

**Explanatory Statement – Jervis Bay Territory Rural Fires Amendment (Offences and Other Measures) Ordinance 2015**

**Ordinance No. 5, 2015**

Overview and Background

The Commonwealth accepted the land that now forms the Jervis Bay Territory (JBT) from New South Wales (NSW) through the *Jervis Bay Territory Acceptance Act 1915* (the Acceptance Act). Section 4A of the Acceptance Act provides that the laws in force from time to time in the Australian Capital Territory (ACT) are, so far as they are applicable to the JBT and are not inconsistent with an Ordinance, in force in the JBT as if it formed part of the ACT.

The Governor-General made the *Jervis Bay Territory Rural Fires Ordinance 2014* (the principal Ordinance) in accordance with the power granted under subsection 4F(1) of the Acceptance Act – to make Ordinances for the peace, order and good government of the JBT.

The purpose of the *Jervis Bay Territory Rural Fires Amendment (Offences and Other Measures) Ordinance 2015* (the Ordinance) is to amend the principal Ordinance to incorporate offence provisions formerly contained in the *Jervis Bay Territory Rural Fires Rule 2014*, and to correct minor drafting matters within the principal Ordinance.

The *Jervis Bay Territory Rural Fires Amendment (Offences and Other Measures) Ordinance 2015* is a legislative instrument for the purpose of the *Legislative Instruments Act 2003*. Pursuant to section 4G of the Acceptance Act, the Ordinance is a disallowable instrument and as such section 42 of the *Legislative Instruments Act 2003* applies. The Ordinance commenced on the day after it was registered on the Federal Register of Legislative Instruments.

Statement of Compatibility with Human Rights

The *Jervis Bay Territory Rural Fires Amendment (Offences and Other Measures) Ordinance 2015* has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Ordinance is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The following paragraphs provide an assessment of the compatibility of the Ordinance with Australia’s international human rights obligations.

The right to liberty

The *Jervis Bay Territory Rural Fires Amendment (Offences and Other Measures) Ordinance 2015* may affect the right to liberty as it contains a criminal offence for which a person found guilty may face imprisonment. However, Article 9.1 of the *International Covenant on Civil and Political Rights* (ICCPR) provides an exception for imprisonment for offences “on such grounds and in accordance with such procedure as are established by law.” The General Comments of the Human Rights Committee, established under the ICCPR, note that “The

right to liberty of person is not absolute. Article 9 recognizes that sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws.” The ratio of term of imprisonment to penalty units for criminal offences is consistent with that prescribed by the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. Under the Ordinance, only the Australian Federal Police have powers of arrest, and any person arrested would be subjected to the criminal justice system. Therefore, the Ordinance is compatible with this human right.

### Freedom of movement

The *Jervis Bay Territory Rural Fires Amendment (Offences and Other Measures) Ordinance 2015* engages this human right in relation to restricting the movement of persons within the JBT. These amendments to the Ordinance give power to a public authority which has responsibility for care, control and management of a road, or vegetation on the side of a road, to light a fire on the road or the verge of the road for the purposes of fire hazard reduction. While such a fire is burning, the authority may prohibit, direct or regulate the movement of persons, vehicles or animals along the road or along another road for which the authority has the care, control or management. This may affect the right to freedom of movement. These powers are consistent with the objectives, aims and provisions of the ICCPR and in particular Article 12, which allows the right to liberty of movement to be restricted where in accordance with domestic law and necessary to protect public order and public health. Here, freedom of movement may be restricted with the aim of protecting the safety of persons wishing to move about in the JBT.

### Peaceful assembly

The powers granted to an officer of a public authority under the Ordinance, to direct or regulate the movement of persons along a road where a fire has been lit for the purposes of bush fire hazard reduction, may engage the right to peaceful assembly. Article 21 of the ICCPR provides that restrictions may be placed on this right, provided they are imposed in conformity with the law and are necessary in the interests of public safety, public health, or public order. The reduction of fire hazards contributes to public welfare, and keeping members of the public away from controlled burns contributes to public safety. Limiting the right to peaceful assembly in this situation is a reasonable and necessary limitation in order to maintain public safety and welfare. The Ordinance, therefore, is consistent with this human right.

### Consultation

In preparing the *Jervis Bay Territory Rural Fires Amendment (Offences and Other Measures Ordinance 2015)*, the Department of Infrastructure and Regional Development undertook consultation with Commonwealth and NSW agencies and organisations, including the Wreck Bay Aboriginal Community Council, and the Shoalhaven City Council, which are involved with and/or affected by the Ordinance.

Draft copies of the Ordinance were sent to the following agencies and organisations:

- Australian Federal Police;
- Commonwealth Director of National Parks;
- Department of Defence (Navy);
- Department of Infrastructure and Regional Development
- NSW Rural Fire Service;
- Wreck Bay Aboriginal Community Council;
- Shoalhaven City Council;
- the Attorney-General's Department provided guidance on administrative and criminal law issues;
- the Department of Finance was consulted as the Ordinance amends legislation creating a statutory authority;
- legal advice was obtained from the Australian Government Solicitor.

Following circulation of the final draft, no agencies or organisations consulted objected to the content of the Ordinance.

#### Detailed provision-by-provision description of the Ordinance

### **Part 1 – Preliminary**

#### **Section 1 – Name**

This is the formal section titling the Ordinance.

#### **Section 2 – Commencement**

The date of commencement is the day after the Ordinance is registered on the Federal Register of Legislative Instruments.

#### **Section 3 – Authority**

This section identifies the authority under which the Ordinance is made; the Ordinance is made under the *Jervis Bay Territory Acceptance Act 1915*.

#### **Section 4 – Schedules**

This section provides that each instrument that is specified in a Schedule to the Ordinance is amended or repealed as specified in the Schedule, and any other item in a Schedule has effect according to its terms.

### **Schedule 1 – Amendments: *Jervis Bay Territory Rural Fires Ordinance 2014***

#### **1 Subsection 6(1)**

This item removes the subsection number (1) from section 6 of the Ordinance, as subsection 6(2) is being repealed.

## **2 Subsection 6(1)**

This item inserts a new definition of AFP, meaning the Australian Federal Police.

## **3 Subsection 6(1) (at the end of the definition of *approved form*)**

This definition has been inserted to specify that the only approved forms which will meet the definition in the Ordinance are those which are approved by the Minister under section 7A of the Ordinance.

## **4 Subsection 6(1) (paragraph (b) of the definition of *authorised member*)**

This item amends the definition of ‘authorised member’ to clarify that people who are authorised by a fire fighting authority to perform functions conferred on authorised members, whether otherwise members of the fire fighting authority or not, are to be included in the definition of authorised member of the fire fighting authority.

## **5 Subsection 6(1) (definition of *bush fire danger period*)**

The former definition of *bush fire danger period* is repealed by this item, and replaced by a new definition, which provides that the bush fire danger period is that period defined by section 72 of the Ordinance.

## **6 Subsection 6(1) (definition of *Director of National Parks*)**

This item clarifies the definition of the Director of National Parks.

## **7 Subsection 6(1)**

This item inserts new definitions of ‘emergency’, ‘emergency services organisation’, ‘environment’, ‘Environment Department’ and ‘motorised machine’ into the Ordinance.

## **8 Subsection 6(1) (definition of *Parks Australia*)**

This section replaces the former definition of Parks Australia with an updated definition.

## **9 Subsection 6(1) (paragraph (a) of the definition of *public authority*)**

This item amends the definition of *public authority* to clarify the language of the definition.

## **10 Subsection 6(1)**

This item inserts a definition of ‘rules’, and defines ‘this Ordinance’ as including rules made under section 98 of the Ordinance.

## **11 Subsection 6(2) (including the notes)**

This item repeals subsection 6(2), which provided that definitions from the *Jervis Bay Territory Emergency Management Ordinance 2015* would be included in the *Jervis Bay Territory Rural Fires Ordinance 2015*. The necessary definitions have now been inserted into the Ordinance by items 2 and 7 above.

## **12 Subsection 7(1)**

This item amends the section enabling the Minister to delegate powers and functions, so that the Minister cannot delegate his or her power to make rules to anyone else.

**13 After paragraph 7(1)(a)**

This item inserts an additional paragraph which allows the Minister to delegate functions under the Ordinance to the Secretary of the Department. Section 19A of the *Acts Interpretation Act* applies here, with the effect that that this paragraph refers to the Secretary of the Department that deals with the Jervis Bay Territory.

**14 At the end of Part 1**

This item inserts an additional section, section 7A, which makes clear that the Minister has power to approve forms for the purposes of the Ordinance. Forms approved by the Minister must be made publicly available.

**15 Paragraph 9(d)**

This item amends paragraph 9(d) to correct the capitalisation of the word Ordinance.

**16 Subsection 16(1)**

This item amends section 16(1) to simplify the language of the subsection.

**17 Subsection 17(1)**

This item amends section 17(1) to simplify the language of the subsection.

**18 Section 23 (heading)**

This item amends the heading for this section to more accurately describe the content of the section.

**19 Subsection 32(4)**

This item amends section 32(4) of the Ordinance to make clear that the section does not limit the functions of a member or special member of the AFP under any Act of Parliament.

**20 Subsection 33(1)**

This item amends section 33(1) to clarify the wording of the subsection.

**21 Paragraph 35(1)(a)**

This item amends section 35(1)(a) of the Ordinance to remove a reference to the rules (the *Jervis Bay Territory Rural Fires Rule 2014*). The amendment at Item 10 above means that mention of the Ordinance now includes the rules.

**22 Subsection 35(2)**

This item amends subsection 35(2) to omit mention of the rules. The amendment at Item 10 above means that mention of the Ordinance now includes the rules.

**23 Subsection 39(3)**

This item amends subsection 39(3) to clarify the wording of the subsection.

**24 Subsections 40(2) to (4)**

This item repeals subsections 40(2), 40(3) and 40(4), and replaces them with a new procedure for appointment of members of the Fire Management Committee. Committee members must be nominated by their organisation, except for members selected by the Minister, and all members must be appointed in writing by the Minister. Members chosen by the Minister, if

they are officers or employees of a State or a State authority, must be nominated by the State or the State authority before they can be appointed. All members of the Committee will hold office on terms and conditions determined by the Minister.

**25 Subsection 41(1)**

This item amends subsection 41(1) to clarify the wording of the subsection.

**26 At the end of Division 2 of Part 3**

This item adds a new section 41A to the Ordinance, which was formerly contained in the *Jervis Bay Territory Rural Fires Rule 2014*. This section provides that the Fire Management Committee may draw to the Minister's attention any matter the committee considers relevant to the protection of land, persons, animals, property or the environment in the Jervis Bay Territory from the impact of fires. The fact of membership of the Fire Management Committee does not give a member the power to conduct or take part in fire fighting or fire prevention operations. However, it does not prevent a member of the committee from taking part in such actions other than as members of the committee, for example as a member of a Jervis Bay Territory rural fire brigade.

**27 Paragraph 53(1)(c)**

This item amends subsection 53(1)(c) to clarify the wording of the paragraph.

**28 Subsection 53(2) (note)**

This item repeals the note at the end of this subsection.

**29 Paragraph 53(3)(c)**

This item amends paragraph 53(3)(c) to clarify the wording of the paragraph.

**30 Subsection 56(9) (note)**

This item repeals the note at the end of the subsection.

**31 Subsection 59(3) (note)**

This item repeals the note at the end of the subsection.

**32 At the end of Division 2 of Part 4**

This item inserts a new section 60A into the Ordinance, which was formerly contained in the *Jervis Bay Territory Rural Fires Rule 2014*. This section permits a public authority with responsibility for the care, control or management of a road, or of vegetation on the side of the road, to conduct bush fire hazard reduction work. This work can only be conducted if it is consistent with the bush fire management plan. While the fire is burning the public authority may prohibit, direct or regulate the movement of persons, vehicles or animals along the road or along another road.

**33 Paragraphs 74(1)(c) and (d)**

This item repeals paragraphs 74(1)(c) and (d), and replaces them with a new paragraph (c), which requires a person to give notice before lighting a fire in accordance with subsections (3), (4) and (5) of this section, rather than in accordance with the rules.

### **34 At the end of section 74**

This item inserts three new subsections to section 74 which were previously contained in the rules. These subsections specify that the notice given before lighting a fire must be in writing, and contain details of the name of the person intending to light the fire, the intended purpose, location, timing and duration of the proposed fire, and a statement that a fire permit has been issued authorising the lighting of the fire. This notice must be given to the Minister and to occupiers or owners of neighbouring properties, and must be given either within the notice period specified in the fire permit, or otherwise, no later than twenty-four hours before the fire is lit.

### **35 Subsection 76(1)**

This item omits the '(1)' from the subsection, as there are no subsequent subsections.

### **36 Paragraph 80(1)(b)**

This item amends the paragraph to correct the capitalisation of the word Ordinance and to clarify the meaning of the paragraph.

### **37 Paragraph 81(c)**

This item amends the paragraph to omit the reference to the rules. The amendment at Item 10 above means that references to the Ordinance now include the rules.

### **38 Subsection 85(4) and 39 Subsection 85(4)**

These items clarify references to 'order' in section 85 of the Ordinance by clearly distinguishing between orders in force under the NSW *Rural Fires Act 1997* and orders made under s85(1) of the *Jervis Bay Territory Rural Fires Ordinance 2014*.

### **40 Subsection 85(5)**

This item amends the section to clarify that a NSW order has effect in the Jervis Bay Territory pursuant to subsection 85(4).

### **41 Subsections 85(6) and (7)**

This item repeals subsections 85(6) and (7) and replaces them with new subsections. The new subsections clarify that NSW orders have effect in the Territory under subsection 85(4), and that this section applies despite any provision in the Ordinance, the rules, or any other Ordinance. The penalty for failing to comply with these orders is fifty penalty units, imprisonment for ten months, or both.

### **42 Division 8 of Part 4 (heading)**

This item repeals the original heading of Division 8 of Part 4 of the Ordinance and substitutes a new heading.

### **43 Section 86 (heading)**

This item repeals the original heading of the section and substitutes a new heading.

### **44 At the end of Division 8 of Part 4**

This item inserts a number of criminal offences into the Ordinance, which were formerly in the *Jervis Bay Territory Rural Fires Rule 2014*.

Section 86A provides that a person commits an offence if they light a fire to demolish a building or destroy building materials without a permit, or without complying with the conditions of a fire permit. This offence has a penalty of twenty penalty units.

Section 86B creates an offence of burning to destroy sawmill waste material. Fires to destroy sawmill waste material must be lit in an incinerator which is designed to contain sparks and burning material; or on ground surrounded by a galvanised iron fence; or in a pit dug for the purpose, or in accordance with the conditions of a fire permit. Failure to comply with at least one of these requirements will constitute an offence with a penalty of twenty penalty units. Further, if a fire is lit for the purpose of destroying sawmill waste material either on the ground within a galvanised iron fence, or in a pit, and the person lighting the fire has not cleared the ground within nine metres of the fence or pit of combustible matter, or does not have at least two knapsack spray pumps and a supply of water available, this may constitute a further offence with a penalty of twenty penalty units.

Section 86C regulates the use of spark arresters and fireboxes. This section creates an offence if a person drives or uses a steam-powered machine in connection with the use of land for agricultural, pastoral, or other purposes, and the machine is not fitted with the prescribed spark arrester, the machine's firebox is not fitted with a tray to prevent sparks or burning matter from escaping, or the machine's smokebox, spark arrester or firebox tray is not maintained in good condition or in accordance with the relevant Australian Standard. The penalty for this offence is twenty penalty units.

Section 86D creates three offences, all of which carry a penalty of twenty penalty units. The first two offences relate to driving or using a motorised machine in grass, crop or stubble land in connection with the use of the land for agriculture, pastoral or other purposes, unless the conditions prescribed in the section are met. The third offence relates to carrying out welding operations or using explosives, an angle grinder or any other implement that is likely to generate sparks, unless the person has the prescribed fire safety equipment. Prescribed safety equipment is defined.

Section 86E creates an offence of destruction of notices displayed for the purposes of the Ordinance, under the authority of the Minister, the Fire Management Committee, or a public authority. If a person destroys, defaces or removes a notice without lawful authority, they may be liable for a penalty of five penalty units.

Section 86F creates an offence of lighting a fire for cooking during a bush fire danger period, unless the fire is surrounded by ground which is clear of all combustible matter for a distance of at least two metres from the fire. This offence carries a penalty of twenty penalty units.

Section 86G creates offences of burning garbage and refuse. If a person lights a fire to destroy household rubbish, or to destroy an animal carcass, during the bush fire danger period, and the conditions are not met, or the fire is not lit in accordance with the conditions of a fire permit, they may be guilty of an offence carrying a penalty of twenty penalty units.



Section 86H prohibits the lighting of fires to produce charcoal or distil oils, unless the conditions set out in the section are met. This section creates two offences, each with a penalty of twenty penalty units. The first offence involves lighting a fire for, or in connection with charcoal production or distillation of eucalyptus or other oils during a bush fire danger period, and the fire is not surrounded by ground that is clear of all combustible matter for a distance of at least thirty metres, or the fire is not lit in compliance with the conditions of a permit. The second offence involves lighting a fire to burn waste products from the production of charcoal or the distillation of eucalyptus or other oils during the bush fire danger period, where the person does not meet the conditions set out in the section. The section specifies a number of types of material which do not constitute combustible matter for the purposes of this section.

Section 86J creates several offences: those of lighting a tobacco product, match or other object within 15 metres of a stack of grain, hay, corn or straw or any standing crop, dry grass or stubble field, during a bush fire danger period; also of using or carrying a lit tobacco product, match or other lit object near one of these during a bush fire danger period; or of leaving or depositing a lit tobacco product or lit match or incandescent material, on any land, bridge, wharf, pontoon or similar structure during the bush fire danger period. Each of these offences carries a penalty of fifty penalty units.

#### **45 Subsection 88(1)**

This item amends the subsection to clarify its wording.

#### **46 Section 89**

This item repeals the section and replaces it with a new section 89. The section provides that unless the Ordinance makes specific provision otherwise, the fact that a person has been convicted of an offence under the Ordinance, or has paid a penalty or been the subject of proceedings under the Ordinance, does not affect any civil claim or proceedings in relation to loss or damage caused by a fire, or trespass.

#### **47 Section 92**

This item amends section 92 to require that notices which are permitted to be served by the Ordinance, as well as notices which are required to be served, must be served in the manner prescribed by the rules.

#### **48 Paragraph 93(1)(a)**

This item removes reference to the rules from the paragraph.

#### **49 Paragraph 93(1)(b)**

This item replaces a reference to the rules with a reference to Schedule 1A, inserted into the Ordinance by item 63 below. The effect of this is that infringement notices can only be issued under the Ordinance.

#### **50 Subsection 93(2)**

This item repeals the subsection and substitutes new subsections in relation to infringement notices. Infringement notices issued under the Ordinance must contain a statement that if the

person served does not wish to have the matter determined by a court, they may pay the penalty specified in the notice, within the time and to the person named in the notice. Penalties specified in the notice must be those set out in Schedule 1A.

**51 Subsection 93(4)**

This item amends the wording of the section so that if a penalty specified in an infringement notice is paid, the person who has paid the penalty is not liable to any further proceedings for the alleged offence.

**52 Subsections 93(6) and (7)**

This item repeals these subsections of the Ordinance. The effect of this is to remove the provisions enabling the rules to prescribe offences and penalties.

**53 Subsection 93(8)**

This item amends the wording of the subsection to clarify the meaning of the subsection.

**54 Subsection 93(9) (definition of *authorised officer*)**

This item amends the wording of the subsection to include a definition of an authorised officer. An authorised officer is a member or special member of the Australian Federal Police, or a person authorised in writing by the Minister.

**55 Subsection 94(1)**

This item amends the wording of this subsection to remove a reference to the rules.

**56 Subsection 94(3) (note)**

This item repeals the note at the end of this subsection.

**57 Subsections 95(1) and 95(2)**

This item omits mention of the rules from these subsections.

**58 Subsection 95(4) (note)**

This item repeals the note at the end of this subsection.

**59 Subsections 96(1) to (3)**

This item amends the subsections to replace references to ‘authorised officer’ with references to ‘authorised member’.

**60 Subsection 96(3)**

This item amends the subsection to replace the reference to ‘the officer’ with a reference to ‘the authorised member’.

**61 Section 97**

This item amends the wording of this section to remove a reference to the rules.

**62 Paragraphs 98(2)(b) to (f)**

This item amends subsection 98(2) to remove paragraphs (b) to (f). This has the effect of narrowing the scope of the rule-making power under the Ordinance, by limiting the matters on which the Minister may make rules under the Ordinance.

**63 Subsection 98(3)**

This item amends the subsection to remove the power for the rules to create offences punishable by a penalty of up to 50 penalty units. The item substitutes a new subsection 98(3), which clarifies the limits of the rule-making power. It provides that rules may not create offences or civil penalties, provide powers of arrest or detention, entry, search or seizure, impose a tax, or amend the Ordinance.

**64 Before Schedule 1**

This item inserts a new Schedule 1A into the Ordinance, which lists the infringement notice offences created by the Ordinance and the dollar amounts of penalties payable for each offence.