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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

ACTS INTERPRETATION AMENDMENT
(LEGISLATIVE INSTRUMENTS) BILL 2005

EXPLANATORY MEMORANDUM

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

ACTS INTERPRETATION AMENDMENT (LEGISLATIVE INSTRUMENTS) BILL 2005

General Outline

The main purpose of this Bill is to insert a new interpretive provision, section 15AE, into the *Acts Interpretation Act 1901*. This provision explains what is meant by the expression ‘legislative instrument’. It will make clear that wherever the term ‘legislative instrument’ appears in legislation, it has a particular meaning, that is, that instruments that are described in legislation as legislative instruments must be in writing and are legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

Including the new provision in the Acts Interpretation Act will preclude the need to define the term ‘legislative instrument’ every time it is used in legislation. The amendment was proposed, and is supported, by the Office of Parliamentary Counsel.

The Bill also contains a small number of consequential amendments to the Acts Interpretation Act.

None of the amendments makes any change to the substance of the law.

Financial Impact

The Bill will have no financial impact.

Notes on clauses

Clause 1—Short title

1. Clause 1 provides for the Act to be cited as the *Acts Interpretation Amendment (Legislative Instruments) Act 2005*.

Clause 2—Commencement

2. Clause 2 provides for the commencement of the Act. Subclause 2(1) provides that each provision of the Act specified in column 1 of the table commences, or is taken to have commenced, as specified in column 2 of the table.

3. There are three items in the table in subclause 2(1).

(a) Item 1 explains that the short title, the commencement provisions and section 3, which provides for the Schedule to the Act, will all commence on Royal Assent.

(b) Item 2 explains that Schedule 1, item 1, commences immediately after the commencement of the *Legislative Instruments Act 2003* which, as explained in column 3 of the table, commenced on 1 January 2005.

(c) Item 3 explains that Schedule 1, items 2 to 5, commence immediately after the commencement of the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* which, as explained in column 3 of the table, commenced on 1 January 2005. Items 2 to 5 of the Schedule amend provisions in the Acts Interpretation Act as amended by the Legislative Instruments (Transitional Provisions and Consequential Amendments) Act. Item 3 of subclause 2(1) is a separate item from item 2 of subclause 2(1) to reflect the order of commencement of the Legislative Instruments Act and the Legislative Instruments (Transitional Provisions and Consequential Amendments) Act. Both Acts commenced on the same day but the commencement provision in the Legislative Instruments (Transitional Provisions and Consequential Amendments) Act provided that it commenced immediately after the Legislative Instruments Act.

Clause 3—Schedule

2. Clause 3 provides for the Schedule to the Act. It provides that the provisions of the *Acts Interpretation Act 1901* specified in the Schedule are amended as set out in that Schedule. While only one Act is amended by the Schedule, clause 3 appears to indicate that more than one Act is amended. This is because clause 3 is a standard covering clause for Schedules adopting the Office of Parliamentary Counsel's drafting practice whereby, to avoid error, the clause is never modified for a particular case.

3. The amendment made by item 1 of the Schedule inserts a new section into the Acts Interpretation Act. The amendments made by items 2 to 5 of the Schedule make consequential drafting changes in four provisions of the Acts Interpretation Act.

Schedule 1—Amendment of Acts Interpretation Act 1901

Item 1

4. Item 1 inserts a new provision after section 15AD of the *Acts Interpretation Act 1901* in Part IV of the Act which is headed General Provisions.

5. The new provision to be inserted as new section 15AE explains what is meant when a provision of a law provides for the making of an instrument which is described as being a legislative instrument and what is meant when a provision of a law provides for the making of an instrument which is described as not being a legislative instrument. New section 15AE was requested by the Office of Parliamentary Counsel and will make clear that wherever the term ‘legislative instrument’ appears in legislation, it has a particular meaning.

6. Including the new provision in the Acts Interpretation Act will preclude the need to define the term every time it is used in legislation.

7. Subclause 15AE(1) provides that instruments that are described as legislative instruments:

- (a) must be in writing, and
- (b) are legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

8. The requirement that a legislative instrument must be in writing is not a requirement to be imposed by the new section but merely reflects the definition of ‘legislative instrument’ in the Legislative Instruments Act. Section 5 of that Act provides:

...a *legislative instrument* is an instrument in writing:

- (a) that is of a legislative character; and
- (b) that is or was made in the exercise of a power delegated by the Parliament.

9. The requirement in subclause 15AE(1) that a legislative instrument is an instrument in writing also does not affect the ordinary operation of subsection 33(3) of the Acts Interpretation Act, which provides that

Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, 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.

10. Subclause 15AE(1) does not have a substantive effect, as it is intended to be a definitional section and thus a shortening device. In new legislation or when amendments are made to existing legislation, the effect of subclause 15AE will be that an instrument may be described as a ‘legislative instrument’ to bring it within the ambit of the Legislative Instruments Act without the need for a more lengthy explanatory provision such as has been in use since the enactment of the Legislative Instruments Act.

11. The effect of the new subclause 15AE(1) on the drafting of new legislation will be to enable more simplified drafting of provisions dealing with instruments, so that provision x in a Bill may say,

for example, ‘the Minister may, by legislative instrument, determine’ instead of having a separate provision in that Bill which explains that ‘an instrument made under provision x is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.’

12. Thus, subclause 15AE(1) is merely a more detailed description of what is meant by the expression ‘legislative instrument’ where that expression is chosen for use in other legislation. Subclause 15AE(2) is a clarification provision to ensure that describing something as a legislative instrument does not carry any implication that it is of a legislative character (within the ordinary meaning of that term).

13. Subclause 15AE(3) deals with the opposite situation to that in subclause 15AE(1), namely that, where legislation provides that an instrument is not a legislative instrument, this means that the instrument will not be an instrument for the purposes of the Legislative Instruments Act.

14. Current drafting practice is to explain in a provision creating a power to make an instrument whether the instrument is or is not a legislative instrument for the purposes of the Legislative Instruments Act, unless there is an exemption for that instrument (or instruments of that type) in the Legislative Instruments Act or in the regulations made under the Legislative Instruments Act. Where there is an existing exemption, it is considered unnecessary to make a statement in the provision concerned that the instrument is not a legislative instrument. Current practice is that, where a statement is made that an instrument is not a legislative instrument, the Explanatory Memorandum dealing with that provision will explain whether that statement constitutes an exemption from the Legislative Instruments Act and the reasons for this or whether the statement is merely a clarification for users because the instrument is not a legislative instrument within the meaning of the definition in section 5 of the Legislative Instruments Act.

15. Similarly to subclause 15AE(2), subclause 15AE(4) is intended to ensure there are no wider implications drawn from the definition provision. Subclause 15AE(4) explains that the fact that an instrument is described as not being a legislative instrument does not carry any implication that it is not, or must not be, of a legislative character (within the ordinary meaning of that term).

16. Subclause 15AE(5) is also intended to make clear that the scope of the definitional provision is limited. It explains that in deciding whether an instrument is a legislative instrument, no implications should be drawn from the fact that other instruments in the same legislation may be described as being or not being legislative instruments. Gradually, as Commonwealth legislation comes to be amended or replaced, it is expected that references to instruments will be changed to reflect whether they are or are not legislative instruments. Until then, where it is not clear in legislation whether an instrument is or is not a legislative instrument, that question will need to be resolved by deciding whether the instrument is covered by the definition in section 5 of the Legislative Instruments Act and not exempted by another provision of that Act or regulations under the Act.

Item 2

2. Item 2 amends subsection 46(1) of the Acts Interpretation Act to make a drafting change by deleting the words ‘within the meaning of’ and substituting the words ‘for the purposes of’ in consequence of the insertion of new section 15AE. The effect of the provision is to make the provision consistent with the terminology used in proposed section 15AE, to be inserted by item 1.

3. Section 46 of the Acts Interpretation Act was a new provision inserted by the Legislative Instruments (Transitional Provisions and Consequential Amendments) Act to deal with the

construction of instruments that are not legislative instruments and which are not rules of court. The equivalent section in the Legislative Instruments Act is section 13.

4. Subsection 46(1) provides that the Acts Interpretation Act will apply to a non-legislative instrument as if it were an Act and as if each provision of the instrument were a section of an Act; that expressions in the instrument have the same meaning as within the enabling legislation; and instruments are not to exceed the power of the authority.

Item 3

5. Item 3 amends subsection 46AA(1) of the Acts Interpretation Act to make a drafting change by deleting the words ‘within the meaning of’ (wherever occurring) and substituting the words ‘for the purposes of’ in consequence of the insertion of new section 15AE. The effect of the provision is to make the provision consistent with the terminology used in proposed section 15AE, to be inserted by item 1.

6. Section 46AA of the Acts Interpretation Act was a new provision inserted by the Legislative Instruments (Transitional Provisions and Consequential Amendments) Act to deal with the construction of instruments that are not legislative instruments or rules of court. Section 46AA enables non-legislative instruments to make provision for matters by applying, adopting or incorporating (with or without modification) the provisions of any Commonwealth Act, or disallowable legislative instrument as in force at the time of incorporation or from time to time. The section also enables non-legislative instruments to make provision for matters by applying, adopting or incorporating (with or without modification) the provisions of any other instrument or writing which is in force at the time of incorporation. Section 46AA has a parallel, in relation to legislative instruments, in section 14 of the Legislative Instruments Act.

Item 4

7. Item 4 amends paragraph 46B(1)(a) of the Acts Interpretation Act to make a drafting change by deleting the words ‘within the meaning of’ and substituting the words ‘for the purposes of’ in consequence of the insertion of new section 15AE. The effect of the provision is to make the provision consistent with the terminology used in proposed section 15AE, to be inserted by item 1.

8. Section 46B of the Acts Interpretation Act was a new provision inserted by the Legislative Instruments (Transitional Provisions and Consequential Amendments) Act to deal with the construction of instruments that are not legislative instruments or rules of court. Section 46B deals with commencement and disallowance of non-legislative instruments. The equivalent provision for legislative instruments is section 12 of the Legislative Instruments Act.

9. Paragraph 46B(1) defines the instruments to which the section applies to include instruments that are not legislative instruments for the purposes of the Legislative Instruments Act or rules of court.

Item 5

10. Item 5 amends subsection 46B(2) of the Acts Interpretation Act to make a drafting change by deleting the words ‘within the meaning of’ and substituting the words ‘for the purposes of’ in consequence of the insertion of new section 15AE. The effect of the provision is to make the provision consistent with the terminology used in proposed section 15AE, to be inserted by item 1.

11. Section 46B of the Acts Interpretation Act was a new provision inserted by the Legislative Instruments (Transitional Provisions and Consequential Amendments) Act to deal with the construction of instruments that are not legislative instruments or rules of court. Section 46B deals with commencement and disallowance of non-legislative instruments. The equivalent provision for legislative instruments is section 12 of the Legislative Instruments Act.

12. Subsection 46B(2) provides the mechanism for determining the commencement day of such an instrument. It provides that an instrument or a provision of an instrument takes effect from a date specified in the instrument (this may be by reference to the commencement of an Act or a provision of an Act, or of the occurrence of an event). If no specification is made then the instrument will take effect from the first moment of the day next following the day when it is notified in the Gazette.