

Monitor 8 of 2024 – Ministerial Responses¹

Contents

Chapter 2: Concluded matters

Jervis Bay Territory Rural Fires Rules 2024.....	1
Migration Amendment (Bridging Visas) Regulations 2024.....	22

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Ministerial Responses, *Delegated Legislation Monitor 8 of 2024*; [2024] AUSStaCSDLM 84.



The Hon Kristy McBain MP

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

Ref: MS24-001258

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

Dear Chair

Thank you for your additional correspondence on the Jervis Bay Territory Rural Fires Rules 2024 and comments in the Delegated Legislation Monitor 7 of 2024 (the Monitor).

Replacement Explanatory Statement to the Rules

I have approved a Replacement Explanatory Statement to the Rules that reflects the additional information requested by the Committee at paragraphs 1.19, 1.30, 1.39, and 1.46 of the Monitor. This Replacement Explanatory Statement will be registered on the Federal Register of Legislation as a matter of priority. A copy of that Replacement Explanatory Statement to the Rules is attached for the Committee's information.

Justification of Broad Discretionary Powers

At paragraph 1.18 of the Monitor, the Committee asked whether further justification can be provided about why it is considered necessary and appropriate for the minister to have broad discretionary powers under subsections 7(2) and 9(2) and whether an example can be provided. The Replacement Explanatory Statement justifies the broad discretionary powers and provides examples where the powers could be used.

Definitions of Careless and Inefficient Conduct

At paragraph 1.47 of the Monitor, the Committee requested advice as to whether examples can be provided of a situation in which a Jervis Bay Territory Rural Fire Service member may be deemed 'careless' or 'inefficient' for the purposes of disciplinary action under paragraph 11(1)(b) of the instrument. The Replacement Explanatory Statement provides examples of relevant conduct.

I thank the committee for its attention to these matters and trust this information will assist in reassessing the Committee's proposed motion of disallowance.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Kristy McBain', with a long horizontal flourish extending to the right.

Kristy McBain MP

26/7/2024

Enc

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

Replacement Explanatory Statement

Issued by the Authority of the Minister for Regional Development, Local Government and Territories

Jervis Bay Territory Acceptance Act 1915

Jervis Bay Territory Rural Fires Rules 2024

Authority

The *Jervis Bay Territory Rural Fires Rules 2024* (the Rules) is made under subsection 98(1) of the *Jervis Bay Territory Rural Fires Ordinance 2014*.

Purpose

The purpose of the instrument is to make rules as permitted by the *Jervis Bay Territory Rural Fires Ordinance 2014* (the Ordinance) to provide effective and efficient fire management services to the Jervis Bay Territory (JBT). The instrument replaces the *Jervis Bay Territory Rural Fires Rule 2014* which sunsets on 1 October 2024.

Background

Note: The Service Standards, procedures and policies referred to in this Replacement Explanatory Statement are accurately referenced as at the time of publication, but may change during the period the Instrument is in effect.

The Ordinance provides the legislative framework for fire management services to the JBT. It establishes the JBT Rural Fire Service, the JBT Fire Management Committee (FMC) and deals with other matters relating to bushfire prevention, such as preparation of JBT Bush Fire Management Plans and issuing of notices and fire permits.

Section 98 of the Ordinance gives the Minister the power to make rules in relation to the issuing of fire permits, the classification of substances as combustible, the operation of committees, the service of notices or directions under the Ordinance, the conduct and discipline of members of the Rural Fire Service, and the operations of rural fire brigades. The rules may not:

- create offences or civil penalties
- provide powers of arrest or detention, or entry, search or seizure
- impose a tax; or
- directly amend the text of the Ordinance.

For practical reasons and to ensure consistency across jurisdictions in responding to emergencies, the Australian Government engages the New South Wales Rural Fire Service (NSWRFS) to provide day-to-day management of the Jervis Bay Territory Rural Fire Service and operational support in relation to fire management in the JBT.

Due to this cross-border delivery of fire services from New South Wales (NSW) to the JBT, the Ordinance and the Rules are modelled off the *NSW Rural Fires Act 1997* and *Rural Fires Regulations 2022* respectively, with modifications to reflect the JBT's jurisdictional and administrative circumstances as appropriate. Many of the provisions in the Ordinance and the

Rules are identical to the NSW legislation which gives emergency services personnel clarity as to their role and their rights and responsibilities regardless of whether they are operating in the JBT or in NSW on any given day.

The JBT Rural Fire Service is aligned as far as practical, with the services provided by the NSWRFSS in the Shoalhaven Rural Fire District. Members of the JBT Rural Fire Service are all volunteers and JBT brigades are part of a local NSW group in the Shoalhaven district. In practice, this means that the Service Standards, policies and procedures applying to NSWRFSS members are applied to JBT Rural Fire Service members.

Under the *Jervis Bay Territory Rural Fires Ordinance 2014* (the Ordinance) and the Rules, new Service Standards can be made from time to time. Service Standards are policy documents that set out the policies and procedures to be followed by Rural Fire Service members in connection with the operation, management and control of the service.

The authority to make Service Standards has been delegated by the Minister to the Commissioner of the NSW RFS and is covered by the agreement between the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department) and NSWRFSS.

As at the date of publishing this Replacement Explanatory Statement, Service Standards used as operational policies by the JBT RFS can be found on the NSWRFSS website at <https://www.rfs.nsw.gov.au/resources/publications/corporate-governance-and-planning/service-standards>.

Review processes

Most membership decisions in the Rules specify an internal review process. The Rules provide a robust process involving reviews conducted at senior level either by a senior officer of the NSWRFSS, at or above the rank of Assistant Commissioner, or by the Minister. These review provisions provide for review by a person other than the primary decision-maker who may affirm or vary the original decision.

In other instances, such as in relation to probationary membership, the same informal review processes available to members of the NSWRFSS local group are available to JBT Rural Fire Service members. That is, the person can request reconsideration of the decision.

This is consistent with the *Australian Administrative Law Policy Guide 2011* (the Guide) which acknowledges some agencies may have ‘ad hoc systems’ rather than formal legislative review rights. It notes that these may be ‘simply available through administrative processes in the agency. Internal review can be sought by requesting reconsideration of a decision or by following the set procedures of more formal mechanisms.’ The Guide further acknowledges that ‘generally, internal review is easy for applicants to access, and enables a quicker and more inexpensive means of re-examining decisions where applicants believe a mistake has been made.’

Summary of the Rules

This instrument remakes the *Jervis Bay Territory Rural Fires Rule 2014* and in summary it:

- Sets out definitions used in the Rules and prescribes a definition of managed land for the purposes of section 6 of the Ordinance.
- Sets out the requirements for the constitution of rural fire brigades, including the requirement for brigades to review their constitution annually.
- Prescribes the criteria and conditions for becoming a member of a rural fire brigade, including serving an initial six month probationary period.
- Sets out the circumstances and process for removing a person from a rural fire brigade.
- Sets out the process for review of decisions relating to membership, including decisions by the Minister refusing to include a person's name on the brigade register and decisions to remove a person from a brigade register.
- Sets out the process for taking disciplinary action against a member of a rural fire brigade as well as the process for appeals against disciplinary decisions.
- Requires the officer in charge of the brigade to prepare and provide an incident report following attendance by the brigade at a fire, incident or other emergency.
- States that the FMC will meet in the manner and at the times determined by the FMC.
- Requires the FMC to display a draft bush fire risk management plan together with any information to help understand it for at least 42 days, during which interested parties may make submissions on the plan.
- Requires a hazard management officer appointed under the Ordinance to give notice of bush fire hazard reduction work to be undertaken on land within 8 kilometres of Commonwealth land.
- Requires notice be given to the relevant Commonwealth authority where a permit has been given to light a fire on Commonwealth land.
- Prescribes the manner in which notices and directions should be served, including requirements when the person to be served is not in JBT at the time of service.
- Requires the Minister keep a register of commendation and long service awards given to rural fire brigade members, as well as awards for bravery or other forms of meritorious service.
- Specifies when rural fire brigade members are able to assist public authorities outside of the JBT, including assistance to NSW Fire and Rescue, the Australian Federal Police and NSW Ambulance in the circumstances listed.
- Prescribes several conditions for fire permits, including lighting the fire be consistent with the bushfire risk management plan and be in accordance with any direction from the Minister.

The instrument is a legislative instrument for the purposes of the *Legislation Act 2003* and is subject to the default sunseting requirements and disallowance. The Rules commence on 1 October 2024.

Details of the instrument are set out in [Attachment A](#).

Consultation

In preparing the Rules, the Department of Infrastructure Transport, Regional Development, Communications and the Arts (the Department) consulted Commonwealth, Australian Capital Territory and New South Wales agencies and organisations which are involved with and/or affected by these Rules.

The Department also consulted the JBT Emergency Management Committee (EMC) and FMC. Members of the EMC and FMC include representatives from:

- The Department
- Australian Federal Police
- Commonwealth Director of National Parks
- Department of Defence (Navy – HMAS Creswell)
- NSW Rural Fire Service
- NSW State Emergency Service
- NSW Ambulance Service
- NSW Fire and Rescue
- Wreck Bay Aboriginal Community Council; and
- Shoalhaven City Council.

Agencies and organisations consulted agreed the Rules were needed and that the 2014 Rules were meeting their objective and should be remade. No substantive changes to the 2014 Rules were proposed for the remade rules.

In August 2023, the Department undertook an initial round of four weeks public consultation on an issues paper via the Department's 'Have Your Say' public consultation platform. JBT community members were notified of the consultation in a Community Bulletin. One formal submission was received, which did not recommend any changes to the rules.

Between August and December 2023, the Department worked with stakeholders, in particular the NSW RFS to develop exposure draft Rules and explanatory material.

Between 14 December 2023 and 2 February 2024, the Department undertook a further round of public consultation on Exposure Draft Rules via the Department's 'Have Your Say' consultation platform. The Department again informed the community of this consultation via a Community Bulletin which was delivered to homes in the local community. It also provided material for social media posts to the Wreck Bay Aboriginal Community Council. No submissions were received on the exposure draft material.

Office of Impact Analysis

The Office of Impact Analysis (OIA) advised (reference OIA23-05046) the instrument is unlikely to have a more than minor regulatory impact. This is on the basis the Rules will likely have low direct impact (governance and appointment arrangements for fire management operation, and notice requirements), noting the modest population of the Jervis Bay Territory (JBT) and the Rules are being remade with no substantive changes to *Jervis Bay Territory Rural Fires Rule 2014*. As such, OIA advised the preparation of an Impact Analysis (IA) is not required and neither is a letter certifying the efficient and effective operation of the Rules in lieu of an IA.

Statement of Compatibility with Human Rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at Attachment B.

Details of the Jervis Bay Territory Rural Fires Rules 2024

Section 1 – Jervis Bay Territory Rural Fires Rules 2024

This section provides that the name of the instrument is the *Jervis Bay Territory Rural Fires Rules 2024*.

Section 2 – Commencement

This section provides for the instrument to commence on 1 October 2024.

Section 3 – Authority

This section provides that the instrument is made under subsection 98(1) of the *Jervis Bay Territory Rural Fires Ordinance 2014*.

Section 4 – Definitions

This section notes that a number of expressions used in the Rules such as such as ‘AFP’, ‘Fire Management Committee’ and ‘Service Standards’ are defined in the Ordinance. The section also defines ‘appropriate disciplinary authority’, ‘brigade register’, ‘hazardous material’ and ‘Ordinance’.

Section 5 – Schedules

This section provides that each instrument specified in the Schedule is amended or repealed as set out in the applicable item in the Schedule concerned, and that any other item in a Schedule to the instrument has effect according to its terms.

Part 2 – Rural fire brigades

Section 6 – Constitution of rural fire brigades

This section provides for the constitution of rural fire brigades. It prescribes the constitution include the name of the brigade, the classification of members (other than officers), arrangements for brigade meetings and member voting rights. Brigade members must review the brigade’s constitution annually to determine whether it should be amended, having regard to any relevant Service Standards. Applicable Service Standards are made by the New South Wales Rural Fire Service (NSWRFS) Commissioner and can be found at <https://www.rfs.nsw.gov.au/resources/publications/corporate-governance-and-planning/service-standards>. At the time of publication, the Service Standard relevant to the constitution of brigades is Service Standard 2.1.2 Brigade Constitution.

Section 7 – Membership of rural fire brigades

This section prescribes the criteria and conditions for eligibility for membership to a rural fire brigade. A person is eligible for membership if they comply with membership rules set out in the brigade constitution and satisfy any membership requirements determined by the Minister. A copy of membership rules are provided to applicants electronically and in the case of the Code of Conduct and Ethics and Respectful and Inclusive Workplace Standards,

in hard copy. Service Standards are also explained in the Member Induction module, which forms a part of the mandatory training for RFS members prior to moving from a probationary to an ordinary member.

Members of rural fire brigades perform an important role in managing and preventing fires and other areas of emergency response. It is critical therefore that members have the requisite qualities, skills and training to keep themselves and the community safe when responding 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 RFS group structure, it is essential that members of the JBT Rural Fire Service (JBT RFS) operate under the same instructions and procedures as their NSW RFS counterparts.

Emergency situations are often fluid and may be unpredictable, therefore responders need to be able to act quickly, safely and according to standard operating procedures within an identified chain of command. Under the Ordinance, JBT RFS members hold extensive 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 in certain circumstances.

Given this context, it is necessary and appropriate the Minister and their delegates have flexibility and broad discretion to determine initial suitability of applicants and to assess and determine their ongoing suitability. This protects the community, the JBT RFS and other volunteers, ensuring they can have confidence in the suitability of RFS members.

These initial and ongoing requirements are identical to those governing members of the NSW RFS and the discretionary powers of the NSW RFS Commissioner and their delegates.

Considerations include ensuring members have the requisite qualities (such as being of good character and having sound judgement), and that members attain and retain requisite competencies. 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 assesses membership, including new applications, on the basis of published criteria including criminal history, working with children checks, previous service history, physical suitability for certain roles and health conditions. The criteria used to assess a person as fit and proper under subsections 7(2) and 9(2) are detailed in Service Standard 2.1.6 Volunteer Membership Applications.

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.

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.

Under subsection 7(2), the Minister may refuse to list a person as a member of a rural fire brigade if the Minister considers the person is not a fit and proper person to be a member. In practice, this assessment will be made based on the person's application and the outcome of administrative processes such as a Police Check. Where a member discloses a criminal

history, the RFS can, after ordinary consideration of criminal history and other eligibility criteria, use its discretionary power to accept the applicant as a probationary member. Failure to disclose prior criminal history later identified may call into question an applicant's suitability for membership.

If a person is refused membership, the Minister must notify the person in writing.

A person may seek an internal review of such a decision under subsection 10. Under subsection 7(4), the Minister may impose conditions on the person's membership. In practice this may include such things as the types of duties the person is able to perform.

Under subsection 7(4), a person's listing on a brigade register may be subject to conditions. The decision to impose conditions might be made on the basis of physical limitations or health conditions which might impact on the person's 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.

Conditions imposed will depend on the particular facts and context and role but may include conditions such as the person may not attend particular 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 they 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.

Section 8 – Probationary membership

This section prescribes an initial six month probationary period for new members of rural fire brigades. The Minister may remove a person's name from the brigade register if at the end of the probationary period the person has not achieved a satisfactory level of competency, or does not satisfy the membership requirements set out in the brigade's constitution. The person must be notified if their name is removed from a brigade register.

Section 9 – Removal of membership

This section prescribes the criteria and conditions for removing a person from a rural fire brigade register. The Minister must remove a person's name from the register if the person dies or asks for their name to be removed. Under subsection 9(2), the Minister may remove a person's name where the person has become mentally incapacitated; been convicted inside or outside the JBT of an offence punishable by 12 months or more imprisonment; or where in the Minister's opinion the person is no longer a fit and proper person to be a rural fire brigade member. A person can seek review of these decisions as set out in section 10.

The Minister may also remove the person's name from the register where they are found to have committed a disciplinary breach under section 11 of the Rules. Appeal rights in relation to disciplinary breaches are set out in section 11.

Other than when a person has died or requested their name be removed from the register, the Minister must give the person 21 days' notice before removing their name from the register. If the person seeks review of the decision, their name must not be removed until after the conclusion of any review against the decision.

It is essential the community and the brigade as a whole has trust and confidence in brigade members and their suitability. Determining whether a person is and remains a 'fit and proper' person may involve both objective and subjective considerations. It will also depend on the context in which the individual is operating. Not all brigade members attend fires and similar incidents. There are a number of different types of roles brigade members may occupy ranging from community engagement and brigade administration, operational support and communications, to frontline firefighting and emergency response.

A person may be considered to no longer be a fit and proper person to remain on the brigade where they, for example, fail to maintain or undertake relevant training; are physically unable to undertake duties with the brigade and cannot be assigned to other duties; fail to uphold the brigade's Code of Conduct; repeatedly fail to attend or are late for rostered shifts; demonstrate reluctance or unwillingness to undertake assigned duties or responsibilities; are not fulfilling their duties to their full capacity; or are not fully cooperating or working as part of a team which is essential in emergency operations. A person found to have drug or alcohol problems which affects their capacity to perform their duties might also not be considered 'fit and proper' for continued brigade membership.

Section 10 – Review of decisions relating to membership

A person may apply to the Minister for review of the Minister's decision to:

- refuse to include a person's name on a brigade register under subsection 7(2), or
- remove a person's name from a brigade register. under paragraphs 9(2)(b), (c), (d) or (e).

An application must be in writing, within 21 days of the decision and set out the reasons for seeking the review. Upon receiving an application, the Minister must appoint a review officer who is an officer of the NSW Rural Fire Service (NSWRFS) who holds the rank of Assistant Commissioner or above. Where a person applies for a review, their name must not be removed from the register until the application is decided by the review officer.

After considering all relevant information available to them, the review officer must either: confirm the Minister's decision; include the applicant's name on the brigade register (for a review of a decision under subsection 7(2)); or decide to retain the applicant's name on the brigade register (for a review of a decision under paragraph 9(2)(b), (c), (d) or (e)).

The review officer must notify the applicant, in writing, of the review officer's decision and the reasons for the decision.

Section 11 – Disciplinary action

This section prescribes the process for disciplinary action against a member of a rural fire brigade. This section also prescribes when an appropriate disciplinary authority may take disciplinary action against a member of a rural fire brigade, and what disciplinary action may be taken.

A rural fire brigade member commits a breach of discipline if they:

- contravene the Ordinance or a provision in the Rules
- are negligent, careless, inefficient or incompetent in discharging their duties; or
- fail to comply with a relevant service standard or a condition of their membership.

The Minister may appoint an officer of the NSW RFS at or above the rank of Superintendent to be the appropriate disciplinary authority for such an alleged breach of discipline.

Alternatively, the appropriate disciplinary authority may be a disciplinary panel constituted as set out in the Service Standards. The Service Standards may also set out procedures for dealing with alleged disciplinary breaches. Applicable Service Standards are made by the NSW RFS Commissioner and can be found at

<https://www.rfs.nsw.gov.au/resources/publications/corporate-governance-and-planning/service-standards>. All Service Standards are relevant when considering whether a member has failed to comply with a Service Standard.

When a member is found to have committed a disciplinary breach, the disciplinary authority may reprimand the member, suspend the member from service, recommend the Minister demote the member, disqualify the member from holding a rank in the rural fire brigade, or remove the member's name from the JBT rural fire brigade register.

Any disciplinary action taken under section 11 would follow a documented process, currently detailed in Service Standard 1.1.2 Discipline. This Service Standard includes standard operating procedures establishing disciplinary panels, investigating 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, and are read in context of the full phrase in which they appear in the Rules.

While rare, negligent, careless, inefficient or incompetent conduct may affect the operational capability of the RFS and the public's confidence in the RFS. Non-exhaustive examples of conduct included within "negligent, careless, inefficient or incompetent" conduct may include:

- Where a member performs a task contrary to standard operating procedure, accepted practice or reasonable direction which could reasonably or did result in injury or damage.
- Where a member does not apply at least the minimum level of reasonable practice to the execution of their duties. Such examples may include where a member does not

call for additional firefighting resources to combat a fire, while knowing (from experience and training) or it being reasonable to expect additional resources would be required to attempt to protect life, property and the environment.

Discipline for negligent, careless, inefficient or incompetent conduct may be more applicable to senior RFS members who voluntarily assume higher levels of responsibility and by virtue of their position and higher level of training are responsible for large groups of other volunteers during emergency operations or make decisions which may have major impacts on communities and the individuals who live within them.

Section 12 – Appeals concerning disciplinary action

This section prescribes the process for appealing decisions or disciplinary actions taken under the Rules. Before taking disciplinary action under section 11, the disciplinary authority must investigate the alleged breach and give the member at least 14 days' written notice of the investigation and the proposed action to be taken. The person may appeal to the Minister against the findings or the proposed action. On appeal, the Minister may confirm the disciplinary authority's decision or determine that no action, or some other action, be taken against the member.

Section 13 – Incident reports

This section prescribes that if a rural fire brigade attends a fire, incident or other emergency, the officer in charge must ensure that the Minister receives a written report on the fire, incident or emergency. The Service Standards may specify the time period for providing the report and its content. The applicable Service Standards made by the NSW RFS Commissioner can be found at <https://www.rfs.nsw.gov.au/resources/publications/corporate-governance-and-planning/service-standards>.

Brigades are provided templates for the purpose of documenting incidents under section 13 and these contain fields to capture information relating to the incident. This may include matters such as the date, time and place of the incident, the type of incident, the action taken, particulars of fire-fighting appliances used and names of crew member attending the scene and remaining at the station.

Incident reports may include personal information such as the names of fire service members and the name and contact details of an informant where an incident is reported through Triple Zero (where information is collected through the RFS operational call centre).

Service Standards currently prescribing how the brigade members collect, handle, retain, disclose, assess and use personal information currently include:

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

In addition, the Commonwealth *Privacy Act 1988* applies to information collected under section 13 of the Rules, as the Minister, the Department and the JBT RFS are 'agencies' for the purposes of that Act. Further legislative safeguards also apply including the Australian Privacy Principles.

Part 3 – Fire Management Committee

Section 14 – Procedure for meetings of the Fire Management Committee

This section provides that the Fire Management Committee (FMC) will determine how and when meetings will be called, as well as how they will be conducted.

Section 15 – Chair of the Fire Management Committee

This section provides the chair presides at meetings of the FMC. If the chair is absent, another member can be elected to chair the meeting.

Under the Ordinance, the Department’s nominated representative is the chair of the FMC.

Part 4 – Notices

Section 16 – Public notice and display of draft bush fire risk management plan

This section prescribes that the FMC must publicly display a draft bush fire risk management plan, together with any other material that assists with understanding the draft plan, for at least 42 days. Interested persons may make submissions on the draft plan during that period.

Section 17 – Notice for bush fire hazard reduction work

This section requires that where, under subsection 58(3) of the Ordinance, hazard reduction work is to be undertaken on land located within eight kilometres of Commonwealth land, a copy of the hazard reduction notice must be given to an officer of the responsible Commonwealth authority. The notice must be given to that officer within 24 hours of it being given to the occupier or owner of the land to which the notice relates.

Section 18 – Notice if Minister is to carry out bush fire hazard reduction work

This section requires the Minister to notify an officer an authority responsible for Commonwealth land if, under subsection 59(1) of the Ordinance (where there has been non-compliance with a notice to undertake hazard reduction work), the Minister intends to undertake bush fire hazard reduction work on land within eight kilometres of Commonwealth land.

Section 19 – Notice of issue of fire permit

Under section 82 of the Ordinance, if the Minister issues a fire permit to light a fire on prescribed land, the Minister must give notice to the prescribed person or body. Under section 19 of the Rules, Commonwealth land is prescribed land and the prescribed body is the authority responsible for the Commonwealth land.

Section 20 – Giving of notices

This section sets out the ways in which notices and directions required or permitted to be served on a person must be served. This includes:

- Delivering it to the person personally.
- Delivering it to the person’s business or residence and leaving it with a person aged over 14 residing or working at the premises.

- Posting it by prepaid letter to the person's last known place of residence, business or post office box.
- Faxing it to a number given by the person.
- Emailing it to an email address given by the person.
- Fixing it to a conspicuous part of land or building owned or occupied by the person.
- Attaching the notice or direction to the vehicle to which the notice relates if relevant.

The notice or direction does not need to name the person but can be addressed to 'occupier' or 'owner'.

If the person to be served appears to be absent from the JBT, it may be served on the person's agent personally, to their residence or place of business, by fax or email. If the land, building or premises of the person to be served are unoccupied and the owner's address or place of residence is not known, notice may be served by publishing an advertisement in a newspaper circulating in the JBT.

Part 5 – Miscellaneous

Section 21 – Bravery and other awards

This section requires the Minister to keep a register of the name of each member of the Rural Fire Service who is given a commendation or award for long service, bravery or other forms of meritorious service and details of the commendation or award given to the member.

The Service Standards, the *Privacy Act 1988* and Privacy Principles also apply to information collected and retained in maintaining this Register.

Section 22 – Voluntary work by rural fire brigades

Section 27 of the Ordinance allows the rural fire brigades, on consent from the Minister, to voluntarily cooperate with a prescribed public authority in undertaking prescribed functions. Section 22 of the Rules prescribes the functions where a rural fire brigade may assist public authorities either within or outside the JBT. These are:

- functions that may be exercised under the *Jervis Bay Territory Emergency Management Ordinance 2015*
- a function that may be exercised by a public authority in relation to the prevention and suppression of bush or other fires
- cooperating with the Commissioner of Fire and Rescue NSW in relation to hazardous materials and similar matters or in assisting with an incident or emergency
- assisting the Australian Federal Police in relation to traffic control by a police officer or in assisting with an incident or emergency
- cooperating with the Ambulance Service of NSW in relation to patient care and similar matters; and
- assisting the Commissioner of the NSW State Emergency Service in relation to an incident or emergency.

Subsection 22(2) of the Rules prescribes public authorities as the Minister, the Commissioner of Fire and Rescue NSW, the NSW State Emergency Service and emergency service

organisations as defined in section 4 of the *Jervis Bay Territory Emergency Management Ordinance 2015*.

Section 23 – Definition of managed land

This section prescribes the types of land that are defined as ‘managed land’ in section 6 (definitions section) of the Ordinance.

Section 24 – Conditions of fire permit

This section prescribes the conditions for a fire permit authorising the lighting of a fire on land. These are:

- lighting the fire must be consistent with the bush fire risk management plan; and
- at least one person must be present from the time the fire is lit until it is extinguished.

Schedule 1 - Repeals

The Schedule repeals the *Jervis Bay Territory Rural Fires Rule 2014* following commencement of the Rules on 1 October 2024.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Jervis Bay Territory Rural Fires Rules 2024

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Background

The *Jervis Bay Territory Rural Fires Rules 2024* (the Rules) is made under subsection 98(1) of the *Jervis Bay Territory Rural Fires Ordinance 2014* (the Ordinance).

Section 98 of the Ordinance gives the Minister the power to make rules in relation to the issuing of fire permits, the classification of substances as combustible, the operation of committees, the service of notices or directions under the Ordinance, the conduct and discipline of members of the Rural Fire Service, and the operations of rural fire brigades.

The Ordinance and Rules together provide the legislative framework for fire management services to the Jervis Bay Territory (JBT). The Ordinance establishes the JBT Rural Fire Service, the JBT Fire Management Committee (FMC) and deals with other matters relating to bushfire prevention, such as preparation of JBT Bush Fire Management Plans and issuing of notices and fire permits.

Due to the cross-border delivery of fire services from New South Wales (NSW) to the JBT, the Ordinance and Rules are based on the NSW *Rural Fires Act 1997* and *Rural Fires Regulations 2022*, modified to reflect the JBT's jurisdictional and administrative circumstances.

For practical reasons and to ensure consistency across jurisdictions in responding to emergencies, the Commonwealth engages the NSW Rural Fire Service to provide day-to-day management of the JBT Rural Fire Service and operational support in relation to fire management in the JBT.

The JBT Rural Fire Service is aligned as far as practical, with the services provided by the NSW Rural Fire Service in the Shoalhaven Rural Fire District. Members of the JBT Rural Fire Service are all volunteers and JBT brigades are part of a local NSW group in the Shoalhaven district.

The Ordinance and the Rules allow for the making of Service Standards from time to time. The authority to make Service Standards has been delegated by the Minister to the Commissioner of the NSW RFS and is covered by the agreement between the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department) and NSW RFS.

Service Standards are policy documents that set out the policies and procedures to be followed by Rural Fire Service members in connection with the operation, management and control of the service.

As at the date of publishing this Replacement Explanatory Statement, Service Standards used as operational policies by the JBT RFS can be found on the NSW RFS website at <https://www.rfs.nsw.gov.au/resources/publications/corporate-governance-and-planning/service-standards>.

Overview of the Instrument

The *Jervis Bay Territory Rural Fires Rules 2024* expand on and prescribe certain matters permitted under the Ordinance in relation to the JBT Rural Fire Service and fire management in the JBT. The Rules are largely procedural or administrative in nature, dealing with membership of fire brigades, administration of the JBT FMC and matters relating to notices and directions given under the Ordinance.

The aim of the overarching framework provided by the Ordinance and the Rules is the prevention, mitigation and suppression of bush and other fires in the Territory; the coordination of bush firefighting and bush fire prevention throughout the Territory; the protection of persons from injury or death, and property from damage, arising from fires; and the protection of the environment.

The Rules:

- Set out eligibility for becoming and remaining a rural fire services brigade member and the process, including review rights, for removing a person from a brigade register.
- Set out the process to be followed where a brigade member is considered to have committed a disciplinary breach, including appeal rights.
- Specify administrative matters relating to the FMC, incident reporting in relation to fires and other emergencies, and record keeping for brigade members receiving awards for bravery, other meritorious service and long service.
- Set out what is prescribed land and which entity is a prescribed authority for the purposes of the Ordinance.
- Prescribe matters relating to fire permits for land in the JBT, including notice requirements.
- Set out the requirements for notices relating to hazard reduction work in the JBT.
- Specify the display and notice requirements for the draft JBT bushfire management plan, including that it be displayed for 42 days and interested persons may make submissions in that period.
- Set out the requirements for effective service of notices or directions as required or permitted under the Ordinance.

The Rules do not create offences or civil penalties. They do not provide powers of arrest or detention, or entry, search or seizure.

Human rights implications

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

This Disallowable Legislative Instrument potentially engages the following rights or freedoms:

- The right to work and rights in work as contained in articles 6(1), 7 and 8(1)(a) of the [International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#).
- The right to Privacy and Reputation under article 17 of the International Covenant on Civil and Political Rights (ICCPR).
- The rights of people with disability in the [Convention on the Rights of Persons with Disabilities \(CRPD\)](#).

The right to just and favourable conditions of work

Under section 9 of the Rules, a person may be removed from brigade membership if the person:

- (a) is found to have committed a breach of discipline under section 11; or
- (b) becomes mentally incapacitated; or
- (c) is convicted in the Territory of an offence punishable by imprisonment for 12 months or more; or
- (d) is convicted outside the Territory of an offence that, if committed in the Territory, would be an offence punishable by imprisonment for 12 months or more; or
- (e) in the Minister's opinion, is no longer a fit and proper person to be a member of the rural fire brigade.

While members are volunteers and not remunerated, this may engage to the right to just and favourable conditions of work in Article 7. Under Article 7(b) this includes that workers be able to enjoy a safe and healthy workplace.

Under subsection 9(4) of the Rules, the Minister must notify a member before removing them from a brigade and the member has the right to review of the decision under section 10.

If the person is to be removed for a breach of discipline, the process is set out in section 11 and the relevant Service Standards.

Given the nature of their duty is to serve and protect the community, brigade members must be trusted individuals with the requisite qualities, knowledge, skills and training to instil confidence in the community and fellow brigade members. Any limitation of these worker rights by the circumstances for possible removal is justified by the broader policy need for the brigade to hold community trust to deliver their functions, and appeal rights available.

The rule will promote the right to favourable conditions of work as opportunities to remove members under certain conditions above will bolster the cohesiveness of brigade relations and reputation and ensure the brigade continues to represent its core values of service to the community. They also promote the right of fellow brigade members to enjoy a safe and healthy workplace.

The rule will promote the right to just conditions of work as there are robust avenues for appeal available for workers who may be subject to removal under section 9.

Under subsection 9(4) of the Rules, the Minister must notify a member before removing them from a brigade and the member has the right to review of the decision under section 10. If the person is to be removed for a breach of discipline, the process is set out in section 11 and the relevant Service Standards.

The rule is considered compatible with human rights given the purpose and context of the Rules and the safeguards for individuals impacted by it.

The right of persons with disability

The Minister's ability to remove a person from a brigade under paragraph 9(2)(b) of the Rules, if they become lacking in mental capacity may engage the rights of people with disability such as the right to participate in all aspects of life, including vocational and in this context, volunteering (for example Articles 5, 9(1), 19 and 26(1)).

As brigade members operate in emergency situations, it is essential that they have the mental and physical capability to undertake the roles and duties to which they are assigned. This is both for their protection and that of the community. If a brigade member is found to have become incapable of performing the inherent requirements of their role and performing their duties safely, the Minister has the discretion to remove that member but is not required to do so.

Engagement in the fire brigade is governed by workplace health and safety legislation as well as anti-discrimination legislation, disability legislation, Service Standards (such as Service Standard 1.1.42 Respectful and Inclusive Workplace) and standard operating policies. These ensure the RFS is a safe and inclusive workplace and that processes are in place to guard against and address bully, harassment and discrimination and workplace injury. Disability and Mental Health employment strategies developed by the NSW RFS are also applicable to JBT RFS members.

In applying and complying with these policies and legislative requirements, to the extent possible, consideration would first be given to what reasonable adjustments can be made to the person's duties to enable them to continue in their role. Depending on the particular facts and circumstances of the person's incapacity, rather than removal from the brigade, the individual might be offered or assigned to different duties.

The person must be notified of any intention to remove them from the brigade and has review rights. State and Commonwealth legislation as well as RFS service standards, policies, procedures and other employment strategies also apply to protect the person's rights.

Given the discretionary nature of the Rule, the available safeguards to the individual's rights and the need to keep the community and other brigade members safe, the Rules are considered to be compatible with this human right. Any limitation on this human right is considered reasonable, necessary and proportionate.

The right to privacy and reputation

Brigade registers and registers for recording details of awards received by members may engage the right relating to privacy and reputation under Article 17 of the ICCPR. These

registers are intended to operate as an administrative record and collection and use of the information is governed by privacy protocols including NSWRFSS Service Standards and the Commonwealth *Privacy Act 1988*.

Details of incidents such as fires are captured in incident reports and these may include personal information such as the name of the person who reported the incident and the brigade members who attended. Templates completed for this purpose ensure that only necessary information is captured. Collection and use of the information is governed by privacy protocols including NSWRFSS Service Standards and the Commonwealth *Privacy Act 1988*.

Service Standards prescribing how the brigade members collect, handle, retain, disclose, assess and use personal information currently include:

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

This framework ensures appropriate safeguards are in place to ensure the information collected is necessary and appropriate, is only used for its intended purpose and is handled and stored in a manner that protects the person's information. These ensure the information collected is not an arbitrary or unlawful interference with a person's rights. The Rules are considered to be compatible with this human right.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.



THE HON ANDREW GILES MP
MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: MC24-017710

Ms Hannah Dibley
Committee Secretary
Senate Standing Committee for the Scrutiny of Delegated Legislation
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Dibley

Thank you for your correspondence of 27 June 2024 concerning consideration by the Senate Standing Committee for the Scrutiny of Delegated Legislation of the *Migration Amendment (Bridging Visas) Regulations 2024* (the Amendment Regulations) in the Committee's Delegated Legislation Monitor 6 of 2024.

General remarks

The grant of Subclass 070 (Bridging (Removal Pending) visas (BVRs) is an essential tool in the Government's response to managing non-citizens released from immigration detention following the High Court's judgment in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37 (NZYQ) on 8 November 2023 (NZYQ). The objective of the amendments in the Amendment Regulations is to enhance the administration of the BVR scheme, by simplifying and standardising the provisions that enable the Minister to make a decision to grant a BVR to a member of the NZYQ-affected cohort.

Prior to the commencement of the Amendment Regulations on 12 April 2024, it was necessary to rely on regulation 2.25AA of the Migration Regulations to grant an *initial* BVR to an NZYQ-affected non-citizen while they remained an unlawful non-citizen – and then to rely on regulation 2.25AB to grant any *further* BVRs to that same non-citizen (as the holder of a BVR). This 'two-step' process enabled the Minister to grant a BVR subject to certain conditions, including curfew and electronic monitoring, and also to vary the imposition of those conditions from time to time on subsequent BVRs. The Migration Regulations relevantly provide that the Minister must impose each of these conditions on a BVR granted to an NZYQ-affected non-citizen, unless the Minister is satisfied that it is not reasonably necessary to impose the condition for the protection of any part of the Australian community.

As set out in the Amendment Regulations' explanatory statement, regulation 2.25AB has now been amended to provide a dedicated legislative basis for the grant of both initial and further BVRs to NZYQ-affected non-citizens. As amended, regulation 2.25AB removes reliance on regulation 2.25AA to grant an initial BVR to an NZYQ-affected non-citizen (and noting regulation 2.25AA was originally developed and legislated in 2013). Initial and subsequent BVRs are now all granted to members of the NZYQ-affected cohort under regulation 2.25AB – the development of which has been appropriately informed with the benefit of consideration of the High Court's reasons in *NZYQ*, and legal advice from the Australian Government Solicitor. The amendments also clarify that the power to grant a BVR without application under regulation 2.25AB does not extend to non-citizens living lawfully in the community on a substantive visa, or to holders of criminal justice or enforcement visas.

Consultation

I acknowledge the Committee's request at paragraph 1.40 of Monitor 6 of 2024 for information relating to:

- which other Commonwealth agencies were consulted; and
- whether any persons likely to be affected by the instruments, any experts or any stakeholders representing the NZYQ-affected cohort were otherwise consulted and, if so, who or, if not, why not.

Having regard to section 17 of the *Legislation Act 2003* and the Committee's Guidelines on *Principle (d): Adequacy of consultation*, I confirm that I am satisfied that adequate and appropriate consultation was undertaken before the Amendment Regulations were made. The amendments give effect to changes that enhance the effective administration of the legislative scheme implemented to manage the NZYQ-affected cohort, and the risk members of that cohort may present to the Australian community. The approach to the amendments was informed by advice from my Department informed by its experience, and that of the Australian Border Force, administering the scheme since it was first implemented on 18 November 2023. The amendments were also appropriately informed by external legal advice, including by the Australian Government Solicitor. As the Committee would appreciate, the explanatory statement does not go into the detail of those matters.

As previously advised in MC24-014668, the Department held roundtable discussions on three occasions with the Australian Human Rights Commission, the Commonwealth Ombudsman's Office and the Australian Red Cross to discuss matters relating to implementation of the legislative response to NZYQ, management of the NZYQ-affected cohort, and to hear these organisations' views on these and related matters. The Department did not undertake consultation with members of the NZYQ-affected cohort or their representatives, or other external stakeholders in relation to these Amendment Regulations. The Amendment Regulations fundamentally do not change any 'client-facing' elements of the BVR scheme. The Amendment Regulations do not alter the conditions imposed on a BVR. The Amendment Regulations also do not alter the existing statutory procedural fairness mechanism in section 76E of the *Migration Act 1958*, which affords natural justice to a non-citizen who is granted a BVR subject to curfew and electronic monitoring conditions; and they do not alter the existing access to merits review for decisions under section 76E to grant a further BVR that is subject to curfew, electronic monitoring or certain financial reporting conditions.

Availability of independent merits review; adequacy of explanatory materials

I acknowledge the Committee's request at paragraph 1.46 of Monitor No. 6 of 2024 as to whether the Amendment Regulations' explanatory statement can be amended to explain any safeguards or limitations that apply to the exercise of the Minister's power under regulation 2.25AB, including the availability of independent merits review and other safeguards with reference to the *Migration Act 1958* (Migration Act) and Migration Regulations.

I confirm that I intend to arrange for the explanatory statement to be revised to set out the framework for procedural fairness and merits review in relation to decisions to grant a BVR under regulation 2.25AB. I note the Amendment Regulations do not make any changes to the natural justice framework that was first established in section 76E of the Migration Act on 18 November 2023 when the *Migration Amendment (Bridging Visa Conditions) Act 2023* commenced; however, I acknowledge the Committee's request is intended to ensure the explanatory statement includes detail about how regulation 2.25AB (as amended) operates within that existing framework.

When the Minister grants a BVR to an NZYQ-affected non-citizen, cl 070.612A of Schedule 2 to the Migration Regulations provides that the Minister must impose certain conditions, including in relation to curfew and electronic monitoring, unless the Minister is satisfied that it is not reasonably necessary to impose that condition for the protection of any part of the Australian community. The amendments to regulation 2.25AB do not change this requirement.

When the Minister grants an NZYQ-affected non-citizen a BVR, they are given written notice of the decision to grant the BVR, and the conditions imposed on that BVR. If the BVR is subject to conditions relating to curfew, electronic monitoring or certain financial reporting obligations, subsection 76E(3) requires the Minister to give the non-citizen notice of the decision and to invite them to make representations to the Minister (within a period specified by the Minister) as to why the BVR should not be subject to one or more of the conditions. This ensures the non-citizen is afforded statutory procedural fairness. If the Minister is satisfied under s 76E(4)(b) that those conditions are not reasonably necessary for the protection of any part of the Australian community, the Minister is required under s 76E(4) to grant a further BVR that is not subject to such condition(s).

The Minister is also required under s 76E(5) to give the non-citizen written notice of the decision made in accordance with s 76E(4), and the reasons for the decision. If the Minister decides not to grant a non-citizen a BVR that is not subject to any one or more of the conditions, paragraph 338(4)(c) provides that this decision is merits reviewable. The non-citizen is able to apply to the Administrative Appeals Tribunal for merits review of the decision.

In addition to these statutory safeguards, independent oversight and investigation of complaints about administrative actions taken by the Department of Home Affairs, including the Australian Border Force, is also available through the Commonwealth Ombudsman. An NZYQ-affected non-citizen who is granted a BVR would also be entitled to seek judicial review of a decision under regulation 2.25AB, and may seek other forms of relief from the Court.

Significant matters in delegated legislation

I acknowledge the Committee's resolution at paragraph 1.50 of Monitor No. 6 of 2024 to draw its concerns about significant matters in delegated legislation related to visa arrangements to the attention of the Senate under standing order 23(4). The matters dealt with in the Amendment Regulations are appropriate for implementation in regulations rather than by parliamentary enactment. It has been the consistent practice of the Government of the day to provide for detailed matters of visa settings in the Migration Regulations rather than in the Migration Act itself – and the Migration Act expressly provides for these matters to be prescribed in regulations. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to effectively manage the operation of Australia's visa system and respond quickly and effectively to emerging needs, including in response to the High Court's decision in NZYQ.

I appreciate the time the Committee has taken to consider the Amendment Regulations. The Department will engage with the Committee secretariat in relation to the updates I have undertaken to make to the explanatory statement. I have also copied this letter to the Minister for Home Affairs and Minister for Cyber Security, the Hon Clare O'Neil MP.

I trust this information is of assistance to the Committee in its deliberations.

Yours sincerely



ANDREW GILES

15 / 7 / 2024