repeal of the former whistleblower scheme.

The new mechanism provides greater protection for public employees than the whistleblower scheme it replaces. This enhances, rather than detracts from, the rights of Parliamentary Service employees and there is no detriment caused because of the retrospective application of the new provisions. In any event, no public interest disclosures have been made to the Commissioner or MPC since 15 January 2014.

Schedule 3 repeals subclauses 147(7) and (8) of the Determination and replaces them with a single new clause 147(7) with effect from 12 March 2013. The effect of both the repealed subclauses 147(7) and (8) and new subclause 147(7) is to confirm that section 147 of the Determination is considered to be a 'law of the Commonwealth' that authorises certain treatment of personal information for the purposes of the *Privacy Act 1988*. The amendments simply update cross-references consequential on the commencement of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* and make no practical change to the application of clause 147 of the Determination. There is no possible disadvantage to persons other than the Commonwealth arising from the retrospective application of these amendments.

Yours sincerely

JOHN HOGG



THE HON IAN MACFARLANE MP
MINISTER FOR INDUSTRY



PO BOX 6022
PARLIAMENT HOUSE
CANBERRA ACT 2600

05 JUN 2014

MC14-001407

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

Dear Senator Edwards 

Thank you for your letter of 14 May 2014 concerning the *Australian Jobs (Australian Industry Participation) Rule 2014*. I note the Committee's earlier correspondence of 5 March 2014 on this matter. I understand that the Committee has considered the earlier response, and now requests further information.

As you would be aware, the Rule in question is enabled under the *Australian Jobs Act 2013*. The Rule prescribes matters which set out essential machinery for the proper operation of the Act. I note that the Committee's concerns do not relate to the substance of the Rule, but rather to the broader approach adopted by the Office of Parliamentary Counsel (OPC) to its drafting.

I am concerned that the Rule, which serves an essential function under the Act, has become the vehicle by which the Committee is exploring OPC's drafting practice of including a rule-making power in primary legislation as opposed to the more traditional regulation-making power. In particular, I note that the Committee has taken the step of having moved a notice of motion to disallow the Rule, notwithstanding the Committee's queries do not relate to the substance of the Rule itself, but rather to the underlying power authorising the making of the instrument.

First Parliamentary Counsel has prepared a further response providing advice on the additional matter requested by the Committee (see enclosed).

I understand my department has discussed this matter with the Committee Secretariat with the offer of facilitating a face-to-face meeting to allow these issues to be more directly discussed and resolved between the Committee and OPC. I would be grateful if the Committee gives consideration to this offer as the Committee's concerns relate to the appropriateness of the provision in the Act that creates a general rule-making power, which is an issue that cannot be resolved in the context of scrutiny of this rule.

As these questions about the appropriateness of particular drafting approaches to legislation are essentially legal policy matters, I have copied this letter to the Attorney-General.

Yours sincerely

Ian Macfarlane

Encl.

CC: Attorney-General, Senator the Hon George Brandis QC



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—Further request for information from
Senate Standing Committee on Regulations and
Ordinances**

1 The Senate Standing Committee on Regulations and Ordinances has requested your further advice on issues identified in the *Delegated Legislation Monitor* No. 5 of 2014 published on 14 May 2014 in relation to the *Australian Jobs (Australian Industry Participation) Rule 2014* (the Rule).

2 The Committee gave a notice of motion to disallow the Rule on 13 May 2014 and seeks your advice by 11 June 2014. This letter sets out the views of the Office of Parliamentary Counsel (OPC) on the matters raised by the Committee.

Prescribing of matters by “legislative rules”

3 As discussed in my previous letter, Commonwealth Acts have provided for the making of instruments rather than regulations for many years. The use of a general rule-making power in place of a general regulation-making power is a development of this long-standing approach, and has been adopted by OPC for the reasons discussed below. In my view, over time this approach will enhance, and not diminish, the overall quality of legislative instruments (in particular, the quality of instruments that have the most significant impacts on the community) and will accordingly facilitate the Committee’s scrutiny role.

Ramifications for the quality and scrutiny of legislative rules

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

1. OPC's drafting functions

(a) OPC's drafting functions generally

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

(b) Who may provide drafting services for Government?

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

7 The Legal Services Directions provide that certain drafting work is tied so that only OPC is to undertake the work (or arrange for it to be undertaken). This work consists of the drafting of government Bills, government amendments of Bills, regulations, Ordinances and regulations of non-self-governing Territories, and other legislative instruments made or approved by the Governor-General.

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

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

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

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

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

(c) Basis for tying instrument drafting work to OPC

11 The drafting of legislative instruments to be made or approved by the Governor-General is an important function of OPC. However, even a cursory examination of the Select Legislative Instruments series (in which most of these instruments are published)

makes it clear that many provisions of legislative instruments presently made by the Governor-General do not have particular sensitivities, or create particular risks for the Commonwealth, such that it could be said that it is appropriate that their drafting should be subject to centralised legal service provision and thus tied to OPC. The reason that the drafting of these instruments is tied to OPC under the Legal Services Directions is that they are made or approved by the Governor-General and not by another rule-maker, rather than because of their content.

12 Under section 61 of the Constitution the Governor-General exercises the executive power of the Commonwealth. It seems reasonable that the drafting of legislative instruments to be made or approved by the Governor-General is “otherwise so bound to the work of the executive” that it should be subject to centralised legal service provision and thus tied to OPC. The special constitutional status of the Governor-General as a rule-maker of legislative instruments is recognised in the *Legislative Instruments Act 2003* (see paragraph 4(3)(a)).

2. Rationalisation of instrument-making powers

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

(a) First Parliamentary Counsel’s statutory responsibilities

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

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

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

(b) Volume of legislative instruments

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

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

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

4.10. The Council does not believe that the drafting of all delegated legislative instruments can be centralised in the Office of Legislative Drafting. The resources are not presently available to cope with such a drafting load, although they could be developed in time. Nor is it necessarily desirable that drafting be centralised. Delegated instruments are not uniform. They comprise a diverse range of instruments covering subject matters of widely differing kinds. Their preparation needs an extensive contribution from the agencies themselves.

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

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

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

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

(c) Division of material between regulations and legislative instruments

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

25 DD3.8 addresses this matter by outlining the material that should (in the absence of a strong justification to the contrary) be included in regulations and so be drafted by OPC and considered by the Federal Executive Council. I would welcome any views that the Committee may have on the appropriate division of material between regulations and other legislative instruments and would be happy to review DD3.8 to take account of any views the Committee may have.

(d) Proliferation of number and kinds of legislative instruments

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

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

27 To address this the Council recommended:

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

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

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

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

- (a) it facilitates the use of a single type of legislative instrument (or a reduced number of types of instruments) being needed for an Act; and
- (b) it enables the number and content of the legislative instruments under the Act to be rationalised; and
- (c) it simplifies the language and structure of the provisions in the Act that provide the authority for the legislative instruments; and
- (d) it shortens the Act.

31 In my view, a general instrument-making power also simplifies the task of drafting instruments under the power. Instruments drafted under a general instrument-making power will not necessarily be complex or lengthy. Nor will a general instrument-making power necessarily broaden substantially the power to make instruments under an Act. The power given by a general instrument-making power in an Act is shaped and constrained by the other provisions of the Act and is not a power at large. A general instrument-making power in an

Act may add little to the power to make instruments under the Act, but will add substantially to the ability to rationalise the number and type of instruments under an Act.

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

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

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

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

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

3. Drafting quality and executive and Parliamentary scrutiny of legislative instruments

35 The Committee has stated:

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

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

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

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

(b) Particular questions raised by the Committee

- **Regarding 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?**

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

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

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

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

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

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

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

42 The Committee sought advice on three matters.

- **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.**

43 In my previous letter I said that 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". To explain this further it may be helpful to say something about the history of the definition and the various meanings that the term "prescribed" has in Commonwealth legislation.

44 In Attachment A, I have set out the history of the definition of "prescribed". From this history, the following points can be drawn.

45 First, the definition was intended as a definition to facilitate the shortening of Acts. It was in this sense that I said that the definition was facilitative. Second, the definition was always able to be displaced by a contrary intention. Third, from the early years of Federation, the definition does not seem to have been regarded as limiting the instruments that could prescribe matters. In particular, it does not appear to have been regarded as inappropriate in legislation to talk of instruments other than regulations (or indeed Acts themselves) prescribing matters.

46 The legislative history, therefore, supports my view that there is no legislative principle or practice that requires the word “prescribe” to be used only in relation to regulations. The purpose of the definition is to enable the language of Acts to be shortened in appropriate cases. Commonwealth legislative drafting practice has always recognised that there will be cases in which it is inappropriate for the definition of “prescribed” to be applied. I am not aware of any specific legal or policy considerations that would lead to the definition being applied or displaced as a general rule. Brevity is, of course, desirable in legislative drafting, but not necessarily desirable at the expense of clarity. The definition of “prescribed” is intended to aid brevity, but there is no justification for its application in inappropriate cases or limiting its use in accordance with its ordinary meaning.

- **Specific cases in which the definition is uncertain in its application.**
- **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.**

47 In my previous letter I mentioned that the definition “can be uncertain in its application” (emphasis added). I pointed to the fact that under the definition matters can be prescribed by the Act itself or by regulations. I also mentioned that the definition appears not to be widely known to users of legislation.

48 There are a number of difficulties with the definition that are likely to cause uncertainty to readers of legislation even if they are aware of the definition. Drafters are generally aware of these difficulties and, as I explained in my previous letter, current legislative drafting practice is to rely on the definition sparingly (even for regulations). There are, therefore, not likely to be a large number of specific cases in which the application of the definition is uncertain.

49 Nevertheless, it may be helpful for me to explain the main difficulties that I see with the definition. First, “prescribe” has an ordinary meaning that is picked up through the definition if the definition applies in a particular case or through the direct application of the ordinary meaning if the definition does not apply. The *Macquarie Dictionary* (6th ed) defines “prescribe” as follows:

–*verb* (t) 1. to lay down, in writing or otherwise, as a rule or a course to be followed; appoint, ordain, or enjoin.

50 This ordinary meaning could, of course, be displaced in a particular case, but this is likely to be rare. There are examples of the application of the ordinary meaning of “prescribe” in the following provisions of the AIA where the definition does not apply: section 25C, paragraph 33(3AB)(a) and subsection 33(5). The use of a word like “prescribe”, which has an ordinary, readily understood meaning, in a restrictive sense through a general

definition in the AIA is, in my view, a likely cause of uncertainty for many users of legislation. For example, what would a non-expert reader of legislation make of a provision in an Act that, without any contextual material, required the payment of the “prescribed fee” for an application?

51 Second, “prescribe” is sometimes used in the sense of prescribed (in the ordinary sense of the word) by an Act or instrument (or a particular Act or instrument or particular type of instrument). This is the way in which the definition of “prescribed” in section 2B of the AIA operates.

52 If the definition applies to a general reference to “prescribe” in an Act, the reference will mean prescribed by the Act itself or by regulations made under the Act. The reader will need to read the Act and the regulations made under the Act to work out where the relevant provision is made.

53 If the definition applies to a general reference to “prescribe” in a legislative instrument made under an Act, the reference will mean prescribed by the Act or by regulations made under the Act. If the legislative instrument is not a regulation, the reference cannot mean prescribed by the legislative instrument itself. Again, the reader will need to read the Act and the regulations made under the Act to work out where the relevant provision is made. (Under paragraph 13(1)(a) of the *Legislative Instruments Act 2003* (the LIA), the AIA applies to a legislative instrument if it were an Act.)

54 To me, good drafting practice requires that the reader not be left to work these matters out unaided, but at least be told whether the provision is made in the Act itself (preferably by an appropriate cross-reference to the provision), or in a particular type of instrument made under the Act. This is why current drafting practice is to rely on the definition of “prescribed” sparingly and to spell out, at least in general terms, where the relevant provision is made. There are examples of this approach in the following provisions of the LIA, where the definition could be relied on, but in fact is not relied on: paragraph (b) of the definition of “original legislative instrument” in subsection 4(1), subsection 7(1) table item 24, paragraph 26(1A)(g), subsection 44(2) table item 44, subsection 54(2) table item 51. This approach is common in recent legislation and is, in my view, usually the appropriate one.

Further information

55 If the Committee would like any further information in relation to these matters, I would be happy to meet with them to discuss the matter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Peter Quiggin', with a horizontal line underneath.

Peter Quiggin PSM

First Parliamentary Counsel
23 May 2014

Attachment A—History of definition of “prescribed”

1 When the AIA was enacted in 1901, the long title provided that the Act was “An Act for the Interpretation of Acts of Parliament and for Shortening their Language” (emphasis added). This remains the long title of the AIA and its stated purposes. The definition of “prescribed” was not included in the original AIA. However, it is interesting to note that the original AIA mentioned “prescribed” in an undefined sense in 2 provisions, and in neither case in the sense of “prescribed by the regulations”. Section 4 (the original version of the existing section 4) dealt with, among other things, the power to “prescribe forms”. Although it is not completely clear, the section seems to have been dealing with a power under the relevant Act itself to prescribe forms (and not a power in regulations to prescribe forms). Section 36 (the original version of the existing section 36) also talked of time being prescribed by an Act (and not by regulations).

2 The definition of “prescribed” was first enacted in the *Acts Interpretation Act 1904* (the 1904 Act). The definition was in the same terms as the current definition of “prescribed” in section 2B of the AIA. The long title of the 1904 Act provided that it was “An Act for the Interpretation of Acts of Parliament and for Further Shortening their Language” (emphasis added). The 1904 Act dealt with only 2 topics: criminal matters and regulations. In that context it is not surprising that “prescribed” was defined as meaning prescribed by the Act or by regulations under the Act. The 1904 Act did not deal with other types of instruments, for example, rules and by-laws, even though their use had already been recognised in the original AIA and, for example, in the *Judiciary Act 1903* (see sections 29, 31 and 86). It is also important to note that the definition in the 1904 Act (like other definitions to facilitate the shortening of language in Acts) was expressed to apply “unless the contrary intention appears”. This remains the position under the present AIA (see subsection 2(2)).

3 The 1904 Act was repealed in 1937 and the definition of “prescribed” was relocated to the AIA.



ATTORNEY-GENERAL

CANBERRA

05 JUN 2014

MC14/06353

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

Dear Mr Powell

Thank you for your letter dated 26 March 2014, in which you drew to my attention the comments enclosed in the report of the Senate Standing Committee on Regulations and Ordinances (Committee), *Delegated legislation monitor* No. 4 of 2014, regarding the *Privacy Amendment (External Dispute Resolution Scheme–Transitional) Regulation 2014* [F2014L00219] and the Credit Reporting Privacy Code [F2014L00170].

You have requested advice as to whether consultation was undertaken on the *Privacy Amendment (External Dispute Resolution Scheme–Transitional) Regulation 2014*, as required under section 17 of the *Legislative Instruments Act 2003*. I can confirm that consultation did occur. In addition to the large number of representations that I received from the credit reporting industry, particularly from commercial credit providers, my department undertook consultation with key credit reporting stakeholders and peak bodies, including the Australian Retail Credit Association and the Australian Finance Conference. Targeted consultation was also undertaken with certain State and Territory energy and water ombudsmen, the Chair of the Australian and New Zealand Ombudsman Association (being the peak body for Ombudsmen in Australia and New Zealand) and the Office of the Australian Information Commissioner (OAIC). Furthermore, consistent with the Government's commitment to reducing regulatory burden on Australian businesses, the Office of Best Practice Regulation and the Treasury were consulted as to the regulation's impact on business. The explanatory statement to the *Privacy Amendment (External Dispute Resolution Scheme–Transitional) Regulation 2014* will be amended to describe the nature of the consultation undertaken.

You have also drawn to my attention the Committee's comments on the Credit Reporting Privacy Code (CR Code). The Committee has identified the CR Code as appearing to rely on subsection 33(3) of the *Acts Interpretation Act 1901* (Acts Interpretation Act), which provides that the power to make an instrument includes the power to vary or revoke the instrument. The Committee considers that, in circumstances where an instrument does in fact rely on this provision, the Explanatory Statement should refer to subsection 33(3) of the Acts Interpretation Act.

The *Privacy Act 1988* (Privacy Act), as recently amended by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*, includes provisions that deal with future variations of the CR Code. In addition, the CR Code is an essential component of the regulatory arrangements for credit reporting and there is a clear intention in the legislation that there must always be a CR Code in place. Accordingly, it does not appear necessary to rely on the Acts Interpretation Act in relation to any future variation or revocation of the CR Code. The relevant provisions of the Privacy Act are set out in more detail below.

Part IIIB of the Privacy Act permits the Australian Information Commissioner (Information Commissioner) to approve and register enforceable codes, including the CR Code, which are developed by entities on their own initiative, or following a request from the Information Commissioner, or directly developed by the Information Commissioner. Subsection 26Q(1) provides that the CR Code developer may apply for registration of the CR Code by the Information Commissioner. Subsection 26S(1) provides that the Information Commissioner may register the CR Code. Subsection 26M(2) provides that the registered CR Code is a legislative instrument.

Section 26T of the Privacy Act provides that the Information Commissioner may approve a variation of the CR Code and sets out the process by which the Information Commissioner must consider the variation. A variation may occur:

- on the Information Commissioner's own initiative, or
- when an entity bound by the registered code applies for a variation, or
- when a body or association representing one or more entities bound by the registered code (such a code administrator) applies for a variation.

The CR Code is an integral part of the credit reporting system as it deals with the practical implementation of the requirements of the Privacy Act. As it is expected that there will always be a CR Code in place Part IIIB does not deal with the possible revocation of the CR Code. Consistent with this approach, subsection 26S(4) places an obligation upon the Information Commissioner to ensure that there is one, and only one, registered CR Code at all times after the commencement of Part IIIB. Similarly, the definition of the registered CR Code in section 26M does not include a requirement that the CR Code set out the period that it is in force as it is expected that there will always be a CR Code in force (see Explanatory Memorandum to the Privacy Amendment (Enhancing Privacy Protection) Act 2012, clause 26M, p 207 and clause 26S, p 212).

Further information about the Information Commissioner's Code making power is set out in the OAIC *Guidelines for developing codes: Issued under Part IIIB of the Privacy Act 1988*, at: <<http://www.oaic.gov.au/privacy/applying-privacy-law/privacy-registers/privacy-codes/>>.

I hope that this information is of assistance and I thank you for bringing to my attention the Committee's views on these matters.

Yours faithfully

(George Brandis)



THE HON MICHAEL KEENAN MP
Minister for Justice

MC14/09651

Senator Sean Edwards
Chair
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Dear Senator *Sean*

Response to issue identified in the *Delegated legislation monitor No. 5 of 2014 - Anti-Money Laundering and Counter-Terrorism Financing (Iran Countermeasures) Regulation 2014*

Thank you for your letter of 14 May 2014 to the Attorney-General, Senator the Hon George Brandis QC, regarding the *Anti-Money Laundering and Counter-Terrorism Financing (Iran Countermeasures) Regulation 2014* (the Regulation).

Your letter was referred to me for reply as the matter you raised falls within my portfolio responsibilities. I welcome the opportunity to provide the Senate Standing Committee on Regulations and Ordinances with further information regarding the consultation process for the Regulation.

The Regulation was implemented to replace the existing countermeasures regulations against Iran, which sunset on 1 April 2014. The Attorney-General's Department had previously undertaken extensive consultation with the public and industry in the development of the existing regulations.

The Department and the Australian Transaction Reports and Analysis Centre (AUSTRAC) also engaged extensively with affected reporting entities and relevant peak bodies, through direct contact and through a number of consultative forums both prior to and while the initial regulations were in effect.

The remade Regulation did not materially alter the regulatory requirements already in place under the existing regulations. A number of minor and technical amendments were incorporated into the Regulation following consultation with the Department of Foreign Affairs and Trade. These amendments reduced existing regulatory impacts by exempting a greater number of transactions and persons from the countermeasures scheme.

The Office of Best Practice Regulation was consulted in the development of the Regulation, and confirmed that it only had a minor regulatory impact on business, community organisations and individuals, as it was intended to clarify and not substantially alter existing arrangements.

In light of this assessment and the extensive public consultation undertaken on the previous iteration of the countermeasures instrument, further consultation was considered unnecessary. Thank you for the opportunity to clarify these matters.

Yours sincerely

Michael Keenan

06 JUN 2014