



Migration Institute
of Australia

SUBMISSION

Acts and Instruments (Framework Reform) Bill 2014



Migration Institute of Australia
ABN 83 003 409 390

Phone: +612 9249 9000 | Fax: +612 9279 3172 | Email: info@mia.org.au | Website: www.mia.org.au

The Migration Institute of Australia, the professional association of Registered Migration Agents, holds interests in all areas of migration legislation and policy development and appreciates the opportunity to provide comment to the Legal and Constitutional Affairs Legislation Committee on the proposed *Acts and Instruments (Framework Reform) Bill 2014* (The Bill).

The Migration Institute of Australia acknowledges that the *Acts and Instruments (Framework Reform) Bill 2014* does generally “improve the operation and clarity of the legislative frameworks for Commonwealth Acts and instruments”. The Institute does however have the following serious concerns about several aspects of the Bill.

1. The potential use of “notifiable instruments” to prevent the disallowance of legislative instruments.

It is a fundamental principle of our democratic system that legislation is subject to parliamentary scrutiny.

The provision for the disallowance of delegated legislation in the *Legislative instruments Act 2003* remains in the *Acts and Instruments (Framework Reform) Bill 2014*. However, the creation of the new category of “notifiable instruments”, which will not be disallowable, raises concerns about the potential use of these to circumvent disallowance.

The *Acts and Instruments (Framework Reform) Bill 2014* [11(2)] provides the following examples of a *notifiable instrument*:

- (a) *a commencement instrument for an Act, legislative instrument or notifiable instrument, or for a provision of an Act or such an instrument;*
- (b) *an instrument, other than a legislative instrument, prescribed by regulation for the purposes of this paragraph;*
- (c) *an instrument, other than a legislative instrument, that is registered as a notifiable instrument, if the instrument is made under a power delegated by the Parliament or another power given by law;*
- (d) *an instrument, other than a legislative instrument, that includes a provision that amends or repeals another notifiable instrument.*

Note: The effect of paragraph (c) is that an instrument (other than a legislative instrument) may be a notifiable instrument because it is registered as a notifiable instrument, even if it would not otherwise be a notifiable instrument because of this section. For a corresponding provision relating to legislative instruments, see subsection 8(3).

The Explanatory Memorandum to the Bill states that notifiable instruments include:

- *instruments declared to be notifiable instruments by their enabling laws*
- *instruments prescribed by the Regulations*
- *instruments that are neither legislative instruments or notifiable instruments under their enabling legislation or the Regulations, but are made under a*
- *power delegated by the Parliament or another power given by law, and are registered as notifiable instruments*
- *commencement instruments for legislative and notifiable instruments, and*
- *instruments that include a provision that amends or repeals another notifiable instrument.*

The Bill provides that

11 (1) If a primary law gives power to do something by notifiable instrument, then:

- (a) if the thing is done, it must be done by instrument; and*
- (b) that instrument is a notifiable instrument.*

In other words, if an instrument is registered as a notifiable instrument then it is a notifiable instrument.

It is not clear from the Bill or from the Explanatory Memorandum under what circumstances an instrument would be classified as “legislative” or “notifiable” or what use can be made of notifiable instruments.

This does not provide any assurance that notifiable instruments would not or could not be used to evade the disallowance of legislation.

This should be clarified.

2. Retrospectivity

It is a basic principle of the rule of law in Australia that legislation should apply prospectively rather than retrospectively.

The Explanatory Memorandum to the Bill recognises this when it states: “*An offence should be given retrospective effect only in rare circumstances and with strong justification*”.

The Explanatory Memorandum goes on to say that:

The Legislative Instruments Act is an Act of general application and protects against any type of retrospective legislative instrument, or provision of a legislative instrument, to the extent that it may adversely affect a person.

The Explanatory Memorandum to the Bill says that it “provides an important safeguard against the application of retrospective **criminal** [MIA’s emphasis] laws without

appropriate parliamentary oversight and scrutiny to ensure any limitations on this right are reasonable, necessary and proportionate”.

The Bill does not, however, provide a safeguard against the application of retrospective administrative laws, which cover most of migration legislation.

Indeed the Explanatory Memorandum states that

*“The Bill provides that a legislative or notifiable instrument will not apply to a person retrospectively to the extent that it would affect the person’s rights so as to disadvantage them or impose liabilities on the person. This is more targeted than existing section 12(2) of the Legislative Instruments Act, which provides that an instrument will have no effect at all if any provision of the instrument would purport to have such operation. **The application of the provision in the Bill can be displaced by expressly providing for retrospective operation in the enabling Act.**”* [MIA’s emphasis]

The Migration Institute of Australia believes that except in matters of national emergency or security, legislation should not be retrospective.

3. Consultation

The Migration Institute of Australia is concerned that the use of notifiable instruments may have the possibility of being used to circumvent requirements for consultation.

The Explanatory Memorandum to the Bill (p14) states:

*“The existing provisions regarding drafting standards are extended to apply to notifiable instruments. The consultation requirements are amended so that the requirement to undertake appropriate consultation (which can include no consultation) applies equally to instruments that affect business and/or competition and those that do not. The list of circumstances in which consultation may be unnecessary or inappropriate is removed. **The consultation requirements for legislative instruments do not apply to notifiable instruments.**”* [MIA’s emphasis]

The process of proper and genuine consultation is an essential feature of our democratic system and should not be removed as a requirement for notifiable instruments in cases where the effect of those instruments could adversely affect individuals or businesses.

The concerns raised in this submission must be addressed before the legislation is brought before the Parliament again and if required, there should be a proper period of genuine consultation available to the Australian public.

The Migration Institute of Australia notes that the amount of time given for submissions to this enquiry cannot be regarded as sufficient for genuine consultation.