

1994

**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**SENATE**

**LEGISLATIVE INSTRUMENTS BILL 1994**

**EXPLANATORY MEMORANDUM**

(Circulated by authority of the Attorney-General,  
the Honourable Michael Lavarch MP)





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## LEGISLATIVE INSTRUMENTS BILL 1994

### GENERAL OUTLINE

This Bill sets out a comprehensive regime governing drafting standards and procedures for the making, publication and scrutiny of delegated legislation. This Bill implements the Government's response to the major recommendations of the Administrative Review Council's Report No. 35 'Rule Making by Commonwealth Agencies'

The Bill defines the term 'delegated legislative instrument', specifically excludes particular instruments and provides a mechanism for the issue of an Attorney-General's certificate to remove doubt about the nature of an instrument.

This Bill establishes an electronic Register of existing and future delegated legislation to be maintained by the Principal Legislative Counsel. Where a new instrument made after the commencement of the legislation is legislative in character then unless it is registered it is unable to be enforced. With existing legislative instruments provision is made for their back capturing over a period finishing on 28 February 1997 in accordance with the table set out in Clause 37 of the Bill. The legislation provides for the Principal Legislative Counsel to have responsibility to ensure that delegated legislation meets requirements of appropriateness and high quality.

As announced in the White Paper *Working Australia* issued on 26 April 1994 a consultation process will be introduced for changes to all delegated legislation affecting business. This Bill provides for Government agencies proposing legislative instruments which affect the business sector to prepare and make available a Legislative Instrument Proposal, which will set out the need for the regulation, costs and benefits, and alternative ways of achieving the objectives.

The Bill also provides a comprehensive regime for Parliamentary scrutiny of legislative instruments. It does this by re-enacting in the Bill those parts of Part XII and Section 46A of the Acts Interpretation Act that relate to delegated legislative instruments and extending their operation to all such instruments. The Bill makes consequential amendments to those provisions so that their operation in the Acts Interpretation Act is confined to administrative instruments.

The Bill makes significant amendments to Part XI of the *Acts Interpretation Act 1901*, repeals Part XII of that Act and repeals the *Statutory Rules Publication Act 1903*.

## **FINANCIAL IMPACT STATEMENT**

Establishment of the Register for delegated legislative instruments will cost \$2.78M over the years 1994/95 to 1997/98 including the staff to run the Register. In addition the staff provided for enhanced drafting resources will cost \$2.58M over the same period. Thereafter on current costings the yearly cost for both aspects will be \$0.881M.

No provision has been made for the additional cost in respect of the consultation process. This cost is to be borne by the originating agency out of its normal running costs.

## NOTES ON CLAUSES

### PART 1 - PRELIMINARY

#### Clause 1 - Short title

This clause provides for the Act to be cited as the *Legislative Instruments Act 1994*.

#### Clause 2 - Commencement

2 This clause provides that the Act commences on 1 January 1995.

#### Clause 3 - Definitions

- 3 This clause contains definitions of certain terms used in the Act. The definitions of commencement day, explanatory statement, Government business enterprise, Index, legislative instrument, Principal Legislative Counsel and Register make reference to substantive provisions of the Bill.
- 4 The clause defines making in relation to an instrument as the method by which a document becomes a legislative instrument.
- 5 The clause also defines the terms prescribed authority and principal officer in terms similar to that used in the *Freedom of Information Act 1982*.
- 6 The clause defines the statutory rules series by reference to the *Statutory Rules Publication Act 1903* and defines the term rule-maker for the purposes of the Bill.

#### Clause 4 - Definition - a legislative instrument

- 7 This clause provides a substantive definition of a legislative instrument. Subclause 4(1) provides the general requirements that the instrument be in writing, be an exercise of a power delegated by Parliament, determines a law or alters its content, and imposes an obligation, creates a right or varies or removes an obligation or right, and is binding in its application.
- 8 Subclause 4(2) provides that certain instruments are legislative instruments for the purposes of the Act. These are regulations, Ordinances, rules or by-laws and Proclamations made under an Act or Ordinance. Subclause 4(2) further includes as legislative instruments documents required to be published under the *Statutory Rules Publication Act 1903* or disallowable instruments under Section 46A or Part XII of the *Acts Interpretation Act 1901*.

- 9 Subclause 4(3) provides that instruments referred to in Schedule 1 of the Bill are not legislative instruments. Subclause 4(4) provides that because an instrument is included in Schedule 1 does not mean that it would otherwise have been a legislative instrument.
- 10 Subclause 4(5) provides that where an instrument is not a legislative instrument but the particulars of it are required to be published in the Gazette or the instrument are required to be laid before the Houses of the Parliament without provision for disallowance this Bill has no application to such an instrument whenever it is made.
- 11 The definition will provide certainty about the ambit of the Act, and reduce the likelihood of litigation seeking to define its coverage. The definition is comprehensive, and focuses on the legislative character of the instruments as the operative criterion.

#### Clause 5 - Power delegated by the Parliament

- 12 This clause defines power delegated by the Parliament to include a further power of delegation authorised by the Parliament.

#### Clause 6 - Rules of court are not legislative instruments

- 13 Clause 6 provides that rules of court are not legislative instruments for the purposes of the Act. However, the principles underlying the Act are to apply to the High Court of Australia, the Family Court of Australia, the Federal Court of Australia and the Industrial Relations Court and these are set out in Schedule 4 as amendments to the Acts establishing those courts.

#### Clause 7 - Attorney-General may certify whether instrument is legislative instrument or not

- 14 Clause 7 deals with the situation where a rule-maker is uncertain whether an existing or prospective instrument is legislative in character. It provides that the Attorney-General may determine that issue. Subclause 7(4) provides for the Attorney-General to determine whether an instrument is a legislative instrument. He must do so in writing and forward a copy of his certificate to the Principal Legislative Counsel. Subclause 7(5) provides that a certificate by the Attorney-General is conclusive of the question whether the instrument is legislative or not.

#### Clause 8 - When do provisions of legislative instruments take effect

- 15 Subclause 8(1) provides the mechanism for determining the commencement day or date of effect of a legislative instrument. It allows for date of effect from a date specified or some other time specified in the



instrument and if no specification is made then at midnight next following the time that it is registered.

- 16 Subclause 8(2) provides that a legislative instrument has no effect if it would otherwise take effect before the date of registration and as at the date of registration the rights of a person other than the Commonwealth or an authority of the Commonwealth would be adversely affected or a liability would be imposed in respect of anything done or omitted to be done before the day of registration.

#### Clause 9 - Construction of legislative instruments

- 17 Clause 9 provides for the construction of legislative instruments and is founded on the *Acts Interpretation Act 1901*. Subclause 9(2) provides that where the making of an instrument exceeds the power of the rule-maker then to the extent that the instrument is within power it is valid. Subclause 9(3) provides that where instruments require identification of matters or things the rule-maker may identify those matters or things by referring to a class or classes.

#### Clause 10 - Prescribing matters by reference to other instruments

- 18 Clause 10 provides for the reference to other instruments and is founded on the *Acts Interpretation Act 1901*.

#### Clause 11 - Effect of repeal of legislative instrument

- 19 Clause 11 sets out the effect of repeal of a legislative instrument and is founded on the *Acts Interpretation Act 1901*.

### **PART 2 - THE RESPONSIBILITIES OF THE PRINCIPAL LEGISLATIVE COUNSEL**

- 20 This Part establishes the office of Principal Legislative Counsel within the Attorney-General's Department as the office with the responsibilities under this Act and describes its responsibilities. Establishment of the office ensures that one agency bears responsibility for the standards, publication and availability of delegated legislation.

#### Clause 12 - Principal Legislative Counsel

- 21 This clause provides for the designation of an officer of the Attorney-General's Department as the Principal Legislative Counsel.

### Clause 13 - Responsibilities of the Principal Legislative Counsel

- 22 Clause 13 sets out the responsibilities of the Principal Legislative Counsel of ensuring the quality of drafting of legislative instruments, maintaining the Register of legislative instruments, maintaining a data base of registered legislative instruments, the storage of registered legislative instruments and arranging for the laying before the Parliament of registered legislative instruments and accompanying explanatory material.

### Clause 14 - Measures to ensure high standards are achieved

- 23 Clause 14(1) empowers the Principal Legislative Counsel to take steps to ensure that legislative instruments are of a high standard, are legally effective and intelligible to users. For the purposes of this provision subclause 14(2) sets out a range of steps that the Principal Legislative Counsel can take to achieve those results. These include undertaking, supervising or providing advice on the drafting of legislative instruments, and providing drafting precedents and training to officers and employees of other Departments or agencies.

## **PART 3 - CONSULTATION BEFORE MAKING LEGISLATIVE INSTRUMENTS**

### Clause 15 - Purpose of the Part

- 24 Clause 15 provides that the purpose of the Part is to outline consultation procedures to be undertaken before making a legislative instrument so as to ensure that persons likely to be affected by the instrument have an adequate opportunity to make submissions concerning the policy and content of the instrument.

### Clause 16 - What legislative instruments require consultation?

- 25 Clause 16(1) provides that for legislative instruments made after 1 January 1996 pursuant to legislation specified in Schedule 2 or any subsequent amendments to that Schedule and which is not excluded from consultation for the reasons set out in clause 19 the rule-maker must before the instrument is made seek submissions on it. Subclause 16(2) provides that the rule-maker has the discretion as to the timing of seeking the submission.

Clause 17 - Responsible Minister to decide whether particular organisations or bodies represent those affected by proposed legislative instrument

- 26 Clause 17 provides that if the rule-maker is required to invite submissions on a proposed legislative instrument the Minister responsible for the enabling legislation must decide whether sufficient consultation can be had through a particular organisation or body or groups of organisations or bodies so as to represent the interests of all those likely to be affected by the instrument.
- 27 Paragraph 17(b) provides that any decision by the Minister must be recorded in writing.

Clause 18 - Procedures for seeking and dealing with submissions

- 28 Subclause 18(1) provides that where submissions will be sought on a proposed legislative instrument the rule-maker must prepare a written Legislative Instruments Proposal. Subclause 18(2) sets out the matters that must be contained in a Legislative Instrument Proposal. These are a summary of the proposal and of the objectives to be obtained, an analysis of the means of obtaining those objectives, a broad indication of the costs benefits to the Government and the public of the proposal and a statement of reasons for the preferred approach.
- 29 Subclause 18(3) provides that if the Minister has decided to seek submissions only from specific organisations or bodies then he must give a notice to each such body containing the information required by Subclause 18(5). Subclause 18(4) operates where there are no particular organisations or bodies to represent the interests of affected persons and provides that a public notice containing the information required by Subclause 18(5) be advertised in the print or electronic media.
- 30 Subclause 18(5) specifies the contents of a notice to be given to organisations or to the public. It must contain a declaration of the intention to make a legislative instrument, indicate where copies of the Legislative Instrument Proposal and other documents can be obtained or inspected and indicate the period within which written submissions may be made on the proposal.
- 31 Subclause 18(6) provides that the period for submissions may be made is at least 21 days after the giving, publishing or broadcasting of the notice or if a lesser period is allowed, such lesser period as the Attorney-General by written notice allows because of special circumstances. Subclause 18(7) provides that any submission received within the specified period

must be considered by the rule-maker before the proposed legislative instrument is made.

#### Clause 19 - Circumstances in which submissions not required

32. Clause 19(1) sets out the specific exemptions from the requirement of the rule-maker to invite submissions on proposed legislative instruments and provides for the Attorney-General to certify in writing that the public interest requires that no consultation occur in respect of the instrument.
33. Subclause 19(2) provides that where the rule-maker is satisfied that a proposed legislative instrument comes within one of the exemptions from the requirement to invite submissions the rule-maker must record that decision in writing and set out the reasons for being so satisfied.

#### Clause 20 - Consequence of failure to seek submissions

34. Clause 20 provides that a failure to comply with this Part does not affect the validity or enforceability of a legislative instrument.

#### Clause 21 - Alterations to Schedule 2

35. Clause 21 provides that Schedule 2 setting out the Acts which enable the making of a legislative instrument directly affecting business may be amended either by a new enabling Act or by regulations under this Act.

### **PART 4 - THE FEDERAL REGISTER OF LEGISLATIVE INSTRUMENTS**

#### **Division 1 - Preliminary**

#### Clause 22 - The purpose of the Part

36. Clause 22 provides that the Part deals with the establishment of the Federal Legislative Register of Legislative Instruments and the requirements for when documents are to be registered, the procedures for registration and the consequences of failing to register those documents.

#### Clause 23 - Definitions

37. Subclause 23(1) contains definitions of lodge and working day for the purposes of this Part. Subclause 23(2) provides that where an Act or thing is required to be done within a specified number of working days that it can be done at any time after that event on the day on which the event occurs or on a working day included in the specified number of working days after that day.

## **Division 2 - The Register**

### **Clause 24 - Federal Register of Legislative Instruments**

- 38 Clause 24 provides for the establishment of a Federal Register of Legislative Instruments, and its division into Parts A, B, C and an Index. Parts A, B and C are to consist of scanned images of particular documents. The Index is to be prepared in accordance with Division 6.

### **Clause 25 - Register to be kept by computer**

- 39 Clause 25 provides that the Register is to be kept by computer, and that the regulations may provide for the manner in which the Register is kept. The regulations can also provide for the manner of altering entries on the Register and providing access to information on the Register.

### **Clause 26 - Inspection of the Register**

- 40 This clause provides that the Principal Legislative Counsel must ensure that the public can inspect the Register. Ensuring that members of the public have access to computer terminals to inspect the Register and to copies of instruments in it and obtain information from it is sufficient.

### **Clause 27 - The status of the Register and judicial notice of legislative instruments**

- 41 Subclause 27(1) provides that the Register is to be taken as a complete and accurate record of the documents whose particulars are set out in it. Subclause 27(2) provides that in any proceedings proof about the provisions and the coming into operation of a legislative instrument are not required where an instrument is extracted from the Register and that extract is printed by the Government Printer. Subclause 27(3) enables a Court or Tribunal to acquire information about the contents of the Register in any way it thinks fit.
42. Subclause 27(4) provides that a document that purports to be an extract from the Register and to have been printed by the Government Printer is what it purports to be unless the contrary is proved. Subclause 27(5) further refines the presumption by providing that if it shows a particular date or time of registration then it is presumed that the document was registered in that Part of the Register on that date and at that time unless the contrary is proved.

### **Clause 28 - Rectification of Register**

43. Subclause 28(1) provides that the Principal Legislative Counsel may rectify an error on the Register if satisfied that the Register is erroneous

because of a mistake, an omission or a false entry and is satisfied that the error can be rectified and that the error lies in the document as it appears in the Register and not in the original from which the image was taken.

44. Subclause 28(2) provides for the correction of the Index at any time for any purpose to correct entries necessitated by rectification of the Register or to annotate the Index with information concerning disallowance, repeal or revival of a legislative instrument, the revocation of an Attorney-General's certificate or any other useful information.

### **Division 3 - Registration of legislative instruments in Part A**

#### **Clause 29 - What legislative instruments can be registered in Part A**

- 45 This clause provides that legislative instruments made or deemed to be made on or after the commencing day, and legislative instruments amending prior legislative instruments after the commencing day must be registered in Part A.

#### **Clause 30 - Ordinary procedure for registration in Part A**

- 46 Subclause 30(1) sets out the ordinary registration procedure for Part A. The original of a legislative instrument which is required to be registered under clause 29 must be lodged with the Principal Legislative Counsel as soon as possible after the making of it. Subclause 30(2) provides that the Principal Legislative Counsel must register the instrument unless there is reason to doubt the instrument lodged is not the original instrument.

#### **Clause 31 - Registration of copies in certain circumstances**

- 47 Subclause 31(1) sets out the circumstances in which the Principal Legislative Counsel may register a copy of a legislative instrument. Registration of the copy does not remove the requirement to lodge the original as soon as possible. Subclause 31(2) sets out the requirements in relation to copies - the copy to be registered must be a good copy of the original and show all markings that appear on the original.

#### **Clause 32 - Explanatory statement to be lodged with the Principal Legislative Counsel**

- 48 Subclause 32(1) provides that the rule-maker must at the time of lodging an instrument for registration or soon thereafter also lodge with the Principal Legislative Counsel a statement called an explanatory statement explaining the purpose and operation of the instrument.
- 49 Subclause 32(2) sets out matters that must be contained in the explanatory statement. These include description of any document

incorporated into the instrument, a statement of the decision made on consultation under clause 17, if necessary; if consultation is necessary a description of the manner of seeking submissions and the nature of the submissions obtained; if a Legislative Instrument Proposal was not prepared the reasons for this; if submissions were certified by the Attorney-General to be provided earlier than 21 days, the statement of special circumstances why the Attorney-General so determined, if consultation was not required because paragraph 1(a) applied the statement of reasons why the rule-maker was satisfied of the relevant matters; if consultation was not required because the Attorney-General so certified under paragraph 19(1)(b), the statement of reasons why the Attorney so certified; and, finally, a copy of the relevant records of decision, determination or certificate.

- 50 Subclause 32(3) provides that a failure to lodge an explanatory statement does not affect the validity or enforceability of the instrument.

#### Clause 33 - Obligation to provide original instrument

- 51 Clause 33 provides that where a copy of an instrument has been registered the rule-maker must lodge the original instrument with the Principal Legislative Counsel.

#### Clause 34 - Original instrument to be retained by the Principal Legislative Counsel

- 52 Clause 34 provides that the Principal Legislative Counsel must retain original instruments received. Provision is made for the transfer to the Australian Archives for storage of these instruments as necessary.

#### Clause 35- Obligation to provide electronic copy of instrument

- 53 This clause provides that the rule-maker must provide an electronic copy of the instrument in the prescribed form to the Principal Legislative Counsel within 3 working days of an instrument being registered.

### **Division 4 - Registration of legislative instruments in Part B**

- 54 This division is concerned with the back-capturing of legislative instruments.

#### Clause 36 - What legislative instruments are to be registered in Part B?

- 55 Clause 36 provides for existing legislative instruments made prior to the commencing day to be registered in Part B.

#### Clause 37 - Ordinary procedure for registration in Part B

- 56 Clause 37 provides for the back-capture in a systematic basis of legislative instruments made prior to the commencing day. This is achieved by providing that instruments made from 1 January 1990 to the commencement date be back-captured by 1 September 1995, that instruments made between 1 January 1980 and 31 December 1989 be back-captured before 1 March 1996 and instruments made preceding 1 January 1980 be back-captured before 1 March 1997.
- 57 Subclause 37(2) provides that where an instrument is made after the commencement date which amends a legislative instrument made before the commencement date then back-capture of the previous instrument must be made no later than 28 days of the registration of the amendment.

#### Clause 38 - Registration of copies in certain circumstances

- 58 This clause provides for the registration of copies in Part B if the original instrument no longer exists or cannot be located and a true copy is provided. It sets out the criteria for a registerable copy.

#### **Division 5 - Registration of Attorney-General's certificates**

##### Clause 39 - Attorney-General's certificates are to be registered in Part C

- 59 This clause makes provision for the registration of Attorney-General's certificates and is self-explanatory.

#### **Division 6 - The Index**

##### Clause 40 - Information to be supplied for the Index

- 60 Subclause 40(1) requires the Principal Legislative Counsel to create and maintain an index to the documents in the Register from information supplied by rule-makers. Subclause 40(2) requires that the Index be compiled from information provided for inclusion in Parts A and B of the Register.
- 61 Subclause 40(4) sets out the information the Index is to contain for instruments, such as the identifying number of the instrument etc, and certificates, for example the identifying number of the certificate. This Subclause also sets out the requirements for the Index in respect of certificates given under Section 7 as to whether an instrument is legislative or not.



#### Clause 41 - Further material to be contained in the Index

- 62 Subclause 41(1) requires information to be supplied to the Principal Legislative Counsel regarding legislative instruments that have not been validly made and of the reasons for the invalidity.
- 63 Subclause 41(2) enables the Principal Legislative Counsel to annotate the Register upon being satisfied that a registered instrument has not been validly made.

#### **Division 7 - Effect of registration**

#### Clause 42 - Effect of failure to register a legislative instrument in Part A

- 64 Clause 42 provides that failure to register a legislative instrument required to be registered in Part A renders it unenforceable.

#### Clause 43 - Effect of failure to register a legislative instrument in Part B

- 65 Clause 43(1) provides that a legislative instrument, or its copy, required to be registered in Part B and which is not lodged before the last day for registration under section 4P, ceases to be enforceable on that day.
- 66 Subclause 43(2) provides an exception to unenforceability for failing to register an instrument in Part B where such an instrument is connected with the collection of revenue by the Commissioner of Taxation.
- 67 Subclause 41(3) provides that where an instrument becomes unenforceable it is taken to be repealed with effect from the relevant date set out in the table in subclause 37(1).

#### **PART 5 - PARLIAMENTARY SCRUTINY OF LEGISLATIVE INSTRUMENTS**

- 68 This Part replaces the provisions of Part XII of the *Acts Interpretation Act 1901* ("Acts Interpretation Act") dealing with parliamentary scrutiny of regulations and provides a system which enhances and extends scrutiny to legislative instruments made under this Act after the commencing day. Unlike Part XII, which applies only to regulations, and 'disallowable instruments' by the operation of section 46A Acts Interpretation Act, the scrutiny provisions in the Part apply to all legislative instruments made on or after the commencing day. A single exception is provided in recognition of the special position of intergovernmental schemes and bodies where uniformity between jurisdictions is required.

#### Clause 44 - The purpose of the Part

- 69 This clause is self-explanatory.

#### Clause 45 - Tabling of legislative instruments

- 70 This clause applies the requirements previously contained in paragraph 48(1)(c) and subsection 48(3) Acts Interpretation Act that regulations (and disallowable instruments under s.46A Acts Interpretation Act) be laid before each House of Parliament,
- 71 Subclause 45(1) requires the Principal Legislative Counsel to deliver to the Parliament all legislative instruments made on or after the commencing day to be laid before each House. To ensure that scrutiny of legislative instruments is timely, the period in which legislative instruments must be laid before each House is limited to six sitting days of that House.
- 72 Subclause 45(2) ensures that all legislative instruments made after commencing day will be laid before each House, irrespective of whether instruments of that kind are currently disallowable.
- 73 Subclause 45(3) provides that if the requirements of the clause are not met the instrument ceases to have effect. An instrument will cease to have effect at the end of the last day on which there could have been compliance with the requirements.

#### Clause 46 - Additional material to be tabled with the legislative instrument

- 74 Subclause 46(1) requires the explanatory statement, and any accompanying documents, lodged with the Principal Legislative Counsel under clause 32 to be delivered by the Principal Legislative Counsel to each House to be laid before it with the copy of the legislative instrument.
- 75 Subclause 46(2) requires a rule-maker who has failed to lodge the explanatory statement with the Principal Legislative Counsel before he or she delivers a copy of the legislative instrument to each House to deliver to each House a copy of the explanatory statement together with a written explanation of the delay.

#### Clause 47 - Incorporated material may be required to be made available

- 76 Under clause 10, a document may be incorporated into a legislative instrument by reference to the document in the legislative instrument. The incorporated document is not required to be registered under Part 4. To ensure, however, that Parliament has the opportunity to scrutinise the incorporated document if it so desires, clause 47 requires a document which has been incorporated by reference to be made available for inspection by either House.

## Clause 48 - Disallowance of legislative instruments

- 77 Clause 48 re-enacts with some modifications the provisions of subsections 48(4), (5), and 5A) Acts Interpretation Act and provides for the various methods by which a legislative instrument may be, or may be deemed to be, disallowed. In every case, the pre-condition is that, once a legislative instrument has been laid before a House, a notice of motion of disallowance is given within fifteen sitting days of that House.
- 78 Subclause 48(1) re-enacts the effect of subsection 48(4) Acts Interpretation Act. The subclause provides that when a resolution is passed disallowing a legislative instrument, the instrument ceases to have effect from that time, if the resolution is passed within fifteen sitting days of the giving of the notice of the motion in the House in which the resolution is passed.
- 79 Subclause 48(2) re-enacts the effect of subsection 48(5) Acts Interpretation Act. The subclause provides that where a notice of a motion to disallow a legislative instrument has been given in a House, and has not been withdrawn or the motion finally dealt with, or its consideration deferred under subclause 48(4), the legislative instrument is taken to be disallowed and ceases to have effect at the end of fifteen sitting days of that House.
- 80 Subclause 48(3) re-enacts the effect of subclause 48(5A) Acts Interpretation Act. This Subclause provides that where the House of Representatives is dissolved or expires, or the Parliament is prorogued, before the end of fifteen sitting days in the House in which a notice of motion has been given, and has not been withdrawn or the motion finally dealt with, or its consideration deferred under Subclause 48(4), the legislative instrument is taken to be laid before that House on the first sitting day after the dissolution, expiry or prorogation. The fifteen sitting day period in which a notice of motion of disallowance must be given commences again from that time.
- 81 Subclause 48(4) has no counterpart in the Acts Interpretation Act, and is inserted to facilitate parliamentary scrutiny while acknowledging the practical need for the existence of particular legislative instruments. It enables a House to defer disallowance of a legislative instrument for a period of up to six months to enable the instrument to be remade or amended to achieve a specified objective. This provides an option to a House where it finds an instrument in some way objectionable, but its immediate disallowance would have unacceptable consequences, such as creating an unacceptable gap in a legislative scheme, or of disallowing other provisions in the instrument which the House desires to have effect.
- 82 Subclause 48(4) also provides that, if a House passes such a resolution deferring consideration of a motion of disallowance, the first sitting day after the period specified in the resolution is the last day on which a

legislative instrument will be disallowed by a resolution disallowing it, or will be taken to be disallowed if the motion has not been finally dealt with by that House.

- 83 Subclause 48(5) exempts from the operation of the section certain legislative instruments which were first authorised to be made before the commencing day, but which were at that time not disallowable. The exempted instruments are those made by joint Commonwealth/State bodies, or for the purposes of such bodies, or of intergovernmental schemes.

Clause 49 - Effect of a legislative instrument ceasing to have effect

- 84 This clause re-enacts subsections 49(6) and (7) Acts Interpretation Act.
- 85 Under Subclause 49(1) the effect of an instrument ceasing to have effect under the previous clauses is the same as if the instrument had been repealed with effect from the time at which it ceased to have effect. This ensures that the same protection of rights and obligations operates as in relation to repealed instruments under Clause 11.
- 86 Subclause 49(2) provides an exception to the operation of a repeal where an instrument which ceases to have effect itself repealed a previous legislative instrument. In this case, the previous instrument is revived from the time the repealing instrument ceases to have effect.

Clause 50 - Legislative instruments not to be remade while required to be tabled

- 87 This clause re-enacts Section 50 Acts Interpretation Act to prevent the making of a legislative instrument being the same in substance as a registered instrument which has been tabled but for which the period in which that registered instrument might be disallowed has not expired.
- 88 Subclause 50(1) prohibits the making of an instrument which is the same in substance as one which has been registered during a certain period unless the making has been approved by resolution of both Houses of Parliament.
- 89 Subclause 50(2) determines the period during which the prohibition operates as seven days after the day, or later of the days, on which the instrument was laid before the Houses of Parliament. If the registered instrument was not laid before both Houses, the period is seven days after the last day on which it could have been so laid in compliance with Subclause 45(1).
- 90 Subclause 50(3) provides that an instrument made in contravention of the clause has no effect.

Clause 51 - Legislative instruments not to be remade while subject to disallowance

- 91 This Clause re-enacts Section 48B Acts Interpretation Act preventing the making of an instrument the same in substance as an instrument the subject of a notice of a motion to disallow, unless the notice has been withdrawn or the motion has been finally dealt with, except in certain circumstances.
- 92 Subclause 51(1) prevents the making of an instrument the same in substance as an instrument the subject of a notice of a motion to disallow, unless the notice has been withdrawn, the motion has been finally dealt with or after the giving of the notice of motion but before it was withdrawn or finally dealt with the House of Representatives was dissolved, expired, or Parliament was prorogued.
- 93 Subclause 51(2) provides that where an instrument has been taken to be laid before a House on a particular day because of a dissolution, expiry or prorogation, and notice of motion of disallowance has been given in that House within fifteen sitting days, an instrument the same in substance must not be made unless the notice has been withdrawn or the motion finally dealt with, or the House of Representatives has again been dissolved, or has again expired, or Parliament was again prorogued.
- 94 Subclause 51(3) provides that a legislative instrument made in contravention of the clause has no effect.
- 95 Subclause 51(4) provides that this clause does not limit the operation of the prohibitions on remaking while subject to tabling, or within six months of disallowance.
- 96 To ensure that this clause does not impede the effectiveness of the ability to defer disallowance of an instrument, subclause 51(5) excludes from the operation of the clause a legislative instrument which is made solely to remake or amend an instrument to achieve an objective of a resolution deferring consideration of that instrument.

Clause 52 - Disallowed legislative instruments not to be remade unless disallowance resolution rescinded or House approves

- 97 Subclause 52(1) re-enacts subsection 49(1) Acts Interpretation Act, preventing the making of a legislative instrument the same in substance as one which has been disallowed or taken to be disallowed for a period of six months unless either the motion of disallowance has been rescinded, or the House in which the notice of motion to disallow the instrument was given passes a resolution approving the making of such an instrument.

- 98 Subclause 52(2) re-enacts subsection 49(2) Acts Interpretation Act to provide that a legislative instrument made in contravention of the clause has no effect.

## PART 6 - MISCELLANEOUS

### Clause 53 - Amendments of other legislation

- 99 The clause provides for the amendment of other Acts as provided in Schedule 4.

### Clause 54 - Repeal of the *Statutory Rules Publication Act 1903*

- 100 The clause repeals the *Statutory Rules Publication Act 1903*.

### Clause 55 - Instruments made but not finally dealt with before the commencing day

- 101 Subclause 55(1) applies the clause to legislative instruments made before the commencing day which were disallowable under Part XII Acts Interpretation Act (whether because of the operation of s.46A Acts Interpretation Act or not).
- 102 Subclause 55(2) applies to these instruments if they had not been published or notified in the Gazette before the commencing day. In this case the instrument is treated as if made on the commencing day, and the provisions of this Bill apply to it. This does not however effect the tenor of the instrument, so matters such as a commencement day specified in the instrument will not be affected.
- 103 Subclause 55(3) applies to these instruments if they had been published or notified in the Gazette before the commencing day. In this case the previously existing requirements under the *Statutory Rules Publication Act* and the Acts Interpretation Act continue to apply to the instrument.

### Clause 56 - Delegation

- 104 Subclause 56(1) permits a Minister to delegate to the principal officer of a prescribed authority the power to make a decision under clause 17, relating to whether or not there is a body or organisation, or combination of these, which sufficiently represent the interests of those affected by a legislative instrument, for the purpose of determining whether notice will be given to the relevant body or organisation, or by public advertisement.
- 105 Subclause 56(2) permits the Principal Legislative Counsel to delegate any of his or her powers under the Act to an officer of the Attorney-General's Department.

### Clause 57 - Transitional provisions

- 106 The clause ensures that legislative instruments authorised by legislation which is introduced into the Parliament before commencing day, but which does not come into effect until after commencing day, are included in the definition. Subclause 57(1) includes instruments which would, if not for this Bill, be published in the Statutory Rules series, and subclause 57(2) includes instruments which would be 'disallowable instruments' under section 46A Acts Interpretation Act.

### Clause 58- Regulations

- 107 Subclause 58(1) provides the usual regulation making power.
- 108 Subclause 58(2) provides that Schedule 3 dealing with bodies that are Government business enterprises may be added to or omitted from by regulation.
- 109 Subclause 58(3) provides a limit on the power to amend Schedule 2, the enabling legislation providing for legislative instruments directly affecting business, provided in subparagraph 21(b)(ii). A regulation may not amend the Schedule so as to omit enabling legislation unless the Attorney-General determines in writing that a legislative instrument authorised under such enabling legislation will no longer directly affect business. This provides a mechanism to ensure that the obligation to consult before making legislative instruments provided for in enabling legislation contained in Schedule 2 is not removed by regulation inappropriately.

### SCHEDULE 1 - INSTRUMENTS THAT ARE NOT LEGISLATIVE INSTRUMENTS

- 110 The Schedule lists certain instruments which are not legislative instruments for the purposes of the Bill. The schedule is provided to resolve doubt about whether certain instruments the character of which is questionable are legislative instruments.
- 111 Items 9, 10, and 11 exclude laws of self-governing Territories, States and the former Colony of Singapore which would otherwise fall within the definition, because the power to make them has been delegated by the Parliament, or in the case of laws applied in non self-governing Territories, because they are applied as Commonwealth laws.

## SCHEDULE 2 - ENABLING LEGISLATION PROVIDING FOR LEGISLATIVE INSTRUMENTS DIRECTLY AFFECTING BUSINESS

- 112 Schedule 2 lists the legislation which provides for legislative instruments directly affecting business. The consultation procedures contained in Part 3 of the Bill apply to legislative instruments made under legislation listed in the Schedule, subject to the exceptions listed in paragraph 19(1)(a).
- 113 Legislation included in the Schedule provides for the range of legislative instruments which have a regulatory or other direct effect on business.

## SCHEDULE 3 - BODIES THAT ARE GOVERNMENT BUSINESS ENTERPRISES

- 114 Schedule 3 lists bodies that are government business enterprises. This means that Ministerial directions to these bodies are, by virtue of the inclusion of these directions in Schedule 1, not legislative instruments.

## SCHEDULE 4 - AMENDMENTS OF OTHER LEGISLATION

### *Acts Interpretation Act 1901*

#### Heading to Part XI

- 115 The current heading to Part XI is replaced by a new heading, to refer to "Non-legislative instruments " instead of "Instruments".

#### Sections 46 and 46A

- 116 Sections 46 and 46A are repealed and replaced by new sections 46, 46A and 46B.
- 117 New section 46 mirrors the effect of clause 9 in relation to instruments which are provided for by legislation but are not legislative instruments for the purposes of the Bill. It provides for the construction of legislative instruments and is founded on the current *Acts Interpretation Act 1901*. New subsection 46(2) provides that where the making of an instrument exceeds the power conferred, then to the extent that the instrument is within power it is valid. New subsection 46(3) provides that where instruments require identification of matters or things those matters or things may be identified by referring to a class or classes.
- 118 New section 46A applies to instruments which are provided for by legislation but are not legislative instruments for the purposes of the Bill. It mirrors the effect of clause 10, which provides for the reference to other instruments and is founded on the current *Acts Interpretation Act 1901*, in relation to these instruments.



- 119 New section 46B replaces the effect of current section 46A. It provides for the commencement, publication and parliamentary scrutiny of an instrument which is not a legislative instrument.

## Part XII

- 120 Part XII of the Acts Interpretation Act is repealed.

## *Administrative Decisions (Judicial Review) Act 1977*

### Schedule 1

- 121 Two paragraphs are added to Schedule 1 of the Act, excluding from review under the Act decisions by the Attorney-General under clause 7 of the Bill (certifying that an instrument is or is not a legislative instrument), and decisions of rule-makers under Part 3 of the Bill (which provides for consultation before making certain legislative instruments).

## *Family Law Act 1975*

### Subsection 123(2)

- 122 The subsection is omitted, and instead new subsection 123(2) applies the provisions of the Bill, other than clause 4 which defines 'legislative instrument', clause 7 which provides for the Attorney-General's certificate as to whether an instrument is a legislative instrument or not, and paragraph 13(a) and clause 14, which provide for the Principal Legislative Counsel to have responsibility for the standards of legislative instruments, to Rules of Court, subject to modification by the regulations.
- 123 New subsection 123(3) ensures that, despite the fact that the Principal Legislative Counsel will not have a responsibility for the standards of Rules of Court, he or she is authorised to provide drafting assistance if the Chief Justice so desires.

### After paragraph 125(1)(ba)

- 124 New paragraph 125(1) (bb) is inserted, to allow for the making of regulations modifying the provisions of the Bill in their application to Rules of Court.

### After subsection 125(1)

- 125 New subsection 125(1A) requires regulations to be made to provide for a consultation procedure to be followed in the case of Rules of Court directly affecting business, in substitution for the procedure contained in Part 3 of the Bill.

*Federal Court of Australia Act 1976*

Subsection 59(4)

- 126 The subsection is omitted, and instead new subsection 59(4)) applies the provisions of the Bill , other than clause 4 which defines 'legislative instrument', clause 7 which provides for the Attorney-General's certificate as to whether an instrument is a legislative instrument or not, and paragraph 13(a) and clause 14, which provide for the Principal Legislative Counsel to have responsibility for the standards of legislative instruments, to Rules of Court, subject to modification by the regulations.
- 127 New subsection 59(5) ensures that, despite the fact that the Principal Legislative Counsel will not have a responsibility for the standards of Rules of Court, he or she is authorised to provide drafting assistance if the Chief Justice so desires.

After section 59

- 128 New subsection 59A (1) is inserted, to allow for the making of regulations modifying the provisions of the Bill in their application to Rules of Court.
- 129 New subsection 59A (2) requires regulations to be made to provide for a consultation procedure to be followed in the case of Rules of Court directly affecting business, in substitution for the procedure contained in Part 3 of the Bill.

*High Court of Australia Act 1979*

Section 48

- 130 New subsection 48 (2)) applies the provisions of the Bill , other than clause 4 which defines 'legislative instrument', clause 7 which provides for the Attorney-General's certificate as to whether an instrument is a legislative instrument or not, and paragraph 13(a) and clause 14, which provide for the Principal Legislative Counsel to have responsibility for the standards of legislative instruments, to Rules of Court, subject to modification by the regulations .
- 131 New subsection 48(3) ensures that, despite the fact that the Principal Legislative Counsel will not have a responsibility for the standards of Rules of Court, he or she is authorised to provide drafting assistance if the Chief Justice so desires.

After section 48

- 132 New subsection 49 (1) is inserted, to allow for the making of regulations modifying the provisions of the Bill in their application to Rules of Court.

- 133 New subsection 49 (2) requires regulations to be made to provide for a consultation procedure to be followed in the case of Rules of Court directly affecting business, in substitution for the procedure contained in Part 3 of the Bill.

*Industrial Relations Act 1988*

Subsection 486(4)

- 134 Subsection 486 (4) is omitted, and replaced with new subsection 486 (4)) which applies the provisions of the Bill , other than clause 4 which defines 'legislative instrument', clause 7 which provides for the Attorney-General's certificate as to whether an instrument is a legislative instrument or not, and paragraph 13(a) and clause 14, which provide for the Principal Legislative Counsel to have responsibility for the standards of legislative instruments, to Rules of Court, subject to modification by the regulations.
- 135 New subsection 486(6) ensures that, despite the fact that the Principal Legislative Counsel will not have a responsibility for the standards of Rules of Court, he or she is authorised to provide drafting assistance if the Chief Justice so desires.

After section 486

- 136 New subsection 486A(1) is inserted, to allow for the making of regulations modifying the provisions of the Bill in their application to Rules of Court.
- 137 New subsection 486A (2) requires regulations to be made to provide for a consultation procedure to be followed in the case of Rules of Court directly affecting business, in substitution for the procedure contained in Part 3 of the Bill.









