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Ordinances

Delegated legislation monitor

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Introduction

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

The 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 John Williams

Chair

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

Chapter 1

New and continuing matters

This chapter lists new matters identified by the committee at its meeting on **16 July 2014**, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to relevant ministers or instrument makers in relation to substantive matters seeking further information or an appropriate undertaking within the disallowance period.

Matters which the committee draws to the attention of the relevant minister or instrument maker are raised on an advice-only basis and do not require a response.

New matters

Social Security (Declaration of Visa in a Class of Visas – Special Benefit Activity Test) Determination 2014 [F2014L00781]

Purpose	Provides that a person who is a Subclass 449 (Humanitarian Stay (Temporary)) visa holder may be required to satisfy the activity test in order to be qualified for Special Benefit under the <i>Social Security Act 1991</i>
Last day to disallow	02 September 2014
Authorising legislation	<i>Social Security Act 1991</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:

No consultation was considered necessary for the purpose of this Determination.

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*.**

Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2014 [F2014L00784]

Purpose	Provides that a person who is a Subclass 449 (Humanitarian Stay (Temporary)) visa holder is exempted from the newly arrived resident's waiting period for Special Benefit under the <i>Social Security Act 1991</i>
Last day to disallow	02 September 2014
Authorising legislation	<i>Social Security Act 1991</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 provides no explanation as to why consultation was considered unnecessary in this case. 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*.**

Social Security (Class of Visas – Qualification for Special Benefit) Determination 2014 [F2014L00783]

Purpose	Provides that a person who is a Subclass 449 (Humanitarian Stay (Temporary)) visa holder is qualified for Special Benefit under subparagraph 729(2)(f)(v) of the <i>Social Security Act 1991</i>
Last day to disallow	02 September 2014
Authorising legislation	<i>Social Security Act 1991</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 provides no description of the nature of the consultation undertaken. 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 that does not describe the nature of any consultation, 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*.**

Continuing matters

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 disallow¹	13 May 2014
Authorising legislation	<i>Australian Jobs Act 2013</i>
Department	Industry

[The committee first reported on this instrument in Monitor No. 2 of 2014, and subsequently in Monitor Nos 5 and 6 of 2014. The committee raised concerns and sought further information in relation to the prescribing of matters by legislative rules].

Issue:

Prescribing of matters by 'legislative rules'

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

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 (OPC) 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

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

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 (Monitor No. 2 of 2014)].**

MINISTER'S RESPONSE:

Prescribing of matters by 'legislative rules'

In relation to the issue of whether the prescribing of matters by legislative rules is novel, First Parliamentary Counsel (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 thanked the minister for his response and made the following comments (Monitor No. 5 of 2014)].

However, the committee noted 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:

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 thanked the minister for his response and agreed to a meeting to discuss the committee's concerns; and made the following comments (Monitor No. 6 of 2014)].

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'.² 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'.³

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 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.

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

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

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 requested FPC's response to the committee's views outlined above (Monitor No. 6 of 2014)].

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 requested FPC's response to the committee's views outlined above (Monitor No. 6 of 2014)].

FIRST PARLIAMENTARY COUNSEL'S RESPONSE:

Basis for tying drafting of regulations to OPC

General regulation and rule-making powers

It may be helpful if I were to make some brief comments on the form and breadth of the standard general rule-making power set out in Drafting Direction 3.8 (DD3.8). The power follows the standard general regulation-making power that has been used for some time. The principles applying to its interpretation are, therefore, well established.

4 The standard general rule-making power is as follows:

The [maker, e.g. Minister] may, by legislative instrument, make [name of legislative instrument (e.g. rules)] prescribing matters:

(a) required or permitted by this [Act/Ordinance] to be prescribed by the [name of legislative instrument (e.g. rules)]; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this [Act/Ordinance].

Paragraph (a) is commonly called the “required or permitted” power and paragraph (b) is commonly called the “necessary or convenient” power.

5 It is important to stress that the scope of each of these powers in the general rule-making power is dependent on the other provisions of the Act.

6 This point is perhaps clearest in relation to the “required or permitted” power. The scope of this power depends on the existence and terms of other provisions of the Act that require or permit the making of rules. Put simply, the “required or permitted” power gives no power to make rules beyond that authorised by the other provisions of the Act. If there is no other provision of the Act that requires or permits the making of rules, the “required or permitted” power does not authorise the making of rules.

7 Again, the “necessary or convenient” power is not a power at large. The scope of the power varies according to the content of the other provisions of the Act. To be valid, a rule (or regulation) made under the power must “complement” rather than “supplement” the other provisions of the Act. “(A)n examination of the Act... will usually indicate whether an attempt is being made to add something to the operation of the Act which cannot be related to the specific provisions of the Act, or whether the regulation-making power has been used merely to fill out the framework of the Act in such a way as to enable the legislative intention to operate effectively.” (Pearce, D and Argument, S *Delegated Legislation in Australia, 4th Edition*, 2012 at 14.5). Only a provision of the latter kind is valid.

8 Thus, the form of a general rule-making power of an Act is not conclusive of the scope of the power. In my view it is, therefore, not correct to suggest that it is the form of the power itself that enables the making of laws “covering a range of matters”. For what is commonly called “skeleton legislation”, it is also not correct to suggest that a general rule-making power can necessarily be relied on to provide for “a vast range of matters” required to effectively implement and support the operation of the Act. In each case the scope of the power conferred by a general rule-making power depends on the exact terms of the other provisions of the Act. In some cases the power may be extensive. In other cases the power will be limited.

9 In my view, it is not appropriate to focus solely (or unduly) on the form of any power in deciding its scope. For a general rule-making power this is particularly the case because the scope of the power can be decided only in the context of the other provisions of the Act.

Tying of drafting work to OPC not dependent on the form of the power or type of instrument

10 There is, in my view, no basis for suggesting that it is the form of the general regulation-making power that is the basis for tying regulation drafting work to OPC. First, as I have explained, the form of the power is not conclusive of its scope. A general regulation-making power may give only a limited power to make regulations. Second, broad non-regulation subordinate legislation-making powers have existed in the Commonwealth for many years and these instruments are not tied to OPC. Finally, the drafting of all legislative instruments (not just regulations) made or approved by the Governor-General is tied to OPC. The tying of these instruments to OPC is not dependent on the form of the power under which the legislative instruments are made nor indeed the type of legislative instrument concerned. They are tied to OPC because they are legislative instruments made or approved by the Governor-General.

Drafting quality and executive and parliamentary scrutiny of legislative instruments

Drafting standards

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

12 In my view, the approach set out in DD3.8 will allow OPC to ensure that it has the capacity to draft the instruments that have the most significant impacts on the community. It will enable OPC to draft the most significant instruments itself and allow it either to draft or assist agencies to draft other instruments. OPC can provide a range of services to assist agencies in drafting instruments. These services include instrument design and template development, editing, commenting on draft instruments and providing advice. In my view this approach will enhance, and not diminish, the overall quality of legislative instruments and ensure that the most significant matters receive the highest level of drafting expertise and executive scrutiny.

Division of material between regulations and other legislative instruments

13 In the past there has been no clear guidance about the appropriate division of material between regulations and other legislative instruments. As a result, material seems to have been allocated between regulations and other legislative instruments without any consideration of the nature of the material itself. Less important matters of detail have sometimes been included in regulations while more important matters have been included in a wide range of other types of legislative instruments. DD3.8 deals with this lack of guidance as well as the previous proliferation of the number and kinds of legislative instruments.

14 DD3.8 outlines the material that should, in OPC's view, be included in regulations (in the absence of a strong justification to the contrary) and so be drafted by OPC and considered by the Federal Executive Council. However, any decision in a particular case is, of course, a decision for the Government, and ultimately the Parliament, to make.

15 I would welcome any views that the Committee (or the Senate Standing Committee on the Scrutiny of Bills) 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 them.

Scope of general rule-making power and likelihood of matters being inappropriately included in rules

16 I note that in *Alert Digest No. 6 of 2014* the Senate Standing Committee on the Scrutiny of Bills has queried whether a general rule-making power would permit a rule-maker to make the following types of provisions:

- offence provisions
- powers of arrest or detention
- entry provisions
- search provisions
- seizure provisions
- provisions which make textual modifications to Acts
- provisions where the operation of an Act is modified
- civil penalty provisions
- provisions which impose (or set or amend the rate) of taxes
- provisions which set the amount to be appropriated where an Act provides the appropriation and the authority to set the amount of the appropriation.

17 I note that this list differs only slightly from the list in DD3.8 and is substantially similar to the list included by the Australian Government Solicitor in Legal Briefing Number 102 dated 26 February 2014 (<http://www.ags.gov.au/publications/legal-briefing/br102.html>).

18 In my view, and taking into account the view expressed in that Legal Briefing, none of the kinds of provisions mentioned in the list would be authorised by either a general regulation-making power or a general rule-making power. Provisions of any of these kinds would require an express provision to authorise their inclusion in a regulation or any other kind of subordinate legislation. Accordingly, I think that there is no real risk of such provisions being inappropriately included in rules or regulations. Any such provision included without express legislative authority would be invalid.

19 However, it may be possible to make the matter even more certain. For example, the standard form of rule-making power (as set out in paragraph 4) could be revised so that it expressly provides that the power does not enable the making of rules dealing with provisions of these kinds. This would ensure that the scope of rule-making powers in relation to these kinds of provisions was clear on the face of the provisions themselves, regardless of whether the resulting rule were to be drafted by OPC, in-house or by another legal services provider.

20 Depending on the Committee's views on the matters that should be included in regulations rather than other types of legislative instruments, other measures may also be appropriate. For example, if any of the matters were inappropriate to be dealt with in express provisions of the kind that I have outlined, it may be possible to deal with them through the issue of drafting standards under the *Legislative Instruments Act 2003* and the introduction of a requirement for explanatory statements to include a statement about compliance with the standards. This would achieve a high level of transparency and should facilitate the Committee's scrutiny function.

21 I would be happy to consider any views that the Committee has about this or other measures the Committee may have in mind.

Volume of OPC drafted instruments

22 I note that the Committee seems to assume that the approach in DD3.8 will lead to OPC drafting fewer instruments. I do not think that this will be the case (see paragraph 17 of my letter of 23 May 2014 on the volume of OPC drafted instruments). OPC will continue to be available to draft, and assist agencies to draft, instruments that are not tied to OPC. OPC will be actively seeking more of this work and I expect that it will continue to draft a substantial proportion of all legislative instruments, including the most significant and sensitive of them.

COMMITTEE RESPONSE:

Drafting quality and executive and Parliamentary scrutiny of legislative instruments

As the advice of FPC notes, the scope of the general regulation and rule-making powers is governed by the provisions of the Act under which they are made, and the exercise of such powers to fill out the framework of an Act may in some cases be 'extensive'. This goes to one of the key concerns raised by the committee in relation to the general rule-making, which is the question of whether it is appropriate for Parliament's delegated legislative power to be exercised without the longstanding requirements for close executive oversight.

While the committee notes FPC's view that 'broad non-regulation subordinate legislation-making powers have existed in the Commonwealth for many years', the committee's inquiries have been directed at the apparent consequences of the new general rule-making power. In particular, the committee has noted that, while

regulations have traditionally been subject to formal requirements for its exercise and making (that is, have been required to be made by the Governor-General and drafted by OPC), legislation made under the general rule-making power will not be subject to the same level of executive oversight. Notwithstanding FPC's view that these requirements do not relate to the general form of the regulation-making power, the question remains as to whether it is appropriate that the new general power should not be similarly subject to close executive oversight. With particular reference to cases where the provisions of an Act effectively provide an extensive power to make rules, the thrust of the committee's inquiries has gone to the extent to which the making and drafting of such rules by persons other than the Governor-General and OPC, respectively, could lead to a diminution in the quality of drafting standards. The committee has previously noted its concern that such an outcome would see a corresponding increase in the level of scrutiny required to be applied by the Parliament.

On this question, the committee notes that FPC's view and assurances that the new general-rule making power will 'enhance, and not diminish, the overall quality of legislative instruments'. However, it remains unclear to the committee how this outcome will be achieved in practice, given that departments and agencies will have responsibility for the drafting of rules. With reference to FPC's advice that the general rule-making power will not lead to OPC drafting fewer instruments, the committee has understood that one of the aims of instigating the general rule-making power was to reduce the number of instruments required to be drafted by OPC. In particular, FPC has advised:

OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate for it to do so.

12 In my view, the approach set out in DD3.8 will allow OPC to ensure that it has the capacity to draft the instruments that have the most significant impacts on the community.

In addition to these questions, it is unclear to the committee what mechanisms are available to OPC to monitor the quality of drafting of instruments based on the new general rule-making power; and what resources and mechanisms may be available to OPC to respond in the event that drafting standards do in fact suffer.

Division of material between regulations and other legislative instruments

The committee notes FPC's statement that certain types of provisions such as offence, entry, search, seizure, and civil penalty provisions would not be authorised by either a general regulation-making power or a general rule-making power:

Provisions of any of these kinds would require an express provision to authorise their inclusion in a regulation or any other kind of subordinate legislation. Accordingly, I think that there is no real risk of such provisions being inappropriately included in rules or regulations. Any such provision included without express legislative authority would be invalid.

However, FPC's statement leaves open the question of whether the inclusion of these types of provisions in a rule is both generally appropriate, and appropriate in a given case, thus supporting the inclusion of an express power in a rule to allow for the prescribing of such matters. The determination of this question appears to turn on the policy considerations which will inform judgements as to what is a 'strong justification' as provided for in Drafting Direction 3.8. The committee's inquiries to date have shed little light on would constitute a 'strong justification' for the inclusion of such matters in rules or, indeed, who will be responsible for the making of such judgements.

The committee notes that these questions are particularly pertinent in light of its inquiries in relation to the Jervis Bay Territory Rural Fires Ordinance 2014 [F2014L00443]. The committee's report on that instrument below outlines a number of matters on which the committee seeks a response from OPC.

The committee notes that, due to the Parliamentary program, the committee was unable to meeting with FPC and officers of the Department of Industry in July as previously scheduled. The committee will seek to reschedule that meeting and, in addition, seeks the written response of FPC to the matters outlined above.

Noting the continued engagement of FPC with the committee over this matter, and the proposals for resolving the committee's concerns in FPC's most recent correspondence (at paragraph 19 and 20), the committee agreed at its meeting on 9 July 2014 to withdraw the 'protective' notice of motion on the Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125].⁴

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

[The committee first reported on this instrument in Monitor No. 6 of 2014. The committee raised concerns and sought further information in relation to the prescribing of matters by legislative rules].

4 For details on the disallowance of instruments, see the Disallowance Alert at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts

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 requested further information from the minister**].

ASSISTANT MINISTER'S RESPONSE:

The Assistant Minister for Infrastructure and Regional Development advised that the drafting of the Ordinance:

...ran in parallel to the Office of Parliamentary Counsel's development of its formal policy on the preparation of subordinate legislative instruments, including in relation to regulation-making powers and the appropriateness of offence provisions to be included under a rule-making power.

The Department of Infrastructure and Regional Development will work with the Office of Parliamentary Counsel to address the comments made by the Committee, including amending the Ordinance to expressly create a regulation-making power, amending the Rule to remove all offence provisions and drafting Regulations with the offence provisions.

COMMITTEE RESPONSE:

The committee thanks the assistant minister for his response and undertaking to amend the Ordinance.

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

However, the committee notes that the assistant minister's advice raises a number of questions regarding the committee's inquiries in relation to the Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125].

In particular, the committee notes the assistant minister's advice that the drafting of the Ordinance, and the inclusion of offences in the rules (authorised by express provision), ran 'in parallel' to OPC's development of its formal policy on the appropriateness of offence provisions to be included under a rule-making power.

As the committee has previously noted, on 6 March 2014 (subsequent to the committee's initial comments on the 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 direction included the guidance 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'. The committee understood this to be a settled statement of the policy on the use of the general rule-making power.

With reference to these points, the committee notes that the assistant minister's undertaking appears to suggest that, while the inclusion of offence provisions in the rules satisfied legal criteria for validity, there was not a sufficiently 'strong

justification' for making provision for the prescribing of offences by rules in this case. This is of particular interest to the committee because, as noted above, the committee's inquiries to date have shed little light on what would constitute a 'strong justification' for the inclusion of such matters in rules or, indeed, who will be responsible for the making of such judgements.

The assistant minister's advice also gives rise to questions regarding the policy development process in relation to the general-rule making power, and whether the implementation of the power has been done on the basis of a sufficiently well developed and articulated policy on its use.

These matters relate directly to the committee's inquiries in relation the Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125]. The committee will have the opportunity to discuss these matters in its upcoming meeting with FPC and, in addition, seeks the written response of FPC to the matters outlined above.

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

[The committee first reported on this instrument in Monitor No. 6 of 2014. The committee raised concerns and sought further information in relation to the prescribing of matters by legislative rules].

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-

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 requested further information from the minister]**.

ASSISTANT MINISTER'S RESPONSE:

The Assistant Minister for Infrastructure and Regional Development advised that the drafting of the Rule:

...ran in parallel to the Office of Parliamentary Counsel's development of its formal policy on the preparation of subordinate legislative instruments, including in relation to regulation-making powers and the appropriateness of offence provisions to be included under a rule-making power.

The Department of Infrastructure and Regional Development will work with the Office of Parliamentary Counsel to address the comments made by the Committee, including amending the Ordinance to expressly create a regulation-making power, amending the Rule to remove all offence provisions and drafting Regulations with the offence provisions.

COMMITTEE RESPONSE:

The committee thanks the assistant minister for his response and undertaking to amend the Rule.

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

The committee's comments on the preceding instrument, Jervis Bay Territory Rural Fires Ordinance 2014 [F2014L00443], apply equally to this instrument.

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.⁵

5 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 **16 July 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 (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2014 [F2014L00411]

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

Issue:

(a) Drafting

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

MINISTER'S RESPONSE:

The Minister for Foreign Affairs advised the instrument 'was drafted in accordance with standard drafting practice for these types of instruments under the Autonomous Sanctions Regulations 2011'. The minister further advised:

On the basis of recent advice from the Office of Parliamentary Counsel and the comments of the Committee in the Monitor, DFAT has updated its drafting practices to ensure that future instruments include an express

amendment instruction to indicate how the Principal Instrument will be amended.

COMMITTEE RESPONSE:

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

Issue:

(b) Insufficient description provided regarding consultation

Regarding consultation, the ES for this instrument states:

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

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

MINISTER'S RESPONSE:

The Minister for Foreign Affairs advised:

DFAT conducts extensive outreach on Australian sanction laws. We undertake two national outreach tours a year to major Australian cities, including open seminars for Australian businesses, financial institutions, universities and individuals. We also undertake ad hoc, tailored outreach to Australian businesses or sectors that are particularly affected by Australian sanction laws. We manage a sanctions e-mail list to notify subscribers immediately of amendments to Australian sanction laws and of updates to the Consolidated List of persons and entities designated for the purposes of all sanctions regimes.

Although DFAT has not conducted specific consultations on sanctions in relation to Zimbabwe, it does conduct regular consultations on Africa with nongovernment organisations in Australia, which have informed the Government's policy settings.

COMMITTEE RESPONSE:

The committee thanks the minister for her response and has concluded its interest in the 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 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 Social Services advised that he had reviewed and updated the ES to include the additional information requested by the committee:

This change is consequential to the removal of the distinction between low and high level residential care as part of the changes to the Aged Care Act 1997 that commence on 1 July 2014.

In April 2012, the former Government launched a major program of aged care reforms. The reform agenda was developed in close consultation with the aged care sector, including consumers, industry and professional bodies.

As part of the consultation on the proposed changes to the Act, and to delegated legislation, arising from the reforms, the former Government communicated its intention to examine the delegated legislation and, where possible, simplify the delegated legislation.

This intent was communicated in November 2012, with the public release of a paper providing an overview of the proposed legislative changes. A video presentation detailing the proposed reforms was also made available online to assist members of the public to understand these changes.

During late 2012 and in the first half of 2013, briefing sessions were held across Australia to provide information and to explain, in detail, the proposed legislative changes included in the package of Bills introduced into Parliament on 13 March 2013. As part of these consultations, the intention to make related changes to delegated legislation was again discussed. For those interested members of the public unable to attend the briefings, the presentation, supporting handouts, a detailed Question and Answer document and an information video were made available online.

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 **16 July 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 after the name of each instrument listed below).

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

Instruments marked with an 'E' are exempt from disallowance.

Instruments received week ending 27 June 2014

<i>Academic and Ceremonial Dress Statute 2005</i>	
Academic and Ceremonial Dress Order 2014 [F2014L00739]	E
<i>Aged Care Act 1997</i> Committee Principles 2014 [F2014L00799]	
Information Principles 2014 [F2014L00800]	
Complaints Principles 2014 [F2014L00802]	
Sanctions Principles 2014 [F2014L00803]	
Approval of Care Recipients Principles 2014 [F2014L00804]	
Classification Principles 2014 [F2014L00805]	
User Rights Principles 2014 [F2014L00808]	
Extra Service Principles 2014 [F2014L00809]	
Records Principles 2014 [F2014L00810]	
Allocation Principles 2014 [F2014L00812]	
<i>Australian Prudential Regulation Authority Act 1998</i>	
Australian Prudential Regulation Authority instrument fixing charges No. 2 of 2014 [F2014L00776]	
Australian Prudential Regulation Authority (confidentiality) determination No.8 of 2014 [F2014L00779]	
Australian Prudential Regulation Authority (confidentiality) determination No. 9 of 2014 [F2014L00806]	

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

<i>Autonomous Sanctions Regulations 2011</i>	
Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Ukraine) List 2014 [F2014L00745]	
<i>Banking Act 1959</i>	
Banking exemption No. 1 of 2014 [F2014L00793]	
<i>Broadcasting Services Act 1992</i>	
Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 7 of 2014) [F2014L00740]	
Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 8 of 2014) [F2014L00744]	
<i>Civil Aviation Regulations 1988</i>	
CASA 129/14 - Direction — number of cabin attendants for Airbus A320 and Fokker F100 aircraft (Virgin Australia Regional Airlines) [F2014L00742]	
CASA 128/14 - Direction — number of cabin attendants (Virgin Australia Airlines) [F2014L00788]	
CASA 130/14 - Direction — number of cabin attendants (Virgin Australia International Airlines) [F2014L00789]	
CASA 131/14 - Direction — number of cabin attendants (Tiger Airways) [F2014L00790]	
<i>Civil Aviation Safety Regulations 1998</i>	
CASA EX15/14 - Repeal of exemption – standard take-off and landing minima – Royal Brunei Airlines [F2014L00741]	
Part 42 Manual of Standards Amendment Instrument 2014 (No. 1) [F2014L00748]	*
CASA EX43/14 - Exemption — hang-gliding and paragliding operations at Hooley Dooley launch site within active restricted airspace at Williamtown, NSW [F2014L00750]	
CASA EX46/14 - Exemption — carriage of children suffering from a serious medical condition [F2014L00787]	
<i>Corporations Act 2001</i>	
AASB 2014-1 Amendments to Australian Accounting Standards - June 2014 [F2014L00811]	*
AASB 14 - Regulatory Deferral Accounts - June 2014 [F2014L00813]	
<i>Defence Act 1903</i>	
Defence Determination 2014/31, Attendance allowance - amendment	
<i>Environment Protection and Biodiversity Conservation Act 1999</i>	
Environment Protection and Biodiversity Conservation Amendment (Rhino Specimens) Regulation 2014 [SLI 2014 No. 73] [F2014L00738]	
<i>Export Market Development Grants Act 1997</i>	
Export Market Development Grants (Associate and Fit and Proper Person) Amendment Guideline 2014 (No. 1) [F2014L00785]	
<i>Fair Work Act 2009</i>	
Fair Work (State Declarations - employer not to be national system employer) Endorsement 2014 (No. 2) [F2014L00778]	E
<i>Financial Sector (Collection of Data) Act 2001</i>	
Financial Sector (Collection of Data) (reporting standard) determination No. 27 of 2014 - SRS 532.0 - Investment Exposure Concentrations [F2014L00792]	

Financial Sector (Collection of Data) (reporting standard) determination No. 1 of 2014 - SRS 530.0 - Investments [F2014L00796]	
<i>Greenhouse and Energy Minimum Standards Act 2012</i>	
Greenhouse and Energy Minimum Standards (Computer Monitors) Determination 2014 [F2014L00780]	
<i>Health Insurance Act 1973</i>	
Health Insurance (Gippsland, Rockhampton and Gladstone Mobile MRI Service) Determination 2014 (No. 1) [F2014L00775]	
<i>Higher Education Support Act 2003</i>	
Higher Education Support Act 2003 - Revocation of Approval as a VET Provider (State of Queensland as represented by Southbank Institute of Technology) [F2014L00751]	
Higher Education Support Act 2003 - Revocation of Approval as a VET provider (State of Queensland as represented by the Gold Coast Institute of TAFE) [F2014L00755]	
Higher Education Support Act 2003 - Revocation of approval as a VET provider (State of Queensland as represented by Wide Bay Institute of TAFE) [F2014L00760]	
Higher Education Support Act 2003 - Revocation of approval as a VET provider (The State of Queensland as represented by Metropolitan South Institute of TAFE) [F2014L00764]	
Higher Education Support Act 2003 - Revocation of Approval as a VET Provider (State of Queensland as represented by Tropical North Queensland Institute of TAFE) [F2014L00765]	
Higher Education Support Act 2003 - Revocation of approval as a VET Provider (State of Queensland as represented by Sunshine Coast Institute of TAFE) [F2014L00767]	
Higher Education Support Act 2003 - Revocation of Approval as a VET provider (State of Queensland as represented by Brisbane North Institute of TAFE) [F2014L00768]	
Higher Education Support Act 2003 - Revocation of Approval as a VET provider (State of Queensland as represented by SkillsTech Australia) [F2014L00770]	
Higher Education Support Act 2003 - Revocation of Approval as a VET provider (State of Queensland as represented by Southern Queensland Institute of TAFE) [F2014L00772]	
Higher Education Support Act 2003 - Revocation of Approval as a VET provider (State of Queensland as represented by The Bremer Institute of TAFE) [F2014L00774]	
Higher Education Support Act 2003 - VET Provider Approval (No. 34 of 2014) [F2014L00798]	
<i>Insurance Act 1973</i>	
Insurance (prudential standard) determination No. 1 of 2014 - GPS 117 - Capital Adequacy: Asset Concentration Risk Charge [F2014L00794]	
<i>Major Sporting Events (Indicia and Images) Protection Act 2014</i>	
Major Sporting Events (Indicia and Images) Protection Rules 2014 [F2014L00791]	
<i>Marriage Regulations 1963</i>	
Marriage (Celebrancy qualifications or skills) Amendment (Training Materials) Determination 2014 [F2014L00814]	
<i>Migration Regulations 1994</i>	
Migration Regulations 1994 - Specification of Occupations, a Person or Body, a Country or Countries - IMMI 14/048 [F2014L00749]	*
Migration Regulations 1994 - Specification of Occupations, a Person or Body, a Country or Countries - IMMI 14/049 [F2014L00753]	

Migration Regulations 1994 - Specification of Student Visa Assessment Levels - IMMI 14/014 [F2014L00752]	E
Migration Regulations 1994 - Specification of Specified Place - IMMI 14/056 [F2014L00754]	E
Migration Regulations 1994 - Specification of Classes of Persons - IMMI 14/045 [F2014L00756]	E
Migration Regulations 1994 - Specification of Classes of Persons - IMMI 14/046 [F2014L00757]	E
<i>National Health Act 1953</i>	
National Health (Weighted average disclosed price – October 2014 reduction day) Determination 2014 (No. PB 42 of 2014) [F2014L00758]	
National Health Determination under paragraph 98C(1)(b) Amendment 2014 (No. 6) (No. PB 46 of 2014) [F2014L00761]	
National Health (Listed drugs on F1 or F2) Amendment Determination 2014 (No. 5) (No. PB 47 of 2014) [F2014L00762]	
National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2014 (No. 6) (No. PB 45 of 2014) [F2014L00763]	
National Health (Highly specialised drugs program for hospitals) Special Arrangement Amendment Instrument 2014 (No. 6) (No. PB 48 of 2014) [F2014L00766]	
Commonwealth price (Pharmaceutical benefits supplied by approved pharmacists) Amendment Determination 2014 (No 1) [F2014L00795]	*
<i>Private Health Insurance Act 2007</i>	
Private Health Insurance (Complying Product) Amendment Rules 2014 (No. 5) [F2014L00797]	*
Private Health Insurance (Benefit Requirements) Amendment Rules 2014 (No. 2) [F2014L00801]	*
<i>Programs and Awards Statute 2013</i>	
Graduate Coursework Awards Rules 2014 [F2014L00759]	E
<i>Protection of the Sea (Shipping Levy) Act 1981</i>	
Protection of the Sea (Shipping Levy) Regulation 2014 [SLI 2014 No. 85] [F2014L00743]	
<i>Quarantine Act 1908</i>	
Quarantine Service Fees Amendment (2014 Measures No. 1) Determination 2014 [F2014L00773]	
<i>Radiocommunications (Transmitter Licence Tax) Act 1983</i>	
Radiocommunications (Transmitter Licence Tax) Amendment Determination 2014 (No. 1) [F2014L00769]	
<i>Radiocommunications Act 1992</i>	
Radiocommunications (Field Trial by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Amendment Determination 2014 (No. 1) [F2014L00771]	
<i>Social Security (Administration) Act 1999</i>	
Social Security (Administration) (Declared income management areas - Ceduna and Surrounding Region) Determination 2014 [F2014L00777]	
<i>Social Security Act 1991</i>	

Social Security (Declaration of Visa in a Class of Visas - Special Benefit Activity Test) Determination 2014 [F2014L00781]	
Social Security (Class of Visas - Qualification for Special Benefit) Determination 2014 [F2014L00783]	
Social Security (Class of Visas - Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2014 [F2014L00784]	
<i>Student Assistance Act 1973</i>	
Student Assistance (Education Institutions and Courses) Amendment Determination 2014 (No. 1) [F2014L00747]	
<i>Superannuation Benefits (Supervisory Mechanisms) Act 1990</i>	
Prescribed Requirements Amendment Determination 2014 (No. 1) [F2014L00730]	E
<i>Telecommunications (Consumer Protection and Service Standards) Act 1999</i>	
Telstra Carrier Charges—Price Control Arrangements, Notification and Disallowance Determination No. 1 of 2005 (Amendment No. 1 of 2014) [F2014L00786]	
<i>Therapeutic Goods Act 1989</i>	
Therapeutic Goods (Listing) Notice 2014 (No. 1) [F2014L00746]	
<i>Water Act 2007</i>	
Water Amendment (Murray-Darling Basin Agreement) Regulation 2014 (No. 1) [SLI 2014 No. 75] [F2014L00728]	
<i>Work Health and Safety Regulations 2011</i>	
Work Health and Safety Exemption to Regulation 81 (June 2014) [F2014L00782]	

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 as the outcome of the consultation process. For example, an ES could state: 'A number of submissions raised concerns in relation to the effect of the instrument on retirees. An exemption for retirees was introduced in response to these concerns'.

Explaining why consultation has not been undertaken

To meet the requirements of section 26 of the Act, an ES must *explain why no consultation was undertaken*. The committee does not usually interpret this as requiring a highly detailed explanation of why consultation was not undertaken. However, a bare statement that consultation has not taken place may be considered insufficient to meet the requirements of the Act.

In explaining why no consultation has taken place, it is important to note the following considerations:

Specific examples listed in the Act

Section 18 lists a number of examples where an instrument-maker may be satisfied that consultation is unnecessary or inappropriate in relation to a specific instrument. This list is not exhaustive of the grounds which may be advanced as to why consultation was not undertaken in a given case. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning in support of this conclusion. An ES should avoid bare assertions such as 'Consultation was not undertaken because the instrument is beneficial in nature'.

Timing of consultation

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

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

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

Seeking further advice or information

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

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

Phone: +61 2 6277 3066

Fax: +61 2 6277 5881

Email: RegOrds.Sen@aph.gov.au

Appendix 3

Correspondence



Australian Government
Office of Parliamentary Counsel

First Parliamentary Counsel

Our ref: C14/21

Senator Gavin Marshall
Deputy Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
Canberra ACT 2600

Dear Senator Marshall

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

1 I refer to the Committee Secretary's letter of 20 June 2014 about this rule and note that a meeting has been arranged for Tuesday 8 July 2014 to brief the Committee on the prescribing of matters by legislative rules. To assist the Committee in advance of the meeting this letter responds briefly to issues raised in *Delegated Legislation Monitor No. 6 of 2014* concerning the rule.

2 I would be happy to respond further to these issues and any other issues the Committee wishes to raise at the briefing.

Basis for tying drafting of regulations to OPC

General regulation and rule-making powers

3 It may be helpful if I were to make some brief comments on the form and breadth of the standard general rule-making power set out in Drafting Direction 3.8 (DD3.8). The power follows the standard general regulation-making power that has been used for some time. The principles applying to its interpretation are, therefore, well established.

4 The standard general rule-making power is as follows:

The [*maker, e.g. Minister*] may, by legislative instrument, make [*name of legislative instrument (e.g. rules)*] prescribing matters:

- (a) required or permitted by this [*Act/Ordinance*] to be prescribed by the [*name of legislative instrument (e.g. rules)*]; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this [*Act/Ordinance*].

Paragraph (a) is commonly called the “required or permitted” power and paragraph (b) is commonly called the “necessary or convenient” power.

5 It is important to stress that the scope of each of these powers in the general rule-making power is dependent on the other provisions of the Act.

6 This point is perhaps clearest in relation to the “required or permitted” power. The scope of this power depends on the existence and terms of other provisions of the Act that require or permit the making of rules. Put simply, the “required or permitted” power gives no power to make rules beyond that authorised by the other provisions of the Act. If there is no other provision of the Act that requires or permits the making of rules, the “required or permitted” power does not authorise the making of rules.

7 Again, the “necessary or convenient” power is not a power at large. The scope of the power varies according to the content of the other provisions of the Act. To be valid, a rule (or regulation) made under the power must “complement” rather than “supplement” the other provisions of the Act. “(A)n examination of the Act... will usually indicate whether an attempt is being made to add something to the operation of the Act which cannot be related to the specific provisions of the Act, or whether the regulation-making power has been used merely to fill out the framework of the Act in such a way as to enable the legislative intention to operate effectively.” (Pearce, D and Argument, S *Delegated Legislation in Australia, 4th Edition*, 2012 at 14.5). Only a provision of the latter kind is valid.

8 Thus, the form of a general rule-making power of an Act is not conclusive of the scope of the power. In my view it is, therefore, not correct to suggest that it is the form of the power itself that enables the making of laws “covering a range of matters”. For what is commonly called “skeleton legislation”, it is also not correct to suggest that a general rule-making power can necessarily be relied on to provide for “a vast range of matters” required to effectively implement and support the operation of the Act. In each case the scope of the power conferred by a general rule-making power depends on the exact terms of the other provisions of the Act. In some cases the power may be extensive. In other cases the power will be limited.

9 In my view, it is not appropriate to focus solely (or unduly) on the form of any power in deciding its scope. For a general rule-making power this is particularly the case because the scope of the power can be decided only in the context of the other provisions of the Act.

Tying of drafting work to OPC not dependent on the form of the power or type of instrument

10 There is, in my view, no basis for suggesting that it is the form of the general regulation-making power that is the basis for tying regulation drafting work to OPC. First, as I have explained, the form of the power is not conclusive of its scope. A general regulation-making power may give only a limited power to make regulations. Second, broad non-regulation subordinate legislation-making powers have existed in the Commonwealth for many years and these instruments are not tied to OPC. Finally, the drafting of all legislative instruments (not just regulations) made or approved by the Governor-General is tied to OPC. The tying of these instruments to OPC is not dependent on the form of the power under which the legislative instruments are made nor indeed the type of legislative instrument concerned. They are tied to OPC because they are legislative instruments made or approved by the Governor-General.

Drafting quality and executive and parliamentary scrutiny of legislative instruments

Drafting standards

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

12 In my view, the approach set out in DD3.8 will allow OPC to ensure that it has the capacity to draft the instruments that have the most significant impacts on the community. It will enable OPC to draft the most significant instruments itself and allow it either to draft or assist agencies to draft other instruments. OPC can provide a range of services to assist agencies in drafting instruments. These services include instrument design and template development, editing, commenting on draft instruments and providing advice. In my view this approach will enhance, and not diminish, the overall quality of legislative instruments and ensure that the most significant matters receive the highest level of drafting expertise and executive scrutiny.

Division of material between regulations and other legislative instruments

13 In the past there has been no clear guidance about the appropriate division of material between regulations and other legislative instruments. As a result, material seems to have been allocated between regulations and other legislative instruments without any consideration of the nature of the material itself. Less important matters of detail have sometimes been included in regulations while more important matters have been included in a wide range of other types of legislative instruments. DD3.8 deals with this lack of guidance as well as the previous proliferation of the number and kinds of legislative instruments.

14 DD3.8 outlines the material that should, in OPC's view, be included in regulations (in the absence of a strong justification to the contrary) and so be drafted by OPC and considered by the Federal Executive Council. However, any decision in a particular case is, of course, a decision for the Government, and ultimately the Parliament, to make.

15 I would welcome any views that the Committee (or the Senate Standing Committee on the Scrutiny of Bills) 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 them.

Scope of general rule-making power and likelihood of matters being inappropriately included in rules

16 I note that in *Alert Digest No. 6 of 2014* the Senate Standing Committee on the Scrutiny of Bills has queried whether a general rule-making power would permit a rule-maker to make the following types of provisions:

- offence provisions
- powers of arrest or detention
- entry provisions
- search provisions

- seizure provisions
- provisions which make textual modifications to Acts
- provisions where the operation of an Act is modified
- civil penalty provisions
- provisions which impose (or set or amend the rate) of taxes
- provisions which set the amount to be appropriated where an Act provides the appropriation and the authority to set the amount of the appropriation.

17 I note that this list differs only slightly from the list in DD3.8 and is substantially similar to the list included by the Australian Government Solicitor in Legal Briefing Number 102 dated 26 February 2014 (<http://www.ags.gov.au/publications/legal-briefing/br102.html>).

18 In my view, and taking into account the view expressed in that Legal Briefing, none of the kinds of provisions mentioned in the list would be authorised by either a general regulation-making power or a general rule-making power. Provisions of any of these kinds would require an express provision to authorise their inclusion in a regulation or any other kind of subordinate legislation. Accordingly, I think that there is no real risk of such provisions being inappropriately included in rules or regulations. Any such provision included without express legislative authority would be invalid.

19 However, it may be possible to make the matter even more certain. For example, the standard form of rule-making power (as set out in paragraph 4) could be revised so that it expressly provides that the power does not enable the making of rules dealing with provisions of these kinds. This would ensure that the scope of rule-making powers in relation to these kinds of provisions was clear on the face of the provisions themselves, regardless of whether the resulting rule were to be drafted by OPC, in-house or by another legal services provider.

20 Depending on the Committee's views on the matters that should be included in regulations rather than other types of legislative instruments, other measures may also be appropriate. For example, if any of the matters were inappropriate to be dealt with in express provisions of the kind that I have outlined, it may be possible to deal with them through the issue of drafting standards under the *Legislative Instruments Act 2003* and the introduction of a requirement for explanatory statements to include a statement about compliance with the standards. This would achieve a high level of transparency and should facilitate the Committee's scrutiny function.

21 I would be happy to consider any views that the Committee has about this or other measures the Committee may have in mind.

Volume of OPC drafted instruments

22 I note that the Committee seems to assume that the approach in DD3.8 will lead to OPC drafting fewer instruments. I do not think that this will be the case (see paragraph 17 of my letter of 23 May 2014 on the volume of OPC drafted instruments). OPC will continue to be available to draft, and assist agencies to draft, instruments that are not tied to OPC. OPC will be actively seeking more of this work and I expect that it will continue to draft a

substantial proportion of all legislative instruments, including the most significant and sensitive of them.

23 I look forward to discussing these issues with the Committee next Tuesday.

Yours sincerely

Peter Quiggin PSM
First Parliamentary Counsel

2 July 2014



The Hon Jamie Briggs MP

Assistant Minister for Infrastructure
and Regional Development
Member for Mayo



PDR ID: MC14-001534

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

Dear Chair

Thank you for the Senate Standing Committee on Regulations and Ordinances' letter dated 20 June 2014 about comments contained in *Delegated legislation monitor* No 6 of 2014 regarding the *Jervis Bay Territory Rural Fires Ordinance 2014* and the *Jervis Bay Territory Rural Fires Rule 2014*.

I am advised that the drafting of the above Ordinance and Rule ran in parallel to the Office of Parliamentary Counsel's development of its formal policy on the preparation of subordinate legislative instruments, including in relation to regulation-making powers and the appropriateness of offence provisions to be included under a rule-making power.

The Department of Infrastructure and Regional Development will work with the Office of Parliamentary Counsel to address the comments made by the Committee, including amending the Ordinance to expressly create a regulation-making power, amending the Rule to remove all offence provisions and drafting Regulations with the offence provisions.

I trust this information addresses the Committee's concerns.

Yours sincerely

 Jamie Briggs

- 2 JUL 2014



THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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



Dear Deputy Chair

I write in regard to the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2014* ('the Instrument').

The Senate Standing Committee on Regulations and Ordinances has raised two issues in the Delegated legislation monitor No. 5 of 2014 ('the Monitor'): first, that the Instrument could have been drafted more clearly to explain its effect; and second, that the Explanatory Statement to the Instrument did not adequately explain the domestic consultations conducted by the Department of Foreign Affairs and Trade ('DFAT') on the Instrument.

In relation to the first issue, the Instrument, which amends the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) List 2012* ('the Principal Instrument'), was drafted in accordance with standard drafting practice for these types of instruments under the *Autonomous Sanctions Regulations 2011*. On the basis of recent advice from the Office of Parliamentary Counsel and the comments of the Committee in the Monitor, DFAT has updated its drafting practices to ensure that future instruments include an express amendment instruction to indicate how the Principal Instrument will be amended.

In relation to the second issue, in addition to the information provided in the Explanatory Statement for the instrument, I can advise the Committee that DFAT communicates regularly with the Australian business community about changes to Australian sanctions laws.

DFAT conducts extensive outreach on Australian sanction laws. We undertake two national outreach tours a year to major Australian cities, including open seminars for Australian businesses, financial institutions, universities and

individuals. We also undertake ad hoc, tailored outreach to Australian businesses or sectors that are particularly affected by Australian sanction laws. We manage a sanctions e-mail list to notify subscribers immediately of amendments to Australian sanction laws and of updates to the Consolidated List of persons and entities designated for the purposes of all sanctions regimes.

Although DFAT has not conducted specific consultations on sanctions in relation to Zimbabwe, it does conduct regular consultations on Africa with non-government organisations in Australia, which have informed the Government's policy settings.

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

Yours sincerely

Julie Bishop

09 JUL 2014



**The Hon Kevin Andrews MP
Minister for Social Services**



Parliament House
CANBERRA ACT 2600

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MC14-007775

09 JUL 2014

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

Dear Chair

Thank you for your letter of 20 June 2014 about the report of the Senate Regulations and Ordinances Committee, *Delegated legislation monitor* No. 6 of 2014, concerning the following instrument for which I have portfolio responsibility:

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

I have reviewed and updated the Explanatory Statement for this instrument to include the additional information as requested by the Committee.

Thank you again for writing.

Yours sincerely


KEVIN ANDREWS MP

Encl.

EXPLANATORY STATEMENT

Aged Care Act 1997

*Aged Care (Conditions for Residential Care Allocations)
Determination 2014*

Authority

Section 14-6 of the *Aged Care Act 1997* (the Act) provides that the Secretary may determine that conditions apply to an allocation of places to a person.

Purpose

The purpose of this determination is to amend conditions of allocation applying to allocated residential care places to remove the distinction between high care and low care residential aged care places from 1 July 2014.

Background

Historically, residential aged care places have been allocated on the basis that a specified number of the allocated places are for the provision of high care or low care. This has been given effect through written conditions in the Schedule of Conditions of Allocation for each allocation. The removal of this distinction, from 1 July 2014, is a key feature of the aged care reform measure *Better Access to Care – Greater Choice and Control for Aged Care Recipients*.

Section 14-6 of the Act provides that an allocation of places under the Act is subject to conditions determined from time to time by the Secretary. These conditions can apply to allocations of places generally or to allocations of places of a specified kind.

Details

Under this new Determination, conditions of allocation for residential care places about whether high or low care is to be provided through the places will no longer be in force from 1 July 2014.

Consultation

This change is consequential to the removal of the distinction between low and high level residential care as part of the changes to the *Aged Care Act 1997* that commence on 1 July 2014.

In April 2012, the former Government launched a major program of aged care reforms. The reform agenda was developed in close consultation with the aged care sector, including consumers, industry and professional bodies.

As part of the consultation on the proposed changes to the Act, and to delegated legislation, arising from the reforms, the former Government communicated its intention to examine the delegated legislation and, where possible, simplify the delegated legislation.

This intent was communicated in November 2012, with the public release of a paper providing an overview of the proposed legislative changes. A video presentation detailing the proposed reforms was also made available online to assist members of the public to understand these changes.

During late 2012 and in the first half of 2013, briefing sessions were held across Australia to provide information and to explain, in detail, the proposed legislative changes included in the package of Bills introduced into Parliament on 13 March 2013. As part of these consultations, the intention to make related changes to delegated legislation was again discussed. For those interested members of the public unable to attend the briefings, the presentation, supporting handouts, a detailed Question and Answer document and an information video were made available online.

Regulation impact statement

No Regulation Impact Statement is necessary as this Determination is a minor administrative instrument to give effect to relevant legislative amendments already agreed to by industry (RIS ID 12602).

Statement of compatibility with human rights

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* as it does not engage any of the applicable rights or freedoms.

This Determination commences on **1 July 2014**.

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

**Details of the Aged Care (Conditions for Residential Care Allocations)
Determination 2014**

1 Name of Determination

Clause 1 states that the name of the amending Determination is the *Aged Care (Conditions for Residential Care Allocations) Determination 2014*.

2 Commencement

Clause 2 states that this Determination commences on 1 July 2014.

3 Conditions applying to allocations of residential care places

Clause 3 provides that for all allocated residential care places, residential care may be provided to care recipients classified at any classification level.

4 Section 14-5 conditions about high and low care of no effect

Under clause 4, conditions of allocation for residential care places specified under section 14-5 of the Act about whether high or low care is to be provided will be of no effect from the date of the Determination. This provision removes the high care / low care distinction from all allocations of permanent residential care places.

5 Application of conditions

Clause 5 lays down the rules applying to the application of the conditions detailed in this Determination. In particular, except in relation to removal of the high care / low care distinction, the conditions in the Determination apply in addition to any other conditions that are in force under a determination made under section 14-5 or subsection 14-6(1) of the Act.

Moreover, the conditions in the Determination apply to all allocations of places in force, including those made before or after the Determination is made.