SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SECOND REPORT

OF

2005

Legislative Instruments Act - Declarations

9 March 2005

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator R Ray (Chair)
Senator B Mason (Deputy Chair)
Senator G Barnett
Senator D Johnston
Senator G Marshall
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT OF 2005

The Committee presents its Second Report of 2005 to the Senate.

The Committee reports to the Senate on recent deliberations involving new drafting practices put in place following the commencement of the *Legislative Instruments Act 2003* on 1 January 2005.

It appears that the new Legislative Instruments regime will involve a number of changes to the practices and procedures and the Committee expects to report further on these changes in coming months.

Legislative Instruments Act – Declarations

Under its terms of reference, the Committee will comment on provisions of bills which appear to delegate legislative power inappropriately or without establishing a sufficient regime of scrutiny over the exercise of that power. In considering whether a particular provision comes within these criteria, the Committee must resolve whether or not the power delegated is legislative in character. The Committee generally looks to explanatory memoranda to guide its consideration (see *Third Report of 2004, The Quality of Explanatory Memoranda Accompanying Bills*).

The *Legislative Instruments Act 2003* (LIA), which commenced on 1 January 2005, provides the general framework for the registration, tabling, disallowance and 'sunsetting' of legislative instruments. It also provides means to exclude specific instruments from aspects of the tabling and disallowance regime.

Despite the definition of legislative instrument in section 5 of the Act, it can be difficult to determine the status of instruments. Drafting Direction 19 of 2004 from the Office of Parliamentary Counsel sets out a policy that the status of instruments as legislative or not should be expressly dealt with in legislation.

One problem arising from the inclusion of provisions which expressly state that an instrument is not a legislative instrument lies in determining whether the provision is merely declaratory (ie indicating that the instrument is not one which would ordinarily fall within the definition in section 5) or whether the instrument is legislative in character but is being exempted from the LIA.

The Committee welcomes recent advice from the First Parliamentary Counsel that drafters in his office will be asking their instructors to explain in the explanatory memorandum of a bill which of these reasons applies to an instrument that is expressed not to be a legislative instrument. The advice continues:

> If an instrument is genuinely being exempted from the LIA, drafters will also be asking instructors to explain the policy justification for the exemption.

Such explanations will be of great assistance to the Committee and to the Parliament more generally. The Committee looks forward to explanatory memoranda setting out a full justification for each such provision in the future.

A copy of the advice from the First Parliamentary Counsel, along with Drafting Direction 19 of 2004, is attached.

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Chair

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Senator The Hon Robert Ray
Chair
Senate Scrutiny of Bills Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Senator Ray

Legislative Instruments Act 2003

1 I am writing to you to draw your attention to some changes you and your Committee will notice in Bills as a result of the *Legislative Instruments Act 2003* (the ***LIA***).

2 As you are aware, the LIA commenced on 1 January 2005. I have enclosed for your information a copy of Drafting Direction 19 of 2004 which, in Part 3, sets out the Office of Parliamentary Counsel's response to the LIA.

3 Paragraph 16 of the Drafting Direction states OPC's general policy in relation to the LIA (a policy developed together with the Attorney-General's Department). It has proved to be more difficult than first thought to characterise instruments as falling within the definition of legislative instruments under section 5 of the LIA. To help readers, our policy is that the status of instruments as legislative or not should be expressly dealt with.

4 There are 2 places where the status of an instrument can be dealt with. First, section 6, 7 (including regulations made under section 7) or 9 of the LIA might clarify the status of an instrument. (A large number of commonly occurring instruments that are not legislative instruments are now dealt with under Schedule 1 to the *Legislative Instruments Regulations 2004*.)

5 Secondly, a Bill creating a power to make an instrument might clarify the status of the instrument. In future, your Committee will see a large number of provisions in Bills stating that instruments are, or are not, legislative instruments.

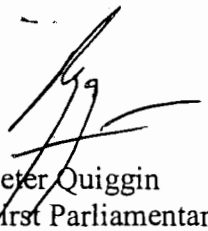
6 For instruments that are not legislative instruments, including a statement to that effect does not necessarily mean that the instrument is being *exempted* from the LIA. As paragraph 29 of the Drafting Direction notes, an instrument might not be a legislative instrument for 2 reasons. The first reason is that an instrument might clearly not fall within the definition of legislative instrument in section 5 of the LIA. (I suspect that the majority of statements included in Bills that certain instruments are not legislative instruments will be included for this reason.) The second (and probably rarer) reason is that, although an

instrument falls within the definition in section 5, the policy is for the instrument to be wholly exempted from the Act.

7 Drafters in our Office will be asking their instructors to explain in the Explanatory Memorandum of a Bill which of these reasons applies to an instrument that is expressed not to be a legislative instrument. If an instrument is genuinely being exempted from the LIA, drafters will also be asking instructors to explain the policy justification for the exemption. I hope that this will help your Committee in its work.

8 Please feel free to contact me if you would like to discuss this matter, or any other matter, further.

Yours sincerely



Peter Quiggin
First Parliamentary Counsel
23 February 2005

PARLIAMENTARY COUNSEL

Drafting Direction 2004, No. 19
Subordinate instruments

Contents

Part 1—Introduction

1 This Drafting Direction notes some considerations, and sets out some standard forms, for drafting provisions of Bills dealing with subordinate instruments.

Part 2—Power to make subordinate legislation

Standard form of regulation-making power

2 The standard provision authorising the making of regulations should be as follows:

> The Governor-General may make regulations prescribing matters:
> (a) required or permitted by this Act to be prescribed; or
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

3 The paragraphing of the provision is to make it clear that the words "for carrying out or giving effect to this Act" do not qualify the words "required or permitted by this Act to be prescribed".

4 There is no need to specify that the regulations are not to be inconsistent with the Act concerned (or any other Act), as courts will find invalid subordinate legislation that is inconsistent with the Act under which it is made (or other Acts or the common law).

Preconditions for the Governor-General making subordinate legislation

5 Provisions setting out a precondition for the exercise of a power for the Governor-General to make subordinate legislation should be drafted to make clear who has the responsibility for forming the opinion, or doing the thing, that is the precondition (see Drafting Direction 2000, No. 3).

Provisions for subordinate legislation to be made to do certain things

Provisions for subordinate legislation to modify, prevail over or amend an Act

6 If you are considering drafting a provision allowing subordinate legislation to make direct amendments or notional modifications of an Act, you must discuss the matter first with First Parliamentary Counsel. This is because such provisions can cause practical problems in accessing the current text of the law.

7 To avoid doubt whether subordinate legislation modifying an Act can add new provisions to the Act, omit provisions from the Act and substitute provisions of the Act, a provision for an Act to apply with modifications made by subordinate legislation should include a definition of ***modifications*** in the following form:

> ***modifications*** includes additions, omissions and substitutions.

8 Although a provision in an Act authorising the modification of the Act by subordinate legislation would not ordinarily be construed as authorising an increase in a penalty, it should be made clear in such a provision that it does not extend to a modification by way of

increasing a penalty provided for in the Act. Any such provision should be discussed with the Criminal Law Branch of the Attorney-General's Department (***AGD***).

Provisions for subordinate legislation to specify things by reference to classes

9 There is no need to state expressly that subordinate legislation may specify things by reference to a class of things (see section 46 of the *Acts Interpretation Act 1901* for non-legislative instruments and section 13 of the *Legislative Instruments Act 2003* (the ***LIA***) for legislative instruments).

Scope of provisions

10 If you are not sure whether your provisions for making subordinate legislation are appropriate to allow subordinate legislation to be made to achieve the result that you understand that your instructors want, you should discuss the matter with the Office of Legislative Drafting (***OLD***) in AGD. This does not limit the requirement (under the Drafting Direction on referral of Bills to other agencies) to refer to AGD provisions conferring or affecting a power to make subordinate instruments.

Part 3—The *Legislative Instruments Act 2003*

Determining whether an instrument is to be a legislative instrument

11 The LIA contains rules dealing with various matters (including disallowance and sunsetting) relating to all instruments that fall within the definition of ***legislative instrument*** in the LIA (see sections 5, 6, 7, 9, 10 and 11 of the LIA).

12 Section 5 sets out a general definition of a legislative instrument. The issue of whether an instrument is a legislative instrument under that section is determined by OLD. The issue of whether an instrument that would otherwise be a legislative instrument should be exempted from the LIA is determined by the Administrative Law and Civil Procedure Branch in the Civil Justice Division (***CJD***).

13 The LIA has lists of exemptions from the Act in its totality and from the disallowance and sunsetting regimes in particular. (Some of these exemptions depend on the regulations.) However, there is still an expectation that all instruments that fall within the definition of a legislative instrument under section 5 will be subject to the full requirements of the Act unless there is a special reason that justifies a full or partial exemption.

Application of this Part of the Drafting Direction to certain subordinate instruments

14 This Part of the Drafting Direction applies to subordinate instruments that can only be made by a person in an official Commonwealth capacity. (A person may make an instrument in an official Commonwealth capacity even if the person is, or is acting on behalf of, a regulatory or other body that is legally separate from the Commonwealth.) For example, an application made by a private individual, or an election made by a taxpayer, would not be a subordinate instrument for the purposes of this Part of the Drafting Direction.

15 However, if you are in doubt as to whether this Part of the Drafting Direction should apply to a particular kind of instrument, then you should treat the kind of instrument as a subordinate instrument for the purposes of this Part of the Drafting Direction.

Generally the status of instruments to be expressly dealt with

The general rule

16 In future, subject to the comments in paragraphs 20 and 21, when you provide a power in a Bill to make a subordinate instrument, the status of an instrument made under that power as a legislative instrument, or not a legislative instrument, must be expressly dealt with. There are 4 main ways in which this might happen:

(a) an instrument might be stated to be a legislative instrument under section 6 of the LIA;

(b) an instrument might be stated not to be a legislative instrument under section 7 of the LIA (including by reason of regulations made for the purposes of that section);

(c) an instrument might be stated to be a legislative instrument in a provision of the Bill you are drafting;

(d) an instrument might be stated not to be a legislative instrument in a provision in the Bill you are drafting (either because it is not a legislative instrument under section 5 of the LIA, or because the instrument, despite being a legislative instrument under that section, is to be totally exempted from the LIA).

17 Rules of Court are stated under section 9 of the LIA not to be legislative instruments. However, under the enabling legislation providing the power to make the Rules, they are treated as if they were legislative instruments.

18 Because of the rule in paragraph 16, the mechanism in sections 10 and 11 of the LIA for the Attorney-General to certify whether an instrument is a legislative instrument should not be needed for instruments made under powers drafted in accordance with this Drafting Direction.

19 Generally, if you are amending an Act that already contains powers to make subordinate instruments, you do not need to clarify by express provision whether those instruments are legislative instruments. However, you may do so if it would be appropriate to do so taking into account the amendments you are making, or if you are given instructions to do so.

The exception to the general rule

20 There is one exception to the rule that, when you provide a power to make a subordinate instrument, the status of every instrument made under that power must be expressly dealt with.

21 Some of the kinds of instruments specified in the regulations must relate to particular individuals to be covered by the regulations. For example, item 30 of Schedule 2 to the regulations clarifies that "an instrument remitting or waiving a penalty ... *in relation to a particular person*" [emphasis mine] is not a legislative instrument. Obviously, instruments that remit or waive a penalty in relation to a class of persons are not covered by the regulations and so their status would normally need to be expressly dealt with. However, if we did this, the benefit of including instruments that remit or waive penalties in the regulations would be lost.

22 Consequently, if a kind of instrument specified in the regulations is only covered by the regulations if it relates to a particular individual, you do not need to state expressly that an instrument of that kind that relates to a class of persons is or is not a legislative instrument. Instead, section 5 of the LIA will be relied on to determine the status of the instrument. (However, remember to check with your instructors that they are happy for the LIA to apply if that kind of instrument is a legislative instrument when it relates to a class of persons. If they are not happy with this outcome then you will need to include an express partial or total exemption from the LIA in one of the forms set out below.)

Whether an instrument is to be a legislative instrument

Referral of Bills to AGD

23 As mentioned in paragraph 12, the issue of whether an instrument is or is not a legislative instrument, or is to be exempted from all or part of the LIA, is ultimately a decision for either OLD or CJD. Consequently, Bills should be referred to AGD in accordance with the Drafting Direction on referral of Bills to other agencies.

Instruments that are already dealt with by the LIA or regulations

24 If an instrument is already expressly stated:

(a) to be a legislative instrument under section 6 of the LIA; or

(b) not to be a legislative instrument under section 7 or 9 of the LIA (including by reason of regulations made for the purposes of section 7);

then no further statement about the status of the instrument need be included in the Bill.

25 In addition, as mentioned in paragraphs 20 to 22, if regulations made for the purposes of section 7 of the LIA include an instrument of a kind that is only covered by the regulations if it relates to a particular individual, then no further statement about the status of an instrument of that kind that relates to a class of persons need be included in the Bill (unless an exemption is required for the instrument).

Instruments that are to be legislative instruments

26 If an instrument (other than one covered by paragraph 24 or 25) is to be a legislative instrument, and the entire LIA is to apply to the instrument, then you will need to state expressly in the Bill that the instrument is a legislative instrument. This can be done by using the expression "by legislative instrument" in the provision that gives the power to make the instrument. For example:

> The Minister may, by legislative instrument, determine guidelines relating to ...

The use of this expression will ensure, because of section 15AE of the *Acts Interpretation Act 1901*, that the instrument is a legislative instrument for the purposes of the LIA.

27 If it is not possible to use the expression "by legislative instrument", then the following form should be used:

> A *[insert description of instrument]* made under *[insert enabling provision]* is a legislative instrument.

Instruments that are not to be legislative instruments

28 If an instrument (other than one covered by paragraph 24 or 25) is not to be a legislative instrument, then you will need to state expressly that the instrument is not a legislative instrument.

29 An instrument might not be a legislative instrument for 2 reasons. Firstly, the instrument might clearly not fall within the definition of ***legislative instrument*** in section 5 of the LIA. Secondly, although the instrument falls within this definition, the policy might be for the instrument to be wholly exempted from the LIA.

30 In either case, the standard form for dealing with such an instrument is as follows:

> A *[insert description of instrument]* made under *[insert enabling provision]* is not a legislative instrument.

Powers to create some legislative instruments and some instruments that are not legislative instruments

31 In a certain small number of cases, a power to make an instrument might need to allow some instruments to be made that are legislative instruments and some to be made that are not legislative instruments. In these cases (other than in the case covered by paragraph 25), you will need to describe the test that will be used to determine whether a particular instrument is a legislative instrument or not. OLD or CJD will give you advice on the nature of the test.

32 For example:

(1) A *[insert description of instrument]* made under *[insert enabling provision]* that *[insert condition eg applies to a named individual or a named single entity]* is not a legislative instrument.

(2) Otherwise, a *[insert description of instrument]* made under *[insert enabling provision]* is a legislative instrument.

33 Although, the nature of the test will be advised on by OLD or CJD, you should ensure that for a particular instrument it will be easy to apply the test and determine whether it is a legislative instrument. If you do not think that the test meets this requirement, then you should speak to First Parliamentary Counsel.

Partial exemptions from the LIA

Exemptions from the disallowance regime

34 If:

(a) an instrument (other than one covered by paragraph 24 or 25) is to be a legislative instrument; and

(b) the policy is that the disallowance regime should not apply to the instrument;

then you will need to state this expressly. The standard form in such a case is as follows:

> A *[insert description of instrument]* made under *[insert enabling provision]* is a legislative instrument, but section 42 of the *Legislative Instruments Act 2003* does not apply to the *[instrument]*.

35 This form of provision (with appropriate modifications) can also be used in the cases described in paragraph 31.

36 There are a number of generically-described instruments included in a table in subsection 44(2) of the LIA that are exempt from disallowance. However, you should not rely on the table to exempt an instrument from disallowance (as it is often difficult to determine whether a particular instrument is an instrument of a kind mentioned in the table), nor should new disallowance exemptions be included by amending the table in that section.

37 If an instructing department wants to provide for a different means of disallowance (for example, by shortening the period for disallowance), then you would exempt the legislative instrument from the disallowance regime and provide for the alternative regime.

Exemptions from the sunsetting regime

38 If:

(a) an instrument (other than one covered by paragraph 24 or 25) is to be a legislative instrument; and

(b) the policy is that the sunsetting regime should not apply to the instrument;

then you will need to state this expressly. The standard form in such a case is as follows:

> A *[insert description of instrument]* made under *[insert enabling provision]* is a legislative instrument, but Part 6 of the *Legislative Instruments Act 2003* does not apply to the *[instrument]*.

39 This form of provision (with appropriate modifications) can also be used in the cases described in paragraph 31.

40 Again, there are a number of generically-described instruments included in the table in subsection 54(2) of the LIA that are exempt from sunsetting. For the same reasons as mentioned above, you should not rely on the table to exempt an instrument from

disallowance, nor should new sunsetting exemptions be included by amending the table in that section.

Exemptions from both the disallowance and the sunsetting regimes

41 If:

(a) an instrument (other than one covered by paragraph 24 or 25) is to be a legislative instrument; and

(b) the policy is that neither the disallowance nor the sunsetting regime should apply to the instrument;

then you will need to state this expressly. The standard form in such a case is as follows:

> A *[insert description of instrument]* made under *[insert enabling provision]* is a legislative instrument, but neither section 42 nor Part 6 of the *Legislative Instruments Act 2003* applies to the *[instrument]*.

42 This form of provision (with appropriate modifications) can also be used in the cases described in paragraph 31.

Providing for other requirements for legislative instruments

Publication and delivery requirements

43 You may require a legislative instrument to be published or delivered. These requirements are additional to the requirement to register a legislative instrument (see subsection 56(2) of the LIA).

44 If you do require a legislative instrument to be published or delivered, you should be aware that ***making***, in relation to a proposed or actual legislative instrument, is defined in section 4 of the LIA to mean "the signing, sealing or other endorsement of the instrument by the person or body empowered to make it whereby it becomes or became that legislative instrument". Therefore, you should be careful to distinguish between the act of making the legislative instrument and any subsequent publication or delivery requirements for the instrument. One way of doing this is to require a *copy* of the instrument, once made, to be published or delivered.

45 However, as all legislative instruments are required to be registered on the Federal Register of Legislative Instruments, the need for legislative instruments to be published in future should be less common.

Tabling requirements

46 The obligation to table a legislative instrument always lies on AGD (although that obligation only arises once the instrument is lodged with them for registration). There should not be any need to provide for any different tabling requirements for legislative instruments.

Part 4—Instruments that are not legislative instruments and the *Acts Interpretation Act 1901*

47 The *Acts Interpretation Act 1901* contains provisions relating to instruments that are not legislative instruments: see sections 46, 46AA and 46B of that Act.

48 In particular, section 46B provides for disallowable (non-legislative) instruments. The form of provision for providing for such an instrument is the following:

> An *[insert description of instrument]* made under *[insert enabling provision]* is not a legislative instrument, but is a disallowable instrument for the purposes of section 46B of the *Acts Interpretation Act 1901*.

Part 5—Other provisions of Bills dealing with or affecting regulations

Provisions referring to regulations

49 It is generally undesirable to refer in an Act to a particular set of regulations or a particular numbered provision of a set of regulations, because the reference could easily be made incorrect. However, if you must include such a reference, it should be in the form provided by the regulations as the name or citation of the regulations (see Word Note No. 4).

Provisions amending regulations

50 Acts should not amend regulations except for compelling reasons (e.g. a need to amend a regulation retrospectively in a way that adversely affects a person's rights or imposes new liabilities contrary to the *Acts Interpretation Act 1901* or the LIA). If you are instructed to draft a provision amending regulations, you should discuss the matter with First Parliamentary Counsel.

51 If it is decided that an Act must amend regulations, you should take care to ensure that:

(a) any amending regulations with suspended commencements will not affect the amendments to be made by the Act (and the Office of Legislative Drafting is aware of the proposed amendments and the instructing Department is aware of the need not to make amending regulations that could affect the amendments to be made by the Act); and

(b) the standard form of the clause "activating" amending Schedule(s) is changed to reflect the fact that regulations are being amended; and

(c) the regulations that are amended by the Act can be further amended or repealed by regulations.

52 The usual form of the clause to achieve this is as follows:

3 Schedule(s)

(1) Each Act, and each set of regulations, that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

(2) The amendment of any regulation under subsection (1) does not prevent the regulation, as so amended, from being amended or repealed by the Governor-General.

Amendments of definitions in enabling Act relied on in regulations

53 The effect of an amendment of a definition in an Act on existing regulations or other instruments is unclear, and you should raise with instructors the possible effect of the amendment of definitions on any existing regulations under the Act concerned (see Drafting Direction 2001, No. 5).

Part 6—Withdrawal of Drafting Directions

54 This Drafting Direction supersedes the following Drafting Directions, which are withdrawn:

No. 1 of 1982
No. 2 of 1984
No. 1 of 1986
No. 13 of 1991

Part 7—Application of this Drafting Direction

55 This Drafting Direction applies to Bills introduced after the date of this Drafting Direction.

Peter Quiggin
First Parliamentary Counsel
9 December 2004