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No. 54 2003–04

Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003

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Legislative Instruments (Transitional Provisions and
Consequential Amendments) Bill 2003

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Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003

Date Introduced: 26 June 2003

House: House of Representatives

Portfolio: Attorney-General

Commencement: The formal provisions commence on Royal Assent. The substantive provisions commence immediately after the commencement of sections 3 to 62 of the proposed Legislative Instruments Act 2003.¹

Purpose

To make transitional and consequential amendments related to the proposed Legislative Instruments Act 2003. These amendments include:

- repealing provisions in the *Acts Interpretation Act 1901* that deal with disallowable instruments and regulations. Legislative instruments will be covered in the proposed Legislative Instruments Act.
- inserting provisions in the Acts Interpretation Act to provide a regime for the disallowance and construction of non-legislative instruments
- repealing the *Statutory Rules Publication Act 1903*. The publication of statutory rules will be dealt with by the proposed Legislative Instruments Act. The *Amendments Incorporation Act 1905* will be amended to deal with the reprinting of statutory rules, and
- applying the proposed Legislative Instruments Act to rules of court.

Background

As the 'Purpose' section of this Digest indicates, this Bill is companion legislation to the Legislative Instruments Bill 2003. The Legislative Instruments Bill 2003 is designed to establish a 'comprehensive regime for the registration, tabling, scrutiny and sunseting of

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Commonwealth legislative instruments.² To quote further from the report of the Senate Regulations and Ordinances Committee, it:

- (a) defines a legislative instrument;
- (b) establishes a Federal Register of Legislative Instruments;
- (c) encourages high standards in the drafting of legislative instruments to promote their legal effectiveness, clarity and intelligibility;
- (d) encourages rule-makers to undertake appropriate consultation;
- (e) improves public accessibility;
- (f) enhances parliamentary scrutiny; and
- (g) establishes a ten-year sunseting regime.³

Further information about the Legislative Instruments Bill 2003 can be found in [Bills Digest No. 26 of 2003-04](#).

Main Provisions

Transitional provisions

Clauses 4 and 5 deal with transitional matters. Transitional provisions are needed if, for instance, a statute commences after the commencement of the proposed Legislative Instruments Act 2003 but refers to legislation which is repealed by that Act.⁴ In such a case, the transitional provisions will instead apply the relevant provisions of the proposed Legislative Instruments Act.

Clause 5 enables the Governor-General to make regulations dealing with transitional matters. If made within 12 months, those regulations can have a retrospective effect [**subclause 5(2)**].

Amendments of the *Acts Interpretation Act 1901*

Item 4 of Schedule 1 amends the definition of ‘Proclamation’ in the Acts Interpretation Act to include a reference to ‘the Federal Register of Legislative Instruments established under the *Legislative Instruments Act 2003*’. Because Proclamations are legislative instruments under the proposed Legislative Instruments Act they will be entered on the Register. The amendment reflects this.

Item 6 repeals sections 46 and 46A of the Acts Interpretation Act which deal with the construction of statutory instruments and with disallowable instruments. In relation to

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legislative instruments, these matters will be covered by the proposed Legislative Instruments Act.

Item 6 also inserts **proposed sections 46, 46AA and 46B**. These new sections will operate in relation to instruments that are neither legislative instruments nor rules of court and will cover:

- how to construe such instruments—in conformity with meanings in the enabling legislation and so as not to exceed power (**proposed section 46**).

As with existing section 46 of the Acts Interpretation Act, where a statute gives an authority power to make an instrument that specifies a ‘matter or thing’ then the ‘matter or thing’ can be identified by reference to a class. Parliament may be interested to know that in 1998 the Attorney-General’s Department published a review of the Acts Interpretation Act.⁵ The review expressed concern about whether the word ‘thing’ includes a person or animal and suggested that section 46 be amended to make this clear. The suggestion has not been incorporated in the present Bill or in the equivalent provision in the proposed Legislative Instruments Act.⁶

- how those instruments can incorporate other material by reference—such instruments can incorporate the provisions of Commonwealth Acts or disallowable legislative instruments as in force at the time of incorporation or from time to time. Such instruments can also incorporate other material. Unless the enabling legislation allows, other material can only be incorporated as in force at the time of incorporation. Parliament may wish to note that the incorporation of ‘other material’ may raise issues about transparency of and accessibility of the law (**proposed section 46AA**).
- disallowance—**proposed section 46B** contains a disallowance regime for instruments that are neither legislative instruments nor rules of court if they are expressly subjected to the regime. Thus, disallowable non-legislative instruments that adversely impinge on rights or impose liabilities cannot take effect until they are notified in the *Gazette*, unless their enabling legislation provides to the contrary. Failure to have copies of a disallowable non-legislative instrument available to the public means that the responsible Minister must table an explanation in Parliament as to why they were not available. Disallowable non-legislative instruments must be tabled within 6 sitting days of being made and cease to have effect if they are not so tabled. And, with some exceptions, the disallowance provisions of the proposed Legislative Instruments Act apply to disallowable non-legislative instruments.

Item 7 repeals sections 48, 48A, 48B, 49, 49A and 50 of the Acts Interpretation Act. These sections deal with matters such as the tabling and disallowance of regulations, the requirement that regulations not be re-made during the tabling or disallowance periods and the effect of the repeal of regulations. In relation to legislative instruments, these matters will be dealt with by the proposed Legislative Instruments Act.

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The Explanatory Memorandum notes that the Bill does not attempt to amend all Commonwealth legislation which presently contains references to sections 48-50 of the Acts Interpretation Act:

The operation and subject matter of the repealed provisions will be covered by the 2003 Act where they relate to legislative instruments, and by the Acts Interpretation Act as amended by [the] Bill where they relate to non-legislative instruments, thereby preserving the status quo.

There are, however, a number of pieces of Commonwealth legislation that modify the operation of sections 48 to 50 of the Acts Interpretation Act in relation to instruments made under that legislation. Where this is the case, this Bill continues that modification by transitional provisions or by making consequential amendments to the enabling legislation so that it refers to the relevant part of the 2003 Act or the Acts Interpretation Act.⁷

Amendments relating to the repeal of the *Statutory Rules Publication Act 1903*

The Statutory Rules Publication Act deals with the printing, numbering, gazettal and sale of rules, regulations and by-laws. It also requires reprinted statutory rules to contain all the amendments that have been made to the instrument and to refer to the amending statutory instrument.

The Statutory Rules Publication Act is repealed by **item 33** of the Schedule because the proposed Legislative Instruments Act will cover all legislative instruments, including rules, regulations and by-laws. Requirements about reprints of legislative instruments will be contained instead in the *Amendments Incorporation Act 1905* (**item 9**).

Amendments relating to rules of court

At present, rules of court made by federal courts are subject to the notification, tabling and disallowance provisions of the Acts Interpretation Act.⁸

Under the proposed Legislative Instruments Act, rules of court are not legislative instruments. However, in general, the proposed Act will apply to rules of court once the relevant legislation for each federal court is amended. This will mean that rules of court will be registered on the Register of Legislative Instruments, subject to consultation requirements if they affect business or restrict competition, disallowable by either House of Parliament, and subject to sunseting.

In order to effect these changes, the Bill amends the *Family Law Act 1975*⁹, the *Federal Court Act 1976*¹⁰, the *Federal Magistrates Act 1999*¹¹, and the *Judiciary Act 1903*¹² (relating to rules of court for the High Court). The amendments will remove references to the Acts Interpretation Act and substitute references applying relevant provisions of the proposed Legislative Instruments Act.

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Subsection 375(1) of the *Commonwealth Electoral Act 1918* enables the High Court to make rules of court that apply when it sits as the Court of Disputed Returns. Subsection 375(2) applies certain Acts Interpretation Act provisions to those rules. Subsection 375(2) is repealed because amendments to the Judiciary Act applying provisions of the proposed Legislative Instruments Act will cover all rules made by the High Court.¹³

The amendments also enable regulations to be made altering the way in which the proposed Legislative Instruments Act applies to rules of court.¹⁴ However, the application of Part 5 of the proposed Act, which deals with parliamentary scrutiny, cannot be altered by way of regulation. There may be a question of whether amendment of a primary statute by regulation (a Henry VIII clause) is an appropriate delegation of legislative power. Concerns about Henry VIII clauses were expressed in relation to three provisions in the proposed Legislative Instruments Act by the Senate Regulations and Ordinances Committee in its report on the Legislative Instruments Bill 2003 and this Bill.

Miscellaneous amendments

Schedule 1 also makes amendments to a number of other statutes. For instance, it:

- removes references in some statutes to the Legislative Instruments Act 1995 (**items 8, 34 and 35**), the Legislative Instruments Act 1998 (**item 27**), and the Legislative Instruments Act 1997 (**item 28**)—proposed legislation that was introduced into Parliament but never enacted
- adds references to the proposed Legislative Instruments Act 2003 in a number of statutes (**items 10 and 11**)
- applies the Acts Interpretation Act as in force at the commencement of the Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003 to the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001* (**items 12 and 15**). At present, the Acts Interpretation Act's application is frozen at 1 November 2000.
- amends the defence of mistake or ignorance of subordinate legislation found in the Criminal Code to include a reference to the Legislative Instruments Register (in general terms, a person charged with an offence found in subordinate legislation will have a defence if the legislation is not appropriately published) (**item 16**)
- amends the *Customs Act 1901* so that Tariff Concession Orders can be revoked and replaced with retrospective effect. An explicit amendment of this sort is needed because the proposed Legislative Instruments Act provides that, unless the contrary intention appears, legislative instruments which adversely affect rights will not have a retrospective effect (**items 17 and 18**), and

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- provides that directions issued by the Public Service Commissioner are disallowable non-legislative instruments for the purposes of proposed section 46A of the Acts Interpretation Act. This preserves the status of the directions as disallowable instruments¹⁵ (**item 32**).

Endnotes

- 1 These sections will commence on a date that is either a 1 January or 1 July and if not commenced within 12 months of Royal Assent being given to the Act, will commence on the 1 January or 1 July that first occurs after the 12 months period.
- 2 Senate Regulations and Ordinances Committee, [*Legislative Instruments Bill 2003. Legislative Instruments \(Transitional Provisions and Consequential Amendments\) Bill 2003. 111th Report*](#), October 2003, p. 7.
- 3 *ibid.*, pp. 7–8.
- 4 Repealed legislation would include the *Statutory Rules Publication Act 1903* or section 46A of the *Acts Interpretation Act 1901* (which deals with disallowable instruments).
- 5 Attorney-General's Department and Office of Parliamentary Counsel, [*Review of the Commonwealth Acts Interpretation Act 1901*](#), 1998.
- 6 Proposed section 13, *Legislative Instruments Bill 2003*.
- 7 *Explanatory Memorandum*, p. 1.
- 8 The relevant Acts Interpretation Act sections are sections 48, 48A, 48B, 49, 49A and 50.
- 9 **Items 19-22.**
- 10 **Items 23 and 24.**
- 11 **Items 25 and 25.**
- 12 **Items 29-31.**
- 13 **Items 13 and 14.**
- 14 Proposed paragraphs 26E(c), 37A(14)(c), 123(2)(c) and 125(1)(baa) of the *Family Law Act 1975*; proposed paragraph 59(4)(c) and proposed section 59A of the *Federal Court Act 1976*; proposed paragraph 81(3)(c) of the *Federal Magistrates Act 1999* and proposed paragraphs 86(2)(c) and 88(cb) of the *Judiciary Act 1903*.
- 15 They are currently disallowable instruments for the purposes of existing section 46A of the Acts Interpretation Act.

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