

1996

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

LEGISLATIVE INSTRUMENTS BILL 1996

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Daryl Williams AM QC MP)

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LEGISLATIVE INSTRUMENTS BILL 1996

GENERAL OUTLINE

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

The Bill defines the term 'legislative instrument', specifically excludes particular instruments and provides a mechanism for the issue of an Attorney-General's certificate to resolve doubt if the application of the definition is unclear.

The Bill will introduce a mandatory consultation process for legislative instruments directly affecting, or having a substantial indirect effect on, business. Under the Bill Government agencies proposing legislative instruments which affect the business sector must 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 provides for public notification by advertisement in most cases where consultation is required by the Bill. Where a proposed legislative instrument is controversial or sensitive, the responsible Minister must consider and decide whether a public hearing is appropriate.

This Bill establishes an electronic Register which will contain existing and future delegated legislation and will be maintained by the Principal Legislative Counsel, a senior officer of the Attorney-General's Department. Any legislative instrument made after the commencement of the legislation must be registered to be enforceable. Provision is made for backcapturing of existing legislative instruments over a 26 month period after the commencement of the legislation in accordance with the table set out in Clause 37 of the Bill. The legislation provides that the Principal Legislative Counsel is responsible for ensuring that delegated legislation is of a high standard.

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 regulations and disallowable instruments and extending their operation to all legislative instruments. The Bill makes consequential amendments to those provisions so that their continued operation in the Acts Interpretation Act is confined to administrative instruments. The Bill provides for registration to replace Gazettal as the means of publication of legislative instruments.

The Bill provides for sunseting (automatic repeal) of legislative instruments after five years operation. This period can be extended in limited circumstances when a legislative instrument cannot be remade by the sunseting date. The introduction of sunseting will ensure that delegated legislation is regularly reviewed.

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*. It provides for the establishment of equivalent court-specific regimes for rules of court, which are excluded from the Bill.

The Bill provides for a review of the operation of the legislation to take place three years after commencement and for a review of the general sunseting provisions seven years after commencement.

FINANCIAL IMPACT STATEMENT

Establishment of the Register for delegated legislative instruments costing \$2.78M in 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.

No provision has been made for the additional costs in respect of the consultation or sunseting processes. These costs are to be borne by the originating agency out of its normal running costs.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 - Short title

- 1 This clause provides for the Act to be cited as the *Legislative Instruments Act 1996*.

Clause 2 - Commencement

- 2 Subclause 2(1) provides for commencement of the Bill by Proclamation. Subclause 2(2) provides that the commencement day fixed by Proclamation must be the first day of a month. This provision is necessary because of other clauses in the Bill which contain dates to be calculated by reference to the commencement day. Were commencement to take place during a month, these calculations would be more complicated and more likely to result in confusion. Subclause 2(3) contains a similar requirement in relation to default commencement where the Bill has not commenced 6 months after Royal Assent for the same reasons.

Clause 3 - Schedule 4

- 3 This clause sets out the effect of amendments to other Acts contained in Schedule 4.

Clause 4 - Definitions

- 4 Subclause 4(1) contains definitions of certain terms used in the Act. The definitions of ADJR Act, commencing day, Corporations Law of the Capital Territory, enabling legislation, explanatory statement, government business enterprise, Index, legislative instrument, Legislative Instrument Proposal, lodge, Principal Legislative Counsel, Register, responsible Minister and State make reference to substantive provisions of the Bill.
- 5 The subclause defines "making" in relation to an instrument as the means by which a document becomes a legislative instrument. It defines the terms "prescribed authority" and "principal officer" in terms similar to that used in the *Freedom of Information Act 1982*.
- 6 The subclause defines "regulatory review body" for the purposes of the Act as the body declared by the regulations and defines the statutory rules series by reference to the *Statutory Rules Publication Act 1903*. The term "working day" is also defined for ease of reference in the Act.

- 7 Subclause 4(2) defines the times applicable for complying with requirements under the Act.
- 8 Subclause 4(3) defines “entry on the Register” and “registration” to clarify the meaning of those terms. The term “rule-maker” is also defined for the purposes of the Act, enabling simple reference to the person responsible for certain matters under the Act.

Clause 5 - Definition - a legislative instrument

- 9 This clause provides a substantive definition of a legislative instrument. The definition aims to 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.
- 10 Subclause 5(1) provides the general requirements that a legislative instrument is an instrument in writing, of a legislative character, made in the exercise of a power delegated by Parliament.
- 11 Subclause 5(2) sets out the circumstances in which an instrument is taken to be of a legislative character to provide clarification and additional certainty. If the instrument determines or alters the content of the law, rather than applying the law in a particular case, and 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, it will be taken to have a legislative character.
- 12 Subclause 5(3) provides that certain instruments are legislative instruments for the purposes of the Act. These instruments are regulations, legislative instruments required to be printed and sold under the *Statutory Rules Publication Act 1903*, Ordinances and certain instruments made under them, disallowable instruments under Section 46A or Part XII of the *Acts Interpretation Act 1901* and Proclamations made under an Act or Ordinance.
- 13 Subclause 5(4) provides that certain instruments are not legislative instruments. These instruments are those referred to in Schedule 1 of the Bill and instruments where post-commencement enabling legislation declares the instruments not to be legislative.
- 14 Subclause 5(5) provides that inclusion in Schedule 1 does not mean that an instrument would otherwise have been a legislative instrument.
- 15 Subclause 5(6) provides that the Bill does not affect requirements for tabling and gazettal of non-legislative instruments authorised to be made before the commencing day.

Clause 6 - Definition - power delegated by the Parliament

- 16 This clause defines power delegated by the Parliament to include a further power of delegation authorised by the Parliament. This ensures that the definition covers instruments made under enabling provisions in regulations or other legislative instruments.

Clause 7 - Rules of court are not legislative instruments

- 17 Clause 7 provides that rules of court are not legislative instruments for the purposes of the Act.
- 18 However, Schedule 4 provides that regulations made under the enabling legislation for each of the Federal courts will establish court-specific regimes applying appropriate parts of the Bill.

Clause 8 - Attorney-General may certify whether instrument is legislative instrument or not

- 19 Clause 8 deals with the situation where a rule-maker is uncertain whether an existing or proposed instrument is legislative in character. It establishes a mechanism to provide certainty for rule-makers where the application of the definition does not resolve the question of whether an instrument is a legislative instrument.
- 20 Under clause 8 the Attorney-General may determine whether existing instruments (subclause 8(1)) or instruments of a particular kind proposed to be made after the commencement of the Bill (subclause 8(2)) are legislative instruments or not. Subclause 8(4) provides for the Attorney-General to determine whether an instrument is a legislative instrument and issue a certificate setting out the decision. A copy of the certificate must be forwarded to the Principal Legislative Counsel. Subclause 8(5) provides that a certificate by the Attorney-General is conclusive of the question whether the instrument or the kind of instrument is legislative or not subject only to reconsideration by the Attorney-General following a Federal Court order to quash or set aside the decision.
- 21 If the Federal Court makes an order to quash or set aside the original decision, subclause 8(6) requires the Attorney-General to reconsider that decision and issue a replacement certificate. The Court's order will only take effect immediately before the issue of a replacement certificate (subclause 8(7)).
- 22 Subclauses 8(8) and 8(9) contain savings provisions applicable where the Attorney-General's certificate relating to an instrument or an instrument of a particular kind is reversed on reconsideration. Where certification that an instrument was legislative is reversed, the valid operation of the administrative instrument is preserved, but if the instrument is required

to be notified in the Gazette it must be published in the Gazette within three working days of the issue of the replacement certificate (subclause 8(8)).

- 23 Where certification that an instrument was administrative is reversed, the valid operation of the legislative instrument is preserved if the instrument is registered by the applicable backcapturing date or within three working days of the issue of the replacement certificate (subclause 8(9)).
- 24 Subclause 8(10) addresses the situation where the Attorney-General's certificate on a reconsideration of a decision under subclause 8(4) confirms the original decision. In these circumstances, the requirements for registration, and registration if it has occurred, are unaffected.
- 25 Where the Court quashes or sets aside a decision to issue a certificate under clause 8, the relevant rule-maker must notify the Principal Legislative Counsel in writing of the Court's decision and the issue of the replacement certificate, as soon as practicable after these events (subclause 8(11)).

Clause 9 - When do provisions of legislative instruments take effect?

- 26 Subclause 9(1) provides the mechanism for determining the commencement day or date of effect of a legislative instrument. It allows for a legislative instrument to take effect from a date specified or certain other times that may be specified in the instrument. 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 registered, according to time applicable in the Australian Capital Territory.
- 27 The default commencement time for legislative and non-legislative instruments has been standardised, as recommended by the House of Representatives Standing Committee on Legal and Constitutional Affairs. in its report on the Legislative Instruments Bill 1994. A corresponding amendment has been made to new section 46B of the *Acts Interpretation Act 1901* which provides for default commencement of non-legislative instruments.
- 28 Subclause 9(2) ensures that, where specific provision is made for the commencement of a legislative instrument in an enabling provision in an Act, that this provision overrides the default commencement provision in paragraph 9(1)(d).
- 29 Subclauses 9(3) and 9(4) make special provision for the commencement of particular instruments made under the national companies and securities scheme laws in order to preserve the seamless operation of those laws.

- 30 Subclause 9(5) in effect re-enacts subsection 48(2) of the *Acts Interpretation Act 1901* in relation to retrospective effect of legislative instruments. It provides that a legislative instrument has no effect if it would otherwise take effect before the date of registration and consequently 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 time of registration.

Clause 10 - Construction of legislative instruments

- 31 Clause 10 provides for the construction of legislative instruments and is founded on section 46 of the *Acts Interpretation Act 1901*. Subclause 10(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 10(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 11 - Prescribing matters by reference to other instruments

- 32 Clause 11 provides for a legislative instruments to prescribe matters by reference to other instruments and is founded on section 46A of the *Acts Interpretation Act 1901*.

Clause 12 - Effect of repeal of legislative instrument

- 33 Clause 12 sets out the effect of repeal of a legislative instrument or a provision of a legislative instrument, and is founded on section 50 of the *Acts Interpretation Act 1901*.

Clause 13 - This Act applies to legislative instruments relating to corporations

- 34 This clause overcomes the effect of section 9 of the *Corporations Act 1989* which states that an Act or instrument enacted after the commencement of the section is not to be interpreted as amending or repealing, or otherwise altering the effect or operation of, a provision of a reserved law unless the Act or instrument expressly provides. A reserved law under section 9 of the *Corporations Act 1989* means the Corporations Law or the Corporations Regulations of the Australian Capital Territory, or the Australian Securities Commission Act or Regulations of the Australian Capital Territory. The clause expressly applies the Bill to legislative instruments that are reserved laws and legislative instruments for which the enabling legislation is a reserved law.

PART 2 - THE RESPONSIBILITIES OF THE PRINCIPAL LEGISLATIVE COUNSEL

- 35 This Part establishes the office of Principal Legislative Counsel within the Attorney-General's Department as the office with relevant 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 14 - Principal Legislative Counsel

- 36 This clause provides for the appointment of a senior officer of the Attorney-General's Department as the Principal Legislative Counsel.

Clause 15 - Responsibilities of the Principal Legislative Counsel

- 37 Clause 15 sets out the responsibilities of the Principal Legislative Counsel, including responsibility for the quality of drafting of legislative instruments, and arranging for the laying before the Parliament of registered legislative instruments and accompanying explanatory material. The Principal Legislative Counsel's responsibility to retain original legislative instruments lodged for registration does not apply in the case of instruments made or approved by the Governor-General. This will ensure that the existing practice of retaining all records of Federal Executive Council in one series of annual bound volumes may be continued.

Clause 16 - Measures to ensure high standards are achieved

- 38 Clause 16(1) is concerned with strategies for improving the quality of legislative instruments. It 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. Subclause 16(2) sets out a range of steps that the Principal Legislative Counsel can take to achieve those aims. 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

- 39 Part 3 sets out the consultation requirements under the Bill.

Clause 17 - Purposes of this Part

- 40 Clause 17 states the objects of Part 3 of the Bill (Consultation). The clause responds to the House of Representatives Standing Committee on Legal

and Constitutional Affairs' concern in relation to the Legislative Instruments Bill 1994 about the limitation of consultation to instruments affecting business. The clause sets out the benefits of consultation and encourages voluntary consultation where the process is not mandatory under the Bill.

Clause 18 - What legislative instruments require consultation?

- 41 Mandatory consultation under Part 3 is limited to legislative instruments directly affecting business, or having a substantial indirect effect on business, identified by reference to enabling legislation set out in Schedule 2. Unless an exemption under Part 3 is applicable, the consultation requirements apply to such legislative instruments proposed to be made six months after the commencing day to allow rule-makers sufficient time to comply with the Part 3 procedures.

Clause 19 - Responsible Minister to identify any representative bodies or organisations

- 42 Clause 19 requires the responsible Minister to decide for the purposes of consultation whether or not there is a representative body or organisation, or combination of bodies and organisations, that sufficiently represent the interests of most or all of those likely to be affected by the proposed legislative instrument or instruments of that kind and to record the decision in writing.

Clause 20 - Notification of intention to make a legislative instrument

- 43 This clause requires a rule-maker proposing to make a legislative instrument to notify the persons most likely to be affected by the proposed instrument, or any representative bodies identified under clause 19, prior to the preparation of a Legislative Instrument Proposal. The notification must include details of the issues giving rise to the need for the proposed instrument and the objective of the proposed instrument, and must invite submissions commenting on the proposal and alternative ways of achieving the objective.

Clause 21 - Legislative Instrument Proposals

- 44 The consultation provisions in the Bill focus on the preparation of a Legislative Instrument Proposal. This document is intended to explain the reasons for, and background to, a proposed legislative instrument. If after considering any submissions made in response to the notification under clause 20, the rule-maker still proposes to make a legislative instrument, the rule-maker must prepare a Legislative Instrument Proposal unless an exemption applies (subclause 21(1)).

- 45 Subclauses 21(2) and (3) set out the categories of information which must be contained in a Legislative Instrument Proposal, including an indication of the direct and indirect social and economic costs and benefits of each option for achieving the objective.
- 46 As soon as practicable after completing the Legislative Instrument Proposal, the rule-maker must submit it to the prescribed regulatory review body for certification that it meets the requirements of Part 3 (subclause 21(4)). In certifying the Legislative Instrument Proposal, the regulatory review body must be satisfied that the notification of the proposal was adequate and that the Legislative Instrument Proposal contains the information required under subclause 21(2) (subclause 21(5)).

Clause 22 - Inviting written submissions or participation in a public hearing

- 47 Clause 22 requires a rule-maker to invite written submissions or participation in a public hearing as soon as practicable after the regulatory review body has certified that a Legislative Instrument Proposal satisfies the requirements of Part 3. The clause responds to a recommendation of the House of Representatives Standing Committee on Legal and Constitutional Affairs on the Legislative Instruments Bill 1994, that the Bill should provide for Ministerial consideration of the appropriateness of a public hearing where a proposed legislative instrument is controversial or sensitive. However, the Minister is not precluded from directing the rule-maker to hold a public hearing in relation to a non-controversial or non-sensitive instrument (subclause 22(2)).
- 48 If the responsible Minister for a proposed legislative instrument becomes satisfied that the instrument is likely to be controversial or sensitive whether on advice from the rule-maker under subclause 22(4) or otherwise, the Minister must decide whether or not a public hearing should be held (subclause 22(6)). The Minister must record the decision, and the reasons for it, in writing.

Clause 23 - Content of an invitation

- 49 Clause 23 sets out the required content of an invitation under clause 22, and the time limits that apply to the closing date for making submissions or expressing views at a public hearing. Subclause 23(1) provides that an invitation to make submissions or participate in a public hearing must contain a declaration of the intention to make the proposed instrument, a description of how to obtain or inspect copies of the Legislative Instrument Proposal and certain other documents, and information about how to make written submissions.

- 50 Subclause 23(2) provides that an invitation to participate in a public hearing must indicate when and where the hearing will be held. Subclause 23(3) sets out a minimum 21 day period for written submissions to be made or views expressed, unless the Attorney-General specifies an earlier day in special circumstances, to ensure interested parties have sufficient time to respond to the invitation. Subclause 23(4) sets out the procedure where written submissions have been sought and subsequently it is decided to hold a public hearing. It provides that the closing date for making written submissions to the public hearing must not be earlier than that specified in the original invitation to make written submissions.

Clause 24 - Publicising an invitation

- 51 Clause 24 implements the principle of a recommendation by the House of Representatives Standing Committee on Legal and Constitutional Affairs on the Legislative Instruments Bill 1994, that the Bill should provide for public notification by advertisement in all cases where consultation is required by the Bill. Subclause 24(1) requires an invitation under clause 22 to be advertised in one or more newspapers circulating in each State including the Australian Capital Territory and the Northern Territory, the Jervis Bay Territory and relevant inhabited external territories, or broadcast on electronic media received in those places. The option of advertising through electronic media enables the rule-maker to use the most effective way of notifying those likely to be affected by the proposed legislative instrument.
- 52 Subclause 24(2) provides that if the responsible Minister has decided under clause 19 that a representative body or bodies exist then, in addition to the public advertisement, an invitation under section 24 must also be given to each representative body. This ensures that bodies that represent the interests of those particularly affected by a proposed legislative instrument are specifically made aware of the proposal and given the opportunity to make submissions.

Clause 25 - Consideration of written submissions and submissions made at public hearing

- 53 This clause sets out how a rule-maker will treat written submissions and submissions made at a public hearing. Subclauses 25(1) and (2) require any such submissions to be considered before the proposed instrument is made. Subclause 25(3) provides that an invitation to participate in a public hearing does not prevent a person from making a written submission in response to an earlier invitation to provide written submissions, ensuring that the two mechanisms for seeking submissions are not mutually exclusive.

Clause 26 - Disclosure of submissions received under this Part

- 54 Clause 26 provides for the disclosure of submissions received under Part 3. Subclause 26(1) allows submissions to be used in the course of consultation in certain ways unless the person making the submission indicates at the time of making the submission that the submission, or parts of it, are sensitive. If a submission or part of a submission is identified as sensitive, then the person who made the submission must be consulted before disclosure of the material identified as sensitive. Subclause 26(3) provides that the *Freedom of Information Act 1982* applies to written submissions received under Part 3.

Clause 27 - Rule-maker to prepare consultation statement

- 55 This clause requires the preparation of a consultation statement in relation to a legislative instrument, indicating whether consultation occurred, and if so, explaining the consultation undertaken. The consultation statement must be attached to the explanatory statement required under clause 44.
- 56 Subclause 27(2) sets out the matters which must be contained in a consultation statement. These include a description of any invitations to make submissions issued, and any responses received, the reasons for the method of advertising, the Minister's decision regarding representative bodies, and a statement regarding the responsible Minister's decision about the controversiality or sensitivity of a proposed legislative instrument.
- 57 Subclause 27(3) requires certain documents to be attached to the consultation statement, including a copy of the Legislative Instrument Proposal, a copy of the record of the responsible Minister's decision on representative bodies and a copy of the record of any decision made by the responsible Minister regarding whether or not to hold a public hearing.

Clause 28 - Circumstances in which compliance with sections 20 to 25 is not required

- 58 Subclause 28(1)(a) sets out the specific exemptions from the requirement to invite submissions on proposed legislative instruments affecting business.
- 59 Subclause 28(2) defines a specific Budget decision for the purposes of the exemption from consultation for instruments giving effect to such a decision in paragraph 28(1)(a)(iv).
- 60 Subclause 28(3) defines an airworthiness directive for the purposes of paragraph 28(1)(a)(vi).

- 61 Subclause 28(4) 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 29 - Judicial review of decisions under section 28

- 62 This clause deals with the situation where the rule-maker relies on an exemption from consultation contained in paragraph 28(1)(a) in error, and that decision in relation to a proposed instrument is subsequently overturned by the Federal Court. If the Federal Court quashes or sets aside the rule-maker's decision, the rule-maker must reconsider the decision to rely on that exemption and record the new decision and the supporting reasons (subclauses 29(1) and (2)).
- 63 If the rule-maker subsequently decides that there are insufficient grounds to justify reliance on a paragraph 28(1)(a) exemption in relation to the relevant instrument, then that instrument, as amended and including any savings or transitional provisions, is sunsetted 12 months from the date of the rule-maker's decision on reconsideration (subclauses 29(3) and (4)). If the instrument to be sunsetted under subclause 29(3) amends another instrument, those amended provisions in the other instrument are also sunsetted 12 months from the date of the rule-maker's reconsideration (subclause 29(5)).
- 64 Subclause 29(6) provides for a certificate issued by the Attorney-General to extend the 12 month sunset period under clause 29 in certain circumstances, including where consultation cannot be completed by the sunset date.

Clause 30 - Rule-maker may decide not to comply with sections 20 to 25

- 65 This clause enables the rule-maker to decide not to comply with the consultation procedures if there is a sufficient reason for non-compliance, even though an exemption under clause 28 does not apply. The rule-maker can only rely on this mechanism once for the same reason in respect of instruments with substantially the same content (subclause 30(2)).
- 66 If a rule-maker makes a decision to rely on the subclause 30(1) provision for non-compliance with the consultation requirements, the relevant legislative instrument as amended and including any savings or transitional provisions is sunsetted at the end of 12 months from its commencement (subclause 30(3)). If the instrument to be sunsetted under subclause 30(4) amends another instrument, those amending provisions in the other instrument are also sunsetted 12 months from the date of the rule-maker's reconsideration (subclauses 30(4), (5) and (6)).

- 67 Subclause 30(7) provides for a certificate issued by the Attorney-General to extend the 12 month sunset period under clause 30 in certain circumstances, including where consultation cannot be completed by the sunset date.

Clause 31 - Non-compliance with sections 22 to 25 where alternative requirement provided by enabling legislation

- 68 Subclause 31(1) provides that the regulatory review body can certify that consultation requirements in enabling legislation are comparable to the requirements in sections 22, 23, 24 and 25 of the Bill. In those circumstances compliance with the enabling legislation will satisfy the relevant requirements of the Bill.
- 69 Subclause 31(2) allows the regulatory review body to certify that the costs of complying with sections 22, 23, 24 and 25 of the Bill outweigh any benefits to be obtained from the consultation, and that the consultation requirements in the enabling legislation applicable to the proposed legislative instrument constitute a sufficient level of consultation in the circumstances. In those circumstances compliance with the enabling legislation will satisfy the relevant requirements of the Bill.

Clause 32- Modified consultation procedures for legislative instruments for Territories

- 70 This clause allows the regulations to modify the consultation procedures under Part 3 in relation to proposed legislative instruments made under an Act providing for the government of a Territory. The clause does not apply to the Australian Capital Territory and the Northern Territory, as they are included in the definition of 'State' in clause 4. The clause is only intended to provide for such modification as is necessary, and not to exclude the consultation requirement completely. The Attorney-General will carefully consider any applications for modification, and will only approve the making of regulations where the circumstances are exceptional and justify such an approach.

Clause 33 - Consequence of failure to seek submissions

- 71 Clause 33 provides that a failure to comply with this Part does not affect the validity or enforceability of a legislative instrument. Information on the consultation undertaken in relation to a particular instrument will be contained in the consultation statement attached to the explanatory statement required to be tabled. A failure to comply with Part 3 will be a matter for the Parliament to consider and decide whether in the particular circumstances the instrument should continue to operate.

Clause 34 - Alterations to Schedule 2

- 72 Clause 34 provides that Schedule 2 setting out the Acts which enable the making of a legislative instrument directly affecting business or having a substantial indirect effect on business may be amended by regulations under this Act to allow updating of the Schedule.

PART 4 - THE FEDERAL REGISTER OF LEGISLATIVE INSTRUMENTS

Division 1 - Preliminary

Clause 35 - The purpose of the Part

- 73 This clause is self-explanatory.

Division 2 - The Register

Clause 36 - Federal Register of Legislative Instruments

- 74 Clause 36 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 prepared in accordance with Division 6 will be the key to accessing the information contained in the Register.

Clause 37 - Register to be kept by computer

- 75 Clause 37 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 prescribe the manner of altering entries on the Register and providing access to information on the Register.

Clause 38 - Inspection of the Register

- 76 This clause provides that the Principal Legislative Counsel must ensure that the public can inspect the Register. This obligation will be satisfied by ensuring that members of the public have access to computer terminals to inspect the Index to the Register and copies of the instruments and information the Register contains. This will be possible at the Principal Legislative Counsel's office, AGPS bookshops and via the Internet.

Clause 39 - The status of the Register and judicial notice of legislative instruments

- 77 Clause 39 concerns the authoritative status of the Register and legislative instruments officially extracted from it. Subclause 39(1) provides that the Register is to be taken as a complete and accurate record of the

documents whose images are contained in it. Subclause 39(2) provides that documents extracted from the Register and printed by the Government Printer are authoritative. In any proceedings proof about the provisions and the coming into operation of such a legislative instrument is therefore not required. Subclause 39(3) enables a Court or Tribunal to acquire information about the contents of the Register in any way it thinks fit.

- 78 Subclause 39(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 39(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 40 - Rectification of Register

- 79 Subclause 40(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 is in the document as it appears in the Register, and not in the original or copy of the instrument from which the image was taken.
- 80 Subclause 40(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 or a provision 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 41 - What legislative instruments can be registered in Part A?

- 81 This clause requires legislative instruments made or deemed to be made on or after the commencing day, and legislative instruments amending pre-existing legislative instruments after the commencing day to be registered in Part A.

Clause 42 - Ordinary procedure for registration in Part A

- 82 Subclause 42(1) sets out the ordinary registration procedure for Part A. The original of a legislative instrument which is required to be registered under clause 41 must be lodged with the Principal Legislative Counsel as soon as possible after it is made. Subclause 42(2) clarifies that the exception from the consequences of a failure to register a new instrument

for certain instruments made under the national companies and securities scheme laws in particular circumstances does not alter the requirement to register new instruments in accordance with the procedure set out in clause 42. Subclause 42(3) provides that the Principal Legislative Counsel must register an instrument unless there is reason to doubt the instrument lodged is not the original instrument or a copy has already been registered.

Clause 43 - Registration of copies in certain circumstances

- 83 Subclause 43(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 alter the requirement to lodge the original as soon as possible. Subclause 43(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 44 - Explanatory statement to be lodged with the Principal Legislative Counsel

- 84 Clause 44 limits the requirement to lodge an explanatory statement to legislative instruments required to be lodged in Part A of the Register. These are legislative instruments made on or after commencement of the legislation, to which Part 5 - Parliamentary Scrutiny of Legislative Instruments applies. Instruments required to be registered in Part B of the Register are those instruments made before commencement of the legislation. Such instruments will have been made and scrutinised in accordance with the legislation in place at the time they were made. As these instruments will not be required to be scrutinised by Parliament again at the time of registration, an explanatory statement is unnecessary.
- 85 Subclause 44(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 an explanatory statement explaining the purpose and operation of the instrument.
- 86 Subclause 44(2) sets out matters that must be contained in the explanatory statement. These include a description of any document incorporated into the instrument, a statement explaining how the instrument was drafted and any quality control strategies used in the drafting, and an indication of whether submissions have been sought under Part 3 in relation to the instrument.
- 87 Paragraph 44(2)(b) provides that the consultation statement prepared under section 27 must accompany the explanatory statement.

- 88 Subclause 44(4) provides that a failure to lodge an explanatory statement in accordance with subclause 44(1) does not affect the validity or enforceability of the instrument.

Clause 45 - Obligation to provide original instrument

- 89 Clause 45 is intended to ensure compliance with assurances made under clause 43 in relation to the provision of original instruments. It 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 46 - Original instrument to be retained by the Principal Legislative Counsel

- 90 Clause 46 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.
- 91 Subclause 46(2) exempts original instruments made or approved by the Governor-General from the requirement that they be retained by the Principal Legislative Counsel. This will allow the Principal Legislative Counsel to return original instruments to the Executive Council Secretariat after registration, to be retained in the records of Executive Council. The Principal Legislative Counsel will retain copies of all such instruments.

Clause 47- Obligation to provide electronic copy of instrument

- 92 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. The electronic copy will be used to compile a text-based database of instruments on the Register that will be searchable at the office of the Principal Legislative Counsel, AGPS bookshops and via the Internet.

Division 4 - Registration of legislative instruments in Part B

- 93 This Division is concerned with the backcapturing of legislative instruments.

Clause 48 - What legislative instruments are to be registered in Part B?

- 94 Clause 48 provides for existing legislative instruments made prior to the commencing day to be registered in Part B.

Clause 49 - Ordinary procedure for registration in Part B

- 95 Clause 49 provides for the systematic backcapture of legislative instruments made prior to the commencing day. This is achieved by providing that instruments made in the period commencing on 1 January 1990 and ending on the day before the commencing day must be backcaptured by the first day of the ninth month after the commencing day, that instruments made between 1 January 1980 and 31 December 1989 must be backcaptured by the first day of the 15th month after the commencing day, and instruments made before 1 January 1980 must be backcaptured by the first day of the 27th month after the commencing day. All legislative instruments must be backcaptured by 2 years and 2 months after the commencing day.
- 96 Subclause 49(2) provides that where an instrument is made after the commencement date which amends a legislative instrument made before the commencement date then the pre-existing instrument must be backcaptured no later than 28 days after the registration of the amending instrument.
- 97 There is a note at the end of subclause 49(4) referring to clause 56 which provides for the consequences of a failure to register a legislative instrument in Part B. The note clarifies the implicit time limits for registering instruments that have been lodged for registration.
- 98 Subclause 49(5) clarifies that the exception in particular circumstances from the consequences of a failure to register an existing instrument by the relevant cut-off date that may apply to revenue instruments and certain instruments made under the national companies and securities scheme laws does not alter the requirement to register these instruments in accordance with the procedure set out in clause 49.

Clause 50 - Registration of copies in certain circumstances

- 99 Subclause 50(1) 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. Subclause 50(2) sets out the criteria to be satisfied for a copy of an instrument to be a registrable copy.
- 100 Subclause 50(3) provides for registration of copies of existing instruments which were made or approved by the Governor-General and published in the Statutory Rules series. As such original instruments are contained in bound annual volumes of Federal Executive Council records, the amendment will allow for the registration of copies of these instruments.

Division 5 - Registration of Attorney-General's certificates

Clause 51 - Attorney-General's certificates are to be registered in Part C

- 101 This clause makes provision for the registration of Attorney-General's certificates issued under clause 8 and is self-explanatory.

Division 6 - The Index

Clause 52 - Information to be supplied for the Index

- 102 Subclause 52(1) requires the Principal Legislative Counsel to create and maintain an index to the documents in each Part of the Register from information supplied by rule-makers or the Attorney-General in respect of Part 3.
- 103 The Index is to be compiled in part from information supplied in accordance with subclause 52(3). Information to be included in the Index must be provided with the original or copy instrument lodged for registration and must be in the content and form prescribed by the regulations (subclause 52(3)).
- 104 Paragraph 52(4)(a) sets out the information which the Index is to contain in respect of registered instruments,. Paragraph 52(4)(b) sets out the requirements for the Index in respect of certificates given under clause 7 as to whether an instrument is legislative or not. The Index will be searchable at AGPS bookshops and at the office of the Principal Legislative Counsel.
- 105 To enhance the integrity of the Index subclause 52(5) sets out other information the Index is to contain about an instrument if there has been any legal challenge to the instrument or any decision not to engage in the consultation procedure or if the instrument has been amended by an Act or has been revoked, repealed or ceased to have effect.

Clause 53 - Further material to be contained in the Index

- 106 Subclause 53(1) requires information to be supplied to the Principal Legislative Counsel regarding legislative instruments or provisions of such instruments that have not been validly made and the reasons for the invalidity.
- 107 Subclause 53(2) enables the Principal Legislative Counsel to annotate the Register upon being satisfied that a registered instrument or provision has not been validly made.

Clause 54 - Attorney-General to notify Parliament of Index deficiencies

- 108 The House of Representative Standing Committee on Legal and Constitutional Affairs in relation to the Legislative Instruments Bill 1994 was concerned that the importance of the Index to the Register in facilitating access to legislative instruments should be recognised by provisions for keeping the index up to date. Subclause 54(1) requires the Attorney-General to table an explanatory statement in each House of Parliament within 6 sitting days of becoming aware that an entry required to be made in the Index has not been made. Subclause 54(2) clarifies that an explanation is not required for omissions of a minor nature.

Division 7 - Effect of registration

Clause 55 - Effect of failure to register a legislative instrument in Part A

- 109 Subclause 55(1) provides that failure to register a legislative instrument required to be registered in Part A renders it unenforceable.
- 110 Subclause 55(2) provides an exception to unenforceability for failing to register an instrument in Part A for certain legislative instruments made under the national companies and securities scheme laws. The exception is necessary to preserve the seamless operation of national companies and securities scheme laws. The exception is not automatic, and there are criteria which must be satisfied for it to operate. Subclause 55(3) defines 'responsible officer' for the purposes of subclause (2).

Clause 56- Effect of failure to register a legislative instrument in Part B

- 111 Subclause 56(1) provides for the consequences of a failure to register a legislative instrument in Part B. It clarifies that the instrument must be registered by the relevant cut-off date to remain enforceable, and that mere lodgement for registration is insufficient.
- 112 Subclause 56(2) provides that if an instrument is not registered by the lodgment date it ceases to be enforceable and is deemed to be repealed.
- 113 Subclauses 56(3) and (5) set out exceptions to unenforceability for failure to register an instrument in Part B as required. Subclause 56(3) provides an exception to unenforceability for failing to register an instrument connected with the collection of revenue, in order to protect Government revenue. Subclause 56(5) provides an exception to unenforceability for failing to register an instrument in Part B for certain legislative instruments made under the national companies and securities scheme laws. The exception is necessary to preserve the seamless operation of national companies and securities scheme laws. In both cases, the

exception is not automatic, and there are criteria which must be satisfied for it to operate.

PART 5 - PARLIAMENTARY SCRUTINY OF LEGISLATIVE INSTRUMENTS

114 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 of the Acts Interpretation Act, the scrutiny provisions in the Part apply to all legislative instruments made on or after the commencing day, with very limited exceptions.

Clause 57 - The purpose of the Part

115 This clause is self-explanatory.

Clause 58 - Tabling of legislative instruments

116 This clause applies the requirements previously contained in paragraph 48(1)(c) and subsection 48(3) of the Acts Interpretation Act that regulations (and disallowable instruments under section 46A of the Acts Interpretation Act) be laid before each House of Parliament but within a reduced timeframe.

117 Subclause 58(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.

118 Subclause 58(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.

119 Subclause 58(3) provides that if the requirements of the clause are not met the instrument ceases to have effect. A legislative instrument will cease to have effect at the end of the last day on which there could have been compliance with the requirements.

Clause 59 - Additional material to be tabled with the legislative instrument

120 Subclause 59(1) requires the explanatory statement, and any accompanying documents, lodged with the Principal Legislative Counsel under clause 44 to be delivered by the Principal Legislative Counsel to each House to be laid before it with the copy of the legislative instrument.

The Principal Legislative Counsel is only required to deliver to the Parliament the documents that the rule-maker actually provided with the explanatory statement, and not documents which should have been provided but were not.

- 121 If a rule-maker fails to lodge the explanatory statement or a document required to accompany the explanatory statement with the Principal Legislative Counsel before he or she delivers a copy of the legislative instrument to each House, the rule-maker must undertake delivery of a copy of the explanatory statement or missing document together with a written explanation of the delay (subclause 59(2)).

Clause 60 - Incorporated material may be required to be made available

- 122 Under clause 11, 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 60 requires a document which has been incorporated by reference to be made available for inspection by either House.

Clause 61 - Disallowance of legislative instruments

- 123 Clause 61 re-enacts with some modifications the provisions of subsections 48(4), (5), and 5A) of the Acts Interpretation Act and provides for the various methods by which a legislative instrument or a provision of such an 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.
- 124 Clause 61 ensures that the existing power of the Parliament to disallow not only whole legislative instruments but also provisions of legislative instruments is preserved, and neither diminished nor extended. The term "provision" is currently used in section 46A of the Acts Interpretation Act, where it has an interpretation congruent with 'regulation' in relation to parliamentary scrutiny under Part XII of the Acts Interpretation Act. The continuation of this term is intended to preserve the existing law relating to the extent of the disallowance power.
- 125 Subclause 61(1) re-enacts the effect of subsection 48(4) of the 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.

- 126 Subclause 61(2) re-enacts the effect of subsection 48(5) of the 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 61(4), the legislative instrument is taken to be disallowed and ceases to have effect at the end of fifteen sitting days of that House.
- 127 Subclause 61(3) re-enacts the effect of subclause 48(5A) of the 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 61(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.
- 128 Subclause 61(4) has no counterpart in the Acts Interpretation Act. It is inserted to facilitate parliamentary scrutiny while acknowledging the practical need for the existence of particular legislative instruments. It enables a House to defer consideration of a motion to disallow 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 identified in the motion. This provides an option to a House where it finds an instrument in some way objectionable but where immediate disallowance would have unacceptable consequences, such as creating an unacceptable gap in a legislative scheme.
- 129 Subclause 61(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 the legislative instrument concerned 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.
- 130 Subclause 61(5) clarifies that, where a house passes a motion of deferral of disallowance, the rule-maker in making a further instrument is not required to enter into further consultation using the provisions of Part 3 of the Bill prior to making the new instrument or to prepare a consultation statement. (Parliament, as the elected representatives of the public, has raised a concern with the original instrument to which the new instrument responds.) The clause does not preclude consultation, and the Legislative Instruments Handbook will guide rule-makers on the issue of further consultation in these circumstances.

- 131 Subclause 61(6) provides for the lodgement of the new instrument with the Principal Legislative Counsel for registration. The explanatory statement that the rule-maker must provide for such an instrument is only required to contain an explanation that the instrument has been prepared to meet the requirements of the relevant House of the Parliament under this clause and to indicate whether any further consultation has occurred or not. Paragraph 61(6)(c) provides for the Principal Legislative Counsel to deliver the instrument and the explanatory statement to the Parliament.
- 132 Subclause 61(7) exempts from the operation of the section certain legislative instruments made on or after the commencing day by joint Commonwealth/State bodies, or for the purposes of such bodies, or of intergovernmental schemes where the enabling legislation has the effect that such instruments cannot be disallowed. The amendment ensures that the exemption from disallowance under the Bill applies to legislative instruments made under existing and future enabling provisions.
- 133 Paragraphs 61(8)(a) and (c) exempt from the operation of the clause a number of Proclamations including a Proclamation solely for the commencement of an Act or a provision of an Act. This exemption is necessary to ensure that one House of Parliament, by disallowance of a commencement Proclamation, is not able to prevent or delay the coming into operation of legislation which has been passed by both Houses. The amendment does not affect the requirement that such Proclamations be registered, and tabled in the Parliament.
- 134 Paragraph 61(8)(b) exempts from disallowance a certificate of the Attorney-General extending the time for sunseting in the limited circumstances set out in clauses 29, 30 and 66.
- 135 Paragraph 61(8)(d) exempts a legislative instrument which, under its enabling legislation, is required to be approved by Parliament in order to come into operation from the provisions of clause 61. This ensures that the disallowance provisions of clause 61 do not override the more stringent requirement of approval by the Parliament where this applies.
- 136 Paragraphs 61(8)(e) and (f) implement a recommendation of the House of Representatives Standing Committee on Legal and Constitutional Affairs and Senate Standing Committee on Regulations and Ordinances in relation to the Legislative Instruments Bill 1994 that legislative instruments of the Australian National University and the University of Canberra relating to the content of academic courses should not be subject to disallowance under the Bill, in order to protect academic freedom.

Clause 62 - Effect of a legislative instrument ceasing to have effect

- 137 Clause 62 re-enacts subsections 48(6) and (7) of the Acts Interpretation Act in relation to the effect of an instrument ceasing to have effect.
- 138 Under subclause 62(1) the effect of an instrument or provision ceasing to have effect under the previous clauses is the same as if the instrument or provision 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 12.
- 139 Subclause 62(2) provides an exception to the operation of a repeal where an instrument or provision which ceases to have effect itself repealed a previous legislative instrument or law or provision of a legislative instrument or law. In this case, the previous legislative instrument, law or provision is revived from the time the repealing instrument ceases to have effect.

Clause 63 - Legislative instruments not to be remade while required to be tabled

- 140 This clause re-enacts section 48A of the 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.
- 141 Subclause 63(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.
- 142 Subclause 63(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 58(1).
- 143 Subclause 63(3) provides that an instrument made in contravention of the clause has no effect.

Clause 64 - Legislative instruments not to be remade while subject to disallowance

- 144 This clause re-enacts section 48B of the Acts Interpretation Act preventing the making of an instrument or provision of a legislative instrument the same in substance as an instrument or provision which is 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.

- 145 Subclause 64(1) prevents the making of an instrument the same in substance as an instrument or provision 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.
- 146 Subclause 64(2) provides that where an instrument or provision 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 or provision 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.
- 147 Subclause 64(3) provides that a legislative instrument or provision of a legislative instrument made in contravention of the clause has no effect.
- 148 Subclause 64(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.
- 149 To ensure that this clause does not impede the effectiveness of the ability to defer disallowance of an instrument or a provision of a legislative instrument, subclause 64(5) excludes from the operation of the clause a legislative instrument which is made solely to remake or amend an instrument or provision of an instrument to achieve an objective of a resolution deferring consideration of a notice of motion to disallow that instrument.

Clause 65 - Disallowed legislative instruments not to be remade unless disallowance resolution rescinded or House approves

- 150 Subclause 65(1) re-enacts subsection 49(1) of the Acts Interpretation Act, preventing the making of a legislative instrument or a provision 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 or provision was given passes a resolution approving the making of such an instrument or provision.

- 151 Subclause 65(2) re-enacts subsection 49(2) of the Acts Interpretation Act to provide that a legislative instrument or provision of a legislative instrument made in contravention of the clause has no effect.

PART 6 - SUNSETTING OF LEGISLATIVE INSTRUMENTS

Clause 66 - Sunsetting of legislative instruments

- 152 This Part provides for the automatic repeal, or sunsetting, of each legislative instrument five years after the instrument commences or is backcaptured onto the Register.
- 153 Subclause 66(1) sets out certain categories of legislative instruments which are exempt from sunsetting. These include legislative instruments that give effect to an international obligation of Australia, confer heads of power on a self-governing Territory or that establish a body having power to enter into contracts for the purposes of the body's functions.
- 154 If a legislative instrument is made before the commencing day, and is required to be backcaptured under clause 49 and does not amend an earlier legislative instrument that continues in force, then that principal legislative instrument, and the provisions of any other legislative instrument that amend it, cease to be in force after 5 years from the last day for backcapture of the principal legislative instrument under clause 49 (subclause 66(2)).
- 155 If a legislative instrument is made after the commencing day, and does not amend an earlier legislative instrument that continues in force, then that principal legislative instrument, and the provisions of any other legislative instrument that amend it, cease to be in force after 5 years from the commencement date of the principal legislative instrument (subclause 66(3)).
- 156 If a legislative instrument has 2 or more commencement days, the sunsetting period is calculated from the earliest commencement day (subclause 66(4)).
- 157 Subclause 66(5) allows the Governor-General to make regulations to provide for a 15 year sunsetting period for instrument intended to confer long-term rights on a person or body, if the Governor-General is satisfied that application of the standard sunsetting regime would frustrate that purpose.
- 158 Subclauses 66(6) and 66(8) allow the Attorney-General to issue a certificate extending the sunsetting period for a legislative instrument by a period up to 1 year where the Attorney-General is satisfied that the relevant legislative instrument cannot be remade by the sunset date because the drafting or consultation cannot be completed in time, or the

dissolution or expiration of the House of Representatives or the prorogation of the Parliament makes it inappropriate to remake the instrument before a new Government takes office, or the instrument is expected to cease to have effect within 12 months of the sunset date.

PART 7 - MISCELLANEOUS

Clause 67 - Instruments made but not finally dealt with before the commencing day

- 159 Subclause 67(1) applies the clause to legislative instruments made before the commencing day which were disallowable under Part XII of the Acts Interpretation Act (whether because of the operation of s. 46A of the Acts Interpretation Act or not) or were otherwise required to be Gazetted.
- 160 Subclause 67(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. The instrument will therefore be required to be registered in Part A of the Register. 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.
- 161 Subclause 67(3) ensures that rule-makers do not have to provide explanatory statements for tabling in accordance with clause 59 in relation to instruments that were made before the commencing day where the tabling occurs after the commencement date. Although the amendment does not stop rule-makers from providing statements voluntarily at this time, it should not require this where it would result in delay in the commencement of an instrument.
- 162 Subclause 67(4) 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* 1903 and the Acts Interpretation Act continue to apply to the instrument.

Clause 68 - Relationship of certain gazettal requirements to registration requirements

- 163 This clause is necessary to prevent unnecessary duplication of notification of the making of legislative instruments where the gazettal requirement is contained in the enabling legislation for the particular instrument.
- 164 Subclause 68(1) provides that existing requirements for publication or notification of legislative instruments will be satisfied, in the case of instruments made after commencing day, by entry on the Register.

- 165 Subclause 68(2) provides that subclause (1) does not apply to certain legislative instruments made under the national companies and securities scheme laws, to ensure that the requirements for such instruments are the same in every jurisdiction.
- 166 Subclause 68(3) ensures that where post-commencement enabling legislation requires the text of an instrument to be published in the Gazette then both gazettal and registration must be satisfied.

Clause 69 - Effect on existing tabling and disallowance requirements

- 167 This clause provides for the situation where provisions in existence before the commencement of the Bill contain specific requirements for tabling or disallowance of a legislative instrument which are inconsistent with the provisions in clauses 58 to 65 of Part 5 of the Bill. The clause clarifies the tabling and disallowance requirements that apply to instruments subject to a specific tabling or disallowance regime that is inconsistent with the Bill, in order to avoid any confusion concerning which tabling and disallowance requirements apply to a particular instrument.
- 168 Subclause 69(1) provides that compliance with the tabling requirements of the Bill is taken to satisfy pre-existing specific tabling provisions.
- 169 Subclause 69 (2) provides that compliance with the disallowance requirements of the Bill is taken to satisfy pre-existing specific disallowance provisions unless the regulations prescribe that the specific provisions continue to apply despite Part 5 (subclause 69(3)).

Clause 70 - Delegation

- 170 Subclause 70(1) permits a Minister to delegate to the principal officer of a prescribed authority the power to make a decision under clause 19, 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.
- 171 Subclause 70(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 71 - Early backcapturing

- 172 This clause provides for the registration of instruments in Part B of the Register before the commencement day of the Bill and for the registration to be taken as registration on the commencement day. Subclause 71(1) recognises that the electronic database that will be the Register may be

established before the commencement day and that its database can be structured in accordance with the requirements of Part 4 of the Bill. If that occurs then that database becomes the Register on the commencement day.

- 173 Subclause 71(2) provides that entries made on the database before the commencement day which satisfy the requirements for registration on Part B of the Register after the commencement day are taken to have been made on the commencement day.

Clause 72 Review of operation of the Act

- 174 This clause responds to a suggestion of the House of Representatives Standing Committee on Legal and Constitutional Affairs during hearings on the Legislative Instruments Bill 1994, that that Bill should provide for a statutory review.
- 175 Subclause 72(1) requires the Attorney-General to appoint persons to a body to review the operation of the Act. Subclause 72(2) sets out the constitution of the review body. Subclause 72(3) provides that the representative of the Administrative Review Council appointed to the review is the Chair of the review. Subclauses 72(4) and (5) deal with resignation from the body, and the making of substitute appointments.
- 176 Subclause 72(6) sets out the specific matters to be reviewed, as part of the review of all aspects of the operation of the Act. Those matters include extension of the consultation procedures to proposed legislative instruments that will not affect business, issues of cost effectiveness, the continued need for certain specified exemptions and the issue of registration of documents incorporated by reference.
- 177 Subclause 72(7) requires the review body to report in writing to the Attorney-General within 15 months after the third anniversary of the commencing day. Subclause 72(8) requires the Attorney-General to table the report in both Houses within 6 sitting days of receipt.

Clause 73 - Review of operation of the sunset provision

- 178 This clause provides for a further review after 7 years operation of the legislation (2 years operation of the general sunset regime) to examine the operation of the sunset regime and its efficiency.

Clause 74 - Transitional provisions

- 179 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 74(1) includes instruments which would, if not for this Bill, be published in the Statutory Rules series, and subclause 74(2) includes instruments which would be 'disallowable instruments' under section 46A of the Acts Interpretation Act.

Clause 75 - Regulations

- 180 Subclause 75(1) provides the usual regulation making power.
- 181 Subclause 75(2) provides that Schedule 3 dealing with bodies that are Government business enterprises may be amended by regulation.
- 182 Subclause 75(3) provides a limit on the power to amend Schedule 2, the enabling legislation providing for legislative instruments directly or substantially indirectly affecting business, provided in clause 34. 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

- 183 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.
- 184 Items 11, 12, and 13 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 LIKELY TO HAVE AN EFFECT ON BUSINESS

- 185 Schedule 2 lists the legislation which provides for legislative instruments directly affecting business or having a substantial indirect effect on 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 contained in clauses 28 and 30.
- 186 Legislation included in the Schedule provides for the range of legislative instruments which have a regulatory or other effect on business.

SCHEDULE 3 - BODIES THAT ARE GOVERNMENT BUSINESS ENTERPRISES

- 187 Schedule 3 lists bodies that are government business enterprises. The list has been agreed by the Government so that the use of the term "government business enterprise" is congruent, as far as possible, with its use in other legislation. 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

- 188 Subsection 4(6) of the Acts Interpretation Act provides that references in section 4 of the Act to the enactment of an Act or to an Act other than the Acts Interpretation Act, shall be read as references to the making of rules, regulations or by-laws. The Bill redrafts the subsection to refer to instruments of a legislative character, rather than rules, regulations and by-laws.

- 189 The definition of a Proclamation contained in section 17 of the Acts Interpretation Act is amended to include a Proclamation which is entered on the Register of Legislative Instruments. All Proclamations made under enabling legislation are defined as legislative instruments by paragraph 5(3)(e) of the Bill, and will therefore be required to be registered, the amendment of the definition will ensure that unnecessary duplication of notification of the making of these Proclamations is not required.

Heading to Part XI

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

Sections 46 and 46A

- 191 Sections 46 and 46A are repealed and replaced by new sections 46, 46A and 46B.
- 192 Proposed new section 46 mirrors the effect of clause 10 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*. Proposed 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. Proposed 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.
- 193 Proposed 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 11, which provides for the reference to other instruments and is founded on the current *Acts Interpretation Act 1901*, in relation to these instruments.

Section 46B - Disallowable non-legislative instruments

- 194 Proposed 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. The default commencement provision mirrors paragraph 9(1)(d) of the Legislative Instruments Bill, and implements a recommendation of the House of Representatives Standing Committee on Legal and Constitutional Affairs that default commencement for legislative and non-legislative instruments should be standardised.

Part XII

195 Part XII of the Acts Interpretation Act is repealed.

Amendments Incorporation Act 1905

Clause 4 - Incorporation of amendments in reprints of legislative instruments

196 This clause takes account of the effect of the repeal of section 6A of the *Statutory Rules Publication Act 1903* which deals with the Government Printer's obligation relating to up-to-date consolidations. The clause is intended to maintain the effect of the existing regime.

Family Law Act 1975

Section 26E Application of the Legislative Instruments Act 1996 to Rules of Court

197 The subsection is omitted, and instead new section 26E applies the provisions of the Bill to Rules of Court made under sections 26B and 26C, other than clause 5 which defines 'legislative instrument', clause 8 which provides for the Attorney-General's certificate as to whether an instrument is a legislative instrument or not, and paragraph 15(a) and clause 16, 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 .

Subsection 37A(14)

198 The subsection is omitted, and instead new subsection 37A(14) applies the provisions of the Bill to Rules of Court made under section 37A, other than clause 5 which defines 'legislative instrument', clause 8 which provides for the Attorney-General's certificate as to whether an instrument is a legislative instrument or not, and paragraph 15(a) and clause 16, 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 .

Subsection 123(2)

199 The subsection is omitted, and instead new subsection 123(2) applies the provisions of the Bill , other than clause 5 which defines 'legislative instrument', clause 8 which provides for the Attorney-General's certificate as to whether an instrument is a legislative instrument or not, and paragraph 15(a) and clause 16, 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.

- 200 New subsection 123(2A) ensures that, despite the fact that the Principal Legislative Counsel will not have a responsibility for the standards of Rules of Court made under the Act, he or she is authorised to provide drafting assistance if the Chief Justice so desires.

After paragraph 125(1)(ba)

- 201 New paragraph 125(1) (bb) is inserted, to allow for the making of regulations modifying the provisions of the Bill, other than provisions of Part 5, in their application to Rules of Court.

After subsection 125(1)

- 202 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. It provides that regulations under the *Family Law Act 1975* must provide for a consultation procedure to be followed in the case of Rules of Court directly affecting business made more than six months after the Legislative Instruments Bill 1996 commences, in substitution for the procedure contained in Part 3 of the Bill.
- 203 New subsection 125(1B) ensures that exemptions from consultation of the kind referred to in clauses 28 or 30 of the Bill are available for any consultation procedure adopted by the Family Court in substitution for Part 3 of the Bill.

Federal Court of Australia Act 1976

Subsection 59(4)

- 204 The subsection is omitted, and instead new subsection 59(4)) applies the provisions of the Bill , other than clause 5 which defines 'legislative instrument', clause 8 which provides for the Attorney-General's certificate as to whether an instrument is a legislative instrument or not, and paragraph 15(a) and clause 16, 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.
- 205 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.

Section 59A - Regulations modifying or adapting the Legislative Instruments Act

- 206 New subsection 59A (1) is inserted, to allow for the making of regulations modifying the provisions of the Bill (other than the provisions of Part 5) in their application to Rules of Court.
- 207 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. It provides that regulations under the *Federal Court of Australia Act 1976* must provide for a consultation procedure to be followed in the case of Rules of Court directly affecting business made more than six months after the Legislative Instruments Bill 1996 commences, in substitution for the procedure contained in Part 3 of the Bill.
- 208 New subsection 59A(3) ensures that exemptions from consultation of the kind referred to in clauses 28 or 30 of the Bill are available for any consultation procedure adopted by the Federal Court in substitution for Part 3 of the Bill.

Industrial Relations Act 1988

Subsection 486(4)

- 209 Subsection 486 (4) is omitted, and replaced with new subsection 486 (4)) which applies the provisions of the Bill , other than clause 5 which defines 'legislative instrument', clause 8 which provides for the Attorney-General's certificate as to whether an instrument is a legislative instrument or not, and paragraph 15(a) and clause 16, 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.
- 210 New subsection 486(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.

Section 486A - Regulations modifying or adapting the Legislative Instruments Act

- 211 New subsection 486A(1) is inserted, to allow for the making of regulations modifying the provisions of the Bill (other than the provisions of Part 5 - Parliamentary Scrutiny of Legislative Instruments) in their application to Rules of Court.

- 212 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. It provides that regulations under the *Industrial Relations Act 1988* must provide for a consultation procedure to be followed in the case of Rules of Court directly affecting business made more than six months after the Legislative Instruments Bill 1996 commences, in substitution for the procedure contained in Part 3 of the Bill.
- 213 New subsection 486A(3) ensures that exemptions from consultation of the kind referred to in clauses 28 or 30 of the Bill are available for any consultation procedure adopted by the Industrial Relations Court in substitution for Part 3 of the Bill.

Judiciary Act 1903

Section 86

- 214 New subsection 86(2) applies the provisions of the Bill , other than clause 5 which defines 'legislative instrument', clause 8 which provides for the Attorney-General's certificate as to whether an instrument is a legislative instrument or not, and paragraph 15(a) and clause 16, 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.
- 215 New subsection 86(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.

Section 87

- 216 The section is repealed as that section applied former provisions of the Acts Interpretation which have now been repealed and replaced by the requirements of the Bill.

After paragraph 88(ca)

- 217 New subsection 88(cb) is inserted, to allow for the making of regulations modifying the provisions of the Bill (other than the provisions of Part 5 - Parliamentary Scrutiny of Legislative Instruments) in their application to Rules of Court.
- 218 New subsection 88(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. It provides that regulations under the *Judiciary Act 1903* must provide for a consultation procedure to be followed in the case of Rules of Court directly affecting business made more than six months after the Legislative Instruments Bill 1996 commences, in substitution for the procedure contained in Part 3 of the Bill.

- 219 New subsection 88(3) ensures that exemptions from consultation of the kind referred to in clauses 28 or 30 of the Bill are available for any consultation procedure adopted by the High Court in substitution for Part 3 of the Bill.

Statutory Rules Publication Act 1903

- 220 The *Statutory Rules Publication Act 1903* is repealed.



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