



6 February 2020

The Hon Nola Marino MP
Assistant Minister for Regional Development and Territories
Parliament House
Canberra ACT 2600

Via email: Nola.Marino.MP@aph.gov.au
CC: Minister.marino@infrastructure.gov.au

Dear Assistant Minister,

Jervis Bay Territory Rural Fires Amendment (Miscellaneous Measures) Ordinance 2019 [F2019L01546]

Jervis Bay Territory Rural Fires Amendment (Miscellaneous Measures) Rules 2019 [F2019L01494]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified two significant scrutiny concerns in relation to the above instruments, outlined below, and seeks your advice in relation to one of these matters.

Significant penalties in delegated legislation

Item 26 of Schedule 1 to the Jervis Bay Territory Rural Fires Amendment (Miscellaneous Measures) Ordinance 2019 (amendment ordinance) inserts an offence punishable by 7 years' imprisonment or 420 penalty units into the Jervis Bay Territory Rural Fires Ordinance 2014 (principal ordinance).

The explanatory statement to the instrument acknowledges the general principle that delegated legislation should not create offences that impose penalties greater than 50 penalty units. However, it states that the addition of such offences to the principal ordinance is 'appropriate', in light of the legislative framework established by the *Jervis Bay Territory Act 1915*.

The committee acknowledges that section 4F of the *Jervis Bay Territory Act 1915* confers broad powers on the Governor-General to make ordinances 'for the peace, order and good government of the Territory'. However, the committee also notes that section 4G clearly provides for the tabling and disallowance of such ordinances. This ensures that the ordinances fall within the scope of this committee's scrutiny of delegated legislation. In this regard, the committee has long considered that custodial penalties and penalties

exceeding 50 penalty units are matters more appropriate for parliamentary enactment, regardless of whether such penalties are authorised by the enabling legislation.

The committee will continue to closely monitor this issue in 2020, with a view to seeking your more detailed advice about the government's approach to the inclusion of significant matters in territory ordinances at a later date.

Merits review

The Jervis Bay Territory Rural Fires Amendment (Miscellaneous Measures) Rules 2019 (the amendment rules) insert new paragraphs into subsections 7(2) and 10(1) of the Jervis Bay Territory Rural Fires Rule 2014 (principal rule). The new paragraphs provide that a person may be removed from a brigade register, or be found to have committed a breach of discipline, for failing to comply with conditions imposed by the minister.

The committee understands that decisions made under the amended subsections 7(2) and 10(1) of the principal instrument are not subject to independent merits review, because the principal rule is intended to align as closely as possible with the equivalent New South Wales legislation, which only provides for internal review.

The committee acknowledges the underlying policy rationale of promoting consistency with the equivalent New South Wales legislation. However, as matter of technical legislative scrutiny, the committee notes the Senate's strong and longstanding commitment to ensuring that delegated legislation provides for the independent review of administrative decisions with the capacity to affect rights, liberties, obligations or interests of individuals.

Given the importance of independent review as a safeguard against undue trespass on an individual's personal rights, liberties, obligations and interests, the committee does not consider that the desire to promote consistency with state law is, of itself, a sufficient reason to preclude access to independent merits review under Commonwealth law.

Accordingly, the committee requests your advice as to the justification, beyond consistency with state legislation, for excluding independent review of decisions made under amended subsections 7(2) and 10(1) of the principal rule by reference to the Administrative Review Council's guide, *What decisions should be subject to merits review?*.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

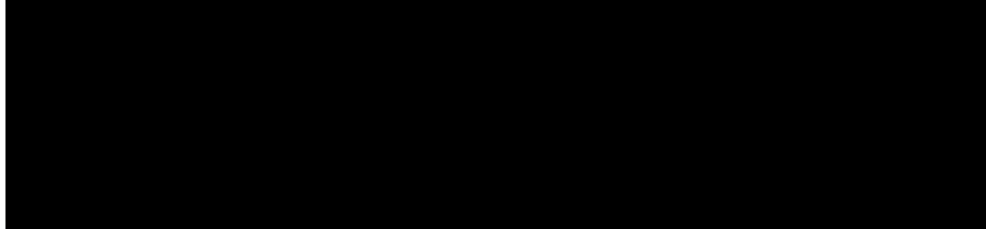
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **Thursday, 20 February 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation



The Hon Nola Marino MP

**Assistant Minister for Regional Development and Territories
Federal Member for Forrest**

Ref: MC20-000661

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells

Thank you for your letter of 6 February 2020 regarding the *Jervis Bay Territory Rural Fires Amendment (Miscellaneous Measures) Rules 2019* (the Amendment Rules).

I understand that on 10 January 2020 the Department of Infrastructure, Transport, Regional Development and Communications responded to an email from the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) secretariat raising potential scrutiny concerns in relation to the Amendment Rule. As requested by the Committee, I am happy to provide further information below to address the Committee's concerns in relation to merits review.

Updating legislation to support the provision of fire and emergency services in the Jervis Bay Territory is important for ongoing effective cooperation in the management of cross-border bushfires.

With regard to the Amendment Rules, I note the Committee's acknowledgement of the underlying policy rationale of promoting consistency with the equivalent NSW legislation. Indeed, the requirement for alignment is at the centre of the arrangements with the NSW Government to provide NSW Rural Fires Service personnel for fire and emergency services operations in the Jervis Bay Territory.

The unique operational circumstances relating to cross-jurisdictional fire and emergency services activities means that personnel must have clarity as to their role and their rights and responsibilities regardless of whether they are operating in the Jervis Bay Territory or in NSW. For this reason the intention has been to maintain, as far as possible, a regime as it is established under NSW legislation, with as few departures as possible under the Jervis Bay Territories legislation.

The Hon Nola Marino MP

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The *Jervis Bay Territory Rural Fires Rule 2014* (the Rural Fires Rule) contains a robust investigation and appeals process in relation to disciplinary action. By way of example, a member of a rural fire brigade may be subject to disciplinary action if they are negligent or careless in the discharge of their duties, or fail to comply with service standards. In the first instance, the member will appear before a senior officer of the NSW Rural Fires Service or a disciplinary panel, and the alleged breach will be investigated. If a member is found guilty of a breach of discipline, they may then appeal to the Minister against the findings or any disciplinary action to be taken.

Consistent with the Senate's commitment to ensuring delegated legislation provides for the independent review of administrative decisions with the capacity to affect rights, liberties, obligations or interests of individuals, this appeals process provides for independent review of the decision by a person other than the primary decision-maker.

With regard to the Administrative Review Council's guide, *What Decisions Should Be Subject To Merits Review?*, the existing appeals process is consistent with the objectives for merits review set out by the Council as it ensures fair treatment of all persons affected by a decision.

Further, the approach is consistent with two of the factors the Council identifies that may justify excluding merits review. First, the Council states that 'decisions that are the product of processes that would be time-consuming and costly to repeat on review' may be excluded. Under the Rural Fires Rule, before disciplinary action is taken the alleged breach of discipline must be investigated. Further investigation may also be undertaken as part of an appeals process. Such investigations are both time-consuming and costly to repeat.

Secondly, the Council identifies decisions which have 'such limited impact that the costs of review cannot be justified' as suitable for exclusion from merits review. The range of disciplinary actions available under the Rural Fires Rule include reprimand, suspension for a specified period and demotion. The most severe is removal of the member's name from the brigade register. The effect of the majority of these actions is generally temporary and allows for the member to either continue their participation in the brigade or to return to their normal activities after a period of time. The costs of undertaking merits review, given the short-term impact of the decisions, therefore cannot be justified.

Thank you for bringing your concerns to my attention and I trust this is of assistance.

Yours sincerely



Nola Marino

18 FEB 2020



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

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27 February 2020

The Hon Nola Marino MP
Assistant Minister for Regional Development and Territories
Parliament House
CANBERRA ACT 2600

Via email: Nola.Marino.MP@aph.gov.au

CC: Minister.Marino@infrastructure.gov.au; Rob.Terrill@infrastructure.gov.au


Dear Assistant Minister,

**Jervis Bay Territory Rural Fires Amendment (Miscellaneous Measures) Rules 2019
[F2019L01494]**

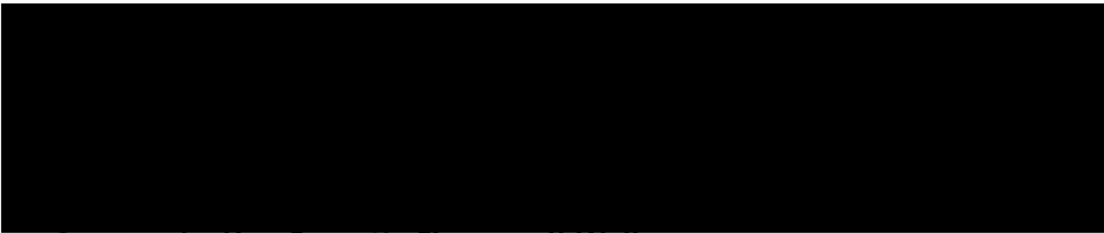
Thank you for your response of 18 February 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 26 February 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation