

The Senate

Standing
Committee on
Regulations and
Ordinances

Report on the work of the committee
in 2013-14

Report no. 119

July 2013 – June 2014

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ISSN: 2206-3730 (Print)

ISSN: 2206-3749 (Online)

This document was prepared by the Senate Standing Committee on Regulations and Ordinances and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Committee information

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

Former members 2013-14

Senator the Hon Ron Boswell (13.11.13 – 30.06.14)	Queensland, NAT
Senator the Hon Michaelia Cash (02.02.10 – 07.02.13)	Western Australia, LP
Senator the Hon Richard Colbeck (Deputy Chair) (16.03.12 – 11.11.13)	Tasmania, LP
Senator Sam Dastyari (12.11.13 – 12.11.15)	New South Wales, ALP
Senator Sean Edwards (Chair) (13.11.13 – 01.07.14)	South Australia, LP
Senator Mark Furner (Chair) (01.07.11 – 11.11.13)	Queensland, ALP
Senator Claire Moore (14.2.08 – 11.11.13)	Queensland, ALP
Senator Louise Pratt (21.06.12 – 11.11.13)	Western Australia, ALP
Senator the Hon Scott Ryan (18.11.10 – 11.11.13)	Victoria, LP
Senator the Hon Arthur Sinodinos AO (07.02.13 – 11.11.13)	New South Wales, LP

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Chapter 1

Introduction

Work of the committee

1.1 The Senate Standing Committee on Regulations and Ordinances (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.

1.2 In most years, thousands of instruments of delegated legislation are made, relating to many aspects of the lives of Australians. Instruments of delegated legislation have the same force in law as primary legislation, and may form as much as half of the law of the Commonwealth of Australia.¹

1.3 The committee's work may be broadly described as technical legislative scrutiny, as it does not generally extend to the examination or consideration of the policy merits of delegated legislation. The scope of the committee's scrutiny function is formally defined by Senate Standing Order 23, which requires the committee to scrutinise each instrument to ensure:

- that it is in accordance with the statute;
- that it does not trespass unduly on personal rights and liberties;
- that it does not make the rights and liberties of citizens unduly dependent on administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- that it does not contain matter more appropriate for parliamentary enactment.

1.4 The committee's work is supported by processes for the registration, tabling and potential disallowance of legislative instruments, which are established by the *Legislation Act 2003*.²

1.5 This report on the work of the committee covers the 2013-14 financial year period.

Committee membership

1.6 Senate Standing Order 23(1) provides that the committee is appointed at the commencement of each Parliament. The committee has six members: three senators drawn from the government party and three senators drawn from non-government parties. The committee is chaired by a government senator.

1 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 416.

2 On 5 March 2016 the *Legislative Instruments Act 2003* became the *Legislation Act 2003* due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015*. The *Legislation Act 2003* and the disallowance process are discussed in Chapter 2.

1.7 Current members at May 2016 are as follows:

- Senator John Williams (Chair);³
- Senator Gavin Marshall (Deputy Chair);⁴
- Senator Claire Moore;⁵
- Senator Nova Peris OAM;⁶
- Senator Linda Reynolds CSC;⁷ and
- Senator Zed Seselja.⁸

1.8 The following senators were also members of the committee during the reporting period:

- Senator the Hon Ron Boswell;⁹
- Senator Sam Dastyari;¹⁰ and
- Senator Sean Edwards (Chair).¹¹

Independent legal adviser

1.9 The committee is assisted by an external legal adviser, who reports on each instrument that comes before the committee. The committee's legal adviser during the reporting period was Mr Stephen Argument.

The committee's mode of operation

Delivery of instruments

1.10 Legislative instruments must be registered and, within six sitting days of registration, tabled in both Houses of Parliament.¹² Once registered, the instruments are delivered to the two Houses for tabling, and to the committee secretariat.

1.11 In relation to non-legislative disallowable instruments, the individual department administering the authorising Act under which any such instrument is made is responsible for delivering copies to both Houses for tabling, as well as to the committee secretariat.

3 Appointed 01.07.14 (elected Chair on 09.07.14).

4 Appointed 12.11.13 (appointed Deputy Chair on 14.11.13).

5 Member from 14.2.08 to 11.11.11; and appointed 12.11.15.

6 Appointed 12.11.13.

7 Appointed 01.07.14.

8 Appointed 13.11.13.

9 Member from 13.11.13 to 30.06.14.

10 Member from 12.11.13 to 12.11.15.

11 Member from 13.11.13 to 01.07.14.

12 *Legislation Act 2003*, sections 15G and 38 (previously *Legislative Instruments Act 2003*, sections 30, 38 and 39).

Scrutiny of instruments

1.12 Instruments tabled in Parliament are scrutinised by the committee secretariat and legal adviser with reference to the committee's scrutiny principles.

1.13 The committee meets regularly, during sittings of Parliament, to consider any instruments that may breach its scrutiny principles, and to determine the appropriate course of action.

1.14 Where an instrument raises a concern referable to the committee's scrutiny principles, the committee's usual approach is to write to the responsible minister seeking further explanation or information, or seeking an undertaking for specific action to address the issue of concern.

Committee's use of the disallowance process

1.15 The committee's scrutiny of instruments is generally conducted within the timeframes that apply to the disallowance process, as set out in chapter 2. Working within these timeframes ensures that the committee is able, if necessary, to seek disallowance of an instrument about which it has concerns. Such disallowance motions based on the recommendation of the committee have, without exception, been adopted by the Senate.¹³

1.16 In cases where the 15 sitting days available for giving a notice of motion for disallowance is likely to expire before a matter is resolved, the committee may give a notice of motion for disallowance in order to protect the Senate's ability to subsequently disallow the instrument in question. Such notices are referred to as 'protective notices'.¹⁴

Undertakings

1.17 In many cases, ministers and other instrument makers provide an undertaking to address the committee's concern through the taking of steps at some point in the future. Typically, an undertaking will relate to the making of amendments to primary or delegated legislation. The acceptance of such undertakings has the benefit of securing an outcome agreeable to the committee, without interrupting the administration and implementation of policy by disallowance of the instrument in question.

Committee publications and resources

1.18 The following committee publications and resources may be accessed at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments.

13 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 424.

14 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 432.

Senate disallowable instruments list

1.19 The 'Senate disallowable instruments list' (SDIL) is a list of all disallowable instruments tabled in the Senate.¹⁵ This online resource may be used to ascertain whether or when an instrument has been tabled in the Senate, and how many sitting days remain in which a notice of motion for disallowance may be given.

1.20 The SDIL is updated after each sitting day.

Delegated legislation monitor

1.21 The *Delegated legislation monitor* (the monitor) is the regular report on the work of the committee, and is published in each sitting week of the Senate. The monitor details matters raised in relation to disallowable instruments of delegated legislation that are tabled in the Senate and subsequently scrutinised by the committee.

1.22 Prior to 2013, the monitor provided only statistical and technical information on instruments scrutinised by the committee in a given period.

'Index of matters' webpage

1.23 The 'Index of matters' webpage (formerly the 'Scrutiny of Disallowable Instruments' list) is a list, by meeting date and monitor number, of all the disallowable instruments about which the committee has raised a concern. Full comments on individual matters are contained in the relevant monitor.

'Disallowance Alert' webpage

1.23 The 'Disallowance Alert' webpage (the alert) is a list of all instruments subject to a notice of motion for disallowance (whether at the instigation of the committee or an individual senator or member). The progress and outcome of any such notice is also recorded.

Senate Procedure Office seminar on delegated legislation and the Senate

1.24 The Senate Procedure Office conducts half-day seminars on the Senate's scrutiny of delegated legislation. These are tailored to parliamentary staff, government officers and other stakeholders whose work or interests intersect with the work of the committee.

1.25 Information on seminar dates and booking inquiries may be accessed through the Senate website.¹⁶

Structure of the report

1.26 Chapter 2 provides an overview of delegated legislation and the disallowance process, including discussion of the *Legislation Act 2003*.

15 As instruments may be tabled on different dates in the Senate and the House of Representatives respectively (and hence have different disallowance timeframes), there is also a House of Representatives disallowable instruments list. This list is available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments.

16 See Parliament of Australia website, 'Seminars for public servants' http://www.aph.gov.au/About_Parliament/Senate/Whats_On/Seminars_and_Lectures/Seminars_for_public_servants.

1.27 Chapter 3 reports on the work of the committee during 2013-14.

Acknowledgements

1.28 The committee wishes to acknowledge the work and assistance of its legal adviser in the reporting period, Mr Stephen Argument.

1.29 The committee also wishes to acknowledge the assistance of ministers and associated departments and agencies during the reporting period. The responsiveness of ministers, departments and agencies to the committee's inquiries is critical to ensuring that the committee can perform its scrutiny function effectively.

Chapter 2

Delegated legislation and the disallowance process

Introduction

2.1 This chapter provides an overview of delegated legislation, the disallowance process and the *Legislation Act 2003* (LA).¹

What is delegated legislation?

2.2 Many Acts of Parliament delegate to executive government the power to make regulations, ordinances, rules and other instruments (such as determinations, notices, orders and guidelines). Such instruments supplement their authorising Act, and have the same force in law. 'Delegated legislation' is a collective term referring to such instruments.

2.3 Because they are made under a delegated power, instruments of delegated legislation are not directly enacted by the Parliament, as must happen for a bill to become an Act with the force of law. Therefore, to ensure that Parliament retains effective oversight, any such instrument is usually: (a) required to be registered on the Federal Register of Legislation;² (b) required to be tabled in the Parliament; and (c) subject to a disallowance process prescribed by the LA, which may be initiated by any member of either the Senate or the House of Representatives.

What is a disallowable instrument?

2.4 A 'disallowable instrument' is an instrument of delegated legislation that is subject to the disallowance process prescribed by the LA (see below for a description of the disallowance process).

Legislative instruments

2.5 Subsection 8(4) of the LA states that an instrument is a legislative instrument if:

- (a) the instrument is made under a power delegated by the Parliament; and
- (b) any provision of the instrument:
 - (i) determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and

1 On 5 March 2016 the *Legislative Instruments Act 2003* (LIA) became the *Legislation Act 2003* due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015*.

2 Following the changes to the LIA (see previous note), the Federal Register of Legislative Instruments (FRLI) is now called the Federal Register of Legislation and may be accessed at <http://www.comlaw.gov.au/>.

(ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

2.6 Specifically, subsection 8(3) provides that an instrument made under a power delegated by the Parliament is a legislative instrument if it is registered on the Federal Register of Legislation; and subsection 10 provides that particular types of instruments, such as regulations and ordinances, are to be classed as legislative instruments.

Exemptions from disallowance

2.7 Paragraph 44(2)(b) of the LA provides that regulations may be made that exempt a legislative instrument from disallowance.³ Such instruments are not subject to the committee's scrutiny.

Legislation Act 2003

2.8 Prior to 2005, the committee's scrutiny of delegated legislation was wholly governed by the *Acts Interpretation Act 1901* (AIA), which contained the scheme requiring regulations and other disallowable instruments to be tabled in Parliament and subject to the disallowance regime.

2.9 On 1 January 2005, the AIA scheme was replaced by the scheme set out in the LIA. While the LIA largely replicated the previous scheme, it included a number of important innovations, such as the requirement for the registration of instruments on FRLI.

2.10 The main elements of the scheme contained in the LIA (and now in the LA) are:

- instruments of delegated legislation that are of a legislative character are subject to the disallowance process outlined in the Act;
- such instruments must be registered on the Federal Register of Legislation, along with an explanatory statement;
- once registered, such instruments must be delivered within six sitting days to each House of Parliament for tabling;⁴ and
- any member of the Senate or the House of Representatives may initiate the process to disallow any such instrument within 15 sitting days of it being tabled. Once such a notice has been given, a further period of 15 sitting days is available to resolve the motion.

3 Legislation (Exemptions and Other Matters) Regulation 2015 [F2015L01475].

4 Under section 38, an instrument that is not tabled in each House within six sitting days of registration ceases to have effect immediately after the sixth day.

Disallowance

Purpose

2.11 The ability of the executive—usually ministers and other executive office holders—to make delegated legislation without parliamentary enactment is a 'considerable violation of the principle of the separation of powers, [and] the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government'.⁵

2.12 The ability of a member of either the Senate or the House of Representatives to seek disallowance of legislative instruments is therefore critical to ensuring that Parliament retains effective oversight of delegated legislation.

The disallowance process

2.13 The disallowance process is set out in subsection 42(1) of the LA, which provides:

(1) If:

(a) notice of a motion to disallow a legislative instrument or a provision of a legislative instrument is given in a House of the Parliament within 15 sitting days of that House after a copy of the instrument was laid before that House; and

(b) within 15 sitting days of that House after the giving of that notice, the House passes a resolution, in pursuance of the motion, disallowing the instrument or provision;

the instrument or provision so disallowed then ceases to have effect.

2.14 In summary, subsection 42(1) provides that any member of the Senate or House of Representatives may, within 15 sitting days of a disallowable legislative instrument being tabled, give notice that they intend to move a motion to disallow the instrument or a provision of that instrument. There is then a further 15 sitting days in which the motion may be resolved.

2.15 The maximum time for the entire disallowance process to run its course is therefore 30 sitting days (assuming the maximum available period elapses for both the giving of notice and the resolution of the motion to disallow the instrument or provision).

Unusual disallowance processes

2.16 In some cases, the disallowance process may be modified by the authorising legislation under which an instrument is made, affecting the period available for giving or resolving a notice of motion for disallowance.

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

2.17 For example, for a determination made under subsections 20(1) or (2) of the *Financial Management and Accountability Act 1997*, the time available for both giving and resolving a notice of motion for disallowance is only five sitting days.⁶

Effect of disallowance

2.18 Subsections 42(1) and 45(1) of the LA provide that, where a motion is passed to disallow a legislative instrument or a provision of an instrument, that instrument or provision ceases to have effect from the time the motion was passed.

2.19 If the disallowed instrument or provision repealed all or part of an earlier instrument, then that earlier instrument or part is revived.⁷

2.20 Subsection 42(2) of the LA provides that, where a notice of motion to disallow a legislative instrument or a provision of an instrument remains unresolved after 15 sitting days of being given (for example, where it has not been withdrawn or put to the question), the instrument or provision is deemed to have been disallowed and therefore ceases to have effect from that time. This provision ensures that the disallowance process cannot be frustrated by allowing a motion for disallowance to be adjourned indefinitely.

Restrictions on re-making legislative instruments

2.21 In order to ensure that Parliament's power of disallowance may not be circumvented, and to preserve the Parliament's intention in any case where a House has disallowed an instrument, the LA imposes restrictions on the re-making of legislative instruments that are the 'same in substance' as an existing or recently disallowed instrument. These are:

- for a period of seven days, unless approved by resolution by both Houses of Parliament, an instrument may not be made that is the same in substance as a registered instrument that has been laid before both Houses of Parliament (or, if it was tabled on different days, seven days after it was last tabled). This prevents the disallowance provisions from being circumvented by an instrument being successively repealed and remade;⁸
- an instrument may not be made that is the same in substance as an existing instrument that is subject to a notice of motion for disallowance (unless the notice is withdrawn; the instrument is deemed to have been disallowed under subsection 42(2); or the motion is withdrawn, otherwise disposed of or subject to the effect of subsection 42(3)). This prevents an instrument simply being remade in response to notice of a motion for disallowance;⁹ and

6 *Financial Management and Accountability Act 1997*, section 22 (this provision was preserved by Schedule 4 to the Legislative Instruments Regulations 2004).

7 LA, subsection 45(2).

8 LA, section 46.

9 LA, section 47.

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- for a period of six months, an instrument may not be made that is the same in substance as an instrument that has been disallowed under section 42 (unless the House which disallowed the instrument, or in which the instrument was deemed to have been disallowed, rescinds the resolution that disallowed the instrument or approves it being made). This prevents an instrument that has been disallowed, or deemed to have been disallowed, from simply being remade.¹⁰

Senate procedures relating to the disallowance process

2.22 A number of the Senate's procedures are relevant to the disallowance process in the LA.

2.23 Standing Order 78(3) is a significant example of one such procedure, whereby any senator has the opportunity to take over a motion for disallowance if the original mover seeks to withdraw that motion. This ensures that the Senate is not denied the right to disallow an instrument where the time for giving notice has passed; and that the right of individual senators to move for disallowance is not lost by the withdrawal of the notice.¹¹

2.24 Another example is Standing Order 86, which prevents the proposing of a question that is the same in substance as any question that has been determined during the same session (the same question rule). This order is qualified by the proviso that it shall not prevent a motion for the disallowance of an instrument substantially the same in effect as one previously disallowed.

2.25 For further detail on Senate procedures relevant to delegated legislation and disallowance, see *Odgers' Australian Senate Practice*, 13th Edition (2012), Chapter 15.

10 LA, section 48. For more detail see *Odgers' Australian Senate Practice*, 13th Edition (2012), pp 420, 434-435.

11 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 430.

Chapter 3

Work of the committee in 2013-14

3.1 This chapter discusses the work of the committee and matters of note in the reporting period.

Number of instruments considered

3.2 The committee held a total of nine private meetings in 2013-14, at which it considered 1614 instruments.

3.3 The number of instruments examined was lower than in 2012-13 (2084) and 2011-12 (1753), but within the normal range of variation across separate years. It is likely that the holding of the federal election on 7 September 2013 contributed to the lower number of instruments examined by the committee, because fewer instruments are usually made in election periods.

Instruments of concern and notices

3.4 Of the 1614 instruments examined by the committee in 2013-14, 241 instruments were identified as raising a concern.¹

3.5 The issues raised by these instruments are classified with reference to the committee's scrutiny principles as shown in Table 1, with the previous year's figures provided as a comparison.

Table 1: Issues identified by the committee in 2013-14 and 2012-13

Year	Instruments commented on	Issues against committee's principles			
		(a)	(b)	(c)	(d)
2013-14	241	219 (90%)	14 (6%)	2 (1%)	6 (3%)
2012-13	283	213 (75%)	56 (20%)	12 (12%)	2 (1%)

3.6 As Table 1 shows, the majority of issues raised by the committee were referable to scrutiny principle (a), which requires that instruments of delegated legislation are made in accordance with statute, such as the *Legislative Instruments Act 2003* (LIA);² and the *Acts Interpretation Act 1901* (AIA)—the broad nature of this

1 Details of these instruments may be found on the 'Index of Matters' webpage at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index. The 138 instances in which the committee raised the failure to identify the relevance of subsection 33(3) of the *Acts Interpretation Act 1901* are not included in the index (see *Delegated legislation monitor* No. 3 of 2013 (14 March 2013)).

2 On 5 March 2016 the *Legislative Instruments Act 2003* was renamed the *Legislation Act 2003* (due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015*). References in this chapter are generally to the *Legislative Instruments Act 2003*, which was the applicable Act in the reporting period.

principle generally captures a wide variety of issues. The spread of issues across the committee's remaining scrutiny principles is broadly comparable with the previous year.

Notices

3.7 The committee gave four notices of motion for disallowance in the reporting period. All of these were subsequently withdrawn following a satisfactory response or undertaking from the instrument-maker in relation to the concerns raised by the committee.

3.8 Twenty-seven notices of motion for disallowance were given by individual members and senators in their own capacity. Details of these are provided on the committee's 'Disallowance Alert' webpage.³

Undertakings

3.9 During the reporting period:

- three undertakings were implemented (see Appendix 1).
- two undertakings to amend legislation were provided to address concerns raised by the committee (see Appendix 1); and
- five undertakings remained outstanding at 30 June 2014 (see Appendix 1).

3.10 The committee continues to monitor the status of outstanding undertakings and, where necessary, to correspond with relevant ministers and instrument-makers regarding their implementation.

3.11 The committee also notes that nine instruments with outstanding undertakings were repealed during the reporting period (see Appendix 1).

Delegated legislation monitors

3.12 In the reporting period the committee tabled nine *Delegated legislation monitors* (No. 8 of 2013 (4 December 2013) to No. 7 of 2014 (25 June 2014)).

Impact of the *Williams* case on the work of the committee

3.13 In June 2012, the High Court delivered its judgement in *Williams v Commonwealth* ((2012) 248 CLR 156) (*Williams*).

3.14 In brief, the High Court held that the Commonwealth executive did not have the power to enter into a funding agreement with a private company that provided chaplaincy services to a Queensland government school under the National School Chaplaincy Program (NSCP). The decision was based on a narrower view of the scope of the executive power to enter into contracts with private parties and spend public

3 The Disallowance Alert is found at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

monies without statutory authority, and had the effect of casting doubt over the constitutional validity of a significant proportion of Commonwealth expenditure.⁴

3.15 The government's response was to propose section 32B of the *Financial Management and Accountability Act 1997*, to provide legislative authority for the government to spend monies on programs listed in Schedule 1AA to Financial Management and Accountability Regulations 1997 (FMA regulations). On enactment, this allowed for the authorisation of expenditure on such programs via the making of regulations adding the particulars of those programs to Schedule 1AA of the FMA regulations.⁵

3.16 With effect from 1 July 2014, the *Financial Management and Accountability Act 1997* was amended and renamed the *Financial Framework (Supplementary Powers) Act 1997*. The Financial Management and Accountability Regulations 1997 were renamed the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) regulations).

3.17 The committee has since scrutinised any such regulations in accordance with Senate Standing Orders and with reference to its scrutiny principles.

Availability of independent review of decisions

3.18 In *Delegated legislation monitor* No. 1 of 2013 (7 February 2013), the committee reported on its examination of the Financial Management and Accountability Amendment Regulation 2012 (No. 7) [F2012L01988] and the Financial Management and Accountability Amendment Regulation 2012 (No. 8) [F2012L02091].⁶ These regulations, respectively, added a program to Schedule 1AA of the FMA regulations to allow for the provision of financial assistance to persons acquiring Commonwealth property; and amended a program that provides a number of payment arrangements in relation to the Mature-Age Participation-Assistance Program.

3.19 The committee noted that the new and amended programs appeared to provide for decisions to be made in relation to the allocation of financial assistance and payments. However, the committee noted that no further information was supplied about the nature of the programs—such as the process and criteria for decision-

4 For a fuller account of the decision, see Ryall, Glenn, 'Williams v. Commonwealth—A Turning Point for Parliamentary Accountability and Federalism in Australia?', Department of the Senate, Papers on Parliament No. 60, March 2014.

5 On 20 December 2013 the Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089] added Schedule 1AB to the FMA regulations. After this date arrangements, grants and programs have been specified under Schedule 1AB rather than Schedule 1AA. This was a technical change to avoid the need to group items under the administering department (as required under Schedule 1AA). See Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089], explanatory statement, pp 1-2.

6 See *Delegated legislation monitor* No. 1 of 2013 (7 February 2013).

making under the programs and the availability of independent review of such decisions.

3.20 The committee therefore sought further information from the Minister for Finance and Deregulation (the minister) in relation to scrutiny principle (c), which requires the committee to ensure that instruments of delegated legislate do not make the rights and liberties of citizens unduly dependent on administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

3.21 In response, the minister provided the committee with detailed information about the purpose of, and decision-making criteria relevant to, each of the programs. The minister advised that decisions made under the programs would not be subject to merits review, because they involved the allocation of finite resources and the re-making of such decisions under merits review would necessarily affect allocations made to other parties (such decisions being recognised as being generally unsuitable for merits review).⁷

3.22 In addition, in correspondence to the Senate Standing Committee for the Scrutiny of Bills the minister advised that decisions made under the programs were also not subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1997* (ADJR Act); and noted that the policy reasons for excluding ADJR Act review of decisions made under items listed in Schedule 1AA of the FMA regulations had been set out in the explanatory memorandum (EM) to the *Financial Framework Legislation Amendment Act (No. 3) 2012*.⁸ Those reasons included that the exclusion of ADJR Act review maintained the 'status quo' in relation to similar decisions prior to the outcome in the *Williams* case, and that limited review of decisions was still possible under the *Judiciary Act 1903* and section 75(v) of the Constitution.

3.23 The minister also advised the committee of further protections and mechanisms available to persons affected by spending decisions, including the rules governing financial decision making under the *Commonwealth Procurement Rules* and *Commonwealth Grants Guidelines* (as applicable) and recourse to the Commonwealth Ombudsman and the scheme for Compensation for Detriment Caused by Defective Administration.

3.24 The committee concluded its examination of the regulations on the basis of the information provided. However, the committee noted that the Scrutiny of Bills Committee remained concerned about the justification put forward for the exclusion of ADJR Act review, and drew the concerns of that committee to the attention of the Senate.

7 For further information on the availability of merits review in relation to particular classes of decision-making see Administrative Review Council, *What decisions should be subject to merits review?* (1999).

8 See Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2012* (19 September 2012), 'Financial Framework Legislation Amendment Act (No. 3) 2012', pp 373-375.

3.25 In the reporting period, the committee subsequently drew attention to the issue of independent review of decisions under programs authorised by inclusion in Schedules 1AA and 1AB of the FMA regulations in relation to the following regulations:⁹

- Financial Management and Accountability Amendment Regulation 2013 (No. 5) [F2013L01386];¹⁰
- Financial Management and Accountability Amendment Regulation 2013 (No. 6) [F2013L01511];¹¹
- Financial Management and Accountability Amendment Regulation 2013 (No. 7) [F2013L01512];¹² and
- Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 SLI 2013 No. 281 [F2013L02089].¹³

Addition of matters to Schedule 1AB of the FMA regulations—previously unauthorised expenditure¹⁴

3.26 In March 2014, the Chair of the Senate Standing Committee on Appropriations and Staffing, Senator the Hon. John Hogg (President of the Senate), requested that the committee monitor executive expenditure authorised by regulation

9 In the previous reporting period the committee also drew attention to the following instruments on an advice-only basis: Financial Management and Accountability Amendment Regulation 2012 (No. 7) [F2012L01988] and Financial Management and Accountability Amendment Regulation 2012 (No. 7) [F2012L01988] (see *Delegated legislation monitor* No. 1 of 2016 (7 February 2013) p. 26 and 36); Financial Management and Accountability Amendment Regulation 2013 (No. 2) [F2013L00600] (see *Delegated legislation monitor* No. 5 of 2013 (16 May 2013) p. 285); and Financial Management and Accountability Amendment Regulation 2013 (No. 3) [F2013L00802] (see *Delegated legislation monitor* No. 6 of 2013 (20 June 2013) p. 392).

10 See *Delegated legislation monitor* No. 8 of 2013 (4 December 2013) (concluded in *Delegated legislation monitor* No. 1 of 2014 (12 February 2014)).

11 See *Delegated legislation monitor* No. 8 of 2013 (4 December 2013) (concluded in *Delegated legislation monitor* No. 1 of 2014 (12 February 2014)).

12 See *Delegated legislation monitor* No. 8 of 2013 (4 December 2013) (concluded in *Delegated legislation monitor* No. 1 of 2014 (12 February 2014)).

13 See *Delegated legislation monitor* No. 1 of 2014 (12 February 2014) (concluded in *Delegated legislation monitor* No. 4 of 2014 (26 March 2014)).

14 Schedule 1AB was added to the Financial Management and Accountability (FMA) Regulations on 20 December 2013 by the FMA Amendment (2013 Measures No. 1) Regulation 2013. Prior to this, section 32B of the FMA Act authorised arrangements, grants and programs to be listed in Schedule 1AA of the FMA Regulations. See Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089], explanatory statement, pp 1-2.

under the *Financial Framework Legislation Amendment Act (No 3) 2012*, and report on such expenditure to the Senate.¹⁵

3.27 In making this request, the Chair noted that it is a fundamental role of Parliament to approve appropriations and authorise revenue and expenditure proposals.

3.28 Section 83 of the Constitution provides that no money shall be drawn from consolidated revenue 'except under appropriation made by law'. While the Senate may not amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government, it may directly amend an appropriation bill not for the ordinary annual services of the government (section 53 of the Constitution). Such bills must contain only appropriations for that purpose (section 54 of the Constitution). In June 2010, the Senate reaffirmed this constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. It stated that appropriations for expenditure on new policies not previously authorised by special legislation are not appropriations for the ordinary annual services of the government, and that proposed laws for the appropriation of revenue or moneys for expenditure on matters such as new expenditure shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.¹⁶

3.29 In the context of these provisions of the Constitution, the Chair identified a deficiency in the Senate's scrutiny of executive expenditure authorised via the making of regulations to add items (programs) to Schedule 1AB of the FMA regulations (the response of the executive to the *Williams* judgment as described above at paragraph 3.14), specifically in relation to items of expenditure inappropriately classified as the ordinary annual services of the government. The Chair noted that previously such items were drawn to the attention of the Senate Standing Committee on Appropriations and Staffing and legislation committees examining estimates of expenditure; and a list of such items was also drawn to the attention of the Minister for Finance. However, post *Williams*, it was possible for items inappropriately classified as ordinary annual services of the government to be included in FMA regulations without direct parliamentary approval, effectively reducing the scope of the Senate's scrutiny of government expenditure.

3.30 The Chair therefore proposed that the committee's scrutiny of legislative instruments include a specific assessment of the nature of executive expenditure (in accordance with the committee's scrutiny principle (d)).

3.31 The committee has since routinely examined regulations authorising expenditure via the addition of items (authorised arrangements, grants and programs)

15 Correspondence from the Chair of the Senate Standing Committee on Appropriations and Staffing, Senator the Hon. John Hogg (President of the Senate), to the Standing Committee on Regulations and Ordinances, 17 March 2014. See Appendix 3, *Delegated legislation monitor* No. 5 2014 (14 May 2014).

16 See *Odgers' Australian Senate Practice*, 13th ed. (2012), p. 372.

to Schedules 1AA and 1AB of the FMA regulations. Where the committee identifies items of expenditure that may have been inappropriately classified as the ordinary annual services of the government, the committee draws this fact to the attention of the Senate and the relevant standing committee.

3.32 In the reporting period, the committee drew the attention of the Senate and relevant standing committees to the following regulations in relation to this matter:

- Financial Management and Accountability Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00160];¹⁷
- Financial Management and Accountability Amendment (2014 Measures No. 2) Regulation 2014 [F2014L00199];¹⁸
- Financial Management and Accountability Amendment (2014 Measures No. 3) Regulation 2014 [F2014L00284];¹⁹
- Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089];²⁰ and
- Financial Management and Accountability Amendment (2014 Measures No. 4) Regulation 2014 [F2014L00436].²¹

3.33 The committee's examination of this issue provides an informative example of the Parliament's role in approving appropriations and authorising revenue and expenditure. Accordingly, the initial monitor entry in relation to this regulation is reproduced in full at Appendix 2.²²

Sunsetting of instruments

3.34 The *Legislative Instruments Amendment (Sunsetting Measures) Act 2012* (the amending Act) amended the LIA (now the *Legislation Act 2003*) to provide greater

17 See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (having drawn the matter to the attention of the Senate and relevant committees, the committee did not require a response from the minister).

18 See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (having drawn the matter to the attention of the Senate and relevant committees, the committee did not require a response from the minister).

19 See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (having drawn the matter to the attention of the Senate and relevant committees, the committee did not require a response from the minister).

20 See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (having drawn the matter to the attention of the Senate and relevant committees, the committee did not require a response from the minister).

21 See *Delegated legislation monitor* No. 6 of 2014 (18 June 2014) (having drawn the matter to the attention of the Senate and relevant committees, the committee did not require a response from the minister).

22 For further information on the role of the Senate in dealing with financial legislation see *Odgers' Australian Senate Practice*, 13th ed. (2012), Chapter 13 ('Financial legislation'), pp 343-407.

certainty about what instruments sunset and when they sunset, as well as incentives for rule-makers to review instruments thematically.²³

3.35 To help government agencies and stakeholders deal with the large number of sunseting instruments, the amending Act was intended to:

- make provision for the automatic repeal of spent instruments and provisions;
- clarify the sunseting dates of repeal for particular categories of instruments; and
- enable thematic reviews of instruments by enabling the Attorney-General to align sunseting dates of instruments.²⁴

3.36 Subsection 50(1) was inserted into the LIA to introduce a new default rule for calculating sunseting dates: the sunseting date for all instruments registered after 1 January 2005 is determined by their date of registration. Subsection 50(2) provided for all instruments made before 1 January 2005, and registered in bulk on that day (the day the LIA came into effect), to sunset over a range of dates based on their year of making, with the oldest sunseting first.²⁵

3.37 The amending Act also introduced changes to allow the Attorney-General to declare a common sunseting date—including a possible extension of up to five years—for instruments that are subject to a single thematic review.²⁶ Introducing the flexibility to align sunseting dates and cluster instruments thematically was intended to encourage a more efficient and effective review process for instruments, 'and enable departments and agencies to comprehensively engage with stakeholders prior to the remaking of any instrument'.²⁷

3.38 The committee notes that the changes to the sunseting regime provided more orderly and manageable arrangements for the sunseting of instruments. The sunseting of instruments under these provisions was due to commence in 2015.

Automatic repeal of spent and redundant instruments and provisions

3.39 As noted above at paragraph 3.34, the amending Act provided for the automatic repeal of new instruments and provisions that are wholly commencing, amending or repealing.²⁸ In other words, rather than waiting for sunseting

23 Legislative Instruments Amendment (Sunsetting Measures) Bill 2012, explanatory memorandum, p. 8.

24 Legislative Instruments Amendment (Sunsetting Measures) Bill 2012, *Bills Digest*, No. 177, Parliamentary Library, 27 June 2012, p. 2.

25 Following the changes to the LIA that commenced in March 2016, the relevant provisions are now contained in Part 4 of the *Legislation Act 2003*.

26 Since the changes to the LIA that commenced in March 2016, the relevant provisions are now contained in Part 4 of the *Legislation Act 2003*.

27 Legislative Instruments Amendment (Sunsetting Measures) Bill 2012, explanatory memorandum, p. 8.

28 Legislative Instruments Amendment (Sunsetting Measures) Bill 2012, explanatory memorandum, p. 4.

arrangements to come into effect, an instrument that has done its job is automatically repealed. Importantly, however, that instrument is still subject to the disallowance process.²⁹

3.40 From 8 November 2013, the committee commenced tracking the number of instruments automatically repealed under Part 5A of the *Legislative Instruments Act 2003*.³⁰ Between 8 November 2013 and 30 June 2014, approximately 427 of 1117 instruments registered on the Federal Register of Legislative Instruments (FRLI) were repealed under this part (approximately 38%).³¹

3.41 The amending Act also provided for the repeal by regulation of existing instruments and provisions that are no longer required. Section 48E was inserted into the LIA to support the maintenance of the FRLI by allowing such spent instruments to be repealed en masse by regulation.

3.42 In the reporting period, the following instruments repealed spent and redundant instruments under section 48E:³²

- Agriculture, Fisheries and Forestry (Spent and Redundant Instruments) Repeal Regulation 2013 [F2013L01404];³³
- Broadband, Communications and the Digital Economy (Spent and Redundant Instruments) Repeal Regulation 2013 [F2013L01530];³⁴
- Civil Aviation (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00279];³⁵
- Customs and Border Protection (Spent and Redundant Instruments) Repeal Regulation 2013 [F2013L01401];³⁶

29 These instruments are designated on FRLI (following the changes to the LIA that commenced in March 2016, FRLI is now called the Federal Register of Legislation) as 'Repealed/Ceased', with the reason for ceasing given as 'Repealed under Division 1 of Part 5A of the *Legislative Instruments Act 2003*'. Any such instrument still open to disallowance will be listed on the Senate and House of Representatives Disallowable Instruments Lists, available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments.

30 Following the changes to the LIA that commenced in March 2016, the relevant provisions are now contained in Part 3 of the *Legislation Act 2003*.

31 Following the changes to the LIA that commenced in March 2016, FRLI is now called the Federal Register of Legislation.

32 In the previous reporting period the committee also drew attention to the following instrument on an advice-only basis that did not require a response from the minister: Attorney-General's (Spent and Redundant Instruments) Repeal Regulation 2013, See *Delegated legislation monitor* No. 5 of 2013 (16 May 2013).

33 See *Delegated legislation monitor* No. 8 of 2013 (4 December 2013) (reported on an advice-only basis that did not require a response from the minister).

34 See *Delegated legislation monitor* No. 8 of 2013 (4 December 2013) (reported on an advice-only basis that did not require a response from the minister).

35 See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (reported on an advice-only basis that did not require a response from the minister).

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- Defence (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00273];³⁷
 - Education (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00276];³⁸
 - Employment (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00271];³⁹
 - Environment (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00275];⁴⁰
 - Finance (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00278];⁴¹
 - Foreign Affairs and Trade (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00266];⁴²
 - Health (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00277];⁴³
 - Human Services (Spent and Redundant Instruments) Repeal Regulation 2013 [F2013L01402];⁴⁴
 - Immigration and Border Protection (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00267];⁴⁵

36 See *Delegated legislation monitor* No. 8 of 2013 (4 December 2013) (reported on an advice-only basis that did not require a response from the minister).

37 See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (reported on an advice-only basis that did not require a response from the minister).

38 See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (reported on an advice-only basis that did not require a response from the minister).

39 See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (reported on an advice-only basis that did not require a response from the minister).

40 See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (reported on an advice-only basis that did not require a response from the minister).

41 See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (reported on an advice-only basis that did not require a response from the minister).

42 See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (reported on an advice-only basis that did not require a response from the minister).

43 See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (reported on an advice-only basis that did not require a response from the minister).

44 See *Delegated legislation monitor* No. 8 of 2013 (4 December 2013) (reported on an advice-only basis that did not require a response from the minister).

45 See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (reported on an advice-only basis that did not require a response from the minister).

- Industry, Innovation, Climate Change, Science, Research and Tertiary Education (Spent and Redundant Instruments) Repeal Regulation 2013 [F2013L01531];⁴⁶
- Infrastructure and Regional Development (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00268];⁴⁷
- Prime Minister and Cabinet (Spent and Redundant Instruments) Repeal Regulation 2013 [F2013L01528];⁴⁸
- Resources, Energy and Tourism (Spent and Redundant Instruments) Repeal Regulation 2013 [F2013L01403];⁴⁹
- Social Services (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00269];⁵⁰
- Spent and Redundant Instruments Repeal Regulation 2014 [F2014L00274];⁵¹
- Treasury (Spent and Redundant Instruments) Repeal Regulation 2013 [F2013L01535];⁵² and
- Veterans' Affairs (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00270].⁵³

3.43 The committee notes that the power to effect mass repeal of redundant instruments of delegated legislation improves the utility of FRLI by making clear which instruments have no continuing effect. Such mass repeals do not generally contribute to the reduction of 'red tape' due to the fact that the instruments are already spent.

3.44 However, in relation to the listing on FRLI of instruments repealed under Part 5A as 'Repealed/Ceased', the committee is aware of some instances of confusion as to whether such instruments remain subject to disallowance. The committee would

46 See *Delegated legislation monitor* No. 8 of 2013 (4 December 2013) (reported on an advice-only basis that did not require a response from the minister).

47 See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (reported on an advice-only basis that did not require a response from the minister).

48 See *Delegated legislation monitor* No. 8 of 2013 (4 December 2013) (reported on an advice-only basis that did not require a response from the minister).

49 See *Delegated legislation monitor* No. 8 of 2013 (4 December 2013) (reported on an advice-only basis that did not require a response from the minister).

50 See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (reported on an advice-only basis that did not require a response from the minister).

51 See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (reported on an advice-only basis that did not require a response from the minister).

52 See *Delegated legislation monitor* No. 8 of 2013 (4 December 2013) (reported on an advice-only basis that did not require a response from the minister).

53 See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (reported on an advice-only basis that did not require a response from the minister).

be concerned if parliamentarians or citizens were deterred from making objections to an instrument of delegated legislation because of a mistaken belief that it was no longer subject to disallowance.

3.45 Accordingly, the committee considers that any future review of FRLI should consider the addition of a note to the current entry for instruments repealed under Part 5A (now under Part 3 of the *Legislation Act 2003*), to make clear that, notwithstanding the fact that such instruments are repealed or ceased, they remain subject to disallowance for the full 15 sitting days from the date of tabling.

Explanatory statements: describing consultation

3.46 Under section 26 of the LIA instruments of delegated legislation must be accompanied by an ES that contains certain, prescribed information.⁵⁴ This includes a description of the nature of consultation undertaken or an explanation as to why consultation was considered unnecessary or inappropriate.

3.47 The failure to adequately address the issue of consultation and inadequate descriptions and explanations in relation to consultation has been a persistent shortcoming in ESs since the commencement of the LIA in 2005. This continued throughout 2013-14, with the committee seeking further information regarding consultation in relation to a significant number of instruments.⁵⁵

3.48 The first main deficiency in this regard was ESs that made no reference whatsoever to consultation. Correspondence with relevant ministers generally indicated that this was due to administrative oversight in the preparation of explanatory material, rather than a lack of awareness about the requirements of the LIA. In all such cases, the committee requested from the rule-maker the relevant information regarding consultation, required that the ES for the instrument be updated and sought an assurance that future explanatory material would be prepared in accordance with the requirements of the LIA.

3.49 The second main deficiency was ESs that did address the question of consultation but contained overly bare or general descriptions of the nature of consultation undertaken, or similarly inadequate explanations as to why consultation was considered unnecessary or inappropriate. While the committee does not usually interpret section 26 of the LIA (now section 15J of the *Legislation Act 2003*) as requiring a highly detailed description of consultation undertaken, it considers that a bare or very general statement of the fact that consultation has or has not taken place, is not sufficient to satisfy the requirement that an ES describe the nature of consultation undertaken or explain why it was considered unnecessary or inappropriate. In all such cases during the reporting period, the committee sought from

54 LIA, section 26 (previously LIA section 4). See also sections 17 and 18 regarding consultation requirements. Following the changes to the LIA that commenced in March 2016, the relevant provisions are now sections 15J and 17 of the *Legislation Act 2003*.

55 In September 2011 the committee produced a guideline to assist those responsible for the development of delegated legislation and ESs to properly address the requirements of the LIA in relation to consultation (see Appendix 3).

the relevant rule-maker a fuller description or explanation, and generally required that the ES in question be amended to include such further information as was subsequently provided.

Senator John Williams

Chair

Appendix 1

Undertakings 2013-14

Instrument	Date of undertaking	Undertaking
Department of Agriculture, Fisheries and Forestry		
Export Control (Animals) Amendment Order 2006 (No. 1) [F2006L02383]	13 September 2006	Amend sections 3.13 and 2.51 to provide for merits review of a decision concerning the costs that an exporter is required to pay <u>Repealed by Agriculture, Fisheries and Forestry (Spent and Redundant Instruments) Repeal Regulation 2013 [F2013L01404] [19 July 2013]</u>
	13 September 2006	Amend subsection 3.07(4) to clarify that a notice may be subject to conditions <u>Implemented by Export Control (Animals) Order 2004 [F2012C00134] [1 March 2012]</u> <u>Repealed by Agriculture, Fisheries and Forestry (Spent and Redundant Instruments) Repeal Regulation 2013 [F2013L01404] [19 July 2013]</u>
Export Control (Fees) Amendment Orders 2011 (No. 1) [F2011L01865]	21 November 2011	Amend the orders to include a note in order 55B about the possible applications of order 49 to remit the whole or part of a fee if the Secretary of the Department of Agriculture, Fisheries and Forestry thinks there is sufficient reason to do so <u>Repealed by Agriculture, Fisheries and Forestry (Spent and Redundant Instruments) Repeal Regulation 2013 [F2013L01404] [19 July 2013]</u>
Export Control (Plant and Plant Products) Order 2011 [F2011L02005]	23 November 2011	Amend the order to require that approval holders (for both container and vessel approvals) be notified in a reasonable manner that cancellation of the approval holder's approval has been made, or will occur, in circumstances where conditions relating to the container and/or vessel have changed following the inspection by an authorised officer; and clarify the use of the uncertain term 'forthwith' in the order

Instrument	Date of undertaking	Undertaking
		<u>Implemented by Export Control (Plants and Plant Products) Order 2011 [F2014C00830] [18 June 2014]</u>
Attorney-General's Department		
AusCheck Regulations 2007 [Select Legislative Instrument 2007 No. 137] [F2007L01570]	4 October 2007	Amend the note to regulation 11 to include a reference to the Cost Recovery Impact Statement that was prepared during the making of the regulations
Department of Defence		
Defence Determination 2013/19, Class of travel, remote location leave travel, aide-de-camp allowance and compulsory tuition fees – amendment	15 July 2013	Amend the determination to remove the term 'major portion of the night' from the travel provision wording, and that entitlement to a sleeper berth would be provided if any part of an overnight rail journey occurred after midnight
Defence Determination 2011/34, Financial support for legal or financial advice on death of a member under section 58B of the <i>Defence Act 1903</i>	29 November 2011	Amend the determination to specify as a mandatory requirement that the Defence Community Organisation (DCO) social worker be required to inform a potential recipient that this assistance may be accessed if they meet the relevant criteria; to clarify that submissions are to be submitted through the DCO social worker; and to specify an inclusive list of conditions which may cause difficulty with financial literacy
Department of Families, Housing, Community Services and Indigenous Affairs		
Aboriginal Land Grant (Jervis Bay Territory) By-laws 2005 [F2005L04071]	23 March 2006	Amend to: Clarify the position with regard to the return of confiscated items Clarify scope of 'commercial activities' Require wardens to produce an identity card Clarify the provision concerning the keeping of dogs and cats within the community <u>Ceased due to sunseting [1 April 2016]</u>

Instrument	Date of undertaking	Undertaking
Disability Services (Eligible Services) Approval (FaHCSIA) 2008 [F2008L01381]	15 August 2008	Amend section 5 to make the delegation powers consistent with those provided for in section 33 of the <i>Disability Services Act 1986</i> <u>Repealed by Social Services (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00269] [19 March 2014]</u>
Department of Health and Ageing		
Lodgment of Private Health Insurance Information in Accordance with the Private Health Insurance Act 2007 [F2013L00627]	16 May 2013	Amend the ambiguous use of words that incorrectly suggested a retrospective commencement date for the revoked instrument <u>Implemented by Private Health Insurance Information in Accordance with the <i>Private Health Insurance Act 2007</i> [F2013L01587] [13 August 2013]</u>
Therapeutic Goods Amendment Regulations 2003 (No. 5) [Statutory Rules 2003 No. 301] [F2003B00315]	11 March 2004	Amend the regulations to clarify the meaning of 'narrowcast transmission' in regulation 5BA; and the terms 'special interest groups' and 'programs of limited appeal' <u>Repealed by Health (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00277] [19 March 2014]</u>
Air Navigation Amendment Regulations 2009 (No. 1) [Select Legislative Instrument 2009 No. 23] [F2009L00564]	6 April 2009	Amend regulation 18 to require the Secretary of the Department of Infrastructure and Transport to provide a statement of reasons for a decision to refuse an application for an international airline licence <u>Repealed by Infrastructure and Regional Development (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00268] [19 March 2014]</u>
Civil Aviation Safety Amendment Regulations 2008 (No. 1) [Select Legislative Instrument 2008 No. 192] [F2008L03483]	11 November 2008	Amend regulations 99.115 and 99.120 to clarify the intent of the provisions regarding the need for consent in obtaining a sample for drug and alcohol testing (undertaking subsequently amended to considering the matter further when considering next substantive amendments to regulations)

Instrument	Date of undertaking	Undertaking
		<p><u>Repealed by Civil Aviation (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00279] [19 March 2014]</u></p>
<p>Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education</p>		
<p>Clean Energy Amendment Regulation 2012 (No. 1) [Select Legislative Instrument 2012 No. 12] [F2012L00417]</p>	<p>12 April 2012</p>	<p>Amend the regulation to revise the definition of ASTM (the American Society for Testing and Materials) to clarify that the reference to those standards are those as updated from time to time, unless a certain date is specified for the standard</p> <p><u>Repealed by Industry, Innovation, Climate Change, Science, Research and Tertiary Education (Spent and Redundant Instruments) Repeal Regulation 2013 [F2013L01531] [9 August 2013]</u></p>
<p>Department of Sustainability, Environment, Water, Population and Communities</p>		
<p>Environment Protection and Biodiversity Conservation Amendment Regulations 2010 (No. 1) [Select Legislative Instrument 2010 No. 100] [F2010L01366]</p>	<p>15 November 2010</p>	<p>Review the application of the offence provision in paragraph 12.58(2)(b) (likelihood of a parachutist landing in a Commonwealth reserve); and the apparent duplication of requirements in paragraphs 10.03AD(a) and (b) and clarify the intent of the provision</p> <p><u>Repealed by Environment (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00275] [19 March 2014]</u></p>
<p>Department of Veterans' Affairs</p>		
<p>Treatment Principles (Australian Participants in British Nuclear Tests) 2006 (Claims/Dental/Fees) Instrument 2010 (No. R9/2010) [F2010L02630]</p>	<p>23 November 2010</p>	<p>Amend paragraph 3.5.1 (o) to specify that acceptance of an 'other GP' fee must be dependent on the GP complying with the principles</p> <p><u>Repealed by Veterans' Affairs (Spent and Redundant Instruments) Repeal Regulation 2014 [F2014L00270] [19 March 2014]</u></p>

Instrument	Date of undertaking	Undertaking
Military Rehabilitation and Compensation (Weekly Payments - Class of Persons) Specification 2011 [F2011L00238]	17 May 2011	Amend the instrument to include examples in a note explaining the term 'financially vulnerable and significantly disadvantaged' when it is next amended; and consider at that time the suitability of the phrase
Veterans' Entitlements (Weekly Payments – Class of Persons) Specification 2011 [F2011L00240]	17 May 2011	Amend the instrument to include examples in a note explaining the term 'financially vulnerable and significantly disadvantaged' when it is next amended; and consider at that time the suitability of the phrase

Appendix 2

Addition of matters to Schedule 1AB of the FMA regulations—previously unauthorised expenditure

Financial Management and Accountability Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00160]¹

Purpose	Amends the Financial Management and Accountability Regulations 1997 to add two items to Schedule 1AB to establish legislative authority for certain spending activities in the Department of Education and the Department of Employment
Last day to disallow	16 June 2014
Authorising legislation	<i>Financial Management and Accountability Act 1997</i>
Department	Finance

Background:

In March 2014, the committee received a letter from the President of the Senate and Chair of the Senate Standing Committee on Appropriations and Staffing (Appropriations and Staffing Committee), Senator the Hon. John Hogg.² As Chair of the Appropriations and Staffing Committee, the President requested that the committee monitor executive expenditure made by regulation under the *Financial Framework Legislation Amendment Act (No 3) 2012* (Financial Framework Amendment Act), and report on such expenditure to the Senate.

The President noted that it is a fundamental role of Parliament to approve appropriations and authorise revenue and expenditure proposals. The committee notes that section 83 of the Constitution provides that no money shall be drawn from consolidated revenue 'except under appropriation made by law'. Under section 53 of the Constitution, the Senate may not amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. However, an appropriation bill not for the ordinary annual services of the government may be

1 This entry was originally published in *Delegated legislation monitor* No. 5 of 2014 (14 May 2014), pp 16-18.

2 Correspondence from the President of the Senate and Chair of the Senate Standing Committee on Appropriations and Staffing, Senator the Hon. John Hogg, to the Standing Committee on Regulations and Ordinances, 17 March 2014. See Appendix 3, *Delegated legislation monitor* No. 5 2014 (14 May 2014).

directly amended by the Senate. Section 54 of the Constitution provides that an appropriation bill for ordinary annual services must contain only those appropriations.

The committee notes that, in June 2010, the Senate reaffirmed its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. The resolution stated, amongst other things, that appropriations for expenditure on new policies not previously authorised by special legislation are not appropriations for the ordinary annual services of the government, and that proposed laws for the appropriation of revenue or moneys for expenditure on matters such as new expenditure shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.³

The importance of adequate parliamentary control of executive government was a key theme of the High Court's judgment in *Williams v Commonwealth* (2012) 248 CLR 156. The decision cast doubt on the validity of government expenditure involving direct payments to persons other than a state or territory, the only authority for which was the appropriation acts. In response to the High Court decision, the Financial Framework Amendment Act added section 32B to the *Financial Management and Accountability Act 1997*. Section 32B established a regulation-making mechanism whereby the executive can authorise expenditure on programs by amending Schedule 1AB of the Financial Management and Accountability (FMA) Regulations, rather than including those matters in primary legislation.⁴

In light of the above considerations, the President drew the committee's attention to the need to monitor a deficiency in the process of scrutinising items of expenditure which appear to have been inappropriately classified as the ordinary annual services of the government. The President noted that previously, such items were drawn to the attention of the Appropriations and Staffing Committee, and to legislation committees examining estimates of expenditure, and a list of such items was also drawn to the attention of the Minister for Finance. However, since the passage of the Financial Framework Amendment Act, items that previously may have been inappropriately classified as ordinary annual services of the government may now be included in FMA Regulations without direct parliamentary approval. The President pointed out that the authorising of expenditure in this way has effectively reduced the scope of the Senate's scrutiny of government expenditure, and therefore proposed that the committee's scrutiny of legislative instruments specifically include an assessment of the nature of executive expenditure (in accordance with the committee's scrutiny principle (d)).

3 The complete resolution is contained in *Journals of the Senate*, No. 127—22 June 2010, pp 3642-3643.

4 Schedule 1AB was added to the Financial Management and Accountability (FMA) Regulations on 20 December 2013 by the FMA Amendment (2013 Measures No. 1) Regulation 2013. Prior to this, section 32B of the FMA Act authorised arrangements, grants and programs to be listed in Schedule 1AA of the FMA Regulations. See Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089], explanatory statement, pp 1–2.

Issue:

Addition of matters to Schedule 1AB of the FMA Regulations—previously unauthorised expenditure

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

Financial Management and Accountability Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00160] adds two items to Schedule 1AB to establish legislative authority for spending activities related to two programs in the Department of Employment and the Department of Education respectively. The first item allocates \$6.9 million over three years to the Tasmanian Jobs program to establish a 'wage subsidy pilot for Tasmanian job seekers'.⁵ The second item allocates \$2.0 million over two years to the Students First—Agriculture in Education program to develop resources to help teachers better understand food and fibre production.⁶

In the committee's view, both items appear to be expenditure not previously authorised by legislation. The committee considers that, prior to the enactment of the Financial Framework Amendment Act, both items should properly have been contained within an appropriation bill not for the ordinary annual services of the government, and subject to direct amendment by the Senate. The committee will draw this matter to the attention of the relevant portfolio committee.

The committee therefore draws the attention of the Senate to the expenditure authorised by this instrument relating to the Tasmanian Jobs program and the Students First—Agriculture in Education program.

5 *Mid-Year Economic and Fiscal Outlook 2013-14*, Appendix A: Policy decisions taken since the 2013-14 Budget, Tasmanian Jobs programme — pilot, p. 139.

6 *Mid-Year Economic and Fiscal Outlook 2013-14*, Appendix A: Policy decisions taken since the 2013-14 Budget, Students First — Agriculture in Education, p. 132.

Appendix 3

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 *Legislation Act 2003* (the Act)¹ 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 *Legislation 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.

It is important to note that section 15J 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.

1 On 5 March 2016 the *Legislative Instruments Act 2003* became the *Legislation Act 2003* due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015*.

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 15J 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 15J 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:

- **Absence of consultation:** Where no consultation was undertaken the Act requires an explanation for its absence. 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 15J 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.

