

Chapter 2

Overview of the bill

Introduction

2.1 This chapter provides an overview of the bill and summarises some key provisions. The provisions of the bill are contained in the three schedules:

- Schedule 1 – Acts, legislative instruments and notifiable instruments;
- Schedule 2 – Machinery of government; and
- Schedule 3 – Updating references to instruments.

2.2 Clause 2 of the bill provides that the provisions in the schedules will commence on a single day to be fixed by Proclamation or on a day after a 12 month period following Royal Assent.

Schedule 1 – Acts, legislative instruments and notifiable instruments

Schedule 1, Part 1 – Definitions and key concepts

2.3 Part 1 of Schedule 1 makes amendments to change the title of the *Legislative Instruments Act 2003* (LIA) to the 'Legislation Act 2003' as well as making a range of other amendments. In particular, the objects section is amended to remove the reference to establishing the Federal Register of Legislative Instruments and to reflect the key amendments made by the bill. As amended section 3 will provide:

The object of this Act is to provide a comprehensive regime for the management of Acts and instruments by:

- (a) establishing the Federal Register of Legislation as a permanent repository of versions (including authorised versions) of Acts, legislative instruments, notifiable instruments and compilations, together with associated documents and information; and
- (aa) enabling the First Parliamentary Counsel to make editorial changes and some other changes in preparing compilations of Acts, legislative instruments and notifiable instruments, if those changes do not change the effect of the Acts or instruments; and
- (b) encouraging rule-makers to undertake appropriate consultation before making legislative instruments; and
- (c) encouraging high standards in the drafting of legislative instruments to promote their legal effectiveness, their clarity and their intelligibility to anticipated users; and
- (d) improving public access to legislative instruments; and
- (e) establishing improved mechanisms for Parliamentary scrutiny of legislative instruments; and
- (ea) automatically repealing spent legislative instruments and notifiable instruments (or provisions of those instruments) that merely provide for the amendment, repeal or commencement of Acts or other instruments; and

(f) establishing mechanisms to ensure that legislative instruments are periodically reviewed and, if they no longer have a continuing purpose, repealed; and

(g) enabling regulations to be made under this Act amending or repealing legislative instruments and notifiable instruments in some circumstances.

2.4 Schedule 1, Part 1 amends the definition of 'legislative instrument' and inserts a definition of 'notifiable instrument'. Proposed new section 8 contains the definition of 'legislative instrument'. The simplified outline provides that, generally, the following are legislative instruments:

- an instrument described or declared by a law (including this Act) to be a legislative instrument;
- an instrument registered on the Federal Register of Legislation as a legislative instrument;
- an instrument made under a power delegated by the Parliament that determines the law or alters its content.

However, an instrument is not a legislative instrument if an Act (or a regulation under this Act) so provides.

2.5 Proposed new section 11 also sets out the definition of 'notifiable instrument'. The simplified outline provides that, generally, the following are notifiable instruments:

- an instrument described or declared by a law (including this Act or a regulation under this Act) to be a notifiable instrument;
- a commencement instrument;
- an instrument (other than a legislative instrument) that is registered on the Federal Register of Legislation as a notifiable instrument.

Generally, unlike legislative instruments, notifiable instruments are not subject to parliamentary scrutiny, nor are they subject to automatic repeal 10 years after registration.

Schedule 1, Part 2 – Registration of Act and Instruments

2.6 Schedule 2, Part 2 of the bill, inserts 'Chapter 2—Registration of Acts, legislative instruments and notifiable instruments' which contains three parts. Chapter 2, Part 1 titled 'The Federal Register of Legislation' includes provisions that:

- the FPC must establish and maintain the Federal Register of Legislation (the Register) (section 15A);
- the Register is, for all purposes, taken to be a complete and accurate record of Acts, legislative instruments and notifiable instruments (section 15B);
- the FPC must ensure that the Register is available to the public on a website prescribed by the rules (section 15C);
- the FPC must correct errors in the Register (section 15D);
- the rules may provide for keeping the Register, including adding and removing documents and information from the Register (section 15E);

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- the FPC must register an Act as soon as practicable following assent (section 15F);
 - deal with obligations on rule-makers regarding the lodgement of legislative instruments, notifiable instruments and other material for the registration (section 15G);
 - deal with obligations on the FPC regarding the registration of legislative instruments and notifiable instruments (section 15H);
 - deal with explanatory statements (section 15J);
 - provide that a legislative instrument is not enforceable unless it is registered (section 15K);
 - responsible persons for Acts, and rule-makers for legislative instruments or notifiable instruments, must notify the FPC of some events affecting the status of the Acts or instruments (section 15L); and
 - the rules may provide for the lodgement and registration of instruments and documents (section 15M).

2.7 Chapter 2, Part 2 is titled 'Compilations'. The simplified outline of Part 2 contained in new section 15N provides:

A compilation shows the text of an Act, legislative instrument or notifiable instrument as amended (if at all) and in force on the compilation date stated in the Act or instrument.

The First Parliamentary Counsel must generally register a compilation after a registered Act or instrument is amended, and in some other circumstances.

A rule-maker for a legislative instrument or notifiable instrument must lodge a compilation for registration if the instrument is amended, or in some circumstances on notice from the First Parliamentary Counsel.

The First Parliamentary Counsel may make editorial changes and some other changes in preparing a compilation of a registered Act or instrument, as long as they do not change the effect of the Act or instrument.

2.8 Chapter 2, Part 2—Compilations includes provisions which:

- prescribe the minimum information that must be included in the compilation of an Act or instrument including any editorial changes and brief outline of the changes in general terms (section 15P);
- define 'required compilation event' and 'discretionary compilation event' (section 15Q);
- require rule-makers to prepare and lodge compilations for registration if a required compilation event occurs (section 15R);
- provide that, if a discretionary compilation event occurs, the FPC may give written notice to a rule-maker to require them to prepare and lodge a compilation (section 15S);

- clarify the role of the FPC in preparing and registering compilations (section 15T);
- provide that rules can be made in relation to compilations, including on the preparation, withdrawal and rejection of compilations (section 15U);
- enable the FPC to make editorial and presentational changes to a compilation of an Act or an instrument (section 15V);
- provide that editorial changes made by the FPC are treated the same way as amendments (section 15W); and
- define 'editorial change' (section 15X).

2.9 Chapter 2, Part 3 is titled 'Authorised versions and judicial notice'. The simplified outline of Part 3 contained in new section 15Y provides:

Authorised versions of registered Acts, legislative instruments, notifiable instruments, explanatory statements for legislative instruments and compilations may be sourced from the approved website. Judicial notice may be taken of authorised versions and related matter.

Schedule 1, Part 3 – Legislative Instruments and notifiable instruments generally

2.10 The EM notes that the key changes made by Schedule 1, Part 3 include:

- amendments consequential to moving the table of instrument classes in existing section 44 of the LIA, which are not subject to disallowance, to the Regulations;
- amendments consequential to moving the list of instrument classes in existing section 54 of the LIA, which are not subject to sunseting, to the Regulations;
- enabling amendment or repeal of multiple instruments to be made more efficiently through a single regulation initiated by the Attorney-General; and
- extending the provisions for automatic repeal of spent or amending instruments to cover notifiable instruments.¹

2.11 In particular, item 33 of Schedule 1, Part 3 repeals subsection 17(1) and substitutes a new subsection. The EM notes:

Existing subsection 17(1) requires the rule-maker to be satisfied that any appropriate and reasonably practicable consultation has been undertaken, —particularly where the proposed instrument is likely to have a direct, or substantial indirect, effect on business, or restrict competition.

The reference to instruments affecting business or competition is repealed by this item, consistent with recommendation 32 of the *2008 Review of the Legislative Instruments Act 2003*, to avoid the perception that consultation is only required for those instruments.

New subsection 17(1) requires that before any legislative instrument is made, the rule-maker must be satisfied that any appropriate and reasonably

1 EM, pp 13-14.

practicable consultation is undertaken. In limited circumstances, no consultation may be appropriate for making a particular instrument.²

Schedule 1, Part 4 – Repeals

2.12 Part 4 of Schedule 1 repeals the Acts Publication Act, the *Acts Citation Act 1976*, and the *Ordinances and Regulations (Notification Act) 1972*. In particular, the EM notes that provisions of the Acts Publication Act have been transferred to the new 'Legislation Act 2003' by Parts 1-3 of the bill.³

Schedule 1, Part 5 – Amendments to other Acts

2.13 Schedule 1, Part 5 amends the Acts Interpretation Act to extend its application to notifiable instruments as well as making a number of other amendments. In particular, Part 5 repeals existing section 46B, which provides a disallowance regime for non-legislative instruments, and also makes consequential amendments to laws within the Defence portfolio which utilise this regime. The EM states:

All of these instruments are able to be classified as legislative instruments (and consequently fall within the disallowance regime of the Legislation Act) with no substantive changes in the effect of the law. This enables the removal of the special, and unnecessary, disallowance regime provided by section 46B of the Acts Interpretation Act. This alignment of disallowance procedures is consistent with recommendation 36 of the 2008 Review of the Legislative Instruments Act 2003. Further, this enhances the status of the Register as the central repository and authoritative source of Commonwealth legislative instruments, encouraging a gradual reduction in other publication procedures.⁴

Schedule 1, Part 6 – References to the Legislative Instruments Act 2003

2.14 Schedule 1, Part 6 provides for transitional arrangements that allow for references to the LIA in legislation in force before the commencement of the new Legislation Act 2003, to be read as though they were references to the relevant parts of the Legislation Act 2003.⁵

Schedule 1, Part 7 – Application, Savings and Transitional provisions

2.15 Schedule 1, Part 7 contains application, savings and transitional provisions. For example, item 173 provides that if an Act was in the Acts database, or if a legislative instrument or an explanatory statement was registered on the Federal Register of Legislative Instruments, prior to the commencement of Schedule 1, they will be taken to have been registered on the Register.⁶

2 EM, p. 51.

3 EM, p. 15.

4 EM, p. 71.

5 EM, p. 80.

6 EM, p. 82.

Schedule 2 – Machinery of government changes

2.16 The EM states Schedule 2 'amends the Acts Interpretation Act to clarify provisions relating to references to ministers, departments and other government authorities, and to broaden and strengthen existing provisions relating to machinery of government changes'.⁷ The EM outlines that the amendments in Schedule 2 will:

- broaden the rules used for interpreting references to Ministers and Departments in legislation, reducing the need to make substituted reference orders;
- provide greater flexibility in the use of substituted reference orders;
- broaden the rules for interpreting references to authorities in agreements entered into by or on behalf of the Commonwealth; and
- provide a broader savings provision for the validity of acts done by any type of authority (not just Ministers) under an agreement as well as in the exercise or performance of powers, functions and duties under legislation.⁸

Schedule 3 – Updating references to instruments

2.17 Schedule 3 makes 'amendments to a wide range of Acts to update references to provisions that currently provide for legislative instruments to be made by referring to repealed provisions of the Acts Interpretation Act and the *Statutory Rules Publication Act 1905* (which has already been repealed)'.⁹

2.18 Part 1 of Schedule 3 repeals the *Legislative Instruments (Transitional Provisions and Consequential Amendments Act) 2003*.

2.19 Part 2 of Schedule 3 amends a large number of Acts. The EM states that amendments to Acts in Schedule 3:

- make clear within enabling legislation that certain instruments are legislative or notifiable instruments for the purposes of the new Legislation Act 2003, and
- update references to repealed provisions of the Acts Interpretation Act (Part XII and sections 46A and 48) and the *Statutory Rules Publication Act 1903* to relevant provisions in the new Legislation Act 2003.¹⁰

2.20 Part 3 of Schedule 3 provides a saving provision regarding the validity and enforceability of instruments, and a transitional provision 'for instruments made under a provision of an Act before the amendments made by Part 2, and that following the commencement of the amendments made by Part 2, the provision changes'.¹¹

7 EM, p. 4.

8 EM, p. 86.

9 EM, p. 4.

10 EM, p. 100.

11 EM, p. 162.