



SENATOR THE HON MURRAY WATT
MINISTER FOR AGRICULTURE, FISHERIES AND FORESTRY
MINISTER FOR EMERGENCY MANAGEMENT

MS24-000308

Senator Deborah O'Neill
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

sdlc.sen@aph.gov.au

Dear Chair

I write to update you on actions taken by the Department of Agriculture, Fisheries and Forestry to address issues raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation Committee (the Committee) at paragraphs 1.75, 1.80 and 1.81 of *Delegated Legislation Monitor 5 of 2024 (the Monitor)* following its scrutiny of the *Biosecurity (Electronic Decisions) Determination 2023 (the Determination)*.

I confirm that a Replacement Explanatory Statement to the Determination reflects the additional information sought by the Committee.

The Replacement Explanatory Statement was approved by the Director of Biosecurity on 11 June 2024 and was registered on the Federal Register of Legislation on 14 June 2024. A copy of the Replacement Explanatory Statement to the Determination is attached for the Committee's information.

Yours sincerely

MURRAY WATT

25 / 06 /2024

Enc: Replacement Explanatory Statement to the *Biosecurity (Electronic Decisions) Determination 2023*



The Hon Kristy McBain MP

Minister for Regional Development, Local Government and Territories
Member for Eden-Monaro

Ref: MC24-004898

Senator Deborah O'Neill
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Chair

I refer to the Senate Standing Committee for the Scrutiny of Delegated Legislation and its request for further information on the Jervis Bay Territory Fires Rules 2024 (the Rules), as detailed in Delegated Legislation Monitor 5 of 2024. I appreciate the opportunity to respond to the Committee's queries.

The Rules replace the Jervis Bay Territory Rural Fires Rule 2014, and facilitate the ongoing operationalisation of New South Wales Rural Fire Service (NSW RFS) policies, procedures and Service Standards with respect to the Jervis Bay Territory (JBT) brigades, and for other rural fire activities in the JBT. Rural fire services in the JBT are provided by volunteers who are members of local rural fire service brigades. These brigades are managed by the NSW RFS Shoalhaven District under an arrangement between the Australian Government and the NSW RFS.

As noted in the Explanatory Statement, the legislative framework applying to the JBT brigades is modelled on, and almost identical to, the *NSW Rural Fires Act 1997* (NSW) and *NSW Rural Fires Regulations 2022* (NSW). Emergency personnel, in both the NSW and JBT brigades, rely upon the certainty and clarity this provides whether they are operating in JBT or NSW on any given day.

JBT is geographically united with NSW. In administering the JBT, the Government often must take a pragmatic approach and rely on partnerships with NSW agencies to deliver state-like services in JBT. In emergencies like bushfires, emergency service personnel in JBT and the Shoalhaven area need to work as one cohesive unit following a consistent set of rules in preventing, managing and controlling bushfires. The importance of this was demonstrated during bushfires on Australia Day 2021, where emergency response services personnel from JBT and Shoalhaven worked together seamlessly to bring a large fire under control within 24 hours.

During this fire event, 340 hectares of JBT bushland and electrical infrastructure were damaged. However, due to the coordinated efforts of emergency agencies, visitors to Booderee National Park were evacuated via a single JBT access road and there was no loss of life. Similar coordinated efforts were demonstrated during bushfires in the Shoalhaven area in the 2019-2020 summer, where JBT brigades supplemented NSW RFS firefighting and preventative efforts.

My detailed responses to the Committee's requests for further information are enclosed.

I thank the committee for its attention to these matters and trust this information will assist in finalising consideration of the Rules.

Yours sincerely

Kristy McBain MP

26/6/2024

Enc

cc The Hon Catherine King MP, Minister for Infrastructure, Transport, Regional Development and Local Government

The Minister for Regional Development, Local Government and Territories provides the following advice to the Standing Committee for the Scrutiny of Delegated Legislation in response to its requests for advice made in Delegated Legislation Monitor 5 of 2024.

The committee requests the minister's advice as to:

- **why it is considered necessary and appropriate for the minister to have broad discretionary powers under the instrument, including in particular those provided under subsections 7(2), 7(4) and 9(2);**
- **whether further detail can be provided regarding the factors the minister may take into account in determining that a person is not, or is no longer, a 'fit and proper person' under subsections 7(2) and 9(2) of the instrument and the weight given to each of those factors; and**
- **what factors the minister may take into account in deciding whether to impose any conditions on a person's listing on a brigade register under section 7(4) and what such conditions are likely to include.**

Members of rural fire brigades perform an important role in managing and preventing fires. It is critical that members have the requisite qualities, skills and training to keep the community safe and are able to respond to an emergency. Given the porous border between Jervis Bay Territory (JBT) and New South Wales (NSW), and that JBT brigade members operate as part of the NSW Rural Fire Service (NSW RFS) group structure, it is essential that members of the JBT RFS operate under the same instructions and procedures as their NSW RFS counterparts.

Given the context in which JBT brigades operate, it is necessary and appropriate the Minister and delegates have broad discretionary powers to determine initial suitability of applicants and to assess and determine ongoing suitability. This includes ensuring members have the requisite qualities (such as being of good character and having sound judgement), and attain and retain requisite competencies. These requirements are identical to those governing members of the NSW RFS and the Minister's broad discretionary powers are identical to the NSW Minister.

Emergency situations can be fluid and unpredictable and responders need to be able to act quickly. JBT RFS members hold a set of powers by virtue of their positions, including powers to remove or restrain a person or thing, to enter premises, close buildings and streets, direct traffic and to destroy parts of buildings or fences. These powers are the same as those granted by NSW legislation to RFS members operating in NSW. Given the significance of these powers, it is appropriate and proportionate for the Minister to have flexibility and discretion in determining the suitability of JBT RFS members, to protect against the potential misuse of such functions. Such considerations are, by their nature, difficult to exhaustively define, and so require a broad discretion to take all relevant matters into account.

In administering the JBT brigades, the NSW RFS undertakes applicant assessment on the basis of published criteria including criminal history, working with children checks, fire service history, fire service disciplinary history, training currency, membership currency, physical fitness, health conditions and an optional applicant interview. These criteria used by the NSW RFS to assess a person as fit and proper under subsections 7(2) and 9(2) are those detailed in Service Standard 2.1.6 Volunteer Membership Applications.

However, it is necessary and appropriate that the Minister retain broad discretionary powers beyond these criteria in the event that an unforeseen adverse characteristic of a member could or does compromise the Minister's confidence that the member can carry out their duties and appropriately

wield the powers given to them. Without such broad discretionary power, the Minister may be unable to preserve the integrity of the JBT RFS in an unforeseen circumstance, for want of characterising all ways in which that confidence could be compromised. The broad discretionary powers are similar to those held by entities that regulate membership of other professions and disciplines, such as professional firefighters, legal practitioners or police officers. This arrangement mirrors the powers provided to the NSW minister under NSW RFS legislation.

It is acknowledged that members need to be afforded natural justice and be treated fairly and equitably. The Service Standards prescribe and afford natural justice in the course of assessing applications and undertaking disciplinary action. This must also be balanced against the significant responsibilities that come from the role, including the protection of human life, by ensuring that both concerns – an individual’s right to natural justice and the community’s safety – are considered in decision making.

The decision to impose conditions on a person’s listing on a brigade register under section 7(4) might be made on the basis of physical limitations or health conditions that might impact on their ability to safely fulfil fundamental requirements of certain roles. Such assessments are informed by information provided by the applicant and their doctor, in response to statements of requirement for specific roles. The conditions ordinarily imposed are (variously as appropriate) that a person may not attend an incident scene, may not attend certain types of incidents, may not perform certain duties or must only perform certain duties (e.g. operational support duties). For example, a member with asthma might not be permitted to attend a bushfire incident where smoke could endanger their health but he or she could be assigned to operational administrative duties.

Persons applying to and joining the JBT RFS are informed of and participate in these assessments and are aware of potential for conditions through the Service Standard 2.1.6 Volunteer Membership Applications and associated application forms and processes.

The committee requests the minister’s advice as to:

- **whether the Service Standards defined under the Ordinance have been incorporated into the instrument; and, if so,**
 - **which specific Standard or Standards are incorporated in relation to subsection 6(3), subsection 8(2), section 11 and subsection 13(2) of the instrument; and**
 - **whether the instrument's explanatory statement can be amended to specify the specific Standards that have been incorporated under each of the above provisions, their manner of incorporation and where they can be freely accessed and used.**

Specific Service Standards have not been incorporated in this instrument. Under the arrangement between the Commonwealth and the NSW RFS for fire management in the JBT, NSW RFS Service Standards are used as operational policies of the JBT RFS. As noted in the Explanatory Statement, the Service Standards, policies and procedures applying to the NSW RFS members are applied to JBT Rural Fire Service Members. These guide all relevant aspects of JBT rural fire service functions and operations including membership and discipline and as outlined further below.

The NSW RFS has prepared and maintains a comprehensive set of Service Standards, Policies and Operational Protocols. The documents are presently available to the public on the NSW RFS website at www.rfs.nsw.gov.au/resources/publications/corporate-governance-and-planning. These are regularly reviewed and updated by NSW RFS.

The specific Service Standards used as operational policies relevant to sections noted by the Committee are:

- For subsection 6(3) relating to amending brigade constitutions: Service Standard 2.1.2 Brigade Constitution
- For subsection 8(2) relating to removing a person's name from a brigade register at the end of the probationary period: Service Standard 2.1.6 Volunteer Membership Applications
- For section 11 relating to failing to comply with service standards: all Service Standards
- For subsection 13(2) relating to incident reports: Service Standard 3.1.3 Incident Reporting and 1.1.14 Personal Information and Privacy

Under the Jervis Bay Territory Rural Fires Ordinance 2014 (the Ordinance), the Rules and the Department of Infrastructure, Transport, Regional Development, Communications and the Arts agreement with NSW RFS, new Service Standards can be made from time to time. The authority to make Service Standards has been delegated by the Minister to the Commissioner of the NSW RFS. So as to not limit the NSW RFS from amending, renumbering, renaming or relocating its Service Standards, references to specific Service Standards or internet addresses are not included in either the Rules or the Explanatory Statement. All volunteers managed by the NSW RFS, including those brigades based in JBT, are made aware of the NSW RFS Service Standards in the course of their application, induction training and throughout their period of service. All are made aware the Service Standards are freely available on the NSW RFS website or through their brigade.

All new brigade recruits complete induction training that covers expectations of them as members and disciplinary procedures, including avenues for appeal. Members are also required to undertake regular training to ensure they have the competencies to respond in an emergency.

Amending the explanatory statement to indicate where they Service Standards can be located would be unlikely to assist future readers of the instrument, as Service Standards:

- are not incorporated into the instrument
- may change frequently
- are presently published on a non-Commonwealth website
- are in the nature of internal organisational policies or procedures and not of general application to the community and
- will be well known to and readily accessible by members of a Rural Fire Brigade to whom the Service Standards apply.

The committee requests the minister's advice as to:

- **the nature and scope of the information that may be collected, used or disclosed under section 13 of the instrument and whether this is likely to include personal information; and**
- **whether any safeguards apply to protect any personal information collected, used or disclosed under either section 13 or section 21 of the instrument and whether these are set out in law or policy, including whether the Privacy Act applies.**

Templates are provided to brigades for documenting incidents under section 13 and contain fields to capture the following information:

- Date of incident
- Time of incident

- Incident address
- Computer aided dispatch number
- Firefighting appliance particulars
- Firefighting appliance crew members' names, whether they were the driver, used breathing apparatus or were injured.
- Names of members who attended in private vehicles
- Names of members who remained at station
- Incident type (eg structure fire, vegetation fire)
- Action taken by brigade (eg extinguish, traffic control)
- Issues or problems experienced (eg lack of co-operation by owners, lack of water)
- Free text comments
- Incident control reference number
- Date of report

When an incident is reported through Triple Zero, the rural fire service's operational call centre will collect the informant's details including name and contact details if these are provided.

Reports prepared and disclosed under section 13 may contain personal information such as:

- the names of fire service members
- the name and contact details of an informant if reported through Triple Zero
- personal details entered into free text comments when relevant to the report of the incident.

The NSW RFS recognises privacy as an issue of concern for its members as well as members of the public. The fire service handles personal information consistently with its privacy-specific service standards:

- 1.1.14 Personal Information and Privacy
- 1.1.14A Privacy Management Plan
- 1.1.14B Data Breach Response Plan

These Service Standards set out the policies for collecting, handling, retaining, disclosing, accessing and using personal information. They state that personal information shall only be collected or solicited for a lawful purpose that is directly related to a function or activity of the NSW RFS and is reasonably necessary for that purpose. The Service Standards also set out the process for when there may be a data breach. These Service Standards are taken to apply to JBT rural fire service members when performing their functions and duties as part of their Shoalhaven local rural fire service group.

When information is collected by, solicited by and held by an 'agency' within the meaning of the *Privacy Act 1988* (Cth), the *Privacy Act 1988* (Cth) also applies. The Minister, the department and the Jervis Bay Territory Rural Fire Service (including its brigades) are all 'agencies' within the meaning of the *Privacy Act 1988* (Cth). The department's privacy policy and procedures operationalise its compliance with the *Privacy Act 1988* (Cth), and will govern the maintenance of the register of bravery awards under s 21 of the Instrument.

Some of the legislative safeguards likely to be relevant to the collection of personal information under the instrument include: Australian Privacy Principles (APP) 3.1, 3.3(a)(i) and 3.4(a) and (b) give support to the collection of personal information on relevancy grounds (relating to the functions of the Jervis Bay Territory Rural Fire Service and the Minister). APP 6.1 and 6.2(b) are likely relevant to

the use and disclosure of such information. Additionally, APP 11 applies, requiring APP entities to take 'reasonable steps' to protect personal information from misuse, interference and loss and from unauthorised access, modification or disclosure.

The committee requests the minister's advice as to:

- **whether procedural fairness is provided for in relation to decisions to take disciplinary action under section 11 of the instrument and, if not, why its exclusion is considered necessary and appropriate;**
- **if procedural fairness is not provided for, whether any additional safeguards apply, noting the limited 14 day period for seeking appeal; and**
- **what is meant by the terms 'careless' and 'inefficient' under paragraph 11(1)(b) of the instrument and whether the instrument or the explanatory statement can be amended to define these terms.**

Procedural fairness applies in relation to decisions to take disciplinary action under section 11 of the Instrument. Procedural fairness is not excluded by the Instrument and so applies in accordance with the usual principles of statutory interpretation.

Disciplinary action under section 11 would be undertaken by the NSW RFS for JBT brigade members pursuant to the process detailed in Service Standard 1.1.2 Discipline. This Service Standard includes standard operating procedures for the establishment of disciplinary panels, investigation of allegations, disciplinary hearings and appeal procedures. A guide on natural justice accompanies this service standard and explains the hearing rule and the bias rule. This service standard and related procedures and guides afford procedural fairness for the member including: a hearing appropriate to the circumstances; a hearing before a decision; full disclosure before the decision; a reasonable opportunity for the member to respond; genuine consideration of any submission by the member; the opportunity to appeal; and the avoidance of actual or apprehended bias.

The terms 'careless' and 'inefficient' are not further defined by the instrument or Ordinance or Service Standards, nor are they defined in the related NSW Act or Regulation where they are also used. These words are read with their ordinary meaning in line with the principles of statutory interpretation.

Amending the Instrument or the explanatory statement to further explicate these terms may unintentionally broaden or contract their ordinary and well-understood meaning in an undesirable way. Additionally, the words 'careless' and 'inefficient' are not further defined in respect of the NSW arrangements governing NSW rural fire brigades. Having inconsistent definitions for disciplinary purposes between NSW and Jervis Bay Territory is not desirable from the perspective of maintaining consistent standards and disciplines amongst brigades that work closely together and within the same organisational structure. Such inconsistency would be undesirable from an operational perspective and could even result in practical injustice through inconsistent treatment of members working alongside each other.