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Standing

Committee on Regulations and Ordinances

Delegated legislation monitor

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# Introduction

The *Delegated legislation monitor* (the monitor) is the regular report of the Senate Standing Committee on Regulations and Ordinances (the committee). The monitor is published at the conclusion of each sitting week of the Parliament, and provides an overview of the committee's scrutiny of instruments of delegated legislation for the preceding period.[[1]](#footnote-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 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]](#footnote-2)

### Structure of the report

The report is comprised of the following parts:

Chapter 1, 'New and continuing matters', sets out new and continuing matters about which the committee has agreed to write to the relevant minister or instrument-maker seeking further information or appropriate undertakings;

Chapter 2, 'Concluded matters', sets out any previous matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date; related (non-confidential) correspondence is included at Appendix 3;

Appendix 1 provides an index listing all instruments scrutinised in the period covered by the report;

Appendix 2 contains the committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003*.

Appendix 3 contains correspondence relating to concluded matters.

### Acknowledgement

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

**Senator Sean Edwards**

**Chair**

# Chapter 1

## New and continuing matters

This chapter lists new matters identified by the committee at its meeting on **26 March** **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.

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

|  |  |
| --- | --- |
| **Purpose** | Amends the Privacy Regulation 2013 to provide a temporary 12-month exemption from the external dispute resolution requirement under subparagraph 21D(2)(a)(i) of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* for utilities and commercial credit providers |
| **Last day to disallow[[3]](#footnote-3)** | 19 June 2014 |
| **Authorising legislation** | *Privacy Amendment (Enhancing Privacy Protection) Act 2012* |
| **Department** | Attorney-General's |

**Issue:**

*No information regarding consultation*

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

### 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.[[4]](#footnote-4)

# Chapter 2

## Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **26 March 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.

### Commonwealth Scholarships Guidelines (Education) 2013 [F2013L02070]

|  |  |
| --- | --- |
| **Purpose** | Revokes and remakes the Commonwealth Scholarships Guidelines (Education) to ensure that the efficiency dividend to university funding included in the 2013-14 budget can be implemented; and separates Indigenous Commonwealth Scholarships from other Commonwealth Scholarships |
| **Last day to disallow[[5]](#footnote-5)** | 27 March 2014 |
| **Authorising legislation** | *Higher Education Support Act 2003* |
| **Department** | Education |

**Issue:**

*No information provided regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the ES for the instrument does not explicitly address the issue of consultation (although the ES contains the heading, 'Consultation') **[the committee requested further information from the minister; and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**MINISTER'S RESPONSE:**

The Minister for Education advised that, as the guidelines were remade primarily to implement the efficiency dividend to university funding announced as part of the 2013-14 Budget, consultation was not considered necessary and was not undertaken.

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

**COMMITTEE RESPONSE:**

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

### Amendment No. 1 to the Commonwealth Grant Scheme Guidelines 201 [F2013L02078]

|  |  |
| --- | --- |
| **Purpose** | Amends the Commonwealth Grant Scheme Guidelines 2012 to implement the efficiency dividend to university funding included in the 2013-14 budget |
| **Last day to disallow** | 15 May 2014 |
| **Authorising legislation** | *Higher Education Support Act 2003* |
| **Department** | Education |

**Issue:**

*No information regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the ES for the instrument does not explicitly address the issue of consultation (although the ES contains the heading, 'Consultation') **[the committee requested further information from the minister; and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**MINISTER'S RESPONSE:**

The Minister for Education advised that, as the guidelines were remade primarily to implement the efficiency dividend to university funding announced as part of the 2013-14 Budget, consultation was not considered necessary and was not undertaken.

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

**COMMITTEE RESPONSE:**

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

### Disability Services Act (Administration of Part II of the Act) Guidelines 2013 [F2013L02002]

|  |  |
| --- | --- |
| **Purpose** | Formulates guidelines on matters relevant to the administration of Part II of the *Disability Services Act 1986* |
| **Last day to disallow** | 17 March 2014 |
| **Authorising legislation** | *Disability Services Act 1986* |
| **Department** | Social Services |

**Issue:**

*No information provided regarding consultation*

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

**MINISTER'S RESPONSE:**

The Assistant Minister for Social Services responded, advising that the National Disability Service and Australian Disability Enterprises were consulted in relation to the making of the guidelines. Policy areas within departments administering programs covered by the guidelines were also consulted as part of the policy development process. Broader consultation was not considered necessary as the changes were intended to simplify and streamline an established administrative process rather than to implement a change in policy.

The assistant minister further advised that the ES had been amended to include the information provided.

**COMMITTEE RESPONSE:**

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

### Higher Education Support Act 2003 - OS-HELP Guidelines 2013 [F2013L01680]

|  |  |
| --- | --- |
| **Purpose** | Revokes and remakes the OS-HELP Guidelines |
| **Last day to disallow** | 4 March 2014 |
| **Authorising legislation** | *Higher Education Support Act 2003* |
| **Department** | Education |

**Issue:**

*Incorporation of extrinsic material*

This instrument revokes and remakes the OS-HELP Guidelines, which set out procedures that higher education providers must follow in deciding whether to select students for receipt of OS-HELP assistance (which provides loans to Commonwealth supported students to undertake study overseas). Paragraph 3.5.1 of the instrument provides that a student is undertaking overseas study in 'Asia' if they are undertaking study in a country listed in the Australian Bureau of Statistics Standard Australian Classification of Countries. While the *Legislative Instruments Act 2003* allows for extrinsic material to be incorporated into instruments, non-legislative material (as in this case) can generally be incorporated only as in force or existing at a particular date (as opposed to being incorporated as in force or existing 'from time to time').[[6]](#footnote-6) In this case, neither the instrument nor the ES provides sufficient detail to determine the basis on which the material is intended to be incorporated into the instrument **[the committee requested further information from the minister]**.

**MINISTER'S RESPONSE:**

The Minister for Eduation advised that the guidelines had incorporated the Australian Bureau of Statistics Standard Australian Classification of Countries (2011, version 2.2) as in force at the time the instrument was made. The minister noted that any potential ambiguity would be addressed in relevant 'communication materials' and in future changes to the guidelines.

**COMMITTEE RESPONSE:**

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

### Declaration of 'corresponding State laws' [F2013L02043]

|  |  |
| --- | --- |
| **Purpose** | Declares the South Australian *Prohibition of Human Cloning for Reproduction Act 2003* to be a corresponding state law |
| **Last day to disallow** | 20 March 2014 |
| **Authorising legislation** | *Research Involving Human Embryos Act 2002* |
| **Department** | Health |

**Issue:**

*Delay in registering instrument*

This instrument was registered on 4 December 2013. It is dated 3 November 2009. The ES for the instrument states that it 'is to take effect from the day after it is registered on the Federal Register of Legislative Instruments (FRLI)' (consistent with subsection 12(1) of the *Legislative Instruments Act 2003*).

However, the committee notes that subsection 25(1) of the *Legislative Instruments Act 2003* requires a rule-maker to lodge a legislative instrument for registration 'as soon as practicable' after the instrument is made. In the case of this instrument, the accommpanying ES provides no explanation as to why it was not practicable to lodge the instrument for registration until approximately four years after it was made **[the committee requested further information from the minister]**.

**MINISTER'S RESPONSE:**

The Minister for Health advised that the delay in registering the instrument was due to 'administrative oversight'. The minister advised that the oversight was identifed by officers of SA Health, who notified the department that the instrument was not registered on the Federal Register of Legislative Instruments (FRLI). The minister noted that the instrument was now registered, and the National Health and Medical Research Council had advised that 'no practical difficulty' had arisen from the delay in registering the instrument.

**COMMITTEE RESPONSE:**

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

### Native Title (Assistance from Attorney-General) Amendment Guideline 2013 [F2013L02084]

|  |  |
| --- | --- |
| **Purpose** | Amends the Native Title (Assistance from Attorney-General) Guideline 2012 eligibility requirements for legal financial assistance for native title respondents' legal representation costs, under section 213A of the *Native Title Act 1993* |
| **Last day to disallow** | 15 May 2014 |
| **Authorising legislation** | *Native Title Act 1993* |
| **Department** | Attorney-General's |

**Issue:**

*Insufficient information regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the ES for the instrument does not explicitly address the issue of consultation. The discussion under the heading, 'Consultation', does not expressly state whether or not consultation occurred in relation to the making of the instrument **[the committee requested further information from the Attorney-General; and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*]**.

**ATTORNEY-GENERAL'S RESPONSE:**

The Attorney-General advised that consultation in relation to the making of the instrument had not taken place, due to the nature of the amendments to the guideline. The amendments reinstated the eliibility test for legal representation costs for native title respondents that was in place prior to 1 January 2013. The Attorney-General advised that, due to a significant level of correspondence from stakeholders expressing support for the broadening of the test, as well as statements by the judiciary, consultation was not considered necessary in this case.

The Attorney-General further advised that the ES would be amended to include the information provided.

**COMMITTEE RESPONSE:**

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

### Home Care Subsidy Amendment (Transitional Workforce Supplement and Various Measures) Determination 2014 [F2014L00096]

### Residential Care Subsidy Amendment (Transitional Workforce Supplement) Principle 2014 [F2014L00099]

|  |  |
| --- | --- |
| **Purpose** | The determination provides for the payment of a transitional workforce supplement to eligible approved providers from 12 December 2013 until 30 June 2014; the principle amends Residential Care Subsidy Principles 1997 and provides for the payment of a transitional workforce supplement on and after 12 December 2013 and before 1 July 2014 to approved providers that were eligible to receive the workforce supplement on 11 December 2013 |
| **Last day to disallow** | 13 May 2014 |
| **Authorising legislation** | *Aged Care Act 1997* |
| **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 determination states:

Since the September 2013 Election, the Minister has consulted with a number of organisations in relation to the effect of this Principle. The changes in the determination in relation to the dementia and cognition supplement are to correct an error and to enable approved providers to back date their claims for payment for eligible care recipients. A communication strategy will be implemented to inform aged care providers of the amendment.

Similarly, the ES for the principle states:

Since the September 2013 Election, the Minister has consulted with a number of organisations in relation to the effect of this Principle.

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

**ASSISTANT MINISTER'S RESPONSE:**

The minister advised that the ESs had been amended to include the information sought by the committee.

The amended ESs note that the policy to remove the Workforce Supplement was outlined in the September 2013 publication, *The Coalition's Policy for Healthy Life, Better Ageing*. Providers in receipt of the supplement had been consulted in relation to the transitional arrangements set out in the principle. Key stakeholders were consulted in parallel regarding options for the redistribution of the supplement funding.

**COMMITTEE RESPONSE:**

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

### Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 SLI 2013 No. 281 [F2013L02089]

|  |  |
| --- | --- |
| **Purpose** | Amends the Financial Management and Accountability Regulations 1997 to add the Australian Aged Care Quality Agency as a prescribed agency in Schedule 1, inserts a new Schedule 1AB to establish legislative authority for new or significantly changed spending activities for the purposes of section 32B, and establishes legislative authority for certain spending activities in the departments of Agriculture, Communications and Prime Minister and Cabinet |
| **Last day to disallow** | 15 May 2014 |
| **Authorising legislation** | *Financial Management and Accountability Act 1997* |
| **Department** | Finance |

**Issue:**

*Addition of new schedule and programs to Financial Management and Accountability Regulations 1997*

Section 32B of the *Financial Management and Accountability Act 1997* (FMA Act) provides legislative authority for the government to spend monies on programs specified in the FMA regulations. Section 32B was introduced in response to the decision of the High Court in *Williams v Commonwealth* ([2012] HCA 23) in June 2012. Previously, such programs were listed under Schedule 1AA. This instrument creates a new Schedule 1AB, under which programs will henceforth be listed. Unlike Schedule 1AA, the new schedule does not list programs under departmental headings, and this change is designed to avoid future confusion following machinery of government changes (a change in the name or responsibility of an administering department does not otherwise affect the specification of a program in Schedule 1AA).

The instrument also adds six new programs to Schedule 1AB. While the ES is generally helpful in providing information about the background, objectives and proposed administration of the new programs, only limited or no information is provided as to whether the individual programs possess the relevant characteristics that would justify the exclusion of decisions under each program from merits review.

The committee notes previous correspondence with the minister regarding this issue, and acknowledges the minister's advice that certain types of programs and decisions are unsuitable for merits review; and that decisions under programs listed in Schedule 1AA (now Schedule 1AB) are excluded from ADJR Act review. However, in order to assess whether a program listed in Schedule 1AB possesses the characteristics justifying the exclusion of the ADJR Act, the committee's expectation is that ESs specifically address this question in relation to each new and/or amended program added to Schedule 1AA (now Schedule 1AB), including a description of the policy considerations and program characteristics that are relevant to the question of whether or not decisions should be subject to merits review **[the committee requested further information from the minister in respect of each listed program (where not already provided]**.

Further, the committee notes the concerns of the Senate Standing Committee for the Scrutiny of Bills regarding the limited justification for excluding such decisions from the *Administrative Decisions (Judicial Review) Act 1997* (ADJR), and questions as to whether the exclusion of ADJR would be appropriate in relation to all decisions pursuant to programs authorised by Schedule 1AA (now Schedule 1AB) **[the committee drew to the attention of senators the comments of that committee on the Financial Framework Legislation Amendment Bill (No. 3) 2012 in the Scrutiny of Bills Eleventh Report of 2012 (19 September 2012)]**.

**MINISTER'S RESPONSE:**

The Minister for Finance's response provided an attachment addressing in detail the relevant policy considerations and characteristics of programs added to Schedule 1AB. This information included an appropriate level of detail to enable the committee to assess the instruments for compatibility with the committee's scrutiny principles, and particularly scrutiny principle (c) (that rights and liberties are not unduly dependent on administrative decisions not subject to merits review).

The minister further advised that statements of compatibility for future instruments amending Schedule 1AB would include information about the availability of merits review.

**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 **26 March 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.[[7]](#footnote-7) Instruments may be located on FRLI by entering the relevant FRLI number into the FRLI search field (the FRLI number is shown in square brackets after the name of each instrument listed below).

Instruments marked with an asterisk (\*) are the subject of the comment on p. 2 of Chapter 1 relating to subsection 33(3) of the *Legislative Instruments Act 2003* (under the heading 'Multiple instruments identified in Appendix 1').

**Instruments received week ending 28 February 2014**

|  |  |
| --- | --- |
| ***Administrative Appeals Tribunal Act 1975*** |  |
| Administrative Appeals Tribunal Amendment (Norfolk Island Land Valuation Decisions) Regulation 2014 [SLI 2014 No. 1] [F2014L00158] |  |
| ***Australian Education Act 2013*** |  |
| Australian Education (Participating States and Territories) Determination 2014 [F2014L00142] | E |
| ***Australian Prudential Regulation Authority Act 1998*** |  |
| Australian Prudential Regulation Authority (confidentiality) determination No. 3 of 2014 [F2014L00184] |  |
| ***Civil Aviation Regulations 1988*** |  |
| Civil Aviation Order 40.3.0 Amendment Instrument 2014 (No. 1) [F2014L00145] | \* |
| CASA EX08/14 - Exemption — operations by paragliders in the Corryong Paragliding Open [F2014L00141] |  |
| CASA EX11/14 - Exemption — Sydney Jabiru Flying School solo flight training at Bankstown Aerodrome [F2014L00162] |  |
| CASA EX09/14 - Exemption — recognition of EASA type certification [F2014L00163] |  |
| CASA EX12/14 – Exemption - recent experience requirements for night V.F.R. agricultural ratings [F2014L00173] |  |
| ***Clean Energy Act 2011*** |  |
| Clean Energy Auction Revocation Determination 2014 [F2014L00176] | \* |
| ***Competition and Consumer Act 2010*** |  |
| Competition and Consumer Act 2010 - Monitoring of Prices, Costs and Profits Relating to the Supply of Regulated Goods by Corporations and the Supply of Goods by Liable Entities in Relation to the Carbon Tax Scheme in Australia [F2014L00180] | E |
| ***Customs Act 1901*** |  |
| Customs Amendment Regulation 2014 (No. 1) [SLI 2014 No. 4] [F2014L00152] |  |
| ***Environment Protection and Biodiversity Conservation Act 1999*** |  |
| Amendment of List of Exempt Native Specimens - Queensland Mud Crab Fishery (19/02/2014) [F2014L00165] |  |
| Christmas Island National Park Management Plan 2014-2024 [F2014L00168] |  |
| Amendment of List of Exempt Native Specimens - Eastern Tuna and Billfish Fishery (24/02/2014) (deletion) [F2014L00185] |  |
| Amendment of List of Exempt Native Specimens - Eastern Tuna and Billfish Fishery (24/02/2014) (inclusion) [F2014L00186] |  |
| ***Food Standards Australia New Zealand Act 1991*** |  |
| Australia New Zealand Food Standards Code — Standard 1.4.2 — Maximum Residue Limits Amendment Instrument No. APVMA 2, 2014 [F2014L00175] | E |
| Food Standards (Application A1081 – Food derived from Herbicide-tolerant Soybean Line SYHT0H2) Variation [F2014L00189] | E |
| ***Income Tax Assessment Act 1997 and Superannuation Guarantee (Administration) Act 1992*** |  |
| Tax and Superannuation Laws Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 6] [F2014L00159] |  |
| ***Migration Act 1958*** |  |
| Migration Act 1958 - Determination of Eligible Passports - IMMI 13/158 [F2014L00155] | E |
| ***Migration Regulations 1994*** |  |
| Migration Regulations 1994 - Specification of Eligible Education Providers and Educational Business Partners - IMMI 14/007 [F2014L00146] | E |
| ***Military Justice (Interim Measures) Act (No. 1) 2009*** |  |
| Military Justice (Interim Measures) (Remuneration and Entitlements) Amendment Regulation 2014 (No. 1) [SLI 2014 No. 2] [F2014L00156] |  |
| ***Military Rehabilitation and Compensation Act 2004*** |  |
| Military Rehabilitation and Compensation (Warlike Service) Determination 2014 (No. 1) [F2014L00154] | E |
| ***National Health Act 1953*** |  |
| National Health Determination under paragraph 98C(1)(b) Amendment 2014 (No. 2) [F2014L00144] |  |
| National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2014 (No. 2) [F2014L00147] |  |
| National Health (Listed drugs on F1 or F2) Amendment Determination 2014 (No. 1) (No. PB 15 of 2014) [F2014L00171] |  |
| National Health (Highly specialised drugs program for hospitals) Special Arrangement Amendment Instrument 2014 (No. 2) - PB 11 of 2014 [F2014L00183] |  |
| ***Navigation Act 2012*** |  |
| Marine Order 70 (Seafarer certification) 2014 [F2014L00177] | \* |
| Marine Order 71 (Masters and deck officers) 2014 [F2014L00178] |  |
| Marine Order 72 (Engineer officers) 2014 [F2014L00179] |  |
| Marine Order 73 (Ratings) 2014 [F2014L00181] |  |
| ***Navigation Act 2012 and Protection of the Sea (Prevention of Pollution from Ships) Act 1983*** |  |
| Marine Order 94 (Marine pollution prevention — packaged harmful substances) 2014 [F2014L00169] | \* |
| ***Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003 and Offshore Petroleum and Greenhouse Gas Storage Act 2006*** |  |
| Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Environment Measures) Regulation 2014 [SLI 2014 No. 5] [F2014L00157] |  |
| ***Privacy Act 1988*** |  |
| Credit Reporting Privacy Code (CR code) [F2014L00170] | \* |
| ***Private Health Insurance Act 2007*** |  |
| Private Health Insurance (Prostheses) Amendment Rules 2014 (No. 1) [F2014L00172] | \* |
| ***Programs and Awards Statute 2013*** |  |
| Higher Doctorates Rules 2014 [F2014L00164] | E |
| ***Radiocommunications Act 1992*** |  |
| Radiocommunications (Spectrum Access Charges — 1800 MHz Band) Determination 2014 [F2014L00182] |  |
| ***Remuneration Tribunal Act 1973*** |  |
| Remuneration Tribunal Determination 2014/01 - Remuneration and Allowances for Holders of Public Office [F2014L00174] | \* |
| Remuneration Tribunal Determination 2014/03 - Remuneration and Allowances for Holders of Part-Time Public Office [F2014L00188] | \* |
| Remuneration Tribunal Determination 2014/02 - Members of Parliament - Travelling Allowance and Entitlements [F2014L00187] | E |
| ***Seat of Government (Administration) Act 1910*** |  |
| National Land (Road Transport) Ordinance 2014 [F2014L00166] |  |
| National Land (Parking) Repeal Ordinance 2014 [F2014L00167] |  |
| ***Social Security Act 1991*** |  |
| Social Security (Waiver of Debts — University of New South Wales approved course of education or study) Specification 2014 [F2014L00161] |  |
| ***Torres Strait Fisheries Act 1984 and Torres Strait Prawn Fishery Management Plan 2008*** |  |
| Torres Strait Prawn Fishery Total Allowable Effort Determination 2014 [F2014L00143] |  |
| ***Veterans' Entitlements Act 1986*** |  |
| Veterans’ Entitlements (Warlike Service—Operation ARIKI) Determination 2014 [F2014L00148] | E |
| Veterans’ Entitlements (Warlike Service—Operation HERRICK) Determination 2014 [F2014L00149] | E |
| Veterans’ Entitlements (Warlike Service—Operation ATHENA) Determination 2014 [F2014L00150] | E |
| Veterans’ Entitlements (Warlike Service—International Security Assistance Force) Determination 2014 [F2014L00151] | E |
| Veterans’ Entitlements (Warlike Service—Operation ENDURING FREEDOM: Afghanistan) Determination 2014 [F2014L00153] | E |

**Instruments received week ending 7 March 2014**

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| ***A New Tax System (Family Assistance) Act 1999*** |  |
| Family Tax Benefit (Entitlement Exclusion - Newborn Upfront Payment and Newborn Supplement) Determination 2014 (No. 1) [F2014L00192] |  |
| ***Australian Capital Territory (Planning and Land Management) Act 1988*** |  |
| National Capital Plan - Amendment 82 - Amtech Estate [F2014L00206] | \* |
| National Capital Plan - Amendment 84 - Pialligo Section 9 Part Block 4 and Section 12 Part Block 2 [F2014L00207] | \* |
| ***Australian Research Council Act 2001*** |  |
| Australian Research Council Funding Rules for schemes under the Discovery Program for the years 2014 and 2015 [F2014L00193] | E |
| ***Broadcasting Services Act 1992*** |  |
| Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 1 of 2014) [F2014L00225] |  |
| ***Charter of the United Nations Act 1945*** |  |
| Charter of the United Nations (Sanctions—Central African Republic) Regulation 2014 [SLI 2014 No. 9] [F2014L00197] |  |
| ***Christmas Island Act 1958*** |  |
| List of Acts of the Western Australian Parliament Wholly of Partly in Force in Christmas Island pursutant to s. 8A, Christmas Island Act 1958 in the period 10 September 2013 to 21 February 2014 and not in previous lists   |  |
| ***Civil Aviation Safety Regulations 1998*** |  |
| CASA ADCX 004/14 — Repeal of Airworthiness Directives [F2014L00220] |  |
| ***Cocos (Keeling) Islands Act 1955*** |  |
| List of Acts of the Western Australian Parliament Wholly of Partly in Force in Cocos (Keeling) Islands pursutant to s. 8A, Cocos (Keeling) Islands Act 1955 in the period 10 September 2013 to 21 February 2014 and not in previous lists   |  |
| ***Corporations Act 2001*** |  |
| ASIC Class Order [CO 14/25] [F2014L00204] | \* |
| ASIC Class Order [CO 14/26] [F2014L00205] | \* |
| ASIC Class Order [CO 14/55] [F2014L00210] | \* |
| ASIC Class Order [14/128] [F2014L00211] | \* |
| ***Defence Act 1903*** |  |
| Defence Determination 2014/10 - Deployment allowance, East Timor peace enforcement allowance and international campaign allowance – amendment  |  |
| Defence Determination 2014/11 -Salary rate for training and salary non-reduction – amendment |  |
| Defence Determination 2014/12 - Higher duties and transport contributions – amendment |  |
| ***Environment Protection and Biodiversity Conservation Act 1999*** |  |
| Amendment of List of Exempt Native Specimens - South Australian Marine Scalefish Fishery (24/02/2014) (deletion) [F2014L00200] |  |
| Amendment of List of Exempt Native Specimens - South Australian Marine Scalefish Fishery (24/02/2014) (inclusion) [F2014L00201] |  |
| Amendment of List of Exempt Native Specimens - New South Wales Ocean Trap and Line Fishery (04/03/2014) [F2014L00222] |  |
| ***Family Law Act 1975*** |  |
| Family Law (Bilateral Arrangements—Intercountry Adoption) Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 7] [F2014L00213] |  |
| FMA Act Determination 2014/04 — Section 32 (Transfer of Functions from Immigration to Social Services) [F2014L00221] | E |
| ***Health Insurance Act 1973*** |  |
| Health Insurance (General Medical Services Table) Amendment (Various Measures) Regulation 2014 [SLI 2014 No. 10] [F2014L00202] |  |
| Health Insurance (Allied Health Services) Amendment Determination 2014 (No. 1) [F2014L00203] | \* |
| ***Higher Education Support Act 2003*** |  |
| Higher Education Support Act 2003 - VET Provider Approval (No. 11 of 2014) [F2014L00217] |  |
| Higher Education Support Act 2003 - VET Provider Approval (No. 13 of 2014) [F2014L00218] |  |
| ***Marine Safety (Domestic Commercial Vessel) National Law Act 2012*** |  |
| Marine Order 503 (Certificates of survey — national law) Amendment 2014 (No. 1) [F2014L00195] | \* |
| ***Membership of the Council Statute 2010*** |  |
| Membership of the Council (Heads of Faculties and Research Schools) Rules 2014 [F2014L00196] | E |
| ***Migration Act 1958*** |  |
| Migration Act 1958 - Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year - IMMI 14/026 [F2014L00224] | E |
| Migration Act 1958 - Determination of Daily Maintenance Amounts for Persons in Detention - IMMI 14/008 [F2014L00226] | E |
| ***Migration Regulations 1994*** |  |
| Migration Regulations 1994 - Specification of Specified Place - IMMI 14/021 [F2014L00190] | E |
| Migration Regulations 1994 - Specification of a Class of Persons - IMMI 14/019 [F2014L00212] | E |
| Migration Regulations 1994 - Specification of a Class of Persons - IMMI 14/020 [F2014L00214] | E |
| Migration Regulations 1994 - Specification of a Class of Persons - IMMI 14/022 [F2014L00215] | E |
| ***National Health Act 1953*** |  |
| National Health (Efficient Funding of Chemotherapy) Special Arrangement Amendment Instrument 2014 (No. 2) - PB 12 of 2014 [F2014L00191] |  |
| National Health (Epworth Private Hospitals Paperless Prescribing and Claiming Trial) Special Arrangement 2014 - PB 16 of 2014 [F2014L00194] |  |
| National Health (Botulinum Toxin Program) Special Arrangement Amendment Instrument 2014 (No. 1) - PB 13 of 2014 [F2014L00198] |  |
| National Health (Growth Hormone Program) Special Arrangement Amendment Instrument 2014 (No. 1) - PB 14 of 2014 [F2014L00208] |  |
| ***Privacy Amendment (Enhancing Privacy Protection) Act 2012*** |  |
| Privacy Amendment (External Dispute Resolution Scheme—Transitional) Regulation 2014 [SLI 2014 No. 8] [F2014L00219] |  |
| ***Social Security Act 1991*** |  |
| Social Security (Exempt Lump Sum) (Thalidomide Class Action Payment) Determination 2014 [F2014L00223] |  |
| ***Taxation Administration Act 1953*** |  |
| Taxation Administration Act 1953 - Nil rate determination and exemption from lodging Minerals Resource Rent Tax (MRRT) Instalment Liability Notices - Instrument (No. 1) 2014 [F2014L00209] | \* |
| ***Telecommunications (Carrier Licence Charges) Act 1997*** |  |
| Telecommunications (Carrier Licence Charges) Act 1997 - Determination under paragraph 15(1)(b) No. 1 of 2014 [F2014L00216] |  |

**Instruments received week ending 14 March 2014**

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| ***Agricultural and Veterinary Chemicals Code Act 1994*** |  |
| Agricultural and Veterinary Chemicals Code Instrument No. 4 (MRL Standard) Amendment Instrument 2014 (No. 3) [F2014L00236] | E |
| ***Australian Film, Television and Radio School Act 1973*** |  |
| Determination of Degrees, Diplomas and Certificates No. 2014/1 [F2014L00228] |  |
| ***Civil Aviation Regulations 1988*** |  |
| CASA 47/14 - Permission - flying over a public gathering at the 2014 Tyabb Air Show, Tyabb, Victoria - Permission - flying below minimum height at the 2014 Tyabb Air Show, Tyabb, Victoria [F2014L00235] |  |
| ***Corporations Act 2001*** |  |
| ASIC Market Integrity Rules (Competition in Exchange Markets) Amendment 2014 (No. 1) [F2014L00233] | \* |
| ***Fisheries Management Act 1991 and the Southern and Eastern Scalefish and Shark Fishery Management Plan 2003*** |  |
| Southern and Eastern Scalefish and Shark Fishery Total Allowable Catch (Non-Quota Species) Determination 2014 [F2014L00232] |  |
| Southern and Eastern Scalefish and Shark Fishery Overcatch and Undercatch Determination 2014 [F2014L00234] |  |
| Southern and Eastern Scalefish and Shark Fishery Total Allowable Catch (Quota Species) Determination 2014 [F2014L00230] |  |
| ***Fisheries Management Act 1991and the Western Tuna and Billfish Fishery Management Plan 2005*** |  |
| Western Tuna and Billfish Fishery Overcatch and Undercatch Determination 2014 [F2014L00231] |  |
| ***Motor Vehicle Standards Act 1989*** |  |
| Vehicle Standard (Australian Design Rule 4/05 – Seatbelts) 2012 Amendment 1 [F2014L00227] | \* |
| ***Privacy Act 1988*** |  |
| Privacy (Persons Reported as Missing) Rule 2014 [F2014L00229] |  |
| ***Taxation Administration Act 1953*** |  |
| Taxation Administration Act 1953 – Provision of further time for lodgment of the 2014 Minerals Resource Rent Tax (MRRT) Return – Low volume non-payers’ Instrument (No. 1) 2014 [F2014L00237] |  |

# 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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/guidelines.htm) 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*](http://www.comlaw.gov.au/Details/C2012C00041) (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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/alert2012.htm).

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

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

***Requirements of the* Legislative Instruments Act 2003**

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

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

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

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

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

***Describing the nature of consultation***

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

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

*Method and purpose of consultation*

An ES should state who and/or which bodies or groups were targeted for consultation and set out the purpose and parameters of the consultation. An ES should avoid bare statements such as 'Consultation was undertaken'.

*Bodies/groups/individuals consulted*

An ES should specify the actual names of departments, bodies, agencies, groups et cetera that were consulted. An ES should avoid overly generalised statements such as 'Relevant stakeholders were consulted'.

*Issues raised in consultations and outcomes*

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

***Explaining why consultation has not been undertaken***

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

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

*Specific examples listed in the Act*

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

*Timing of consultation*

The Act requires that consultation regarding an instrument must take place before the instrument is made. This means that, where consultation is planned for the implementation or post-operative phase of changes introduced by a given instrument, that consultation cannot generally be cited to satisfy the requirements of sections 17 and 26 of the Act.

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

***Seeking further advice or information***

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

Committee Secretary

Senate Regulations and Ordinances Committee

PO Box 6100

Parliament House

Canberra ACT 2600

Australia

Phone: +61 2 6277 3066

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Email: RegOrds.Sen@aph.gov.au

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. [↑](#footnote-ref-1)
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. [↑](#footnote-ref-2)
3. 'Last day to disallow' refers to the last day on which notice may be given of a motion for disallowance in the Senate. [↑](#footnote-ref-3)
4. For more extensive comment on this issue see *Delegated legislation monitor* No. 8 of 2013, p. 511. [↑](#footnote-ref-4)
5. 'Last day to disallow' refers to the last day on which notice may be given of a motion for disallowance in the Senate. [↑](#footnote-ref-5)
6. See section 14, *Legislative Instruments Act 2003*. [↑](#footnote-ref-6)
7. FRLI is found online at http://www.comlaw.gov.au/. [↑](#footnote-ref-7)