

2002-2003

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

LEGISLATIVE INSTRUMENTS BILL 2003

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

(Circulated by authority of the Attorney-General,
the Honourable Philip Ruddock MP)

LEGISLATIVE INSTRUMENTS BILL 2003

OUTLINE

This Bill establishes a comprehensive regime for the registration, tabling, scrutiny and sunseting of Commonwealth legislative instruments. The Bill originated from a 1992 report of the Administrative Review Council, *Rule Making by Commonwealth Agencies*. That report described the framework governing Commonwealth legislative instruments as "patchy, dated and obscure". Previous versions of the Bill were introduced into Parliament in 1994, 1996 and 1998. The Bill contains some important advances on the previous versions of the Bill, to take advantage of advances in technology and to remove potentially adverse impacts on effective administration.

The Bill will establish an authoritative and accessible register of Commonwealth legislative instruments, which will include a reliable source of compilations and explanatory statements. The Bill will also provide for the tabling, scrutiny and sunseting of those instruments.

The proposed Government amendments to the Bill will address six of the 13 recommendations made by the Senate Standing Committee on Regulations and Ordinances following its inquiry into the Bill. The remaining recommendations do not involve legislative changes.

The amendments will:

- clarify that where the Attorney-General issues a new certificate that provides that an instrument is or is not a legislative instrument, and that certificate is contrary to a decision of a court, then that new certificate will be subject to judicial review
- require that the Register be annotated to show when an instrument has been rectified, including the nature of that rectification, the time and date that it took place, and the reasons for the rectification
- require the Secretary of the Attorney-General's Department to cause steps to be taken to ensure that legislative instruments are available to the public
- add the words "where relevant" to every reference to motions (to disallow) being seconded, to acknowledge that seconding of motions is not relevant to current Senate practice but does still occur in the House
- repeal clause 43, which allowed the consideration of a motion to disallow a legislative instrument to be deferred
- replace the provision dealing with the operation of an instrument that has a retrospective adverse effect with a provision based on the existing wording in the *Acts Interpretation Act 1901*, and
- make amendments consequential on the repeal of clause 43.

The proposed Government amendments will also make two amendments to make it clear that:

- a regulation or other instrument that is otherwise a disallowable instrument is not exempt from disallowance even if it relates to an intergovernmental scheme, and
- an instrument listed in the table in clause 44 of the Bill as being exempt from disallowance is not exempt if it is otherwise a disallowable instrument (whether by virtue of the enabling legislation or any other Act).

The proposed Government amendments will also make a minor technical correction.

FINANCIAL IMPACT STATEMENT

The amendments will have no financial impact.

NOTES ON CLAUSES

Item 1

This item makes a minor technical correction to proposed paragraph (c) of the definition of *explanatory statement* in proposed clause 4 to replace “indicate” with “indicates”.

Item 2

This item amends proposed clause 11 to clarify that where the Attorney-General issues a new certificate that provides that an instrument is or is not a legislative instrument, and that certificate is contrary to a decision of a court (which arose because of a challenge to the original certificate), then that new certificate should also be subject to judicial review.

Item 3

This item omits proposed subclause 12(2), which deals with the operation of an instrument that has a retrospective adverse effect, and substitutes a provision based on the existing wording in the *Acts Interpretation Act 1901*. Proposed subclause 12(2) was drafted to clarify, but not alter the effect of, the equivalent provision in the Acts Interpretation Act (subsection 48(2)). However, as there is a risk that, as drafted, the law would be changed, reverting to the wording from the Acts Interpretation Act, will ensure that the status quo remains.

Item 4

This item amends proposed clause 20 to require the Secretary of the Attorney-General’s Department to cause steps to be taken to ensure that legislative instruments are available to the public.

Item 5

This item amends proposed clause 23 to require the Register to be annotated to show that an instrument has been rectified, including explaining the nature of the rectification, the date and time it was made and the reason for the rectification. This will ensure that a person who is affected by the instrument which is then altered, will know what the law was at the time that the instrument was registered (at which time it is authoritative), when it was changed, what those changes were and why.

Items 6, 10, 12 and 14 to 22

These items remove references to proposed clause 43 consequential on the proposed omission of that clause (see Item 9).

Items 7 and 8

These items add the words “where relevant” to every reference to motions (to disallow) being seconded, to acknowledge that seconding of motions is not relevant to current Senate practice but does still occur in the House.

Item 9

This item repeals proposed clause 43 (which allowed deferral of consideration of a motion to disallow a legislative instrument). This clause, which is not based on a provision in the *Acts Interpretation Act 1901*, was inserted because of a recommendation by the Administrative Review Council in its 1992 report, *Rule Making by Commonwealth Agencies*. The aim of the provision was to provide a mechanism for enforcing ministerial undertakings to amend provisions in a reasonable time. The Senate Standing Committee on Regulations and Ordinances, stated in its report into the Bill on 16 October 2003, that such a provision may cause more problems than it solves, and therefore it should be removed.

Item 11

This item amends proposed subclause 44(1) to make it clear that a regulation or other instrument that is otherwise a disallowable instrument is not exempt from disallowance even if it relates to an intergovernmental scheme.

Item 13

This item amends proposed subclause 44(2) to make it clear that an instrument listed in the table in clause 44 of the Bill as being exempt from disallowance is not exempt if it is otherwise a disallowable instrument (whether by virtue of the enabling legislation or any other Act).