

EXPLANATORY STATEMENT

Select Legislative Instrument 2005 No. 184

Issued by the Attorney-General

Legislative Instruments Act 2003

Legislative Instruments Regulations 2005 (No. 3)

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

The LIA 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 LIA also improves the mechanisms for Parliamentary scrutiny of legislative instruments. The LIA commenced operation on 1 January 2005. On the same day, the *Legislative Instruments Regulations 2004* (the Principal Regulations) came into operation.

The Principal Regulations facilitate the operation of the LIA by (amongst other things) providing exemptions from the LIA or parts of the LIA. The purpose of the Regulations is to amend the Principal Regulations to provide further exemptions from the whole of the LIA or exemptions from the disallowance provisions under the LIA. Under section 42 of the LIA, either House of Parliament may give a notice of motion to disallow a legislative instrument or provision of a legislative instrument within 15 sitting days after tabling of the instrument in that House. If the House passes the disallowance motion within 15 sitting days after giving the notice, or if at the end of those 15 sitting days the motion has not been withdrawn or otherwise disposed of, the instrument or provision the subject of the notice of motion is disallowed and ceases to have effect.

The amendments to the Principal Regulations are the result of reviews by Commonwealth agencies of the relationship between legislation they administer and the LIA. Those reviews have identified reasons why certain instruments should not be subject to the legislative instruments regime, or certain aspects of that regime.

Details of the Regulations are set out in the Attachment, including the reasons why the particular exemptions from the LIA were made.

The Regulations are a legislative instrument for the purposes of the LIA.

The Regulations commence the day after they are registered on the Federal Register of Legislative Instruments.

Consultation was unnecessary for this legislative instrument, as this instrument is of a minor or machinery nature only. It has no direct, or substantial indirect, effect on business.

ATTACHMENTDetails of the *Legislative Instruments Amendment Regulations 2005 (No. 3)*

Regulation 1 provides that the name of the Regulations is the *Legislative Instruments Amendment Regulations 2005 (No. 3)*.

Regulation 2 provides that the Regulations commence on the day after they are registered. Because the Regulations are a legislative instrument, the *Legislative Instruments Act 2003* (the LIA) requires that they must be registered on the Federal Register of Legislative Instruments to be effective.

Regulation 3 provides that Schedule 1 to the Regulations amends the *Legislative Instruments Regulations 2004* (the Principal Regulations).

Schedule 1 AmendmentsAmendments to Part 2 of Schedule 1 to the Principal Regulations

Item [1] This item inserts a new item 15 after item 14 in Part 2 of Schedule 1 to the Principal Regulations. Part 2 of Schedule 1 lists instruments made under particular provisions that are declared not to be legislative instruments for the purposes of the LIA. The instrument to be exempted, and the reasons for the exemption from the LIA, is set out below.

New item 15 is a determination under paragraph 3.1(e) of the *Deed to Establish the Public Sector Superannuation Accumulation Plan* (the Deed) made under section 10 of the *Superannuation Act 2005* (the Superannuation Act). Section 10 of the Superannuation Act provides that the Minister for Finance and Administration (the Minister) must, before 1 July 2005, establish the Public Sector Superannuation Accumulation Plan (PSSAP) by deed. Generally, a person is eligible to become a member of PSSAP if he or she is a public sector employee who started work on or after 1 July 2005. Section 10 also provides that the deed is a legislative instrument but is not subject to the disallowance provisions of the LIA. Section 11 of the Superannuation Act allows the Minister to amend the deed and such an amendment is also a legislative instrument.

The Deed was made on 29 June 2005 and is registered as a legislative instrument (F2005L01901). The PSSAP commenced on 1 July 2005. Paragraph 3.1(e) of the Deed provides that the Public Sector Superannuation Scheme (PSS) Board, which is the Trustee for the PSSAP, may determine interest rates for the purposes of the PSSAP.

Interest rate determinations for the PSSAP are applied to the range of investment options, each with a buy and sell price applied to amounts paid into or withdrawn from the investment option. The buy price determines the number of units allocated to the member in the particular investment option. The sell price determines the value of units that are being withdrawn from a particular investment option. Interest rates and the buy and sell prices of units are determined on a daily basis.

Interest rate determinations are likely to be legislative instruments and the exemption means that these instruments are not legislative instruments for the purposes of the LIA. The

exemption reflects the fact that the setting of interest rates is based on commercial considerations that are a matter for the PSS Board. Disallowance of the interest rate determinations could adversely affect the operation of the schemes by disrupting the orderly allocation of funds to members entering or leaving the scheme. The frequency and number of interest rate determinations also make registration on the Federal Register of Legislative Instruments administratively burdensome.

All interest rate determinations under the PSSAP which are made before the Regulations commence will be registered under the LIA in the normal way. Once the Regulations come into operation, and thus the exemption comes into effect, the determinations will cease to be registered. However, they will continue to be publicly available as the interest rates are published on the PSSAP website and are updated on the day they become applicable (usually the business day immediately after the calculation of the interest rate determination).

This item is similar to the exemption at item 14, which exempts interest rate determinations under the Public Sector Superannuation Scheme (the PSS). When item 14 was inserted into Part 2 of Schedule 1 to the Principal Regulations by the *Legislative Instruments Amendment Regulations 2005 (No. 2)*, it was intended to encompass both the existing defined benefits scheme (the PSS), that had been in place since 1 July 1990, and the new PSSAP, which was due to commence on 1 July 2005. This is because, at that time, it was envisaged that the PSS and PSSAP would both come under the *Superannuation Act 1990*.

However, in June 2005, the Superannuation Act was passed by the Parliament and this had the effect of splitting the PSSAP from the Superannuation Act 1990 and setting it up as a separate scheme. This meant that item 14 in Part 2 of Schedule 1 to the Principal Regulations could not cover interest determinations made under the PSSAP. Existing item 14 and new item 15 will ensure that interest rate determinations under both the PSS and PSSAP are exempted as was originally intended.

Amendments to Schedule 2 to the Principal Regulations

Items 2 and 3 of the Regulations insert new material into Schedule 2 to the Principal Regulations. Schedule 2 lists specific classes of instruments that are to be exempt from the disallowance provisions of the LIA. Items 2 and 3 have the effect of providing three new exemptions from the disallowance provisions of the LIA. The instruments to be exempted, and the reasons for their exemption from the disallowance provisions of the LIA, are set out below.

Item [2] This item inserts a new item 4A after item 4 in Schedule 2 to the Principal Regulations. New item 4A is a notice made under subsection 16A(1) of the *Customs Tariff Act 1995*. This means that this instrument is not subject to the disallowance provisions of the LIA.

Section 16A is concerned with special safeguards for goods imported from Thailand. It gives effect to special safeguard measures in relation to certain sensitive agricultural products in accordance with the Thailand-Australia Free Trade Agreement (TAFTA). Under subsection 16A(1), once imports of safeguard goods exceed a certain trigger level in a calendar year, the Minister for Agriculture, Fisheries and Forestry (the Minister) may issue a notice in relation to those goods. Subsection 16A(3) provides that the notice which may be given under subsection 16A(1) must specify the safeguard goods and that the quantity of the

goods imported into Australia during the applicable calendar year exceeds the quantity applicable for that year. The notice may contain any other information that the Minister considers appropriate.

The effect of the notice is that the Minister may increase the preferential tariffs, agreed to under the TAFTA in relation to certain sensitive agricultural products of Thai origin, to the normal rate of duty applying to other countries once imports of those specified products reach agreed volumes in any given calendar year.

The key domestic industries concerned about the likely impact of import competition from Thailand were consulted as part of the TAFTA negotiations and their concerns about the impact of the agreement were ameliorated on the basis of the protection afforded by the special agricultural safeguard measures. To improve transparency in decision making and support stakeholder consultation, the website of the Department of Agriculture, Fisheries and Forestry (DAFF) sets out the decision-making procedure in relation to the application of special agricultural safeguard measures and provides monthly import data compiled by the Australian Bureau of Statistics in relation to the specified agricultural products. Persons who believe that they may be affected by the decision to increase the preferential tariff to the normal rate of duty are invited to register as stakeholders. Their views are taken into consideration by the Minister on the application of any special agricultural safeguards on the specified goods once the agreed import volumes have been reached. If the Minister decides to increase preferential tariffs to the normal rate of duty, the decision is posted on the DAFF website and emailed to registered stakeholders.

The exemption from disallowance provides certainty in relation to the applicable tariff and allows commercial decisions to be made based on that rate of tariff.

Item [3] This item inserts new items 8A and 8B after item 8 in Schedule 2 to the Principal Regulations. New item 8A is an approval under section 18BD of the *Privacy Act 1988* of a variation of an approved privacy code. New item 8B is a revocation under section 18BE of the *Privacy Act 1988* of an approved privacy code or of a variation of an approved privacy code. This means that these instruments are not subject to the disallowance provisions of the LIA.

New items 8A and 8B complement the existing exemption in item 8 for approved privacy codes made under section 18BB of the *Privacy Act 1988*.

Privacy codes are approved pursuant to the Government's co-regulatory regime that allows organisations and industries to have and to enforce their own privacy codes which are adapted to their particular needs. Subsection 18BB(2) provides that, before the Federal Privacy Commissioner (the Commissioner) approves a privacy code, he or she must be satisfied that a number of conditions have been satisfied, including that only organisations that consent to be bound by the code are, or will be, bound by the code. The exemption at item 8 in Schedule 2 of the Principal Regulations provides certainty for organisations that have developed, consulted widely and agreed to be bound by the code.

Under subsection 18BD(1), an organisation may apply to the Commissioner for approval of a variation to an approved privacy code. Under subsection 18BD(3) the Commissioner must consider all of the matters that the Commissioner would consider in approving a privacy code under section 18BB, unless the variation is minor. The exemption from disallowance for variations is supported by reasons similar to those supporting the exemption of approved

privacy codes in item 8, namely, to provide certainty for organisations who agree to be bound by a code and to recognise the changing needs of those organisations as appropriate.

Under subsection 18BE(1) the Commissioner may revoke the approval of an approved privacy code or of a variation to that code, on his or her own initiative or on application by the organisation bound by the code. In both instances, the Commissioner must, under subsection 18BE(2), consult the organisation if practicable, consult any other persons the Commissioner considers appropriate, and consider the extent to which members of the public have been given an opportunity to comment of the proposed revocation. The exemption from disallowance for revocations is supported by reasons similar to those supporting the exemption of approved privacy codes in item 8, namely, to provide certainty for organisations participating in the co-regulatory regime and to recognise the changing needs of those organisations as appropriate.