The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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Membership of the committee

Current members

Senator John Williams (Chair)	New South Wales, NAT
Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator Claire Moore	Queensland, ALP
Senator Nova Peris OAM	Northern Territory, ALP
Senator Linda Reynolds	Western Australia, LP
Senator Zed Seselja	Australian Capital Territory, LP

Secretariat

Mr Ivan Powell, Secretary
Ms Jessica Strout, Acting Senior Research Officer
Ms Eloise Menzies, Senior Research Officer

Committee legal adviser

Mr Stephen Argument

Committee contacts

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

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Introduction

Terms of reference

The Senate Standing Committee on Regulations and Ordinances (the committee) was established in 1932. The role of the committee is to examine the technical qualities of all disallowable instruments of delegated legislation and decide whether they comply with the committee's non-partisan scrutiny principles of personal rights and parliamentary propriety.

Senate Standing Order 23(3) requires the committee to scrutinise each instrument referred to it 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.

Nature of the committee's scrutiny

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 under the *Legislative Instruments Act 2003*.[1]

Publications

The committee's usual practice is to table a report, the *Delegated legislation monitor* (the monitor), each sitting week of the Senate. The monitor provides an overview of the committee's scrutiny of disallowable instruments of delegated legislation for the preceding period. Disallowable instruments of delegated legislation detailed in the monitor are also listed in the 'Index of instruments' on the committee's website.[2]

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

2 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Index of instruments*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index.

Structure of the monitor

The monitor is comprised of the following parts:

- **Chapter 1 New and continuing matters**: identifies disallowable instruments of delegated legislation about which the committee has raised a concern and agreed to write to the relevant minister or instrument-maker:
  - (a) seeking an explanation/information; or
  - (b) seeking further explanation/information subsequent to a response; or
  - (c) on an advice only basis.
- **Chapter 2 Concluded matters**: sets out 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 Correspondence**: contains the correspondence relevant to the matters raised in Chapters 1 and 2.
- **Appendix 2 Consultation**: includes 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 monitor.

General information

The Federal Register of Legislative Instruments (FRLI) should be consulted for the text of instruments, explanatory statements, and associated information.[3]

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.[4]

The Disallowance Alert records all notices of motion for the disallowance of instruments in the Senate, and their progress and eventual outcome.[5]

Senator John Williams (Chair)

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3 The FRLI database is part of ComLaw, see Australian Government, ComLaw, https://www.comlaw.gov.au/.

4 Parliament of Australia, *Senate Disallowable Instruments List*, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List.

5 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Disallowance Alert 2015*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Chapter 1

New and continuing matters

This chapter details concerns in relation to disallowable instruments of delegated legislation received by the Senate Standing Committee on Regulations and Ordinances (the committee) between 23 October 2015 and 5 November 2015 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

Response required

The committee requests an explanation or information from relevant ministers or instrument-makers with respect to the following concerns.

Instrument	**CASA EX174/15 - Exemption — from welding training for grant of aircraft welding authority [F2015L01699]**
Purpose	Exempts a class of applicants for an aircraft welding authority from the requirement to have completed welding training as prescribed in Civil Aviation Regulations 1988
Last day to disallow	22 February 2016
Authorising legislation	*Civil Aviation Safety Regulations 1998*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(d)

Timetable for making substantive amendments to Civil Aviation Regulations 1988

The instrument exempts an aircraft welding authority applicant who previously held an aircraft welding authority from the training requirement prescribed in Civil Aviation Regulations 1998 (CAR 1988). In doing so, the instrument creates an exemption so that applicants with an expired welding authority will not incur the cost or inconvenience of undertaking further training, which they would have avoided if their welding authority had not expired.

The ES for this instrument states:

> CASA is considering updating the legislation covering maintenance permissions for aircraft welding, including making it capable of being responsive to changes in technology and practice. CASA intends to propose amendments to CAR 1988 to make the necessary changes. This instrument has been made in anticipation of those more extensive changes.

The committee generally prefers that exemptions are not used or do not continue for such time as to operate as de facto amendments to principal legislation. Given the committee's general expectation in this regard, the committee notes that the instrument grants the exemption from the welding training as prescribed in CAR 1988 until the end of September 2017; however, no information is provided as to the expected timetable for the proposed amendments to CAR 1988.

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

Instrument	**Excise (Mass of CNG) Determination 2015 (No. 1) [F2015L01733]** **Excise (Volume of Liquid Fuels - Temperature Correction) Determination 2015 (No. 1) [F2015L01732]** **Excise (Volume of LPG – Temperature and Pressure Correction) Determination 2015 (No. 1) [F2015L01745]**
Purpose	These instruments specify methods for determining the volume or mass of particular excisable substances
Last day to disallow	22 February 2016
Authorising legislation	*Excise Act 1901*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

With reference to the above, the committee notes that the first instrument refers to the:

- Australian Standard/International Organization for Standardization AS ISO 13443-2007, *Natural gas – Standard reference conditions*; and
- International Organization for Standardization ISO 6976-1995 *Natural gas – Calculation of calorific values, density and Wobbe index from composition.*

The second instrument refers to the American Society for Testing and Materials (ASTM) *Petroleum Measurement Tables Volume Correction Factors, Volume VIII* and *Practical Alcohol Tables.*

The third instrument refers to the:

- American Society for Testing and Materials (ASTM) *Petroleum Measurement Tables for Light Hydrocarbon Liquids – Density Range 0.500 to 0.653 Kg/L at 15º C*; and
- American Petroleum Institute (API) *Manual of Petroleum Measurement Standards, Chapter 11.2.2M – Compressibility Factors for Hydrocarbons: 350-637 kg/m3 Density (15º C) and -46º C to 60º C metering temperature*.

However, while the explanatory statements (ES) for the instruments include a hyperlink to these documents as at the time of their publication, neither the text of the instruments nor the ESs expressly state the manner in which the documents are incorporated.

The committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Instrument	**International Organisations (Privileges and Immunities—Asian Infrastructure Investment Bank) Regulation 2015 [F2015L01737]**
Purpose	Provides privileges and immunities to the Asian Infrastructure Investment Bank (the bank) to give effect to Australia's obligations as a prospective member of the bank and facilitating Australia's ratification of the bank's Articles of Agreement
Last day to disallow	22 February 2016
Authorising legislation	*International Organisations (Privileges and Immunities) Act 1963*
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(a)

Sub-delegation

Section 13 of the regulation provides that the minister may, by writing, delegate his or her powers under paragraphs 9(1)(b) and (5)(b) of the instrument to 'a person'. Section 9 of the regulation enables the minister to set requirements for the Asian Infrastructure Investment Bank to receive indirect tax concessions for the acquisition of motor vehicles, goods and services.

The committee's expectations in relation to sub-delegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, a limit should be set on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service.

In this respect, the ES for the instrument provides no justification for the broad delegation of the minister's powers under paragraphs 9(1)(b) and (5)(b) of the regulation to 'a person'.

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

Instrument	**Migration Agents Regulations 1998 - Declaration of value of activities, fees for assessments and standards for professional development activities 2015 - IMMI 15/106 [F2015L01710]**
Purpose	Updates matters for migration agents in relation to the value of activities, fees for assessments and standards for professional development activities
Last day to disallow	22 February 2016
Authorising legislation	*Migration Agents Regulations 1998*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

The instrument specifies the fee for performing assessments of migration agents' activities for continuing professional development. The committee notes that the fee will be $99, which is the same as the fee specified in a previous instrument. However, the ES does not explicitly state the basis on which the fee has been calculated.

The committee's usual expectation in cases where an instrument of delegated legislation carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment is that the relevant ES makes clear the specific basis on which an individual imposition or change has been calculated.

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

Instrument	**Special Research Initiatives Funding Rules for funding commencing in 2008-2009 or 2009-2010 Variation (No. 1) 2014 [F2015L01690]**
Purpose	Clarifies that the version of Appendix 2 that appears in the Special Research Initiatives Funding Rules for funding commencing in 2008-09 or 2009-10 Variation (No. 2) is the current law
Last day to disallow	22 February 2016
Authorising legislation	*Australian Research Council Act 2001*
Department	Education and Training
Scrutiny principle	Standing Order 23(3)(a)

No 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. However, section 18 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 provides no information in relation to consultation.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 2.

The committee requests the advice of the minister in relation to this matter; and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.

Advice only

The committee draws the following matters to the attention of relevant ministers or instrument-makers on an advice only basis. These comments do not require a response.

Instrument	**Asian Infrastructure Investment Bank (Privileges and Immunities) Regulation 2015 [F2015L01734]**
Purpose	Conveys privileges and immunities that Australia is obliged to provide to the Asian Infrastructure Investment Bank and its staff, including experts and consultants
Last day to disallow	22 February 2016
Authorising legislation	*Asian Infrastructure Investment Bank Act 2015*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

Drafting

Schedules 1 and 2 of this regulation outline the privileges and immunities bestowed on the Asian Infrastructure Bank and its staff, including experts and consultants. These schedules rely on section 9 of the *Asian Infrastructure Investment Bank Act 2015* (AIIB Act), which has not yet commenced. The ES for the regulation notes that it will commence when sections 3 to 8 of the AIIB Act commence; namely, the later of either the day the Asian Infrastructure Bank is established, or Australia becomes a member of the Asian Infrastructure Investment Bank.

The regulation has therefore been made in reliance of an empowering provision that has not yet commenced (that is, section 9 of the AIIB Act). While this approach is authorised by subsection 4(2) of the *Acts Interpretation Act 1901* (which allows, in certain circumstances, the making of legislative instruments in anticipation of the commencement of relevant empowering provisions), the ES does not identify the relevance of subsection 4(2) to the operation of the instrument.

The committee considers that, in the interests of promoting clarity and intelligibility of the regulation to anticipated users, any such reliance on subsection 4(2) of the *Acts Interpretation Act 1901* should be clearly identified in the accompanying ES.

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

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

Instruments	Agricultural and Veterinary Chemicals Code (Pre-application Assistance Fee) Instrument 2015 [F2015L01752] ASIC Corporations (Amendment) Instrument 2015/991 [F2015L01740] ASIC Credit (Financial Counselling Agencies) Instrument 2015/992 [F2015L01743] ASIC Market Integrity Rules (ASX Market) Amendment 2015 (No. 2) [F2015L01695] ASIC Market Integrity Rules (Chi-X Australia Market) Amendment 2015 (No. 2) [F2015L01696] ASIC Market Integrity Rules (Competition in Exchange Markets) Amendment 2015 (No. 1) [F2015L01694] Excise (Mass of CNG) Determination 2015 (No. 1) [F2015L01733] Excise (Volume of Liquid Fuels - Temperature Correction) Determination 2015 (No. 1) [F2015L01732] Excise (Volume of LPG – Temperature and Pressure Correction) Determination 2015 (No. 1) [F2015L01745] Health Insurance (Midwife and Nurse Practitioner) Amendment Determination (No. 2) 2015 [F2015L01702] Marriage (Recognised Denominations) Amendment (New Denominations and Other Name Changes) Proclamation 2015 [F2015L01744] National Health (Australian Community Pharmacy Authority Rules) Amendment Determination 2015 (No. 1) (PB 89 of 2015) [F2015L01689] Private Health Insurance (Benefit Requirements) Amendment Rules 2015 (No. 5) [F2015L01711] Private Health Insurance Legislation Amendment (National Joint Replacement Register Levy—Consequential Amendments) Rule 2015 [F2015L01716] Woomera Prohibited Area Rule 2014 Determination of an Exclusion Period for the Green Zone Amendment No. 1 [F2015L01705] Woomera Prohibited Area Rule 2014 Determination of Exclusion Periods for Amber Zone 1 and Amber Zone 2 for Financial Year 2015 – 2016 Amendment No. 2 [F2015L01707]
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The instruments identified above 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.[1]

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

Chapter 2
Concluded matters

This chapter sets out matters which have been concluded to the satisfaction of the committee based on responses received from ministers or relevant instrument-makers.

Correspondence relating to these matters is included at Appendix 1.

Instrument	**Corporations Amendment (Financial Advice) Regulation 2015 [F2015L00969]**
Purpose	Amends the Corporations Regulations 2001 in relation to the Future of Financial Advice
Last day to disallow	1 December 2015
Authorising legislation	*Corporations Act 2001*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(d)
Previously reported in	*Delegated legislation monitors* No. 8 and 11

Matters more appropriate parliamentary enactment

The committee commented as follows:

This instrument amends the Corporations Regulations 2000 in relation to the Future of Financial Advice (FOFA) provisions of the *Corporations Act 2001*. The ES for the instrument states that the purpose of the instrument is to:

> …reduce compliance costs for small business, financial advisers, and the broader financial services industry, whilst maintaining the quality of advice for consumers who access financial advice.

The regulation makes amendments to:

- clarify that a provider who provides advice to an employer about default funds is providing a financial service to a retail client;
- provide that the wholesale and retail client distinction that currently applies in other Parts of the *Corporations Act 2001* also applies to the FOFA provisions;
- modify best interests duty to giving advice on a basic banking product and/or a general insurance product where the subject matter of the advice being sought also relates to consumer credit insurance;

- provide a facility for making non-cash payments that is not related to a basic deposit product is a basic deposit product for the purposes of the FOFA provisions;
- clarify the application of the existing client-pays provision; and
- broaden the basic banking exemption from the ban on conflicted remuneration to include benefits relating to consumer credit insurance products.

Scrutiny principle 23(3)(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). This includes legislation which fundamentally changes the law.

The ES for the instrument provides the following reason for introducing the changes via delegated legislation rather than primary legislation:

> The majority of these time sensitive FOFA amendments will also be enacted in legislation. The Government has adopted this approach to provide certainty to industry as quickly as possible.

However, along with the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), the committee has previously questioned whether industry certainty (and benefit) amounts to a sufficient justification for effecting significant policy change via regulation. The Scrutiny of Bills committee, for example, has stated:

> …enabling a regulated industry to benefit from legislative changes 'as soon as possible' is not a sufficient justification to achieve policy change through regulations rather than Parliamentary enactment as this justification could be claimed with respect to any proposal. The fact that the changes may subsequently be enacted in primary legislation does not moderate the scrutiny concerns in this regard.

In light of these considerations, the committee considers that the changes effected by the regulation may be regarded as more appropriate for parliamentary enactment in respect of their substantive effect and the justification provided for their inclusion in delegated legislation.

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

Assistant Treasurer's first response

The Assistant Treasurer responded with the following advice:

> …on 20 December 2013, the Government announced a package of changes to the Future of Financial Advice (FOFA) Provisions. These changes were implemented through the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 (the **Streamlining FOFA Regulation**), which came into effect on 1 July 2014. However, this Regulation was disallowed on 19 November 2014, which meant that the FOFA provisions reverted to their position prior to commencement of the Streamlining FOFA Regulation.

> The disallowance of the Streamlining FOFA Regulation caused industry disruption. From the date of disallowance, the financial advice industry, having made changes to comply with the Streamlining FOFA Regulation, had to make further changes to their systems and processes to comply with the original FOFA provisions.
>
> In response to the disallowance, ASIC announced that it would take a facilitative approach to administering the law until 1 July 2015. The Government also agreed with the Opposition that in order to alleviate industry disruption, certain minor and technical refinements to FOFA should be progressed as a priority via regulation before ASIC's facilitative approach expired.
>
> With bipartisan support, the first tranche of refinements was made through the Corporations Amendment (Revising Future Financial Advice) Regulation (**Revising FOFA Regulation**), which commenced on 16 December 2014. The second tranche of refinements was made, also with bipartisan support, through the Regulation, which commenced on 1 July 2015.
>
> The majority of the amendments made through the Revising FOFA Regulation and the Regulation will also be enacted in legislation through the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014, which is currently before the Senate and will be subject to full Parliamentary scrutiny.
>
> In summary, the purpose of amending FOFA through the Regulation was to swiftly deal in a bipartisan manner with disruption to the financial services sector caused by disallowance of the Streamlining FOFA Regulation and the expiry of ASIC's facilitative approach to compliance with FOFA provisions.

Committee's first response

The committee commented as follows:

The committee thanks the Assistant Treasurer for the response.

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 notes the minister's claim that the purpose of the regulation is:

> …to swiftly deal in a bipartisan manner with disruption to the financial services sector caused by disallowance of the Streamlining FOFA Regulation and the expiry of ASIC's facilitative approach to compliance with FOFA provisions.

The committee also notes the minister's advice that:

> The majority of the amendments made through the Revising FOFA Regulation and the Regulation will also be enacted in legislation through the Corporations Amendment (Streamlining of Future of

> Financial Advice) Bill 2014, which is currently before the Senate and will be subject to full Parliamentary scrutiny.

The committee notes the current progress of the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014, namely that it was introduced into the Senate on 1 July 2014.

The committee remains concerned that the minister's position is capable of forming a precedent for the use of delegated legislation in favour of primary legislation on the basis that, due to the timing or inherent uncertainty of the Parliament's full legislative processes, it is the most convenient or preferred means to effect (interim) policy change.

While the committee notes the minster's advice that there is bipartisan support for the changes contained in the regulation, as the committee has previously noted, it is the pre-emptive character of the use of regulation in this case that gives rise to the committee's inquiries. The committee's questions on this issue point are based on the possibility that, notwithstanding the apparent bipartisan support for the regulation, the bill may not be passed in a form which contains all the measures in the regulation. The committee considers that the potential for this approach, in this and future cases, to 'permit a temporary mechanism to turn into a permanent legislative artefact', or to continue in operation despite the clearly expressed will of the Parliament (for example, if the bill were passed with amendments to remove one of the measures in the regulation or not complemented by the operation of the regulation), is critical to the assessment of whether the legislative approach offends the committee's scrutiny principle (d).

In light of these concerns about the potential for the regulation to implement changes that are subsequently not passed by the Senate, the committee has determined to give a notice of motion for disallowance to ensure that the ability to disallow the instrument is protected prior to the finalisation of the Senate's consideration of the bill.

The committee draws this matter to the Assistant Treasurer's attention.

Assistant-Treasurer's second response

The Assistant Treasurer advised:

> The disallowance of the Regulation while the Bill remains before the Parliament will have consequences for the financial advice industry and may increase the regulatory burden on financial advice businesses as they move to adhere to the original FOFA legislation. To minimise disruption to industry, I am writing to outline the Government's intentions with regards to FOFA and ask the Committee to consider withdrawing the motion to disallow the Regulation once the Bill has been considered by the Senate.
>
> The Government intends to table parliamentary amendments to the Bill in the Senate in the week beginning 23 November 2015. The parliamentary amendments being brought before the Senate entrench in legislation the majority of the changes made through the June 2015 *Corporations Amendment (Financial Advice) Regulation 2015* and December 2014 *Corporations Amendment (Revising Future of Financial Advice) Regulation*

2014, whilst also removing any changes that do not retain bipartisan support. The final Bill will maintain consumer protections and alleviate unnecessary regulatory burdens on industry.

While the parliamentary amendments are likely to be debated and passed through the Senate before the end of 1 December 2015, the revised Bill may not pass the lower House and receive Royal Assent before the disallowance motion deadline.

In settling the final parliamentary amendments to the Bill, I have been in contact with the Opposition, who have indicated that they will support the final Bill. Accordingly, I do not anticipate that there will be any inconsistencies between the Regulation and the legislation ultimately passed by Parliament. However, in the unlikely event that there is an inconsistency between the legislation and the regulations, the Government will take steps to amend the regulations as required.

The Government anticipates that once the Bill has passed, FOFA should be considered settled and given time to work. I would like to bring to the Committee's attention a further consequence of the disallowance of the Regulation. There is one measure in the Regulation that is not included in the Bill. This measure applies the wholesale and retail client distinction to FOFA and makes FOFA consistent with other parts of the *Corporations Act 2001*. This provision is not included in the Bill as this distinction has always been made in the regulations. The disallowance of the Regulation would remove this distinction to FOFA, and would result in all clients being treated as retail clients. This would result in additional costs for both advice providers and clients as the more comprehensive retail disclosure and conduct obligations would apply to wholesale clients.

Committee's second response

The committee thanks the Assistant Treasurer for the response and has concluded its examination of the instrument.

The committee notes that the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (bill) was debated and passed with Government amendments by the Senate on 24 November 2015. The committee thanks the Assistant Treasurer for seeking to ensure the passage of the bill through the Senate within the disallowance period.

Noting that the House of Representatives is yet to consider the amendments to the bill made by the Senate, the committee thanks the Assistant Treasurer for her undertaking that, should there be any inconsistency between the bill once enacted and the regulations, the Government will take steps to amend the regulations as required.

Appendix 1
Correspondence

Minister for Small Business
Assistant Treasurer

The Hon Kelly O'Dwyer MP

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

Dear Senator Williams

I appreciate the opportunity to write to the Senate Standing Committee on Regulations and Ordinances (the Committee) to outline the Government's intentions in relation to the Future of Financial Advice (FOFA) legislation and regulations.

On 16 September 2015, the Committee moved a motion to disallow the *Corporations Amendment (Financial Advice) Regulation 2015* (the Regulation). My understanding is that this motion was brought by the Committee due to concerns that the Regulation pre-empts the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (the Bill) and could lead to a situation in which the Regulation is inconsistent with the FOFA laws as outlined in the Bill.

I understand that the 15 sitting days for which the disallowance motion remains open ends on 1 December 2015. Accordingly, unless the disallowance motion is withdrawn or resolved in the negative before the end of 1 December 2015, the Regulation will be disallowed from 2 December 2015 and the law will revert to the original FOFA legislation.

The disallowance of the Regulation while the Bill remains before the Parliament will have consequences for the financial advice industry and may increase the regulatory burden on financial advice businesses as they move to adhere to the original FOFA legislation. To minimise disruption to industry, I am writing to outline the Government's intentions with regards to FOFA and ask the Committee to consider withdrawing the motion to disallow the Regulation once the Bill has been considered by the Senate.

Parliament House, Canberra ACT 2600, Australia
Telephone: 61 2 6277 7930 | Facsimile: 61 2 6273 0434

The Government intends to table parliamentary amendments to the Bill in the Senate in the week beginning 23 November 2015. The parliamentary amendments being brought before the Senate entrench in legislation the majority of the changes made through the June 2015 *Corporations Amendment (Financial Advice) Regulation 2015* and December 2014 *Corporations Amendment (Revising Future of Financial Advice) Regulation 2014*, whilst also removing any changes that do not retain bipartisan support. The final Bill will maintain consumer protections and alleviate unnecessary regulatory burdens on industry.

While the parliamentary amendments are likely to be debated and passed through the Senate before the end of 1 December 2015, the revised Bill may not pass the lower House and receive Royal Assent before the disallowance motion deadline.

In settling the final parliamentary amendments to the Bill, I have been in contact with the Opposition, who have indicated that they will support the final Bill. Accordingly, I do not anticipate that there will be any inconsistencies between the Regulation and the legislation ultimately passed by Parliament. However, in the unlikely event that there is an inconsistency between the legislation and the regulations, the Government will take steps to amend the regulations as required.

The Government anticipates that once the Bill has passed, FOFA should be considered settled and given time to work.

I would like to bring to the Committee's attention a further consequence of the disallowance of the Regulation. There is one measure in the Regulation that is not included in the Bill. This measure applies the wholesale and retail client distinction to FOFA and makes FOFA consistent with other parts of the *Corporations Act 2001*. This provision is not included in the Bill as this distinction has always been made in the regulations. The disallowance of the Regulation would remove this distinction to FOFA, and would result in all clients being treated as retail clients. This would result in additional costs for both advice providers and clients as the more comprehensive retail disclosure and conduct obligations would apply to wholesale clients.

The debate of the revised Bill in the Senate, which is expected to be in the week commencing 23 November 2015, should provide the Committee with certainty on the Government's intentions regarding FOFA and address the Committee's concerns about possible inconsistencies between the Regulation and legislation. To minimise disruption to industry, I would ask the Committee to consider withdrawing the motion to disallow the Regulation once the revised Bill has been debated in the Senate.

Yours sincerely

Kelly O'Dwyer

Appendix 2
Guideline on consultation

Purpose

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 or instrument-maker 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 or instrument-maker 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 instrument-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 ESs 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/Regulations_and_Ordinances or by contacting the committee secretariat at:

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

Phone: +61 2 6277 3066
Fax: +61 2 6277 5881
Email: RegOrds.Sen@aph.gov.au