

Legislative Instruments Regulations 2004 2004 No. 373

EXPLANATORY STATEMENT

Statutory Rules 2004 No. 373

Issued by the Authority of the Attorney-General

Legislative Instruments Act 2003

Legislative Instruments Regulations 2004

Section 62 of the *Legislative Instruments Act 2003* (the Act) provides that the Governor-General may make regulations prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act establishes a comprehensive regime for the management of Commonwealth legislative instruments, including the creation of the Federal Register of Legislative Instruments as a repository for Commonwealth legislative instruments, explanatory statements and compilations. The Act also improves the mechanisms for Parliamentary scrutiny of legislative instruments. The Act came into operation on 1 January 2005.

The purpose of the Regulations is to facilitate the operation of the Act by setting out how instruments and related documents can be lodged for registration on the Federal Register of Legislative Instruments, and by prescribing exemptions from the Act or parts of the Act.

In particular, the Regulations:

- explain how a document is to be lodged for registration, including the manner and form in which such documents are to be lodged;
- prescribe the information required to be provided with any legislative instrument proposed to be lodged;
- provide that a rule-maker is taken to comply with the requirements to lodge an electronic copy of an instrument if an electronic copy of the instrument is already held by the Department;
- specify the time period in which a legislative instrument that was made before 1 January 2005 but which is amended by a legislative instrument made after that date, must be lodged for registration;
- declare certain classes of instruments not to be legislative instruments for the purposes of the Act;
- provide exemptions for certain legislative instruments from the whole of the Act, or the disallowance regime of the Act, or the sunseting regime of the Act; and
- preserve the operation of special statutory disallowance regimes which operate in a different way to those in the Act.

Details of the Regulations are set out in the Attachment.

The Regulations commenced on 1 January 2005, coinciding with the commencement of the Act.

Attachment

Details of the *Legislative Instruments Regulations 2004*

Part 1 Preliminary

Regulation 1 provides that the name of Regulations is the *Legislative Instruments Regulations 2004*.

Regulation 2 provides that the Regulations commence on 1 January 2005. This is the same date as the date of commencement of the Act.

Regulation 3 defines "Act", for the purposes of the Regulations, as the *Legislative Instruments Act 2003* (the Act).

Regulation 4 prescribes the meaning of lodge for the purposes of the Act.

Subregulation 4(1) states that for the definition of lodge in subsection 4(1) of the Act, this regulation will apply.

Paragraph 4(2)(a) provides that an electronic document is lodged if it is in one of the following word processing or data formats:

- Microsoft Word 97 or later format - this is the most commonly used word processing format in Australia,
- rich text format - this is an interchange format from Microsoft for exchange of documents between Word and other document preparation systems, and
- another format, agreed by the Secretary that is compatible with the Register -given the rapid change that often occurs in information technology, other formats may be considered more suitable in the future.

Paragraph 4(2)(b) states that an electronic document is taken to have been given to the Secretary if:

- it is given through the electronic lodgement facility at <http://frli.gov.au/lodgment.nsf> - this facility can be accessed via the internet, or
- in some other way agreed by the Secretary - this enables use of other methods of giving electronic documents to another person which may become available in the future.

Subregulation 4(3) provides that a non-electronic document may be lodged either by delivery or posting to the Office of Legislative Drafting and Publishing at Robert Garran Offices, Barton ACT 2600, or by giving the document to the Secretary in a way agreed by the Secretary.

Part 2 Federal Register of Legislative Instruments

Regulation 5 sets out the information that needs to be lodged with a legislative instrument. The information is

- the name and relevant provision of the enabling legislation - that is, the legislation authorising the making of the legislative instrument
- a brief description of the subject matter of the instrument
- a reference identifying any document incorporated by reference in the instrument
- the title of the instrument and any instruments it affects, and
- the number of pages in the instrument and the name and contact telephone number of a person who can answer questions about the instrument.

Section 28 of the Act requires that legislative instruments that were made before the commencing day and are in force on the commencing day must be registered unless they are legislative instruments that were required to be, but were not, published in the *Gazette* before the commencing day. For the instruments to which section 28 applies, regulation 5 requires that additional information must be lodged with the Secretary. This information is:

- the reference number (if any) allocated to the instrument when it was made
- the date of the notification of publication in the *Gazette* if the instrument was required to be notified or published
- the date when the instrument was laid before each House of Parliament if the instrument was required to be laid, and
- information about any partial disallowance of the instrument.

Part 3 Registration

Regulation 6 relates to lodgement for registration of instruments that were made before the commencing day.

Subregulation 6(1) provides that a rule-maker is taken to comply with the requirement to lodge an electronic copy of an instrument if an electronic copy of the instrument is already held by the Department. Subsection 29(1) of the Act allows regulations to provide for an exception to the requirement that a rule-maker must lodge an electronic copy of a legislative instrument in electronic form with the Department.

Subsection 29(2) of the Act provides that, where a legislative instrument made on or after the commencing day (which is 1 January 2005) amends another legislative instrument (called the principal legislative instrument) which is made before the commencing day, the principal legislative instrument and any previous amendments must also be lodged in electronic form. The time limit for lodging the principal legislative instrument and the previous amendments is determined in accordance with subsection 29(4), namely within 28 days but another period may be prescribed. Subregulation 6(2) provides that the prescribed period is 6 months. This extension will enable agencies who wish to amend old instruments to locate originals of those documents, and will facilitate the handling of the high volume of material expected to be presented for registration in the early stages of the operation of the Act.

Part 4 Exemptions and exclusions

Regulation 7 provides that the instruments set out in Schedule 1 to the Regulations are prescribed instruments for the purposes of item 24 of the table in subsection 7(1) of the Act. This means that the prescribed instruments are not be legislative instruments for the purposes of the Act.

Regulation 8 provides that the instruments set out in Schedule 2 to the Regulations are prescribed instruments for the purposes of item 44 of the table in subsection 44(2) of the Act. This means that the prescribed instruments are not be subject to the disallowance provisions under the Act.

Regulation 9 provides that the instruments set out in Schedule 3 to the Regulations are prescribed instruments for the purposes of item 51 of the table in subsection 54(2) of the Act. This means that the prescribed instruments are not be subject to the sunset provisions under the Act.

Regulation 10 provides that the disallowance provisions mentioned in Schedule 4 to the Regulations are prescribed for the purposes of subsection 57(5) of the Act, which provides that, where particular disallowance provisions in other Acts are prescribed, then those disallowance provisions continue to apply.

Schedule 1 Instruments declared not to be legislative instruments

Part 1 General classes of instruments

Schedule 1 sets out instruments that are declared not to be legislative instruments to which the Act applies.

Part 1 of Schedule 1 lists the general classes of instruments that are declared not be legislative instruments for the purposes of the Act. These instruments are either administrative in character or would have been legislative instruments but their effect has been spent. Part 1 of this Schedule will help users of the Act by clarifying the types of instruments that do not need to be registered.

Item 1 is an instrument of delegation, including any directions to the delegate. These instruments are administrative in character, as they facilitate the carrying out of powers and functions but do not alter the scope or effect of those powers and functions.

This general exemption is a companion measure to existing item 21 of the table in subsection 7(1) of the Act. Item 21 lists instruments that comprise, in their entirety, directions to delegates.

Item 2 is an instrument of authorisation or an application for such an instrument. The effect of such an instrument is to authorise an individual to take a particular action or act in a particular way. Like instruments of delegation, these instruments are administrative in character as they facilitate the carrying out of particular powers and functions.

Item 3 is an instrument approving how an act is to be done. These instruments are administrative in character as they do not determine the law or alter the content of the law but rather they authorise the manner in which an action authorised by law is to be carried out.

Item 4 is an evidentiary certificate. Evidentiary certificates may be issued to assist the proving of a matter before a court or tribunal by a person who has particular knowledge of a matter. Such certificates are not legislative instruments but merely facilitate the proof of a matter in an efficient way.

Item 5 is an instrument prescribing or approving a form. Prescribed or approved forms are administrative in character because they facilitate the processing of an application for an entitlement. They do not determine or alter the content of the law.

Item 6 is a practice direction made by a court or tribunal. These instruments are administrative and not legislative in character. They are a means by which a court or tribunal communicates their expectations of parties that come before them. They do not determine or alter the content of the law.

Item 7 is a proclamation that provided solely for the commencement of an Act, or a provision of an Act, and had effect before 1 January 2005. Paragraph 6(e) of the Act provides that Proclamations made before, on or after the commencing day under enabling legislation are legislative instruments. Proclamations that provided for the commencement of an Act or a provision of an Act and had effect before 1 January 2005 are spent provisions. Including these instruments as a class that are not legislative instruments avoids the need to backcapture them in the Federal Registrar of Legislative Instruments.

Item 8 deals with other instruments whose effect was spent before 1 January 2005. These instruments may or may not be legislative instruments. As with the instruments referred to in item 7, including these instruments as a class that are exempt from the Act avoids the need to backcapture them in the Federal Registrar of Legislative Instruments.

Item 9 is an instrument of appointment, engagement or employment, or an instrument of suspension or termination of employment, engagement or employment. These instruments are administrative and not legislative in character. This exemption is a companion measure to item 11 below and to item 20 of the table in subsection 7(1) of the Act which exempts terms and conditions of employment.

Item 10 is an instrument of resignation. These instruments are not legislative instruments and are merely a means of formalising a notification made to the Governor-General or the executive.

Item 11 is an instrument granting leave of absence or determining terms and conditions of appointment, engagement or employment. These instruments are not legislative instruments because they arise from an individual's employment contract. Declaring this class of instruments not to be legislative instruments is consistent with the exemption in item 20 of the table in subsection 7(1) of the Act for instruments relating to the terms and conditions of employment.

Item 12 is an instrument constituting recommendations or advice. These instruments are not legislative instruments because they do not have substantive effect. They do not determine the law or alter the content of the law.

Item 13 is an annual or periodic report. Annual or periodic reports are not legislative instruments because they do not have substantive effect. They do not determine the law or alter the content of the law.

Item 14 is an instrument granting a licence, permit or registration to a specified person or renewing, transferring, suspending, cancelling or imposing conditions on such a licence, permit or registration, and instruments refusing to grant, renew or transfer licences, permits or registration. The licences referred to in this item are individual licences rather than licences of a general character. They are not legislative instruments within the meaning of section 5 of the Act because they do not determine the law or alter the content of the law rather they apply the law to a particular circumstance.

Item 15 is a warrant or an application for a warrant, or an instrument supporting such an application. These instruments are made as part of a criminal or civil investigation. They are not legislative instruments because they do not determine the law or alter the content of the law rather they apply the law to a particular circumstance.

Item 16 is an instrument authorising (a) the surveillance of a person or thing, (b) the retrieval of a device facilitating such surveillance, and (c) the interception of a thing. Similar to the instruments referred to in item 15, these instruments are issued as part of a criminal or civil investigation. They are not legislative instruments because they do not determine the law or alter the content of the law rather they apply the law to a particular circumstance.

Item 17 is an application for an instrument mentioned in item 16, or an instrument supporting such an application.

Item 18 is an instrument acknowledging the receipt of something. Similar to instruments referred to in item 10, these instruments are not legislative instruments because they do not have a substantive effect.

Item 19 is an instrument requesting or requiring a person to attend premises, give evidence, answer questions, produce documents or give information. Legislation allows the issuing of these instruments by or on behalf of a court, tribunal or other investigatory body in a range of circumstances. These instruments are administrative in character, assisting the obtaining of material relevant to a proceeding.

Item 20 is a notice of a decision or proposed decision, a notice of reasons for a decision or proposed decision, or a notice of rights of review. These instruments generally indicate the commencement of a period for the person to challenge an administrative decision. They are not legislative instruments because they do not determine the law or alter the content of the law rather they apply the law in a particular circumstance.

Item 21 is an instrument the making or issue of which is: (a) a decision that is reviewable under the *Administrative Decisions (Judicial Review) Act 1977*, or (b) a decision that would be reviewable under that Act except for an exemption under that Act or another Act. Decisions which are reviewable under the *Administrative Decisions (Judicial Review) Act 1977* are administrative decisions.

Item 22 is an agreement, contract or undertaking authorised to be made or given under legislation, or an instrument made under such an agreement, contract or undertaking. They are not legislative instruments within the meaning of section 5 of the Act. They do not determine the law or alter the content of the law rather they apply the law to a particular circumstance.

Item 23 is an acceptance or rejection of an undertaking. Undertakings are not legislative instruments but promises to perform certain actions. Accepting or rejecting an undertaking is an administrative action that does not determine the law or alter the content of the law.

Item 24 is a nomination, request or invitation, or a withdrawal of a nomination, request or invitation. These instruments relate directly to a particular person or body. They are not legislative instruments as they do not determine the law or alter the content of the law.

Item 25 is an application to a court, a Judge, a Federal Magistrate or Magistrate (including a Judge, Federal Magistrate or Magistrate acting in a personal capacity), an officer of a court, a tribunal or a member or an officer of a tribunal. These applications are made by a party to a civil, administrative or criminal proceeding or proposed proceeding.

Item 26 is a companion measure to item 25, namely, an order, direction, or other instrument made in response to an application, being an order, direction or other instrument made by a court, a Judge, a Federal Magistrate or Magistrate (including a Judge, Federal Magistrate or Magistrate acting in a personal capacity), an officer of a court, a tribunal or a member or an officer of a tribunal. These instruments are not legislative because, as with instruments referred to in item 25, they apply the law to a particular circumstance.

Item 27 is an assessment of tax or an amendment of an assessment of tax. These instruments relate to a particular person or body. They are not legislative instruments within the meaning of section 5 of the Act because they do not determine the law or alter the content of the law rather they apply the law to a particular circumstance.

Item 28 is an application for a garnishee notice. These instruments are typically made by a court on application of a party. They do not determine the law or alter the content of the law rather they apply the law to a particular circumstance.

Item 29 is an instrument remitting or waiving a penalty, or discharging or extinguishing a liability, in relation to a particular person. Because these instruments are linked to a particular entity, they do not determine the law or alter the content of the law rather they apply the law to a particular circumstance.

Item 30 is an infringement notice. Typically, such an instrument is an administrative notice given to a person who is believed to have breached a law and gives the person the option of meeting some lesser penalty rather than have a prosecution commenced. They are not mandatory in effect.

Item 31 is an instrument varying, in a particular case, the time for an act to be done or an event to occur, or an instrument extending or shortening a time period. They are not legislative instruments within the meaning of section 5 of the Act.

Item 32 is an instrument that grants, renews, transfers, suspends or cancels a right created or an obligation imposed by an instrument that is not a legislative instrument. These instruments are not legislative instruments because they do not determine the law or alter the content of the law.

Item 33 is an instrument that varies or revokes an instrument that is not a legislative instrument. These instruments are not legislative instruments because they do not determine the law or alter the content of the law.

Part 2 Instruments made under particular provisions

Item 1 The *Aviation Transport Security Act 2004* established a regulatory framework to safeguard against the unlawful interference with aviation. It provides that instruments may be

made in relation to security, including specific security measures, the effectiveness of which may be compromised by public dissemination.

This item exempts all legislative instruments made under the Aviation Transport Security Act with the exception of regulations, commencement proclamations made under section 2 and instruments relating to the form and content of reports made under section 107. The Aviation Transport Security Act substantively re-enacts the security provisions of the *Air Navigation Act 1920* which are exempt instruments under item 1 of subsection 7(1).

Item 2 Orders made under the Program and Awards Statute 2004 made under the *Australian National University Act 1991* deal with the content of courses and programs offered by the university. The orders are exempt from disallowance (item 3 of subsection 44(2)) and sunseting (item 6 of subsection 54(2)).

This item exempts the orders from the requirement to register. As the orders are largely administrative in nature, dealing in considerable detail with academic matters, are subject to frequent change and are available electronically to students, there is no particular benefit in registering them on the Federal Register of Legislative Instruments.

Item 3 Section 32 of the *Australian Postal Corporation Act 1989* provides that the Board of the Corporation may determine the terms and conditions for the Corporation's services. The terms and conditions are generally administrative in nature and subject to frequent modification to take into account changing conditions, new initiatives and commercial considerations. The determinations set out the terms and conditions on which Australia Post will supply services.

The instruments are already exempt from disallowance (item 4 of subsection 44(2) of the Act) and from sunseting (item 7 of subsection 54(2) of the Act).

This item exempts instruments made under section 32 from the requirement to register. As the determinations are generally administrative in nature, set in relation to competitive market conditions, are frequently changed and are available to the public at Australia Post offices, there is no particular benefit to registering them on the Federal Register of Legislative Instruments.

Item 4 Notices under section 161J of the *Customs Act 1901* allow the CEO of Customs to make determinations in relation to the rates of exchange that assist in the valuation of imported goods, for the purpose of calculating the duty and tax payable. Rates are determined each week day and published on a weekly basis in the *Gazette* and the Customs internet site.

This item exempts instruments made under section 161J from the Act. As registration of daily changing rates of exchange is impractical and as the rates are publicly available there is no particular benefit to registering them on the Federal Register of Legislative Instruments.

Item 5 Instruments made under section 269P or 269Q of the *Customs Act 1901* allow Tariff Concession Orders to be made where an importer can establish that there are no substitutable goods produced in Australia in the ordinary course of business. Many thousands of Tariff Concession Orders exist, of which only a small percentage are current. Orders are regularly reviewed and cancelled where they have not been used for two years. Most orders have a relatively short life span.

This item exempts Tariff Concession Orders made before 1 January 2005, as it is not considered worthwhile to back capture the existing orders due to their short lifespan and large number. All new orders will be registered and, therefore, a complete set of orders will be available on the Register within a short period of time.

Item 6 Instruments under Part XVB of the *Customs Act 1901* relate to the enforcement of Australia's anti-dumping countervailing duties which are made in continuance of Australia's international obligations under the World Trade Organisation Agreement.

As a member of the WTO, Australia must strictly adhere to the procedures relating to anti-dumping and countervailing investigations and there is concern that subjecting these instruments

to the Act could lead to the possibility of sanctions due to non-compliance with the provisions of the Agreement. Non-compliance could arise because instruments made under Part XVB are made by public notice, which could lead to discrepancies between making by the Minister and enforcement by registration under the Act.

This item exempts instruments made under Part XVB from the Act in order to avoid the possibility of non-compliance with the Agreement.

Item 7 Section 16 of the *Customs Administration Act 1985* enables the CEO to authorise the disclosure of protected information or classes of information. Authorisations for disclosure are essentially provided for law enforcement reasons and operate for a short duration.

This item exempts authorisations from the Act so that no authorisations of classes of information is required to be disclosed automatically on the Register without regard to the impact that this may have on law enforcement objectives.

Item 8 Instruments made under sections 8, 9, 10 or 11 of the *Customs Tariff (Anti-Dumping) Act 1975* relate to the enforcement of Australia's anti-dumping countervailing duties which are made in continuance of Australia's international obligations under the World Trade Organisation Agreement. As a member of the WTO, Australia must strictly adhere to the procedures relating to anti-dumping and countervailing investigations and there is concern that subjecting these instruments to the Act could lead to the possibility of sanctions due to non-compliance with the provisions of the Agreement. Instruments made under these sections are made in conjunction with the instruments made under Part XVB in item 6.

This item exempts instruments made under sections 8, 9, 10 or 11 from the Act in order to avoid the possibility of non-compliance with the Agreement.

Item 9 Regulations 14 and 23 of the *Defence (Personnel) Regulations 2002* permit the Defence Service Chiefs to determine the conditions with which a person must comply to be eligible for appointment as an officer or enlistment as a member of the relevant Defence Service.

This item exempts the instruments from the Act, which is consistent with the exemption of employment instruments by section 7, item 20 of the Act for terms and conditions of employment of persons, or the terms and conditions of service of members of the Australian Federal Police. Instruments under regulations 14 and 23 are not currently exempt because they do not attract the item 20 exemption as Defence personnel are not employees.

Item 10 Section 42 of the *Foreign Evidence Act 1994* provides that the Attorney-General may make a written order prohibiting the production of documents, things or evidence in proceedings in an Australian court where the proceedings are to obtain evidence for a foreign court proceeding. Section 41 limits such orders to circumstances where the Attorney-General is satisfied that it is desirable to do so for the purpose of preventing prejudice to Australia's security. Orders can be made in relation to either an individual case or to a class of evidence, persons or proceedings.

This item exempts orders which prohibit information prejudicial to Australia's security being adduced in court.

Item 11 Section 8 of the *Intelligence Services Act 2001* provides that the Ministers responsible for the Defence Signals Directorate and the Australian Secret Intelligence Service may make written directions in relation to the performance of the respective agencies' functions. The directions are national security classified and often deal with sensitive operational material. Paragraph 6(1)(e) of the Act provides that the Minister responsible for the Australian Secret Intelligence Service can make directions to undertake other activities relating to the capabilities, intentions or activities of people or organisations outside Australia.

This item exempts directions given under section 8 and paragraph 6(1)(e) from the requirement of registration as publication of this matter may adversely impact on the capacity of these agencies to carry out their statutory functions and undermine national security.

Item 12 The *Maritime Transport Security Act 2003* established a regulatory framework to safeguard against unlawful interference with maritime transport. It provides that instruments may be made in relation to security, including specific security measures, the effectiveness of which may be compromised by public dissemination.

This item exempts all legislative instruments made under the *Maritime Transport Security Act* with the exception of regulations, commencement proclamations made under section 2 and instruments relating to the form and content of reports made under section 182. The *Maritime Transport Security Act* is closely modelled on the provisions of the *Aviation Transport Security Act*. This is a companion measure to item 1. This is also consistent with the current exemption of aviation security instruments made under subsection 7(1).

Schedule 2 Legislative instruments not subject to disallowance

Item 1 Section 19B of the *Acts Interpretation Act 1901* provides for the Governor-General to make orders where a provision of an Act refers to a particular Minister of State, Department or Secretary and there is no longer any such Minister, Department or Secretary. Section 19BA provides for the Governor-General to make orders which enable specific references in Acts to Ministers, Departments and Secretaries to be altered when the administration of a provision is changed.

This item exempts the orders from the disallowance provisions of the Act. These orders are part of the machinery of Executive Government which facilitate restructuring of Ministries and Departments.

Item 2 Section 61 of the *Australian Research Council Act 2001* provides that the Minister may make variations to the funding rules for approved research programs which the Minister approves under section 60. Instruments under section 60 are included in the table of instruments that are exempt from disallowance in subsection 44(2) of the Act.

This item exempts section 61 variations. This is consistent with the current exemption for the principal instruments.

Item 3 Sections 3A and 3B of the *Control of Naval Waters Act 1918* allow Proclamations to be made in relation to certain vessels or naval waters so that directions about activities near those vessels or in those protected waters can be given for the protection of Defence facilities and land and naval vessels. The Proclamations allow for access control to be invoked at times of heightened security.

This item exempts section 3A and 3B instruments from the disallowance provisions. This provides certainty for the Royal Australian Navy to undertake naval operations in an efficient manner.

Item 4 Section 126DA of the *Customs Act 1901* provides for the Chief Executive Officer of Customs to determine certain information technology requirements and standards for persons who communicate with Customs electronically. The Senate Legal and Constitutional Committee have expressed a view that as these requirements are highly technical in nature there is no real benefit to them being disallowable instruments (Report on Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001).

This item exempts the section 126DA instruments from the disallowance provisions. This is consistent with the Committee's recommendation.

Item 5 The *Disability Discrimination Act 1992* provides for disability standards to be made by regulation. They are not currently subject to Parliamentary disallowance but can be amended by either House under subsection 31(3) of that Act. That Act provides for an alternative regime for Parliamentary scrutiny to the general disallowance regime.

This item exempts disability standards from the disallowance provisions. This avoids the situation where both amendment and disallowance are possible without any clear priority between the two processes.

Item 6 Section 59 of the *Education Services for Overseas Students Act 2000* provides for the Minister to determine contributions criteria by which education providers are required to make annual contributions to the ESOS Assurance Fund. The Fund ensures that overseas students are provided with suitable alternative courses or refunds if their education provider cannot provide the courses paid for by the student.

This item exempts the section 59 instruments from the disallowance provisions of the Act. The potential for disallowance of each annual determination of the contributions criteria would have resulted in uncertainty that would have been detrimental to the effective operation of the program. The contributions criteria are publicly available.

Item 7 Section 7 of the *National Transport Commission Act 2003* provides for regulations to be made containing model legislation that has been developed by the National Transport Commission to aid regulatory and operational reform in road, rail and intermodal transport. The model laws do not have the force of law but may be incorporated into Commonwealth, State and Territory legislation by reference. The regulations are currently exempt from the disallowance provisions of the *Acts Interpretation Act 1901*.

This item exempts these regulations from the disallowance provisions. This is consistent with both the current exemption from the Acts Interpretation Act and the general exemption for inter-governmental schemes contained in subsection 44(1).

Schedule 3 Legislative instruments not subject to sunseting

Item 1 Section 19B of the *Acts Interpretation Act 1901* provides for the Governor-General to make orders where a provision of an Act refers to a particular Minister of State, Department or Secretary and there is no longer any such Minister, Department or Secretary. Section 19BA provides for the Governor-General to make orders which enable specific references in Acts to Ministers, Departments and Secretaries to be altered when the administration of a provision is changed. The orders create a link between previous ministers, departments or secretaries that have been responsible for the Act and the current minister, department or secretary, by building on previous orders.

This item exempts sections 19B and 19BA orders from the sunseting provisions which avoids the situation where an earlier order is repealed by the provision, causing a break in the chain of transferred responsibilities.

Item 2 The *Anglo-Australian Telescope Agreement Act 1970* outlines the terms and conditions under which the Governments of Australia and the United Kingdom will provide for the operation and maintenance of the optical telescopes at the Anglo-Australian Observatory in NSW. The Observatory was established by international treaty which came into force in 1971.

Under section 8A of the *Anglo-Australian Telescope Agreement Act*, the Anglo-Australian Telescope Board can be vested with additional functions under the regulations. The current *Anglo-Australian Telescope Agreement Regulations* give the Board powers and functions in relation to another telescope at the Anglo-Australian Observatory.

This item exempts the regulations from sunseting. This is consistent with the general exemption from sunseting (subsection 54(1)) granted to inter-governmental agreements. The regulations are also part of a bilateral agreement and should not be subject to a unilateral sunseting process which would have caused them to cease to exist without the agreement of the other party.

Item 3 Sections 3A and 3B of the *Control of Naval Waters Act 1918* allow Proclamations to be made in relation to certain vessels or naval waters so that directions about activities near those vessels or in those protected waters can be given for the protection of Defence facilities and land and naval vessels. The Proclamations allow for access control to be invoked at times of heightened security.

This item exempts sections 3A and 3B Proclamations from the sunseting provisions. This provides certainty for the Royal Australian Navy to undertake naval operations in an efficient manner.

Item 4 Section 7 of the *National Transport Commission Act 2003*, which is part of an inter-governmental scheme, provides for regulations to be made containing model legislation that has been developed by the National Transport Commission, to aid regulatory and operational reform in road, rail and intermodal transport. The model laws do not have the force of law but may be incorporated into Commonwealth, State and Territory legislation by reference.

This item exempts the regulations made under section 7 from the sunseting provisions. This is consistent with the general exemption provided for inter-governmental schemes in subsection 54(1). Unilateral repeal of the instruments is inconsistent with the inter-governmental nature of the scheme.

Item 5 The Legislative Instruments Act provides that a number of instruments made under the *Native Title Act 1993* are exempt from sunseting. These instruments relate to the application of State/Territory laws and the exemption is consistent with the general approach taken to exempt inter-governmental schemes from the sunseting provisions.

Paragraph 26(3)(b) was repealed and a new provision substituted by the *Native Title Amendment Act 1998*. Determinations under this paragraph have essentially the same effect as the determinations made under subsection 26A(1), which is currently exempt from sunseting. Only one determination was made under the repealed paragraph 26(3)(b) - the Native Title (Right to Negotiate (Exclusion) - NSW Land) Determination No. 1 of 1996. This instrument is still current.

This item exempts the determination made under paragraph 26(3)(b) from the sunseting provision. This is consistent with the general exemption provided for inter-governmental schemes and the specific exemptions granted to similar instruments in the Native Title Act.

Item 6 Section 34 of the *Telecommunications (Interception) Act 1979* allows the Attorney-General to declare eligible agencies of a State or Territory to be declared agencies for the purposes of the Act. Such agencies can obtain and execute telecommunication interception warrants in their own right. Section 35 provides that the Attorney-General must be satisfied that the State has entered into an agreement to pay all expenses connected with the issuing of warrants to the authority and expenses incurred by the Australian Federal Police before issuing a declaration under section 34.

Section 6N of the Act allows the Attorney-General to declare a specified class of members of a police force of a State (which are declared agencies under section 34) to occupy positions corresponding to those in the Australian Federal Police. This allows the chief officer of a State police force to approve a broader class of officers to exercise the authority conferred by an interception warrant, increasing operational flexibility. The Attorney-General only exercises this discretion when he is satisfied that the disciplinary regime of the relevant State police force is equivalent to that of the Australian Federal Police.

This item exempts section 6N and 34 instruments from the sunseting provisions. This increases certainty for agencies that rely on the declarations in the performance of their functions and removes unnecessary complications on Commonwealth-State financial agreements.

Schedule 4 Particular disallowance provisions

Item 1 Subsection 7(8) of the *Remuneration Tribunal Act 1973* provides that either House of Parliament may disapprove a determination made by the Tribunal within 15 sitting days of it being laid before that House. If neither House disapproves the determination, it will continue in force.

Subsection 7(8A) of the Remuneration Tribunal Act provides that the Legislative Assembly of the Australian Capital Territory can disapprove a determination that relates to an ACT office within 30 sitting days of the determination being given to the Chief Minister. If the Legislative Assembly does not disapprove the determination, it will continue in force.

In the case of judicial appointments, the Remuneration Tribunal Act provides that the determinations do not enter into force until the end of the disapproval period. This is to comply

with the constitutional requirements that Parliament fix judicial remuneration and that that remuneration not be reduced while the judge is in office.

The item exempts the determinations from the disallowance provisions of the Act and allows the existing disallowance provisions in the Remuneration Tribunal Act to continue. This ensures that the particular needs of the Remuneration Tribunal Act, including continued Parliamentary oversight of judicial remuneration, continue.