The Senate

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]

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

The committee's terms of reference

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

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

Work of the committee

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

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1 Prior to 2013, the monitor provided only statistical and technical information on instruments scrutinised by the committee in a given period or year. This information is now most easily accessed via the authoritative Federal Register of Legislative Instruments (FRLI), at www.comlaw.gov.au

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

The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments, which are established by the *Legislative Instruments Act 2003*.[2]

Structure of the report

The report is comprised of the following parts:

- Chapter 1, 'New and continuing matters', sets out new and continuing matters about which the committee has agreed to write to the relevant minister or instrument-maker seeking further information or appropriate undertakings;
- Chapter 2, 'Concluded matters', sets out any previous matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date;
- Appendix 1 contains correspondence relating to concluded matters.
- Appendix 2 contains the committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003*.

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 **17 June 2015**, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to relevant ministers or instrument makers in relation to substantive matters seeking further information or an appropriate undertaking within the disallowance period.

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

This report considers all disallowable instruments received between 3 April 2015 and 30 April 2015. All instruments examined in this period are listed on the Senate Disallowable Instruments List.[1]

New matters

Radiocommunications (Radio-controlled Models) Class Licence 2015 [F2015L00497]

Purpose	Revokes and replaces the Radiocommunications (Radio-controlled Models) Class Licence 2002
Last day to disallow	13 August 2015
Authorising legislation	*Radiocommunications Act 1992*
Department	Communications

Issue:

Drafting

The instrument is identified as made under subsection 132(1) and section 133 of the *Radiocommunications Act 1992*, which enable the Australian Communications and Media Authority (ACMA) to issue Class Licences by notice published in the *Gazette*. Section 2 of the instrument provides that the Class Licence commences on the later of the day after it is registered on FRLI or the day on which it is published in the *Gazette*. Note 2 to the instrument states that the Class Licence commences only when both events have occurred.

1 Senate Disallowable Instruments List, available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List.

However, the committee notes that section 56 of the *Legislative Instruments Act 2003* directs that, where the enabling legislation requires the text of a legislative instrument to be published in the *Gazette*, the requirement for publication in the *Gazette* is taken to be satisfied if the instrument is registered.

It is therefore unclear to the committee how the commencement provision in section 2 of the instrument interacts with section 56 of the *Legislative Instruments Act 2003*, and whether, for example, the registration of the instrument alone could be taken as satisfying the commencement requirements set out in section 2 of the instrument.

The committee therefore requests the advice of the minister in relation to this matter.

Australian Prudential Regulation Authority instrument fixing charges No. 1 of 2015 [F2015L00504]

Purpose	Fixes charges to the provision of statistical information about financial sector entities to the Reserve Bank of Australia and the Australian Bureau of Statistics during the 2014-15 financial year
Last day to disallow	13 August 2015
Authorising legislation	*Australian Prudential Regulation Authority Act 1998*
Department	Treasury

Issue:

Description of 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 this instrument states:

> APRA [Australian Prudential Regulation Authority] has informed both the RBA [Reserve Bank of Australia] and the ABS [Australian Bureau of Statistics] of the basis of calculation of the charges and no objection has been made.

In the committee's view, the statement above appears not to describe a process of consultation but rather that key stakeholders have been advised of the changes effected by the instrument.

In terms of complying with sections 17 and 18 of the *Legislative Instruments Act 2003*, the committee considers it would be better for the ES to have explicitly stated, with a supporting explanation, that consultation was considered unnecessary or inappropriate in this case.

The committee therefore draws the matter to the minister's attention.

Financial Sector (Business Transfer and Group Restructure) determination No. 1 of 2015 - Transfer Rules No. 1 of 2015 [F2015L00464]

Purpose	Revokes Transfer Rules No. 1 of 2004, as amended by Transfer Rules Variation Determination No. 1 of 2005 and Financial Sector (Business Transfer and Group Restructure) Determination No. 1 of 2007
Last day to disallow	13 August 2015
Authorising legislation	*Financial Sector (Business Transfer and Group Restructure) Act 1999*
Department	Treasury

Issue:

Description of purpose and operation of instrument

This instrument revokes and remakes rules made under subsection 46(1) of the *Financial Sector (Business Transfer and Group Restructure) Act 1999* (the Act). The ES for the instrument explains that the remaking of the rules is required due to the sunsetting provisions of the *Legislative Instruments Act 2003*:

> Under subsection 50(1) of the *Legislative Instruments Act 2003* (LIA), a legislative instrument registered after 1 January 2005 will sunset on the earlier of 1 April or 1 October, 10 years after the instrument was registered on the FRLI. The 2004 Transfer Rules was registered on 23 March 2005. [Despite intervening amendments, those]…amendments do not affect the operation of subsection 50(1) of the LIA, and the 2004 Transfer Rules would have sunsetted on 1 April 2015.

In relation to the purpose and operation of the rules, the ES states only that:

> The effective and efficient operation of the Act, in so far as it facilitates the voluntary transfer of business between APRA-regulated entities, depends on the existence of the 2004 Transfer Rules.
>
> In light of the fact that the 2004 Transfer Rules were to sunset on 1 April 2015, the purpose of the 2015 Transfer Rules is to allow the rules that exist in the 2004 Transfer Rules to continue without change. APRA conducted an assessment of the effectiveness and efficiency of continuing the operation

> of the 2004 Transfer Rules and concluded that it was appropriate that they be remade without substantive amendment.

The committee notes that this explanation of the purpose and operation of the instrument is supported by section 26(1B) of the *Legislative Instruments Act 2003*, which provides that an instrument that replaces, and is the same in substance as, an earlier instrument may satisfy the requirement to explain the purpose and operation of the instrument by stating that it is the same in substance as the earlier instrument.

However, the committee's present understanding of the concept of the 'same in substance' as applied to legislative instruments is informed by the judgement of Chief Justice Latham in *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, which indicates that the question may involve a determination of whether an instrument 'produces substantially, that is, in large measure, though not in all details, the same effect' as an earlier instrument.

The committee is concerned that, for the purposes of *Legislative Instruments Act 2003* section 26(1B), an instrument (or provision) that is the same in substance as an earlier one, may focus on the overall effect of the instrument or provision without proper regard to material differences that may be relevant to the committee's scrutiny principles. Any such determination by a rule-maker or other officer therefore does not obviate the need for the committee to undertake a provision-by-provision assessment of the remade instrument to ensure that it does not raise any concerns referable to the committee's scrutiny principles.

Therefore, despite section 26(1B) of *Legislative Instruments Act 2003*, in the absence of an item-by-item description of the provisions of an instrument, a statement that an instrument is the same in substance (or has been 'made without substantive amendment' as in this case) may be insufficent for the committee to effectively scrutinise the instrument with reference to its scrutiny principles.

However, in this case, the committee notes that, in relation to consultation, the ES to the instrument states:

> APRA conducted an assessment of the effectiveness and efficiency of continuing the operation of the 2004 Transfer Rules and concluded that it was appropriate that they be remade without substantive amendment…The 2015 Transfer Rules does not differ in any substantive way from the 2004 Transfer Rules, the only changes being to update legislative references and remove transitional provisions that have been redundant for many years. The Transfer Rules 2015 does not impose any additional requirements nor does it remove requirements. Consequently, APRA did not consult externally in relation to Transfer Rules 2015.

The above statement appears to provide an exhaustive description of the changes to the remade instrument—namely, 'only changes to update legislative references and remove transitional provisions' and no additions or deletions of requirements. The

committee considers that in this case this definitive description of the changes to the remade rules provides a sufficient basis for scrutiny of the instrument, notwithstanding the absence of a provision-by-provision description.

The committee therefore draws to the attention of the minister that, while in some cases an exhaustive description of the changes to a remade instrument may be sufficent, the committee's preference is that ESs also include an item-by-item description of the instrument, even in cases where the instrument is being remade due to the sunsetting provisions of the *Legislative Instruments Act 2003*.[2]

Noting the commencement of the remaking of instruments due to the sunsetting provisions of the *Legislative Instruments Act 2003,* the committee draws the above remarks to the attention of ministers and instrument-makers more generally.

A New Tax System (GST, Luxury Car Tax and Wine Tax) Direction 2015 [F2015L00566]

Purpose	Replaces the sunsetting Finance Minister's (A New Tax System) Directions 2005
Last day to disallow	13 August 2015
Authorising legislation	*A New Tax System (Goods and Services Tax) Act 1999* *A New Tax System (Luxury Car Tax) Act 1999* *A New Tax System (Wine Equalisation Tax) Act 1999*
Department	Treasury

Issue:

Retrospectivity

This instrument was made on 10 April 2015. Section 2 of this instrument, provides that it is taken to have commenced on 1 April 2015. The ES for the instrument states:

> This is intended to ensure continuity of GST arrangements for the Commonwealth and relevant Commonwealth entities following the sunsetting of the Finance Minister's (A New Tax System) Directions 2005 on 1 April 2015. The Direction is not intended to affect the rights of any person, or impose liabilities on any person, other than the Commonwealth or an authority of the Commonwealth (see section 12(2) of the *Legislative Instruments Act 2003*).

2 In contrast, see for example, Radiocommunications Licence Conditions (Aeronautical Licence) Determination 2015 [F2015L00495]. This instrument also remakes a determination that was due to sunset without any significant changes, but includes at Attachment A to the ES an item-by-item description of the determination.

The committee notes that subsection 12(2) of the *Legislative Instruments Act 2003* does not operate on the 'intention' of an instrument with retrospective effect but on the fact of whether such an instrument 'would' affect rights (to the disadvantage of a person) or impose liabilities retrospectively.

The committee therefore requests the advice of the minister in relation to this matter.

Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542]

Purpose	Amends the Migration Regulations 1994 in relation to bogus documents and protection visas, visa application bars, oral statements and Safe Haven Enterprise visas
Last day to disallow	13 August 2015
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection

Issue:

Retrospective effect

This instrument amends the Migration Regulations 1994 and is consequential to the *Migration Amendment (Protection and Other Measures) Act 2015*.

Item 2 of schedule 1 to the instrument enables the Refugee Review Tribunal or Administrative Appeals Tribunal to make a direction based on sections 91W or 91WA of the *Migration Act 1958* (Migration Act), which provide the power to refuse a visa application for failure to establish, identity, nationality or citizenship; and section 91WB of the Migration Act, which provides that a protection visa may be granted only on the basis of the applicant being a member of the same family unit as a protection visa holder, if the applicant applied for the protection visa before the primary protection visa holder was granted their protection visa.

Schedule 5 to the instrument (specifically, new clause 4201) provides that the amendments made by item 2 of schedule 1 apply to applications for the relevant visas made, but not finally determined, before the commencement of the instrument (17 April 2015), as well as applications made on or after that day.

The committee notes that, although the instrument is not strictly retrospective, the amendments made by item 2 of schedule 1 prescribe rules for the future based on antecedent facts (that is, the existence of an earlier visa application). As a consequence, it appears that an otherwise valid application not determined at 17 April 2015 may now be subject to new rules that did not apply at the time of the visa application.

The committee's usual approach to such cases is to regard them as being retrospective in effect, and to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)).

The committee therefore requests further information from the minister (as to the justification for this approach).

Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015 [F2015L00551]

Purpose	Amends the Migration Regulations 1994 in relation to the fast track assessment process, the refugee framework and Safe Haven Enterprise visas
Last day to disallow	13 August 2015
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection

Issue:

Retrospective effect

This instrument amends the Migration Regulations 1994 and is consequential to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (RALC Act).

Schedule 2 to the instrument removes references to the Refugee Convention in the Migration Regulations to reflect the new language inserted into the *Migration Act 1958* (Migration Act) by part 2 of schedule 5 to the RALC Act.[3]

Schedule 4 of the instrument (specifically new part 40) provides that the amendments made by schedule 2 apply in relation to the review of a Refugee Review Tribunal-reviewable decision made on or after the commencement of the instrument (16 April 2015) in relation to an application for a protection visa made on or after 16 December 2014.

The committee notes that, although the instrument is not strictly retrospective, the amendments made by schedule 2 prescribe rules for the future based on antecedent facts (that is, the existence of an earlier visa application). As a consequence, it appears that an otherwise valid application not determined at 16 December 2014 may now be subject to new rules that did not apply at the time of the visa application.

3 Part 2 of schedule 5 to the RALC Act removes most references to the Refugee Convention from the Migration Act and creates a new, self-contained statutory framework which articulates Australia's interpretation of its protection obligations under the Refugee Convention.

The committee's usual approach in such cases is to regard them as being retrospective in effect, and to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)).

The committee therefore requests further information from the minister (as to the justification for this approach).

Migration Regulations 1994 - Specification of Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas 2015 - IMMI 15/028 [F2015L00563]

Purpose	Specifies the tests, scores, period, level of salary and other exemptions to the English language requirement for Subclass 457 (Temporary Work (Skilled)) (Subclass 457) visa applicants
Last day to disallow	13 August 2015
Authorising legislation	*Migration Regulations 1994*
Department	Immigration and Border Protection

Issue:

Retrospective effect

This instrument revokes and replaces an existing instrument, prescribing the tests, scores, period, level of salary and other exemptions to the English language requirement for Subclass 457 (Temporary Work (Skilled)) (Subclass 457) visa applicants.

Various provisions of the instrument indicate that they apply to applicants who lodged their most recent applications before, on or after dates in the past (specifically, 1 January 2015, 1 July 2013, 1 July 2010 and 14 April 2009). Additionally, while it is unlcear how this is given effect by the text of the instrument, the ES for the instrument also states:

> …the Instrument applies to applicants of Subclass 457 visas who lodged applications on or after the commencement of this Instrument, or lodged prior to the commencement of this Instrument but not finally determined by the date of commencement [18 April 2015].

The committeee notes that, although the instrument is not strictly retrospective, it prescribes various rules for the future based on antecedent facts (that is, the existence of an earlier visa application or nomination). As a consequence, it appears that an otherwise valid application or nomination not determined at 18 April 2015 may now be subject to new rules that did not apply at the time of the application or nomination.

The committee's usual approach in such cases is to regard them as being retrospective in effect, and to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)).

The committee therefore requests further information from the minister (as to the justification for this approach).

Migration Regulations 1994 - Specification of Income Threshold and Annual Earnings 2015 - IMMI 15/050 [F2015L00569]

Purpose	Specifies the temporary skilled migration income threshold and annual earnings in relation to the Subclass 457 (Temporary Work (Skilled)) Visa programme
Last day to disallow	13 August 2015 (disallowed 16 June 2015)
Authorising legislation	*Migration Regulations 1994*
Department	Immigration and Border Protection

Issue:

Retrospective effect

This instrument revokes and replaces an existing instrument, specifying a temporary skilled migration income threshold for paragraph 2.72(10)(cc) of the Migration Regulations 1994 (Migration Regulations) and a minimum annual earnings level for subregulation 2.72(10AB) and paragraph 2.79(1A)(b) of the Migration Regulations.

The instrument commences on 18 April 2015, and while it is unlcear how this is given effect by the text of the instrument, the ES for the instrument states:

> …the Instrument applies to nominations of proposed occupations by standard business sponsors made under paragraph 140GB(1)(b) of the *Migration Act 1958* that have been lodged on or after the commencement of this Instrument, or lodged prior to the commencement of this Instrument but not finally determined.

The committee notes that, although the instrument is not strictly retrospective, it prescribes rules for the future based on antecedent facts (that is, the existence of an earlier nomination). As a consequence, it appears that an otherwise valid nomination not determined at 18 April 2015 may now be subject to new rules that did not apply at the time of the nomination.

The committee's usual approach in such cases is to regard them as being retrospective in effect, and to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)). The committee's usual expectation is therefore that the statement of

compatibility would address the question of the instrument's retrospective effect and provide a justification for this approach (particularly where a person's rights or liberties may be adversely affected). However, in this case the committee notes that the amendments appear to be beneficial in their effect on applicants.

The committee also notes that the Senate disallowed this instrument on 16 June 2015.

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

Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572]

Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Education and Training and the Department of Social Services
Last day to disallow	13 August 2015
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance

Issue:

Addition of matters to schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997—previously unauthorised expenditure

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

The instrument adds five new items to part 4 of schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities. New table item 74 to part 4 of schedule 1AB appears to authorise the redirection of existing funding to new programs. However, the remaining four items appear to be expenditure not previously authorised by legislation:

- New table item 75 to part 4 of schedule 1AB establishes legislative authority for the Commonwealth government to fund Mathematics by Inquiry which will provide mathematics curriculum resources for primary and secondary school students, and for use by teachers. Funding of $7.4 million has been allocated to the program over four financial years from 2014-15, and it is to be administered by the Department of Education and Training.
- New table item 76 to part 4 of schedule 1AB establishes legislative authority for the Commonwealth government to fund Coding across the Curriculum

which will support the introduction of algorithmic thinking and computer coding across different year levels in Australian schools and support the implementation and teaching of the Australian Curriculum: Technologies in classrooms. Funding of $3.5 million has been allocated to the program for four years from 2015-16 to 2017-18, and it is to be administered by the Department of Education and Training.

- New table item 77 to part 4 of schedule 1AB establishes legislative authority for the Commonwealth government to fund the pilot of an Australian secondary education facility based on the 'Pathways in Technology Early College High School' (P-TECH) model in the United States of America. Funding of $0.5 million has been allocated to the program for two years from 2015-16 and 2016-17, and it is to be administered by the Department of Education and Training.
- New table item 78 to part 4 of schedule 1AB establishes legislative authority for the Commonwealth government to fund Summer Schools for STEM, which will assist female students, including disadvantaged and Indigenous students and those living in regional and remote areas, to attend national science and mathematics summer schools. Funding of $0.6 million has been allocated to the program for two years from 2015-16, and it is to be administered by the Department of Education and Training.

The committee considers that, prior to the enactment of the *Financial Framework Legislation Amendment Act (No. 3) 2012*, the programs outlined above would properly have been contained within an appropriation bill not for the ordinary annual services of government, and subject to direct amendment by the Senate. The committee will draw these matters to the attention of the relevant portfolio committees.

The committee therefore draws the attention of the Senate to the expenditure authorised by this instrument relating to the programs listed below:

- **Mathematics by Inquiry;**
- **Coding across the Curriculum;**
- **Piloting a P–TECH Styled Education Facility; and**
- **Summer Schools for STEM.**

Issue:

Addition of matter to schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997—authority for expenditure

Scrutiny principle (a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle is interpreted broadly as a requirement to ensure that instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements.

The committee notes that, in *Williams No. 1*,[4] the High Court confirmed that executive authority to spend appropriated monies is not unlimited and therefore generally requires legislative authority. As a result of the High Court decision in *Williams No. 2*,[5] the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

In this regard, the committee notes that the ES states that the objective of the Mathematics by Inquiry program is:

> To create and improve mathematics curriculum resources for primary and secondary school students:
>
> (a) to meet Australia's international obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights; and
>
> (b) as activities that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.

The objective of the Coding Across the Curriculum program is:

> To encourage the introduction of computer coding and programming across different year levels in Australian schools:
>
> (a) to meet Australia's international obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights; and
>
> (b) as an activity that is peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.

The committee notes that the ES identifies the consititutional basis for expenditure in relation to both the Mathematics by Inquiry and the Coding Across the Curriculum programs as follows:

> Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:
>
> - the external affairs power (section 51(xxix))
> - Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)).

Therefore, the instrument appears to rely on the external affairs power and the executive nationhood power (coupled with the express incidental power) as the

4 *Williams v Commonwealth* [2012] 248 CLR 156.

5 *Williams v Commonwealth* [2014] HCA 23 (19 June 2014).

relevant heads of legislative power to authorise the making of these provisions (and therefore the spending of public money under them).

However, in relation to the external affairs power, the committee understands that, in order to rely on the power in connection with obligations under international treaties, legislation must be appropriately adapted to implement relatively precise obligations arising under that treaty.

In relation to the executive nationhood power and the express incidental power, the committee understands that the nationhood power provides the Commonwealth executive with a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.

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

- **how the obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights are sufficiently specific to support the Mathematics by Inquiry and the Coding Across the Curriculum programs; and**
- **how the Mathematics by Inquiry and the Coding Across the Curriculum programs are supported by the executive nationhood power and the express incidental power to the extent that they are enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.**

Issue:

Addition of matter to schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997—merits review

The instrument adds new table item 74 to schedule 1AB establishing legislative authority for the Government to provide support under the Sector Development Fund for activities to assist the disability sector in transition to the National Disability Insurance Scheme. While the ES is generally helpful in providing information about the proposed administration of the Sector Development Fund, no information has been provided as to whether the program possesses the relevant characteristics that would justify the exclusion of decisions under this program from merits review.

In order to assess whether a program in schedule 1AB possesses the charecteristics justifying the exclusion from merits review, the committee's expectation is that ESs specifically address this question in relation to each new and/or amended program added to schedule 1AB, including a description of the policy considerations and program chacteristics that are relevant to the question of whether or not decisions should be subject to merits review.

The committee therefore requests further information from the minister in relation to this matter.

National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2015 (No. 1) [F2015L00598]

Purpose	Amends the National Greenhouse and Energy Reporting (Measurement) Determination 2008 to update emissions factors for the combustion of fuel
Last day to disallow	13 August 2015
Authorising legislation	*National Greenhouse and Energy Reporting Act 2007*
Department	Environment

Issue:

Drafting

The committee notes that this instrument purports to rely on sections 7B and 10 of the *National Greenhouse and Energy Reporting Act 2007* (the Act). However, as far as the committee can ascertain, there is no section 7B of this Act.

The committee also notes that schedule 1, item 26 does not appear to be included in the explanation of the amendments provided for in the ES.

In the interests of promoting the clarity and intelligibility of the instrument to anticipated users, the committee therefore seeks clarification of the provision of the enabling legislation on which the instrument relies, as well as an explanation of the amendment provided for by schedule 1, item 26.

The committee therefore requests further information from the minister.

Safety, Rehabilitation and Compensation (Definition of Employee – Defence Families of Australia) Notice 2015 [F2015L00602]

Purpose	Declares that certain representatives of Defence Families of Australia are employees for the purposes of the *Safety, Rehabilitation and Compensation Act 1988*
Last day to disallow	13 August 2015
Authorising legislation	*Safety, Rehabilitation and Compensation Act 1988*
Department	Employment

Issue:

Description of 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 this instrument states:

> This declaration was made in consultation with the Department of Defence.
>
> The Office of Best Practice Regulation was consulted regarding this declaration and indicated that a Regulation Impact Statement was not required for this declaration (OBPR ID 18835).

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative Instruments Act 2003*.

Further, the committee does not consider the process of ascertaining the necessity of a Regulatory Impact Statement for an instrument as strictly relevant to the question of consultation under 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

Multiple instruments that appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*

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

> Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.[6]

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

Water and Wastewater Service Fees Determination 2015 (Jervis Bay Territory) [F2015L00490]

Remuneration Tribunal Determination 2015/02 - Remuneration and Allowances for Holders of Public Office [F2015L00489]

National Health (Pharmaceutical Benefits) (Conditions of approval for approved pharmacists) Amendment Determination 2015 (PB 24 of 2015) [F2015L00511]

Migration Regulations 1994 - Specification of Access to Movement Records 2015 - IMMI 15/068 [F2015L00512]

AASB 2015-6 - Amendments to Australian Accounting Standards – Extending Related Party Disclosures to Not-for-Profit Public Sector Entities - March 2015 [F2015L00539]

Private Health Insurance (Prostheses) Amendment Rules 2015 (No. 1) [F2015L00540]

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

ASIC Corporations (Amendment No. 2) Instrument 2015 [F2015L00586]

Public Governance, Performance and Accountability Amendment (Corporate Plans and Annual Performance Statements) Rule 2015 [F2015L00592]

Private Health Insurance (Council Administration Levy) Amendment Rules 2015 (No. 1) [F2015L00596]

National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2015 (No. 1) [F2015L00598]

Health Insurance (Diagnostic Imaging Accreditation) Amendment Instrument 2015 [F2015L00606]

Chapter 2
Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **17 June 2015**. 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 1.

Textile, Clothing and Footwear Investment and Innovation Programs Regulation 2015 [F2015L00362]

Purpose	Sets out the types of information that must be included in an identity card issued to an authorised officer
Last day to disallow	13 August 2015
Authorising legislation	*Textile, Clothing and Footwear Investment and Innovation Programs Act 1999.*
Department	Industry and Science

[The committee first reported on this instrument in *Delegated legislation monitor* No. 5 of 2015]

Issue:

Insufficient information regarding consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes the ES for this instrument states only that 'no consultation has been required in making this Regulation', with no explanation as to why consultation was considered unnecessary or inappropriate 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's expectations in this regard are set out in the Guideline on consultation in Appendix 2 of this report.

[The committee therefore requested further information from the minister; and requested that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*].

MINISTER'S RESPONSE:

The Minister for Industry and Science advised that, in order to ensure that the requirements of section 26 are met, a new ES with a more detailed explanation of why consultation was not undertaken on the regulation has been approved. The new ES will read, in relevant part, as follows:

> Consultation was considered unnecessary because the purpose of this Regulation is to ensure continuity of the law by replacing the earlier *Textile, Clothing and Footwear Investment and Innovations Programs Regulations* 2005, which is due to sunset on 1 April 2015. The making of this Regulation ensures that the TCF Post-2005 (SIP) scheme and the Clothing and Household Textile (BIC) scheme continue to be effective and the relevant compliance mechanisms are enforceable. In addition, the only change to the instrument is a minor amendment to remove a redundant reference regarding the information which must be included on an identity card issued to an authorised officer undertaking compliance activities for the above schemes.

COMMITTEE RESPONSE:

The committee thanks the Minister for his response and has concluded its examination of the instrument.

Autonomous Sanctions Amendment (Russia, Crimea and Sevastopol) Regulation 2015 [F2015L00356]

Purpose	Amends the Autonomous Sanctions Regulations 2011 to implement autonomous sanctions measures announced by the Prime Minister on 1 September 2014 in response to the Russian threat to the sovereignty and territorial integrity of Ukraine
Last day to disallow	13 August 2015
Authorising legislation	*Autonomous Sanctions Act 2011*
Department	Foreign Affairs and Trade

[The committee first reported on this instrument in *Delegated legislation monitor* No. 5 of 2015]

Issue:

Drafting

The committee notes that the instrument is identifed as made under the *Autonomous Sanctions Act 2011* (Act). However, neither the instrument nor the ES appear to identify the specific provision of that Act that is relied on to make the instrument.

The committee's usual expectation is that an instrument or its ES identify the provision of the enabling legislation which authorises the making of the instrument, in the interests of promoting clarity and intelligibility of the instrument to anticipated users.

[The committee therefore requested the advice of the minister in relation to this matter].

MINISTER'S RESPONSE:

The Minster for Foreign Affairs and Trade advised that section 28 of the Act provided for the making of regulations under the Act and that:

> The Office of Parliamentary Counsel, which drafted the Regulation, has advised that its usual practice when drafting an instrument is to refer only to the enabling legislation and not to the specific provision that authorises the making of an instrument.

The Minister also acknowledged the expectation of the committee regarding clarity and intelligibility of instruments, and advised that she had asked the Department of Foreign Affairs and Trade to ensure this information is included in explanatory material pertaining to future regulations for which she has responsibility.

COMMITTEE RESPONSE:

The committee thanks the Minister for her response and has concluded its examination of the instrument.

Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit — Intra-State Trade) Declaration 2015 [F2015L00335]

Seafarers Rehabilitation and Compensation (Prescribed Ship — Intra-State Trade) Declaration 2015 [F2015L00336]

Purpose	Declares that a ship or vessel only engaged in intra-state trade will be subject to the work health and safety legislation of the state in which they operate
Last day to disallow	13 August 2015
Authorising legislation	*Occupational Health and Safety (Maritime Industry) Act 1993*; and *Seafarers Rehabilitation and Compensation Act 1992*
Department	Employment

[The committee first reported on this instrument in *Delegated legislation monitor* No. 5 of 2015]

Issue:

Relationship of instruments to Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015

The Seafarers Rehabilitation and Compensation (Prescribed Ship — Intra-State Trade) Declaration 2015 declares that a certain type of ship which is only engaged in intra-state trade is not a prescribed ship for the purposes of the *Seafarers Rehabilitation and Compensation Act 1992*.

The Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit — Intra-State Trade) Declaration 2015 prescribes ships or vessels only engaged in intra-state trade as non-prescribed ships or units for the purposes of the *Occupational Health and Safety (Maritime Industry) Act 1992*.

The committee notes that key elements of the instruments may be described as 'mirroring' amendments in a bill, being the Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 (the bill). The bill passed the House of Representatives in February 2015 and passed the Senate with amendments on 13 May 2015. However, the ESs for the instruments provide no information as to their relationship with the bill and, particularly, the reason for introducing these changes via regulation while the bill was still before the Parliament.

[The committee therefore requested the advice of the minister in relation to this matter].

MINISTER'S RESPONSE:

The Assistant Minister for Employment advised that:

> As set out in the Explanatory Statements, the Declarations were made in response to the Federal Court's decision in *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182 (22 December 2014). The *Aucote* decision interpreted the application provisions of the *Seafarers Rehabilitation and Compensation Act 1992* so that the provisions apply to seafarers employed by trading, financial or foreign corporations on a prescribed ship, including ships engaged in intra-state trade. This is a substantially broader application than what had long been understood to be the case by maritime industry regulators and participants. The *Aucote* decision has the same broad implications for the application of the *Occupational Health and Safety (Maritime Industry) Act 1993* because of that Act's similarly drafted application provisions.
>
> The Australian Government's response to the *Aucote* decision was to take immediate administrative action to address these broader implications of the decision and to provide more certainty for interested parties and regulators, while also introducing legislation to bring about a comprehensive solution. The Declarations together with the two exemptions granted by the Seafarers Safety Rehabilitation and Compensation Authority, were intended to form an interim measure to address prospective coverage while the Bill was considered by the Parliament. The Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 was introduced into Parliament to amend the retrospective and prospective coverage of the Seacare scheme.

The Assistant Minister also advised that:

> The Bill and the Declarations and exemptions will now act in concert, with the Bill addressing issues of retrospective coverage and the Declarations and exemptions addressing issues of prospective coverage…This situation represents an interim fix while the Government develops substantial legislative reforms to the Seacare scheme.

COMMITTEE RESPONSE:

The committee thanks the Assistant Minister for his response and has concluded its examination of the instruments.

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

The committee's inquiry in relation to the instrument arose from the fact that key elements of the declarations may be described as 'mirroring' the amendments in the bill in the form in which it was first introduced.

As the committee has previously noted, the pre-emptive use of delegated legislation may give rise to concerns about its capacity to circumvent the will of the Senate as expressed through the enactment of primary legislation.

While the Assistant Minister advises that the declarations were made to implement 'immediate administrative action to address these broader implications of the decision and to provide more certainty for interested parties and regulators', the committee has previously noted that such reasons may provide an insufficient justification for effecting significant policy change via regulation,[1] even if subsequently enacted in primary legislation.[2]

The committee notes that in this case the declarations were registered on the same day the bill was introduced into the Senate (25 March 2015), and the bill was ultimately passed in an amended form that complements the operation of the declarations.

However, the committee considers that the potential for this approach, where the disallowance period has expired, to 'permit a temporary mechanism to turn into a permanent legislative artefact', or to continue delegated legislation in operation despite the clearly expressed will of the Parliament (for example, if the bill were not passed or were passed with amendments not complemented by the operation of the delegated legislation), is critical to the assessment of whether the legislative approach offends the committee's scrutiny principle (d).

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1 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor* No. 14 of 2014 (29 October 2014), pp 5-11.

2 Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2014* (16 July 2014), p. 348.

In light of these concerns about the inclusion in delegated legislation of matters more appropriate for parliamentary enactment in primary legislation (scrutiny principle (d)), the committee draws this matter to the attention of senators.

Appendix 1
Correspondence

THE HON IAN MACFARLANE MP

MINISTER FOR INDUSTRY AND SCIENCE

PO BOX 6022
PARLIAMENT HOUSE
CANBERRA ACT 2600

04 JUN 2015

MC15-002421

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

Dear Mr Powell Ivan

Thank you for your letter of 14 May 2015 concerning comments from the Senate Standing Committee on Regulations and Ordinances in relation to the *Textile, Clothing and Footwear Investment and Innovations Program Regulation 2015* (the Regulation).

I note the Committee's concern that the Explanatory Statement accompanying the Regulation did not sufficiently describe why no consultation was undertaken, for the purposes of satisfying section 26 of the *Legislative Instruments Act 2003*.

In order to ensure the requirements of section 26 are met, I have approved a new Explanatory Statement with a more detailed explanation of why consultation was not undertaken on the Regulation. A copy of the additional text is enclosed.

I trust this will satisfy the Committee's concerns.

Yours sincerely

Ian Macfarlane

Encl(1)

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

Additional text included in the revised Explanatory Statement to the *Textile, Clothing and Footwear Investment and Innovations Program Regulation 2015*

Consultation

Consultation was considered unnecessary because the purpose of this Regulation is to ensure continuity of the law by replacing the earlier *Textile, Clothing and Footwear Investment and Innovations Programs Regulations* 2005, which is due to sunset on 1 April 2015. The making of this Regulation ensures that the TCF Post-2005 (SIP) scheme and the Clothing and Household Textile (BIC) scheme continue to be effective and the relevant compliance mechanisms are enforceable. In addition, the only change to the instrument is a minor amendment to remove a redundant reference regarding the information which must be included on an identity card issued to an authorised officer undertaking compliance activities for the above schemes.

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
Canberra

Dear Senator

Thank you for your Committee's letter of 14 May 2015 to my office concerning the *Autonomous Sanctions Amendment (Russia, Crimea and Sevastopol) Regulation 2015* (the Regulation).

As noted in Delegated Legislation Monitor No.5 of 2015, the Regulation and its Explanatory Statement refer to the *Autonomous Sanctions Act 2011* (the Act) as enabling the Regulation; however, they do not refer to the specific provision of that Act that authorises the making of regulations. The Office of Parliamentary Counsel, which drafted the Regulation, has advised that its usual practice when drafting an instrument is to refer only to the enabling legislation and not to the specific provision that authorises the making of an instrument.

I note that the Explanatory Memorandum for the Regulation, but not the Explanatory Statement, stated that section 28 of the Act provided for the making of regulations under the Act. While the Act is relatively short, I acknowledge the expectations of the Committee regarding clarity and intelligibility of instruments.

Accordingly, I have asked the Department of Foreign Affairs and Trade to ensure that this information is included in explanatory materials pertaining to future regulations for which I have responsibility.

Yours sincerely

Julie Bishop

09 JUN 2015

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THE HON. LUKE HARTSUYKER MP
ASSISTANT MINISTER FOR EMPLOYMENT
DEPUTY LEADER OF THE HOUSE

4 JUN 2015

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

Dear Senator

This letter is in response to the letter of 14 May 2015 from the Senate Standing Committee on Regulations and Ordinances concerning the Committee's request for advice in relation to the Seafarers Rehabilitation and Compensation (Prescribed Ship—Intra-State Trade) Declaration 2015 and the Occupational Health and Safety (Maritime Industry) (Prescribed Ship—Intra-State Trade) Declaration 2015. I am responding on behalf of Minister Abetz as he is currently on leave.

As set out in the Explanatory Statements, the Declarations were made in response to the Federal Court's decision in *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182 (22 December 2014). The *Aucote* decision interpreted the application provisions of the *Seafarers Rehabilitation and Compensation Act 1992* so that the provisions apply to seafarers employed by trading, financial or foreign corporations on a prescribed ship, including ships engaged in intra-state trade. This is a substantially broader application than what had long been understood to be the case by maritime industry regulators and participants.
The *Aucote* decision has the same broad implications for the application of the *Occupational Health and Safety (Maritime Industry) Act 1993* because of that Act's similarly drafted application provisions.

The Australian Government's response to the *Aucote* decision was to take immediate administrative action to address these broader implications of the decision and to provide more certainty for interested parties and regulators, while also introducing legislation to bring about a comprehensive solution. The Declarations, together with two exemptions granted by the Seafarers Safety Rehabilitation and Compensation Authority, were intended to form an interim measure to address prospective coverage while the Bill was considered by Parliament. The Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 was introduced into Parliament to amend the retrospective and prospective coverage of the Seacare scheme.

The Senate passed the Bill with bipartisan support on 13 May 2015 after amendments developed through consultation with interested parties from the maritime industry were made. The Bill is now awaiting Royal Assent. The effect of the amendments is that the Bill will only address the retrospective coverage of the Seacare scheme. It amends the coverage provisions from the commencement of the Seacare scheme up to the date on which the Bill receives Royal Assent. As such, the Bill and the Declarations and exemptions will now act in concert, with the Bill addressing issues of retrospective coverage and the Declarations and exemptions addressing issues of prospective coverage.

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This situation represents an interim fix while the Government develops substantial legislative reforms to the Seacare scheme. To this end, the Government has committed to introducing a further Bill to the Parliament before the end of this year which will be developed in consultation with interested parties from the maritime industry.

During consultations for amendments to the Bill, a stakeholder raised an issue about how the Declarations affect a legacy class of ships (that is, vessels that were, immediately before the repeal of the *Navigation Act 1912*, covered by a declaration in force under subsections 8A(2) or 8AA(2) of that Act). This issue had not been identified in consultations during the development of the Declarations. In order to address this issue, I will be remaking the Declarations to ensure they do not affect this legacy class of ships. The Government will ensure that the Explanatory Statement for these declarations contains a full explanation of the relationship with the Bill.

I thank the Committee for this opportunity to provide this further context to the making of these Declarations.

Yours sincerely

LUKE HARTSUYKER

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Appendix 2
Guideline on consultation

Standing Committee on Regulations and Ordinances
Addressing consultation in explanatory statements

Role of the committee

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

Purpose of guideline

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

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

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

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

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

Requirements of the Legislative Instruments Act 2003

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

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

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

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

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

Describing the nature of consultation

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

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

Method and purpose of consultation

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

Bodies/groups/individuals consulted

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

Issues raised in consultations and outcomes

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

Explaining why consultation has not been undertaken

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

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

Specific examples listed in the Act

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

Timing of consultation

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

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

Seeking further advice or information

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

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