SUBORDINATE LEGISLATION (LEGISLATIVE INSTRUMENTS) REGULATIONS 2011

REGULATORY IMPACT STATEMENT

DEPARTMENT OF
PREMIER AND CABINET

Acronyms

COAG	Council of Australian Governments
RIS	Regulatory Impact Statement
SARC	Scrutiny of Acts and Regulations Committee of Parliament
SLA	*Subordinate Legislation Act 1994*
VCEC	Victorian Competition and Efficiency Commission

CONTENTS

SUBORDINATE LEGISLATIONS (LEGISLATIVE INSTRUMENTS) REGULATIONS 2011 – REGULATORY IMPACT STATEMENT

This Regulatory Impact Statement (RIS) has been prepared to fulfil the requirements of the *Subordinate Legislation Act 1994* and to facilitate public consultation on the proposed *Subordinate Legislation (Legislative Instruments) Regulations 2011*. A copy of the proposed Regulations accompanies this RIS. Public comments and submissions are invited on the proposed Regulations and in response to information provided in this RIS. All submissions will be treated as public documents. Written comments and submissions should be forwarded no later than 17 May 2011 to:

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EXECUTIVE SUMMARY

The draft *Subordinate Legislation (Legislative Instruments) Regulations 2011* (the proposed Regulations) attached to this RIS have been prepared to complement recent amendments to the *Subordinate Legislation Act 1994* (SLA). The amendments were passed in 2010 to extend the application of the requirements of the SLA from statutory rules (commonly Regulations) to a wider range of legislative instruments.

The amendments were intended to target those legislative instruments that impose a significant cost or burden on a sector of the public. In recognition of this, the SLA includes a regulation-making power for Regulations that would exempt a subset of legislative instruments, in particular to exclude instruments that will not impose a significant cost or burden.

It is intended that the proposed Regulations be made under section 4A of the SLA for the following three purposes:

- to prescribe a non-exhaustive list of instruments to be legislative instruments for the purposes of the SLA;
- to prescribe a non-exhaustive list of instruments which are not to be legislative instruments for the purposes of the SLA (mostly instruments of purely administrative character); and
- to exempt certain legislative instruments from the operation of certain provisions of the SLA (including the preparation of a regulatory impact statement (RIS), associated consultation and other requirements).

Nature of the problem to be addressed

From 1 July 2011, the SLA will capture a much wider range of legislative instruments than just statutory rules (as it does now). Many instruments impose a regulatory burden that needs to be assessed through the RIS and associated consultation process as per the SLA; however, other instruments should not require the full assessment under the SLA. Without regulations, the making of all legislative instruments will trigger either an exemption certificate process (under section 12F of the SLA) or a RIS and associated consultation process.

A large number of the legislative instruments that will be subject to the SLA from 1 July 2011 would qualify for an exemption under criteria provided in section 12F of the SLA. However, departmental resources would be required to seek an exemption each time an instrument was made. In other cases, there is considered to be a net benefit in exempting legislative instruments from the RIS, and associated consultation process, due to the nature of the instrument.

Without the proposed Regulations, resources would have to be allocated to these activities, which would represent a considerable opportunity cost for departments and agencies. Departments and agencies would have to divert resources from other, more significant, issues which could otherwise be addressed.

Objectives of the proposed measure

The proposed Regulations seek to:

- provide clarity to departments and agencies about when a RIS should be prepared and associated public consultation should take place;
- assist departments and agencies to allocate their resources efficiently and ensure they are not subject to excessive burden;
- minimise unnecessary delays in making or amending legislative instruments; and
- ensure an appropriate level of parliamentary scrutiny is applied to legislative instruments when they are made.

Options

Without regulations (the Base Case), each legislative instrument that is made would either face an exemption certificate process, if it is eligible to be exempt under section 12F of the SLA, or a RIS and associated consultation process. The benefits of this process include that all legislative instruments, including those exempt under section 12F, would be required to undergo a human rights assessment, and be published in the Victoria Government Gazette, tabled in Parliament and reviewed by the Scrutiny of Acts and Regulations Committee (SARC). These additional steps provide additional scrutiny that would not be provided for legislative instruments that will be exempt under the proposed Regulation. VCEC have found that between 2005-06 and 2009-10, the RIS process achieved estimated gross savings of $902 million (in present value terms) over the 10 year life of the regulations.

However, there a number of associated costs with the Base Case. Seeking an exemption certificate each time an eligible legislative instrument is made could result in a cost to departments of between $1.74 million and $1.94 million over 10 years. There would be greater costs on departments for legislative instruments not able to be exempt under section 12F, but where an exemption will apply under the proposed Regulations, as they would have to prepare a RIS and undergo the associated consultation for each instrument. There would also be a greater impact on SARC, as it would be required to assess every legislative instrument to ensure the requirements of the SLA have been met. With approximately 500 legislative instruments likely to be made each year, SARC's ability to effectively perform its scrutiny function may be compromised by the large number of instruments that it would receive.

Option 1 proposes to exempt 646 legislative instruments from the requirements of the SLA. These instruments would either be eligible for an exemption under section 12F of the SLA, or are being proposed for exemption on overriding public interest grounds. The section 12F criteria include where an instrument would not impose a significant burden, is of a fundamentally declaratory or machinery nature, or increases fees in a financial year by an amount less than the Treasurer's annual rate. The public interest criterion recognises that a large number and diverse range of legislative instruments are now captured by the SLA. In these cases, it is the opinion of the authors of this RIS (the Department of Premier and Cabinet) that the benefits of exempting these instruments outweigh the benefits of additional scrutiny before an instrument is made.

Option 1 will provide clarity and certainty to those responsible for making legislative instruments as to which instruments the requirements of the SLA apply to. There will be some opportunity cost savings, as the costs otherwise faced in preparing exemptions or undergoing a RIS and associated consultation process will not need to be funded from departmental budgets. Option 1 is therefore the least costly to implement overall.

There is a key difference between the Base Case and Option 1. If exemptions are sought on a case-by-case basis (as has been the requirement previously for statutory rules), a legislative instrument must still undergo a human rights assessment, and be published in the Victoria Government Gazette, tabled in Parliament and reviewed by SARC. This part of the process will be largely foregone for legislative instruments that are exempt by regulation. The only remaining requirement is that legislative instruments are published in the Victoria Government Gazette before coming into force.

There is a risk that exempting a set of legislative instruments from the SLA requirements could lead to instruments being made that cause a significant economic or social burden on a sector of the public, or contravene the *Charter of Human Rights and Responsibilities Act 2006* (the Charter), without adequate analysis and consultation and without the additional scrutiny otherwise afforded by parliamentary processes and SARC review. However, each of the instruments proposed for exemption has been carefully assessed to ensure that, on balance, there is a benefit in excluding the instruments from the additional scrutiny the SLA provides.

Option 2 proposes a similar set of proposed Regulations to Option 1, with some key exceptions. Under this option, the following categories of instruments will not be exempt:

- instruments that face a RIS-equivalent process; and
- instruments that are part of a national uniform legislation scheme where an assessment of costs and benefits has been undertaken.

These instruments are provided closer scrutiny in this RIS, in recognition that they would often impose a significant economic or social burden on a sector of the public. However, such instruments face alternative scrutiny elsewhere, and would likely otherwise be granted an exemption on a case-by-case basis under section 12F of the SLA. Requiring that departments go through the exemption process for these particular instruments will impose a cost on them. It will also be confusing to not exempt instruments under the proposed Regulations where they can instead receive a section 12F exemption. As such, this option is not preferred.

Multi-Criteria Analysis

Due to the nature of the problem, it is difficult to fully assess the costs and benefits of each option, and assign a dollar value to each. Where costs are available, these have been provided; and a multi-criteria analysis has been used to provide an overall assessment of the options.

Scores were assigned on three criteria:

- Clarity of SLA requirements, efficiency, and effective use of government resources.
- Minimise unnecessary delays in making or amending legislative instruments.
- Ensure an appropriate level of parliamentary and public scrutiny when making legislative instruments.

The third criterion is scored negatively, due to it's nature as the cost or risk in making regulations that exempt a number of legislative instruments from the SLA requirements.

As can be seen in the table below, Option 1 is the preferred option. It receives the highest score.

TABLE ES1: MULTI-CRITERIA ANALYSIS
(SCORED BETWEEN -5 AND +5)

CRITERIA	WEIGHTING	BASE CASE	OPTION 1		OPTION 2	
			Assigned score	Weighted score	Assigned score	Weighted score
Benefit criteria						
› Clarity of SLA requirements, efficiency, and effective use of government resources	¼	0	+5	+1¼	+4	+1
› Minimise unnecessary delays in making or amending legislative instruments	¼	0	+5	+1¼	+3	+¾
Benefit criteria	½	0	+5	+2½	+3½	+1¾
Cost criteria						
› Ensure an appropriate level of parliamentary and public scrutiny when making legislative instruments.	½	0	-2	-1	-1	-½
Cost criteria	½	0	-2	-1	-1	-½
Total	1	0		+1½		+1¼

Proposed measure

Under section 4A of the SLA, the Governor in Council may make regulations that prescribe instruments to be legislative instruments (subject to the SLA); not to be legislative instruments for the purposes of the SLA; or to be exempt from SLA requirements.

The proposed Regulations have therefore been drafted to clarify which instruments are not legislative instruments, and to provide a number of exemptions to legislative instruments which have met one or more exemption criteria that were developed as part of this proposal (see Attachment A for detail of the proposed exempt instruments). The proposed Regulations reflect Option 1, thus exempting all those instruments set out in Attachment A, including those being proposed for exemption based on RIS-equivalency, or that are part of a national uniform legislation scheme where an assessment of costs and benefits has been done.

Costs and benefits of the proposed measure and groups in society who may be affected

The proposed Regulations will help clarify to instrument-makers which instruments should be subject to the full requirements under the SLA, which instruments are not legislative instruments under the SLA (mostly because they are of purely administrative character), and which are exempt.

This option will maximise the efficient and effective use of government resources, particularly over the Base Case, which would create a considerable opportunity cost. If additional resources are allocated to the processes otherwise required under the SLA, then other, more significant, activities may be foregone.

However, there is a small risk that an exempt instrument could, in future, be used in a way that imposes a significant cost or burden on a sector of the public and that the benefits of exempting the instrument do not outweigh the costs. The release of this RIS and the proposed Regulations for public consultation will provide a further and final check that only those instruments where this is unlikely to happen are exempted.

Why other means of achieving the objectives are not appropriate

While many legislative instruments could be exempted without the proposed Regulations, there would be a cost in doing so. Departments would have to allocate government resources to seek an exemption certificate from the responsible Minister each time an instrument is made. Other legislative instruments are proposed for exemption based on a broad 'public interest' criterion, which has been applied where the costs of undertaking a formal RIS and the associated consultation process are likely to exceed the benefits of doing so. Without regulations, this RIS process would most likely have taken place, which would impact significantly on government resources.

Compliance, Enforcement and Evaluation

Compliance issues are expected to be minimal, given that the proposed Regulations will exempt a large number of legislative instruments from the requirements of the SLA. Where the requirements continue to apply, Ministers will have responsibility for instruments made within their portfolios and SARC will have responsibility for reviewing legislative instruments made after 1 July 2011. As part of its responsibility, SARC will ensure that legislative instruments do not exceed the power conferred by an Act, do not unduly trespass on rights and freedoms, and that the requirements of the SLA have been met.

Ongoing monitoring and evaluation of the implementation and working of the proposed Regulations will be undertaken from 1 July 2011, including monitoring of the number of instruments made and published in the Victoria Government Gazette, and the number of RISs being prepared. In addition, a more formal review will be conducted after four years, or earlier, to ensure the proposed Regulations are having the intended impact.

The proposed Regulations will sunset in 10 years, as per the requirements of the SLA. In addition, as a result of ongoing monitoring and evaluation and/or formal reviews, it may become apparent that the Regulations should be amended from time to time, to ensure new provisions in future Acts or amendments are captured appropriately and to remove any obsolete instruments or reassess instruments where their nature or use may have changed.

Consultation

Ongoing consultation over a number of years has taken place between the Department of Premier and Cabinet and the other government agencies responsible for administering Acts and making legislative instruments. This consultation has resulted in the attached list of exempt instruments.

Further to this, formal consultation on a draft list took place in 2010, as part of consultation on the Exposure Draft of the SLA amendments. This resulted in further refinement of the list, in response to concerns made by submitters at that time. Other issues have been addressed within this RIS.

This RIS now provides a further opportunity for consultation on the proposed Regulations. Public comments and submissions are invited on the proposed Regulations, in response to information provided in this RIS.

INTRODUCTION

This Regulatory Impact Statement (RIS) has been prepared to provide and analyse options for regulations which are proposed to be made in addition to recent changes to the *Subordinate Legislation Act 1994* (the SLA).

Under section 4A of the SLA, the Governor in Council, on recommendation from the Minister, may make regulations to prescribe subordinate instruments as legislative (subject to the requirements of the SLA); not legislative (not subject to the SLA); or legislative but exempt.

Previously, only statutory rules (commonly Regulations) were subject to the requirements of the SLA. However in 2010 the SLA was amended to:

- amend the threshold for a consultation for any proposed subordinate legislation from "an appreciable economic or social burden" to "a significant economic or social burden" (section 6(1));
- extend the application of the SLA from statutory rules (commonly regulations) to all legislative instruments (Parts 2A and 3A, which commence 1 July 2011); and
- improve transparency by requiring all legislative instruments (including any exempt from other SLA provisions) to be published in the Victoria Government Gazette (section 16A) and, from 2013, requiring that a consolidated version of any legislative instrument be made available.

This RIS primarily relates to the changes that extend the application of the SLA from statutory rules (commonly Regulations) to all legislative instruments from 1 July 2011. Unless a legislative instrument is granted a case-by-case exemption under section 12F or 12G of the SLA, the responsible Minister must[1]:

- prepare a RIS for any proposed legislative instruments (sections 12E and 12H of the SLA, commencing 1 July 2011);
- ensure consultation in accordance with any SLA Guidelines ("Premier's Guidelines") (section 12C);
- ensure that all comments and submissions are considered before the legislative instrument is made (section 12I);
- prepare a human rights certificate in respect of proposed legislative instruments (section 12D);
- publish any new legislative instruments in the Victoria Government Gazette (section 16A);
- lay all legislative instruments and related documents before Parliament (section 16B); and
- submit all legislative instruments and related documents to the Scrutiny of Acts and Regulations Committee (SARC) (section 16C).

1 This is a brief overview of the key changes. The *Subordinate Legislation Amendment Act 2010* has the full set of amendments being made to the SLA, and is available from www.legislation.vic.gov.au.

Further, under section 4A of the SLA, which comes into force on 1 July 2011, the Governor in Council may make regulations prescribing an instrument to be a legislative instrument, not be a legislative instrument, or to be exempt. The *Subordinate Legislation (Legislative Instruments) Regulations 2011* (the proposed Regulations) being proposed in this RIS will prescribe:

- a non-exhaustive list of legislative instruments (which are legislative instruments for the purposes of the SLA);
- a non-exhaustive list of instruments that are not legislative instruments subject to the requirements of the SLA (mostly instruments of purely administrative character);and
- a list of legislative instruments that are exempt from the requirements of the SLA (except the requirement to publish new legislative instruments in the Victoria Government Gazette).

Making legislative instruments exempt by regulations will allow that set of instruments to be made without the usual scrutinies the SLA requires, for example, the preparation of a RIS and public consultation on the RIS. The instruments proposed for exemption are those where the authors (the Department of Premier and Cabinet) considered that there is a net benefit of doing so. Specifically, they meet one or more criteria for the case-by-case exemptions allowed for in section 12F of the SLA, or the benefits of undertaking more rigorous analysis and allowing for greater scrutiny are outweighed by the costs or other implications of doing so. However, there is a risk that instruments could be made in an unforeseen way that would impose a significant burden on business or community sectors, without having first undertaken adequate analysis or consultation.

Therefore, the main purpose of this RIS is to enable scrutiny of this set of instruments to ensure they have been accurately identified as appropriate for exemption before the proposed Regulations are made. A full but not exhaustive list of exempt instruments and the rationale for exemption is attached to this RIS, while the full lists of legislative, non-legislative and exempt instruments are provided in Schedules 1, 2 and 3 of the proposed Regulations. The RIS and public consultation being undertaken also ensure that the process of exempting legislative instruments via regulation is transparent.

BACKGROUND

Subordinate Legislation Act 1994

Subordinate legislation can be made when Parliament, through legislation, delegates a law-making power to another person (usually a Minister) or body (such as a government department or agency). It consists of instruments made under Acts or Regulations that affect people's rights or interests. Subordinate legislation is of general application, and does not generally include decisions made which relate only to a specific person or entity.

Subordinate legislation can impose restrictions, costs or requirements on people in the same way as primary legislation. Primary legislation undergoes scrutiny through the parliamentary process, including debate and passage through Parliament. This scrutiny can be bypassed where the power to make a subordinate instrument is delegated to a Minister or other person or body.

The SLA seeks to ensure that the power to make subordinate legislation is subject to an appropriate level of public and parliamentary scrutiny, particularly where that legislation could have a significant impact on business or community sectors. As stated in section 1 of the Act, the purpose of the SLA is, therefore:

a "to ensure that the power to make subordinate legislation is exercised subject to Parliament's authority and control;

b to regulate the preparation, making, publication and scrutiny of subordinate legislation;

c to provide for public participation in the preparation and scrutiny of subordinate legislation; and

d to amend the *Interpretation of Legislation Act 1984* in relation to incorporated documents, the incorporation of amendments and the admissibility of Acts and subordinate instruments".

The most common forms of subordinate legislation are statutory rules (most commonly Regulations) and orders in council. Some other types of subordinate legislation include:

- ministerial directions, such as those made under section 5.10.4(2) of the *Education and Training Reform Act 2006*, which impose binding requirements on TAFEs and other educational institutions;
- mandatory codes of practice, such as a Code of Practice for food safety in the dairy industry made under section 31 of the *Dairy Act 2000*;
- standards of professional practice, such as the approval of qualifications appropriate for entry into teaching under section 2.6.8 of the *Education and Training Reform Act 2006*; and
- declarations, such as a declaration by the Governor in Council that an event is a "special event" for the purposes of Part 4A of the *Crown Land (Reserves) Act 1978*.

There are many other forms of subordinate legislation.

Policy underlying amendments to the *Subordinate Legislation Act 1994*

On 7 October 2010, Parliament passed amendments to the SLA to extend its application from statutory rules to a wider range of legislative instruments from 1 July 2011.

Previously, the requirements of the SLA (including regulatory impact assessments and consultation) only applied to statutory rules, commonly Regulations. Regulations were the primary mode of subordinate legislation used when the SLA was initially passed in 1994.

Since then, there has been an increase in the use of a wider range of legislative instruments. Prior to 1 July 2011, these forms of subordinate legislation are not subject to the same analysis as statutory rules, even though they could impose a significant burden on a sector of the public in the same way as statutory rules.

The SLA was, therefore, updated to reflect the intention that all subordinate legislation faces rigorous analysis, public consultation and parliamentary scrutiny where it could impose a significant burden on a sector of the public. In other words, the amendments ensure that it is the substance of the legislative instrument, not its legal form, which determines the level of scrutiny it faces before being made and enforced.

The process to date, to amend the SLA in 2010 and prepare the proposed Regulations, has been a detailed, iterative process of consultation and analysis. This process has been managed by the Department of Premier and Cabinet with the close involvement of all other departments. The Department of Premier and Cabinet has also worked closely with the Department of Treasury and Finance and the Victorian Competition and Efficiency Commission (VCEC) (as a working group) throughout the process, and has consulted with SARC at key stages.

Legislative instruments

For the purposes of the SLA, the term 'legislative instruments' has been introduced to cover the broad range of subordinate legislation that will be subject to the preparation requirements outlined in the SLA. The amended SLA refers separately to statutory rules, which are already subject to the specified requirements, and legislative instruments, which will be subject to those same requirements from 1 July 2011. In full, the definition of "legislative instrument" in the SLA (section 3(1)) will be as follows:

"Legislative instrument means an instrument made under an Act or statutory rule that is of a legislative character but does not include –

a a statutory rule; or

b a local law made under Part 5 of the Local Government Act 1989 and any other instrument made by a council under that Act or any other Act; or

c a proclamation of commencement of an Act or any provision of an Act; or

d a planning scheme or an amendment to a planning scheme under the *Planning and Environment Act 1987*; or

e the Victoria Planning Provisions within the meaning of the *Planning and Environment Act 1987*; or

f a practice note or practice direction issued by or on behalf of a court or tribunal or an instrument which related only to a court or tribunal or the procedure, practice or costs of a court or tribunal; or

g an instrument of purely administrative character; or

h a prescribed instrument or a prescribed class of instrument."

Subordinate Legislation Act 1994 requirements

From 1 July 2011, a detailed process of analysis must be undertaken before a legislative instrument is made, in line with current requirements for statutory rules. Key elements of the new requirements are the preparation of a RIS and public consultation on the RIS, which provides greater opportunities for public input on legislative instruments that significantly affect Victorians. New legislative instruments must also be tabled in Parliament and will subsequently be reviewed by the SARC. This will improve government accountability and transparency and lead to better quality regulation.

Another key benefit is improved accessibility. Prior to the amendments to the SLA, legislative instruments were not always readily accessible once made, even by those directly affected by them. The amended SLA will require that legislative instruments be published in the Victoria Government Gazette once they are made. This will apply to all legislative instruments, including any instruments exempted from the SLA requirements by regulations made under section 4A or any instruments exempted on a case-by-case basis under section 12F or 12G. This requirement ensures that legislative instruments will be on public record and, as a result, will be more accessible.

Provision for regulations to be made

The amendments to the SLA recognised that some legislative instruments can impose significant costs or a significant burden on people or organisations. However, other legislative instruments now captured by the SLA do not impose a burden; for example, some instruments are fundamentally declaratory or machinery in nature.

Because not all legislative instruments require a level of analysis and scrutiny on par with that previously generally required for statutory rules, section 4A of the SLA allows for Regulations to be made that prescribe an instrument to be: legislative (subject to the requirements of the SLA); not legislative (usually, where the instrument is of purely administrative character) and therefore not subject to the SLA; or legislative but exempt.

Therefore, to further ensure that limited government resources are appropriately targeted at those legislative instruments that will impose a significant burden on a sector of the public, a number of standing exemptions to the process are being proposed. All exempt instruments would still be subject to the requirement to publish new instruments in the Victoria Government Gazette, to ensure they are accessible.

One of the intentions of allowing for Regulations which exempt instruments from the SLA provisions is to avoid the need for agencies to apply for an exemption (under section 12F or, in special circumstances, section 12G) each time an instrument is made that meets one or more exemption criteria where that type of instrument is always likely to be granted an exemption.

Secondly, as was indicated when the amendment legislation was being developed, the proposed Regulations seek to exempt instruments where, on balance, it is in the public interest that an exemption is made. In some cases where a legislative instrument has been proposed for exemption, the instrument might not meet one section 12F criterion alone, but meets significant elements of two or more criteria and, when considered together, it is judged that there is a net benefit from exempting the instruments on overall public interest grounds having regard to the policy intent and balance reflected in the SLA and the recent amendments to it.

While the requirements of the SLA promote accountability and transparency in the process of developing subordinate legislation, sometimes this comes at a greater cost in terms of flexibility, efficiency and/or timeliness.

Flexibility allows instrument-makers to make legislative instruments that best suit the purposes of both their authorising Act and the instrument itself. As a matter of good policy practice, a range of options should be analysed in the development of an instrument to ensure the best outcomes are found. However, instruments are proposed for exemption that should not require the formal RIS and associated consultation process, as further benefits would not be realised beyond the standard policy development process.

Efficiency considerations have also been made in determining those legislative instruments for exemption. It is important that resources used for the SLA processes are not allocated unnecessarily, and to the detriment of other, more significant, policy issues that could otherwise be addressed. In some cases, there is a need to make legislative instruments urgently, or within a timeframe that would not allow for preparation of a RIS and consultation on the RIS. The RIS process can add upwards of six months to the policy-making process. Examples of such instruments include where a public health response is required to a disease outbreak, or where a road closure needs to be made that could not be foreseen far enough in advance to undertake a RIS and consultation. In these cases, the need for urgent responses to public health and safety concerns outweigh the benefits that would be gained in undertaking a lengthy formal analysis and consultation.

In summary, therefore, the authors find there is a net benefit found in exempting the instrument from more rigorous analysis and consultation.[2] This also ensures that government resources can be directed to analysis, consultation and scrutiny for those instruments which have a more significant impact on a sector of the public.

Finally, instrument-makers will be able to easily identify if a proposed instrument is administrative, and thus not subject to any of the requirements of the SLA.[3] As stated during Parliamentary debate on the SLA amendments, the lists of instruments would "provide an easily accessible source for instrument-makers to refer to when considering whether or not their instrument must undergo the scrutiny processes under the Act"[4].

Definition of 'significant burden'

As identified previously in the Subordinate Legislation Amendment Bill Discussion Paper, the scrutiny of proposed legislative instruments should be effectively targeted to ensure that:

- those proposals that will have a significant impact on any sector of the public are adequately scrutinised and well-justified;
- government agencies and departments are able to allocate their resources efficiently, and are not burdened unnecessarily;
- there is no significant cost impact on government programs and services; and
- any delay in making or amending legislative instruments is minimised.

2 The attachment to this RIS outlines the rationale for exempting each of the legislative instruments that fall into this category.

3 Legislative instruments that are administrative are not required to meet any requirements of the SLA, including the publication of the making of an instrument in the Government Gazette.

4 Parliamentary Debates, Legislative Assembly, 2 September 2010, page 3616.

To help achieve this, the amendments also replaced the term 'appreciable economic or social burden' with 'significant economic or social burden'. The change was made to help clarify the level of burden that should lead to a RIS being prepared and consultation being undertaken. It is also more consistent with the threshold for Business Impact Assessments (BIAs), which are required where proposed primary legislation has potentially significant effects for business and/or competition. It also ensures that limited government resources are focussed appropriately on those legislative instruments which can significantly impact part or all of Victoria's population. For example, it ensures that SARC is not inundated with a large number and a wide range of legislative instruments for scrutiny and is, thus, able to focus its attention on those with potentially significant impacts.

A significant burden may be imposed if the proposed legislative instrument is likely to, amongst other things, produce effects that:

- affect a significant number of businesses, community groups or individuals;
- have a significant concentrated effect on a particular group, region or industry;
- have a large aggregate impact on the Victorian economy;
- alter the ability or incentives for businesses to compete in an industry;
- impose resource costs (including time and funds) on business, community groups or individuals in order to undertake compliance activities, change current practices or seek external advice; and/or
- have a significant impact on individual rights and liberties.

Additional guidance will be provided (once these requirements come into effect on 1 July 2011) in the *Subordinate Legislation Act 1994* Guidelines (appended to the Victorian Guide to Regulation and also referred to as the "Premier's Guidelines"). The Premier's Guidelines will assist instrument-makers in the general preparation of subordinate legislation, as well as in determining whether or not a legislative instrument meets the significant burden threshold.

NATURE AND EXTENT OF THE PROBLEM

A large number of provisions to make legislative instruments (1187) have been identified from the statute book. Of these, 455 are purely administrative, and therefore are not a class of legislative instrument under the SLA (as per the definition of legislative instrument under section 3(1) of the SLA). A further 646 were determined as likely to meet at least one of the criteria for exemption listed under section 12F of the SLA in all cases of future use or as meeting an additional criterion where, on balance, the instrument should be exempted in the overall public interest.

The remaining 86 can be made in a way that imposes a significant economic or social burden on a sector of the population or fails to meet any of the other exemption criteria in the SLA.[5] These legislative instruments should receive the same level of scrutiny as statutory rules and, therefore, it is these 86 legislative instruments the amendments to the SLA aimed to capture.

While amendments to the SLA were necessary to capture all such instruments, requiring the 646 other legislative instruments to undergo an exemption or RIS process each time a legislative instrument is proposed to be made places a burden on departments and agencies, which have limited resources.

Impact on responsible agencies and Ministers

Without the proposed Regulations, from 1 July 2011, each time a legislative instrument is made or proposed to be made, instrument-makers (usually departments or agencies) will have to determine on a case-by-case basis if the instrument is administrative; if the instrument could be exempt from SLA requirements, as it meets one or more of the exemption criteria set out in section 12F of the SLA; or if the requirements apply because it is likely to impose a significant economic or social burden.

In summary, each individual instrument made under the 1187 provisions identified would have to be categorised on a case-by-case basis, as the need for an instrument arose. This places a burden on instrument-makers to accurately categorise the instrument being made. If an exemption should apply, then the SLA requires agencies to seek an exemption certificate from the responsible Minister.

Seeking an exemption would entail:

- preparing advice (including obtaining and outlining legal advice) and drafting an exemption certificate (by the responsible department or agency); and
- consideration and signing of the exemption certificate (by the responsible Minister).

While not necessarily resource intensive on an individual basis, overall instrument-makers will face unnecessary costs each year to seek exemptions for a number of legislative instruments. Previous analysis showed an exemption could be expected to cost the instrument-maker about $450 (see discussion on the Base Case for more detail), which covers the costs to review the legislative instrument against the exemption criteria and brief the Minister to make a decision. The costs to agencies in undertaking this activity would likely be absorbed within current departmental or agency budgets, such as general legal branch or legal advice budgets. There would not be an overt, additional cost to taxpayers in administering such a system of exemptions. However, an opportunity cost is created, as inefficient use of limited resources may mean departments and agencies have less capacity to address other issues.

5 An instrument can still be exempted on a case-by-case basis by the responsible Minister, if an instance of its use meets one or more of the exemption criteria in the SLA.

The process is especially inefficient if the exemption is sought on a regular basis for the same type of legislative instrument and exemption criteria, for example, for instruments made annually, or several times each year. To give one example, section 2.3.2 of the *Education and Training Reform Act 2006* allows the Minister to make an order to constitute a school council to exercise and discharge powers, duties and functions in relation to a Government school or group of Government schools. These Orders are made on a regular basis and will likely never impose a significant burden, and to require that an exemption be considered each time an Order is made would be an inefficient use of government resources and Ministers' time.

Having to seek an exemption may also impact situations where it is important that a timely regulatory response occur. A section 12F exemption may apply where the legislative instrument "is not of more than 12 months duration and forms a response to a public emergency, an urgent public health issue or likely or actual significant damage to the environment, resource sustainability or the economy" (section 12F(1)(h) of the SLA); for example, a declaration relating to infectious disease or micro-organism, made under the *Public Health and Wellbeing Act 2008* (s126), which may be needed to respond urgently to an infectious disease outbreak. While an exemption in such cases is likely to be straight forward, any delay or additional burden to the process of making a legislative instrument in such circumstances may hinder a timely and effective response.

Where an exemption would not apply under the SLA, but the instrument is proposed for exemption due to overall public interest, the RIS and associated consultation process would likely need to be undertaken without the proposed Regulations. The cost of doing this varies considerably depending on the size and scope of the proposal. However, VCEC analysis shows that in 2009/10, the average cost of preparing a RIS (including consultancy costs, costs within the responsible department or agency and the cost of VCEC's independent assessment), was $92,800.[6]

Prescribed legislative instruments

Section 4A of the SLA allows the Governor in Council, on recommendation by the responsible Minister (the Premier), to make regulations:

a prescribing an instrument or class of instrument for the purposes of paragraph (h) of the definition of ***legislative instrument***;

b prescribing an instrument or a class of instrument to be, or not to be, a legislative instrument or a class of legislative instrument for the purposes of this Act or any specified provisions of this Act, whether or not subject to conditions;

c exempting an instrument or class of instrument that is a legislative instrument from the operation of this Act or any specified provision or specified provisions of this Act, whether or not subject to conditions".

The proposed Regulations attached to this RIS:

- prescribe a number of instruments to be legislative instruments for the purposes of the SLA;
- prescribe, and list, a number of instruments as not being legislative instruments for the purposes of the SLA (mostly instruments of purely administrative character); and
- exempt a number of legislative instruments from SLA requirements, except for the requirement to publish any new legislative instruments in the Victoria Government Gazette.

6 VCEC 2011, *Cost-effectiveness of regulatory impact assessment in Victoria – Staff Working Paper,* p.28.

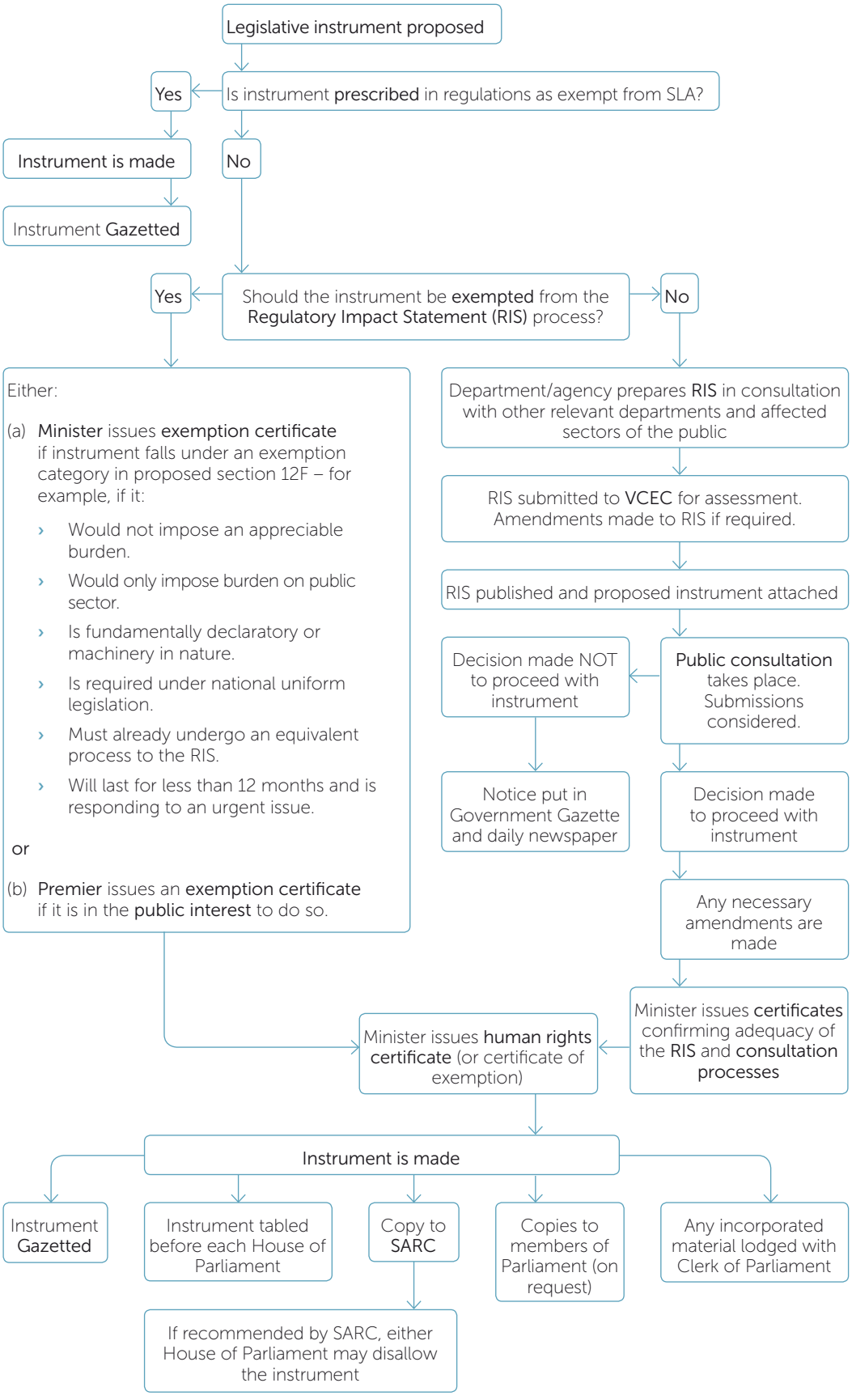
As discussed in more detail below, prescribing instruments to be, or not to be, legislative instruments for the purposes of the SLA would not impose a significant economic or social burden on a sector of the public. It would simply confirm which instruments are not legislative (mostly because they are of purely administrative character) and are therefore not subject to the SLA requirements, and which legislative instruments will be subject to the requirements set out under the SLA. Those subject to the SLA requirements are those likely to impose a significant economic or social burden on a sector of the public, and therefore need to be closely examined each time they are made to ensure the proposed legislative instrument is justified. This will be required from 1 July 2011.

Prescribing instruments as exempt from the requirements of the SLA (except for Victoria Government Gazette publication) will reduce the burden on agencies. It will remove the need to prepare advice and seek an exemption certificate each time a legislative instrument is made that meets the exemption criteria in the SLA or to undertake a RIS and public consultation process where the benefits of doing so are outweighed by the costs.

Best efforts have been made by the Department of Premier and Cabinet, in consultation with instrument-makers (generally other departments), to ensure that, on balance, there is a benefit in excluding the instruments identified for exemption. However, a legislative instrument that is permanently exempted could impose, inadvertently or unintentionally, a significant economic or social burden on a sector of the public without the level of scrutiny required of other statutory rules and legislative instruments. It is these instruments that this RIS is largely focused on.

The process for making legislative instruments, including those exempt from SLA requirements is summarised in Figure 1.

Figure 1: Process for making legislative instruments



Desired Objectives

There are several desired objectives of the proposed regulations:

- Provide clarity to departments and agencies about when a RIS should be prepared and public consultation should take place.
- Assist departments and agencies to allocate their resources efficiently and ensure they are not subject to excessive burden.
- Minimise unnecessary delays in making or amending legislative instruments.
- Ensure an appropriate level of parliamentary scrutiny is applied to legislative instruments when they are made.

EVALUATION OF OPTIONS

Base Case: No regulations

Overview

The recent amendments to the SLA require that all proposed legislative instruments undergo consultation and preparation of a RIS.[7] Subordinate instruments that are not legislative instruments (for example, subordinate instruments of purely administrative character) are not subject to these requirements.

The SLA also allows for the responsible Minister to make regulations to:

- prescribe legislative instruments for the purposes of the SLA;
- prescribe instruments to not be legislative instruments (in practice, these will mostly be instruments of purely administrative character); and
- prescribe legislative instruments as exempt from SLA requirements.

In the case of the proposed Regulations not being made, there would not be a significant difference for the first two groups of instruments in terms of the application of the SLA. The definition of legislative instruments excludes instruments of purely administrative character, so they are not subject to the requirements of the SLA even without the Regulations. However, departments would have to determine whether an instrument is administrative on a case-by-case basis. All other legislative instruments would be required to go through the process outlined in Figure 1 each time an instrument is made. This means for each legislative instrument, either a RIS will be prepared and formal consultation will take place, or instrument-makers will prepare a case for exemption to be granted, under section 12F of the SLA, to be considered by the responsible Minister.

In developing the proposed Regulations (as outlined below under Option 1), 646 legislative instruments have been identified as meeting at least one of the exemption criteria in section 12F of the SLA or an alternative criterion, where the instrument should be exempted in the overall public interest (that is, the costs of meeting the SLA requirements would exceed the benefits). If the proposed Regulations are not made, these instruments will have to be exempted from the SLA requirements by the responsible Ministers on a case-by-case basis or will be required to meet the SLA requirements (that is, prepare a RIS and undertake public consultation, among other requirements).

An exemption would require assessment of the criteria and preparation of advice by the instrument-maker, preparation of an exemption certificate and consideration by the Minister before the exemption certificate is signed. The SLA requirements include preparation of a RIS and undertaking public consultation, as the two most costly aspects of the process. A number of less onerous requirements would also apply.

7 The amendments to the SLA will introduce certain requirements which must be met when preparing and making proposed legislative instruments. As the amendments will not have retrospective effect, these requirements will only apply when making legislative instruments after the commencement date on 1 July 2011.

Benefits

Requiring each legislative instrument to be considered for exemption on a case-by-case basis or to undergo a RIS and associated consultation process will provide the greatest certainty that they are not made in such a way that imposes a significant economic or social burden on any sector of the public. Identifying a range of legislative instruments that are always exempt from SLA requirements poses a risk, albeit small, that those instruments may be used in future in a way that does impose a significant unchecked burden on a sector of the public.

If an exemption is granted by the responsible Minister then a legislative instrument can be made without consultation and preparation of a RIS. However, there is a key difference between exempting legislative instruments via regulation and exempting them on an individual basis. When exemptions are granted individually by a Minister, the legislative instruments are still required to undergo a human rights assessment, and be published in the Victoria Government Gazette, tabled in Parliament and reviewed by SARC. Instruments exempted by regulation will only be subject to the requirement to publish in the Victoria Government Gazette.

Not making the proposed Regulations therefore provides benefits in that each legislative instrument will undergo checks to ensure it is not in contravention of the *Charter of Human Rights and Responsibilities Act 2006*, and it will be reviewed by SARC, even if exempted from the RIS and associated consultation process. SARC has responsibility for scrutinising bills and statutory rules introduced into Parliament. SARC can make recommendations to Parliament in relation to statutory rules on a very broad range of grounds. The amendments to the SLA will also allow SARC to scrutinise legislative instruments. Under section 25A of the SLA (from 1 July 2011), SARC can report a legislative instrument to Parliament if it:

- does not appear to be within the powers conferred to the instrument-maker under the authorising Act;
- is made without clear and express authority, has a retrospective effect; imposes any tax, fee, fine, imprisonment or other penalty; purports to shift the legal burden of proof to a person accused of an offence; or, provides for the subdelegation of powers delegated by the authorising Act or statutory rule;
- is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities; or
- has been prepared in contravention of any of the provisions of the SLA or guidelines with respect to legislative instruments.

SARC can make any recommendations it sees as appropriate, including a recommendation that the legislative instrument be disallowed in whole or in part. However, only Parliament can actually disallow a legislative instrument, and it may choose not too, despite any SARC recommendation. SARC can also recommend a legislative instrument is suspended until a decision is reached by Parliament to disallow or amend the legislative instrument (either in whole or in part), or to leave it in place.

Where a RIS is required, and public consultation occurs, the usual benefits conferred by the SLA will apply. These include the certainty that the benefits of the legislative instrument outweigh any costs imposed, that those costs are well-justified, and that the public have an opportunity to participate in the process through consultation.

VCEC has estimated quantitative benefits of the RIS process.[8] They found that between 2005-06 and 2009-10, the RIS process achieved estimated gross savings of $902 million (in present value terms) over the 10 year life of the regulations. The estimated gross savings to regulatory proposals resulting from the RIS process can be classified into three broad categories: removing an existing or proposed regulatory requirement; reducing the number of entities regulated (that is, narrowing the coverage of the regulations); and reducing the burden of regulatory requirements applying to existing regulated entities (for example, introducing less onerous or less frequent requirements).

8 VCEC 2011, *Cost-effectiveness of regulatory impact assessment in Victoria – Staff Working Paper.*

Costs

Not making the proposed Regulations will impose a significant burden on instrument-makers, largely in the form of an opportunity cost as inefficient use of limited resources may mean departments and agencies have less capacity to address other issues. It may also place additional demand on Ministers' time and impact on scrutiny processes, particularly the review of legislative instruments by SARC.

EXEMPTION CERTIFICATE COSTS

Though not all 646 legislative instruments are made on a regular basis, there would be costs each year to the instrument-makers as they seek exemptions every time an instrument is made where it is eligible for exemption. Legal advice would likely be sought, an exemption certificate would be prepared for the Minister, and he or she would be briefed in each instance. The Minister would then consider the advice received and, if satisfied, issue the exemption certificate. This process would involve costs to the department or agency, as well as create delays to the process of making legislative instruments.

Consultation with departments during the development of the SLA amendments showed that approximately 500 legislative instruments were made in 2006/07. At least 450 of these did not impose a significant burden, and could be exempt on that ground. It could be expected therefore, that at least 450 instruments (as a lower limit) per year would have an exemption certificate prepared under the Base Case. Further instruments would have been eligible for exemptions based on other grounds so it is possible that close to 500 instruments could seek exemptions each year under the Base Case; we use 500 as an upper limit. While only based on one year's data, it seems an appropriate estimate given that multiple instruments can be made each year under one authorising provision, and many instruments are made on an annual basis.

Based on the assumption that each exemption certificate would take about 6 hours to prepare (including preparing associated briefing material and gaining approvals within the department) at a conservative estimate cost of $75, on average, per hour to the department (including salaries and on-costs), each exemption would pose a cost of $450 to make. For those instruments that are made on a regular basis, this cost may reduce over time once a process has been established. However, it expected that any reduction would be minimal, as a significant portion of the costs are likely to be fixed.

Therefore, in total, across all departments and agencies, the cost could be between $202,500 and $225,000 per year, which results in costs over a 10 year period of between $1.74 million and $1.94 million in net present value terms.[9] These calculations exclude the delay cost that could be incurred while an exemption is being sought.

IMPACT ON PARLIAMENTARY SCRUTINY PROCESSES

Further, a legislative instrument exempted on a case-by-case basis must still meet other requirements of the SLA, including preparation of a human rights certificate, publication in the Victoria Government Gazette, tabling in Parliament and review by SARC. With the exception of Victoria Government Gazette publication, this process would not apply to any legislative instruments exempt under regulation.

It is not expected that the publication and tabling requirements would impose a great additional burden on Parliament. However, it could increase the burden on SARC, which does not currently have a role in reviewing legislative instruments, but from 1 July 2011 will be required to scrutinise all legislative instruments.[10]

9 These calculations have been made using a discount rate of 3.5 per cent as recommended in the Victoria Guide to Regulation.

10 Under the proposed Regulations (Option 1), SARC would not be required to scrutinise any legislative instruments made under provisions that are exempt.

To help ensure that SARC's expanded role under these reforms does not result in an inappropriate increase in SARC's workload, the amended SLA provides more targeted grounds of review in relation to legislative instruments (as outlined above). However, due to the large number of legislative instruments likely to be made each year, SARC would still face a larger workload without the proposed Regulations.

SARC would be required to review all legislative instruments, including those where a RIS was prepared and consultation undertaken, and where an exemption certificate was granted. The cost impact of this is unable to be calculated, as information on the time it takes and the cost to SARC is not available. However, the impact of reviewing up to 500 additional legislative instruments each year is expected to be considerable.

Further, the large number of legislative instruments could compromise SARC's ability to effectively perform its scrutiny function, as it may not be able to dedicate an adequate amount of resources to those instruments that impose a significant burden or should otherwise receive closer scrutiny.

COSTS WHERE AN EXEMPTION WOULD NOT APPLY

Not all instruments would receive an exemption. For example, where an instrument has been identified for exemption under the proposed Regulations for public interest reasons, a clear case for exemption under section 12F (if the regulations were not made) may not be able to be made. In this case, a RIS would be required.[11] The cost of preparing a RIS and consulting could be about $92,800 per proposed legislative instrument. This cost includes consultancy costs to prepare the RIS, costs to the relevant agency in undertaking consultation and cost to VCEC of assessing the RIS. These costs would most likely be met within existing budgets, but would come at an opportunity cost to other projects which could make better use of those resources.

Additionally, the process may be potentially difficult or problematic to undertake; for example, where commercial negotiations would undermine the RIS process or where the RIS process and consultation may undermine the purposes of the authorising Act.

INCREASED BURDEN ON DEPARTMENTS

There will also be an additional burden on all instrument-makers, who will need to ensure that any legislative instruments for which they are responsible comply with the requirements in the SLA. This will involve ongoing monitoring to determine which instruments are legislative instruments and therefore subject to the SLA. Where an instrument-maker is unable to determine if a particular instrument is subject to the SLA requirements, legal advice may be required. In these circumstances, it may also be necessary to brief within the relevant department or agency and/or brief a Minister. The cost impact of this cannot be calculated, as it would become one of the departments' 'business as usual' activities and the demand on resources for that particular activity is not able to be estimated.

The greater uncertainty about whether particular instruments are subject to the SLA will also increase the likelihood that some instruments will be mischaracterised. Instrument-makers may incur costs in complying with the SLA (e.g. costs to prepare a RIS and undertake consultation) where compliance would not otherwise be required, or may fail to comply when the SLA requirements should be met. The latter could see a significant burden imposed more widely, unless the instrument is reviewed by SARC and Parliament actions any recommendations for disallowance, either in the interim or permanently.

11 In special circumstances, it may be possible to receive a Premier's exemption certificate under section 12G of the SLA.

Risks

This option carries the lowest risk of unintended or unanticipated outcomes, that is, of a legislative instrument being made that imposes a significant burden without being appropriately scrutinised. This is due to the exemption criteria being assessed against each legislative instrument on a case-by-case basis, where an exemption may apply.

Each new legislative instrument would also still be published in the Victoria Government Gazette, tabled in Parliament and assessed by SARC. This provides additional checks to ensure a significant burden is not unnecessarily imposed.

However, as noted above, there is a converse risk that SARC's ability to adequately scrutinise all legislative instruments may be compromised due to the large number of instruments it would be expected to review.

Option 1: Make the regulations based on the exemption criteria outlined in section 12F of the *Subordinate Legislation Act 1994* and an additional public interest criterion

Overview

Under this option, *Subordinate Legislation Regulations 2011* will be made. There are three purposes to the proposed Regulations, which are:

- to prescribe a non-exhaustive list of legislative instruments;
- to prescribe a non-exhaustive list of instruments that are not legislative instruments (these will mostly be instruments of purely administrative character); and
- to prescribe a list of legislative instruments that are exempt from the requirements to prepare a RIS and associated consultation requirements.

The first and second purposes of the proposed Regulations do not impose an unjustified significant economic or social burden on a sector of the public. The Regulations will provide a level of certainty to the status of legislative instruments that have been identified as either administrative or legislative instruments for the purposes of the SLA. This is to assist instrument-makers in the first instance to identify the type of instrument and therefore the application of the requirements of the SLA.

The third purpose of the proposed Regulations is to prescribe a list of legislative instruments that are exempt from the requirements to: prepare a RIS and associated consultation requirements; prepare a human rights certificate; table the instrument in Parliament; and lodge the instrument and associated materials with SARC. The requirement to publish new instruments in the Victoria Government Gazette will apply in all cases.

The list of prescribed legislative instruments in the proposed Regulations that is being discussed here will always be exempt from the process. Responsible Ministers will still be able to provide exemptions to the RIS requirements, on a case-by-case basis, for any legislative instruments being made that is not included on the prescribed list, provided they meet one or more of the criteria set out in section 12F of the SLA. The Premier will also still be able to provide exemptions in special circumstances for individual legislative instruments under section 12G of the Act.

The criteria under section 12F have also been used as a basis for assessing legislative instruments for inclusion on the proposed list of exempt instruments. Additionally, owing to the large number and diverse range of legislative instruments now captured by the SLA, a further criterion was used in the development of the proposed Regulations.

Assessment of instruments proposed for exemption

Two broad principles were used in assessing whether a legislative instrument should be exempt. The first is where legislative instruments made under the relevant provision would always or almost always meet at least one of the criteria in section 12F of the SLA. The reasons for exemption under section 12F have been used as a basis for developing the set of criteria used to permanently exempt legislative instruments under the proposed Regulations.[12] The second principle is that of public interest. Instruments being proposed for exemption on the public interest ground are those that are considered, on balance, to have a net benefit in exempting them from additional scrutiny. That is, the costs in applying additional scrutiny outweigh the benefits of doing so. The types of instruments under this criterion are discussed in more detail below.

In using these principles to assess each instrument, the Department of Premier and Cabinet has undertaken a detailed and comprehensive process in conjunction with all those agencies responsible for the authorising legislation under which legislative instruments can be made. This has involved legal analysis of the scope of the provisions that authorise the making instruments, analysis of the purpose and effect of each instrument in its broader policy context, consideration of the practical 'on the ground' use and impact of instruments (including operational and administrative implications of exempting or not exempting them), and consultation with all departments, numerous agencies across government, and other key stakeholders about those issues.

This process has been iterative and taken place over a number of years. A draft list was provided for the consultation on the exposure draft bill for the Subordinate Legislation Amendment Act 2010. This has resulted in some further refinement of the list; for example, cemetery trust rules are now proposed to be exempt from the SLA requirement for Class B cemeteries, as Class B cemetery trusts manage relatively small cemeteries, are staffed entirely by volunteers and work under significant resource limitations. It would therefore not be in the public interest for Class B cemetery trusts to comply with the SLA. This is especially the case since Class B cemetery trust rules are relatively unlikely to impose significant, unchecked burden on businesses or the community.

In addition, a number of further amendments to the list, which are mostly relatively minor, have been made:

- where legislative change has occurred (repealed provisions have been removed, repealed and re-enacted provisions have been substituted, and some new provisions have been added);
- as a result of ongoing consultation with departments since the public consultation; and
- to reflect technical drafting advice from the Office of the Chief Parliamentary Counsel.

For example, significant amendments to the *Food Act 1984* are currently commencing in phases. The exposure draft list did not include instruments which can be made under the new regime, as the relevant amending Act had passed but not commenced. Those instruments have now been included. The exposure draft list also included a number of instruments made under the *Transport Act 1983*. That Act has been repealed.

Over time, further instruments may need to be added or removed for these reasons. This can only be done by amendments to the Regulations. As outlined in further detail in later sections of this RIS, the Regulations will be reviewed after 4 years.

12 The proposed Regulations are being made under section 4A. The criteria for exemption available under section 12F are being used to inform the proposed Regulations. However, no instruments are being exempted under section12F, which can only be applied when a case-by-case exemption is sought from the responsible Minister.

Reasons for exemption

In summary, reasons for exemption are where the proposed legislative instrument:

- would not impose a significant economic or social burden on a sector of the public;
- is of a fundamentally declaratory or machinery nature;
- only increases fees in any financial year by an amount not exceeding the annual rate approved by the Treasurer;
- would only impose a burden on a public sector body;
- is an order made under the *Administrative Arrangements Act 1983*;
- is required under a national uniform legislation scheme and an assessment of costs and benefits has been undertaken under that scheme;
- is required to undergo, or has undergone an analytical and consultation process deemed equivalent to a RIS;
- is not of more than 12 months duration and forms a response to a public emergency, an urgent public health issue or likely or actual significant damage to the environment, resource sustainability or the economy;
- deals with administration or procedures within or between departments or declared authorities within the meaning of either the *Public Administration Act 2004* or *Parliamentary Administration Act 2005*;
- would be rendered ineffective or unfairly advantage or disadvantage any person likely to be affected through the publication of a RIS and the subsequent consultation process;
- is made under a statutory rule and the RIS for that statutory rule is adequate; and/or
- should be made without the scrutiny otherwise required due to overriding public interest, where the benefits of the SLA process and requirements are likely to be outweighed by the costs or risks.

Those instruments that are proposed to be exempt from the requirements are those which would always or almost always meet at least one of the criteria listed above. In summary, the making of any of these instruments in future is not likely to impose a significant economic or social burden on any sector of the public, or adequate scrutiny will be face elsewhere if they do, or should be made without the usual provisions of the SLA applying due to public interest. Those instruments meeting criteria equivalent to those provided in section 12F of the SLA would almost certainly be exempted by the responsible Minister on a case-by-case basis. As discussed in the Base Case above, there is a cost to departments in undertaking the section 12F exemption process.

Legislative instruments that are exempt through regulation will not be required to be tabled in Parliament or examined by SARC. The legislative instrument will be made (by the responsible Minister) and published in the Victoria Government Gazette, and will then be in force.

Two key sets of legislative instruments proposed for exemption, which have been assessed in more detail owing to their nature, are discussed below. The first contains those instruments that are more likely to impose a significant burden, but are proposed for exemption because they are part of a national uniform legislation scheme or equivalent RIS process is required under the instrument's authorising Act or statutory rule. The second set contains those instruments that are being proposed for exemption owing to a range of circumstances that come under the banner of "public interest". All other legislative instruments proposed for exemption are included in the attachment to this RIS, including a brief description for why each is proposed to be exempt.

Table 1 demonstrates how many instruments fit under each of the criteria. Given that many instruments fall under multiple criteria, the number of instruments listed in the table exceeds the total number of actual instruments. The table shows that the reasons for exemption are largely due to instruments having no significant burden; being of a fundamentally declaratory or machinery nature; being necessary to respond to a public emergency, urgent public health issue or urgent environmental issue; or that should be made without the scrutiny otherwise required due to overriding public interest, where the benefits of the SLA process and requirements are likely to be outweighed by the costs or risks.

TABLE 1: BASIS FOR EXEMPTING PROVISIONS TO MAKE INSTRUMENTS

BASIS OF EXEMPTION	NUMBER OF INSTRUMENTS
No significant burden	180
Fundamentally declaratory/machinery	133
Only increase fees by annual rate approved by the Treasurer	4
Only imposes burden on a public sector body	29
Instrument is made under the *Administrative Arrangements Act 1983*	1
National uniform scheme	12
RIS equivalent	19
Urgent public safety/environmental issue	75
Overriding public interest	241

Exemptions for RIS-equivalence or national uniform legislation

As noted above, some of the criteria relate to proposals where a significant cost or burden may be imposed, but a RIS or equivalent document has been prepared and assessed elsewhere, and consultation has been undertaken, or the instrument is required under a national uniform legislation scheme and an assessment of the costs and benefits was undertaken. This is the case for the exemption criteria where a proposed instrument is:

- required under a national uniform legislation scheme; or
- required to undergo or has undergone a process deemed equivalent to a RIS.

A total of 31 provisions for legislative instruments have been assessed as meeting one of these criteria. Each category is discussed briefly below, including examples of instruments meeting the criteria.

RIS-equivalent processes

This analysis considers that in order to be RIS-equivalent, the following criteria must be met:

- The preparation of a policy assessment that includes the nature and extent of the problem being addressed and an assessment of the options considered, including an assessment of the costs and benefits, to justify the introduction of the legislative instrument; and
- An independent assessment that advises the adequacy of the policy assessment; and
- A structured consultation process that includes public release of an exposure draft of the legislative instrument, with no less than 28 days of formal consultation.

A number of instruments currently undergo a process very similar to the RIS process. Some of these are legislative requirements that are set out in the authorising Acts for these instruments. It is considered inefficient to require instrument-makers to go through duplicate processes when making legislative instruments. It is also not considered appropriate to amend each of the authorising Acts to avoid such duplication, particularly given that the processes in authorising Acts may be tailored to the particular instruments and regimes to which they relate.

Further, in other cases where RIS equivalency applies, a RIS may not actually be suitable for the legislative instrument concerned. An equivalent, but more suitable process may be more appropriate, provided it meets the three criteria for RIS equivalency above. The equivalent processes in the relevant Acts for the instruments that this applies to are thought to be more suitable than the RIS process.

There are 19 provisions for making legislative instruments where a RIS-equivalent process is also required. These are listed in the table below.

TABLE 2: RATIONALE FOR PROPOSED RIS-EQUIVALENT EXEMPTIONS

INSTRUMENT	RATIONALE FOR EXEMPTION
Notice to determine charges for accident towing services (*Accident Towing Service Act 2007 s* 211)	Instruments are required to undergo, or have undergone, an analytical and consultation process which is equivalent to the process for a RIS. The Essential Services Commissions (ESC), which undertakes the process, will have its analysis independently assessed as part of the process for future instruments that are made.
Instruments made by the Essential Services Commission under various Acts (*Essential Services Commission Act 2001* s 34(1); *Grain Handling and Storage Act 1995* ss 15, 18, 19, 20; *Victorian Renewable Energy Act 2006* s 113)	The ESC conducts thorough analysis for these instruments that are released for public consultation. Participation in the public consultation is high by those affected by the instruments. The authorising Acts do not require independent analysis, however following the SLA amendments, the ESC will have independent advice as to the adequacy of its analysis for future instruments that are made. The exemption from the SLA will only apply to instruments made by the ESC; where an instrument is made by any other department or agency under the same provisions, it will not be exempt under the proposed Regulations.
State Environment Protection Policy (*Environment Protection Act 1970* s 16(1), (1B), (1C))	The Act sets up specific requirements for analysis and consultation equivalent to or more stringent than for a RIS; for example, the consultation period is required to be for a minimum three months. Further, the Environmental Protection Agency (EPA) now requires independent review of its draft Policy Impact Assessments before they are released for public comment along with the draft statutory policy.
Waste Management Policy (*Environment Protection Act 1970* s 16A)	The Act sets up specific requirements for analysis and consultation equivalent to or more stringent than for a RIS; for example, the consultation period is required to be for a minimum three months. Further, the EPA now requires independent review of its draft Policy Impact Assessments before they are released for public comment along with the draft statutory policy.
Price Determinations (*Essential Services Commission Act 2001*, s33(5))	The ESC conducts thorough analysis for these instruments that are released for public consultation. Participation in the public consultation is high by those affected by the instruments. The authorising Acts do not require independent analysis, however following the SLA amendments, the ESC will have independent advice as to the adequacy of its analysis for future instruments that are made.

INSTRUMENT	RATIONALE FOR EXEMPTION
Orders with respect to Codes of Practice (*Essential Services Commission Act 2001* s 47(1))	Instruments are required to undergo, or have undergone, an analytical and consultation process which is equivalent to the process for a RIS. The ESC, which undertakes the process, will have its analysis independently assessed as part of the process for future instruments that are made.
Standards and Conditions of Service (*Port Management Act 1995* s 55(1)(a))	Instruments are required to undergo, or have undergone, an analytical and consultation process which is equivalent to the process for a RIS. The ESC, which undertakes the process, will have its analysis independently assessed as part of the process for future instruments that are made.
General Determination of Terms and Conditions of Access to Channels (*Port Management Act 1995* s 63)	
Determination of Fees and Charges (*Port Management Act 1995* s 63G)	
Rural water customer codes, standards and conditions of service (*Water Industry Act 1994*, ss 4E and 4F)	These instruments are required to undergo, or have undergone, an analytical and consultation process which is equivalent to the process for a RIS. The Commission undertakes an extensive public consultation process before making such Codes and as part of that process carries out a full assessment of the economic and social impacts of the proposed Codes. In line with the requirements of the SLA, the ESC will have independent advice as to the adequacy of the analysis for future instruments that are made.
Instruments relating to fees and charges imposed by metropolitan water licensees (*Water Industry Act 1994*, s 22)	

There is a small risk that the RIS-equivalent process may change in future. This is not considered likely, however, in the event that the process does change for a particular instrument, the provision for making that instrument could have its exemption removed in a future amendment to the Regulations.

National uniform legislation schemes

For proposals under a national uniform legislation scheme, an assessment of costs and benefits must have been undertaken. The exemption ground reflects the unusual nature of national uniform legislation schemes and the cross-jurisdictional nature of the process leading to their establishment and agreement to them by the Victorian Government.

Further to this are considerations such as the impact on State-Commonwealth relations. For example, if a commitment has been made to implement a particular policy (which has undergone a national assessment of costs and benefits) within a set timeframe, and Victoria were to delay this through its own requirements under the SLA, then this could affect the overall implementation of the policy to the detriment of those benefiting (both Victorians and all Australians) and to the relationship with other State governments and the Commonwealth.

There are 12 provisions in total for making legislative instruments where instruments are made under national uniform legislation.

Ten provisions provide for the making of instruments that are made under either the *Road Safety Act 1986* or *Road Safety Road Rules 2009*. In addition to being part of national uniform legislation, many of these satisfy more than one criterion, and when criteria are combined, should be exempted on balance. For example, Notices declaring a service to be an ambulance service for particular purposes, declaring a bus to be a public minibus and approving portable warning triangles are also fundamentally declaratory or machinery in nature. Others, such as orders to specify Intelligent Access Program (IAP) conditions (for heavy vehicles), are part of national laws. In this particular case, the IAP underwent an assessment of costs and benefits which was approved by the Commonwealth Office of Best Practice Regulation.

One provision allows for the making of Orders to suspend or vary the operation of the *Dangerous Goods Act 1985*, which may be required urgently for possible emergencies or unforseen consequences of the scheme that applies to the transport of dangerous goods. A RIS for the national legislative scheme was prepared by the Commonwealth, and found the costs to industry are likely to be offset by improved safety outcomes.

One provision allows for the making of National Electricity Rules and Regulations (under the *National Electricity (Victoria) Act 2005*), and constitutes a national uniform legislation scheme as part of a national energy market reform scheme. Cost-benefit analysis and consultation are required under the national program.

Public interest

The criterion referred to as 'public interest' has been used for legislative instruments where, on balance, the authors consider that the benefits of exempting an instrument outweigh the benefits of additional scrutiny before the instrument is made. A small number are being exempt for a limited time period; for example, to allow for a transitional period where it is known substantial regulatory change is forthcoming. It covers a wide range of legislative instruments with individual circumstances, however, some common themes are outlined in the table below.

TABLE 3: COMMON THEMES FOR THE RATIONALE FOR PROPOSED "PUBLIC INTEREST" EXEMPTIONS

RATIONALE	EXAMPLE
The instruments need to be made under restricted timeframes or there is a need to act quickly.[12]	› Further fisheries quota orders (*Fisheries Act 1995* ss64A(1) and 66D(1)). › Declarations for prohibited period regarding fire protection area and prohibition of the use of fire where acute fire danger exists (*Forests Act 1958* ss3(2) and 64(1)). › Erosion hazard areas (*Land Conservation (Vehicle Control) Act 1972* s5(1)). › Written directions of the harbour master (*Marine Act 1988* s 26E(1)). › Declaration as to, and an Order certifying outbreak of, an exotic pest or disease (*Plant Health and Plant Products Act 1995* s 28A(1)). › Notice of closure, realignment or relocation of road (*Project Development and Construction Management Act 1994* s 24).
The instruments reflect the outcome of detailed, sensitive commercial negotiations that would be undermined by the RIS process.	› Orders regarding architects', builders' and plumbers' insurance cover.
There is a need to maintain the autonomy of an independent Government entity.	› Instruments that relate to university statutes and regulations (*Australian Catholic University (Victoria) Act 1991* ss5(1) and 5(3)); *Deakin University Act 2009* s 28; *La Trobe University Act 2009* s 28; *Melbourne College of Divinity Act 1910* s 30; *Monash University Act 2009* s 28; *Royal Melbourne Institute of Technology Act 2010* s 28; *Swinburne University of Technology Act 2010* s 28; *University of Ballarat Act 2010* s 28; *University of Melbourne Act 2009* s 28; *Victoria University Act 2010* s 28).
Instruments where the RIS process and consultation may undermine the purposes of the authorising Act.	› A range of instruments that can be made under the *Land Acquisition and Compensation Act 1986* (ss 5(3), 7(1)(c), 26(4), and 106(1)(a) and (b)). These instruments are made in extreme circumstances where importance and urgency of a project and fairness to the property owner are relevant factors. › Orders to specify how settlement amounts were determined for a brief period where workers' common rights were abolished in the late-1990s (*Accident Compensation Act 1985* s118C). › Order that *Major Sporting Events Act 2009* (s 15) does not apply to the development or use of an event venue, where the aim of the provision is to streamline processes for particular occasions. › Declaration that a service is an essential service (*Terrorism (Community Protection) Act 2003* ss 26 and 28).

13 These cases are different to those exempted for public emergency reasons, where the legislative instruments are only 12 months in duration.

RATIONALE	EXAMPLE
Instruments that will implement agreements previously made between the Victoria Government and Commonwealth Government.	› Order with respect to fees paid by overseas students applying to be enrolled or enrolled in Government schools (*Education and Training Reform Act 2006* s2.2.9). › Uniform Shipping Code requirements and the National Standard for Commercial Vessels as reflected in the *Marine Act 1988* (s 66(1)). › Notice of substituted public holidays (*Public Holidays Act 1993* s 8(1)). › A number of instruments able to be made under the *Electricity Industry Act 2000* and *Gas Industry Act 2000*.
The instrument is part of a process of comprehensive consultation that would be undermined by a RIS process and RIS consultation.	› Interim protection orders under the *Aboriginal Heritage Act 2006* s96, where requiring a RIS may undermine the role of registered Aboriginal parties and the Council in maintaining the relationship between Aboriginal people and a place or object. › Orders applying to a commodity, under the *Agricultural Industry Development Act 1990* s 8(1), which are made after a request from the industry and following a public meeting of these producers. The final stage is an industry poll on the draft Order, requiring the producers affected to vote on the Order (majority required). The poll is conducted by the Victorian Electoral Commission.
The instrument is developed following a process predetermined under the authorising Act.	› WorkCover premiums, which are determined annually based on an independent actuarial assessment (*Accident Compensation (WorkCover Insurance) Act 1993* s15(1))
The instruments are strategies that are high level documents with more appropriate consultation requirements for that type of instrument.	› Alpine Resorts Strategic Plan and Alpine Resorts Management Plan (*Alpine Resorts (Management) Act 1997* ss33 and 56). › Regional Catchment Strategy (*Catchment and Land Protection Act 1994* Division 1, Part 4). › Victorian Coastal Strategy and Coastal Action Plans (*Coastal Management Act 1995* ss 17(2) and 26(2)). › Flora and Fauna Guarantee Strategy and Flora and Fauna Management Plans (*Flora and Fauna Guarantee Act 1994* ss17 and 21).

Benefits

The proposed Regulations will provide clarity and certainty to those responsible for the authorising Acts' administration (Ministers and relevant departments or agencies) as to which legislative instruments the requirements of the SLA apply to.

There will also be some opportunity cost savings to instrument-makers, as the exemption process outlined in the Base Case will not need to be followed each time any of the exempt legislative instruments is used. The estimated opportunity cost savings under this option are expected to be between $1.74 million and $1.94 million over 10 years. If a RIS was required, the cost could be about $92,800 per instrument. The likely number of RISs that would be prepared without the proposed Regulations is not able to be determined, because it is not known how many instruments will be made each year under those provisions that are proposed to be exempt under the public interest criterion.

The proposed Regulations will also allow for legislative instruments to be introduced without unnecessary delays. As shown in the list above, the reasons for exemption are of a nature that means requiring a RIS and consultation would be wasteful of limited resources, or would in some way impede the effective application of a legislative instrument (for example, some regulations are required to be introduced quickly, as a response to an urgent situation).

Introducing the proposed Regulations will ensure limited government resources are instead targeted towards those initiatives causing, or that may cause, a significant level of burden on some or all of the population and that, therefore, need to be properly scrutinised before their application.

Costs

This option is the least costly in terms of application of the SLA. It is intended to reduce the cost to agencies in preparing advice in order to seek an exemption each time a legislative instrument that should be exempted is made.

There are some small costs in preparing the proposed Regulations. However, these will be subsumed within current departmental or agency budgets, and the total cost to prepare the Regulations upfront will be much less than those that would be faced where assessment of legislative instruments are made on a case-by-case basis and more RISs would be prepared and consulted on (as described in the Base Case above).

Risks

As per the process outlined in Figure 1, if exemptions are sought on a case-by-case basis (as has been the requirement previously for statutory rules), the legislative instrument must still undergo a human rights assessment, and be published in the Victoria Government Gazette, tabled in Parliament and reviewed by SARC. This part of the process will be largely foregone for legislative instruments that are exempt by regulation. The only remaining requirement is that the instruments are published in the Victoria Government Gazette before coming into force. This is a key difference between the current process and proposed Regulations. Given this, there is a risk that exempting these legislative instruments could lead to their application causing a significant economic or social burden on a sector of the public, or contravening the *Charter of Human Rights and Responsibilities Act 2006* (the Charter), without adequate analysis and consultation (and the quantitative benefits VCEC have found can be made) and without the additional scrutiny otherwise afforded by parliamentary processes and SARC review.

However, each of the proposed exempt instruments has been carefully examined, as described above, and has been proposed for exemption as they meet one or more criteria and would most likely be granted an exemption by the responsible Minister on a case-by-case basis anyway or because the benefits of additional scrutiny are outweighed by the additional costs involved. It is also not too dissimilar to the situation in the Base Case, where an instrument may be mischaracterised and exempted from the SLA requirements where it should not be (a 'false negative') and thus fail to comply with SLA requirements.

Due to the nature of these instruments, it is also not necessary that these instruments go through as high a level of scrutiny as more significant subordinate legislation, with the exception of those being exempted due to equivalent assessments being made elsewhere. This latter category of instrument is discussed in more detail below as part of Option 2.

Option 2: Make the regulations as in Option 1, but with the exclusion of the instruments that face alternative scrutiny processes

Overview

A small number of legislative instruments are subject to analytical and consultation processes (set out in their respective authorising Acts) which are considered as, or more, stringent than the RIS process. Under Option 1, 31 provisions are proposed to be exempt from the requirements of the amended SLA because of these alternative processes. These instruments and the reasons for exemption were outlined above. They come under two criteria for exemption under Option 1, where the legislative instrument:

- is required to undergo, or has undergone an analytical and consultation process deemed equivalent to a RIS; or
- is required under a national uniform legislation scheme and an assessment of costs and benefits has been undertaken under that scheme.

During consultation on the 2010 amendments to the SLA, three of the 13 submitters raised concerns with the criteria for exemption based on an alternative, RIS-equivalent process being used when a legislative instrument is made.

The specific concerns of submitters, in summary, were:

- An exemption should not apply unless an individual class of instrument is demonstrably unsuited to RIS scrutiny. The RIS process should be the benchmark, as other processes were considered less rigorous by this submitter.
- An exemption should not apply unless the analysis of the costs and benefits of the proposal is independently assessed.
- Exemptions based on this criterion are seen to allow the circumvention of the SLA requirements, as an equivalent process in a different jurisdiction does not always meet the same criteria set out in Victorian legislation and associated guidance materials.

As a result of the previous consultation and specifically of the concerns outlined above, Option 2 is being considered before the regulations are made. Option 2 allows for the exemption criteria outlined in Option 1 above, excluding the RIS equivalency and national uniform legislation criteria for exemption. This means a total of 615 (ie 646 instruments in Option 1 less 31 instruments excluded in Option 2 leaves 615) provisions to make legislative instruments will be exempt.

Benefits

There may be some additional benefit realised (over Option 1) through ensuring this particular group of legislative instruments is subject to the SLA requirements.

However, given that the instrument will face scrutiny through alternative processes which are seen to be as stringent as the RIS process, and more appropriate for the legislative instrument concerned, the likelihood of any relevant additional information coming to light through the RIS process that affects the final legislative instrument is low. In practice, a section 12F exemption would likely be sought and granted on a case-by-case basis.

Nonetheless, being subject to this scrutiny on a case-by-case basis may provide greater confidence that only those instruments where comprehensive and independently assessed analysis and consultation takes place, or where there is an equivalent process that takes account of the impact on Victoria specifically will be exempted. If the impact to Victoria specifically has not been adequately taken account of in the alternative RIS, then an exemption should not be granted and a separate RIS that meets the SLA analysis requirements should be prepared.

Costs

If these 31 instruments are not exempt from the requirements of the SLA through the proposed Regulations, the instrument-maker will need to apply for an exemption each time an instrument under that provision needs to be made. In some cases this may be straight forward, and, indeed, those proposed for exemption are those where the equivalent or national processes have been deemed as likely to adequately assess the cost and benefits for Victoria in future use. However, in order to adequately document this for each instrument, it is likely that more in depth assessment (compared with other, more straightforward exemption criteria) of the instrument being proposed will be required each time to explain and justify this. This is due to the risk that instruments may impose significant costs on Victorian communities or businesses, even where that cost has been justified at a national level or as part of an equivalent process. An exemption certificate would have to be prepared to outline and explain this in each case. The explanation would need to be sufficient to satisfy SARC, which would be provided with the exemption certificate as part of its scrutiny process. This creates a burden for agencies, and takes away resources from other priorities, where the outcome is likely to be the same whether the exemption is made under regulations or sought on a case-by-case basis.

If a RIS were prepared in error, then this has further implications. This may occur where a case-by-case exemption was not sought (i.e. a 'false positive' outcome due to confusion about whether an exemption should apply). The cost of preparing a RIS could be particularly high if the issue is complex or is not especially suitable for the RIS process. It could also create confusion during consultation, for example, if two separate consultation processes were required, or different and confusing consultation materials were made available during a combined consultation process. Even where the processes broadly align, and much of the information is transferable, there will still be a cost in presenting the information in the RIS format.

Risks

One concern raised in the consultation for the SLA amendments was that the exemption to the SLA requirements would forgo the opportunity to have the costs and benefits assessed independently. This concern has been addressed and the RIS-equivalent criterion used in this RIS includes the need for an independent assessment (either by VCEC or another appropriate person or body). The requirements as set out in the Premier's Guidelines and the Victorian Guide to Regulation were also used to assist the Department of Premier and Cabinet in preparing the list of instruments for exemption. These publications provide guidance as to the requirements of the SLA and, more broadly, guidance on the overall RIS process and best practice regulation.

As noted previously, there may also be a risk to State-Commonwealth relations where a commitment has been made to implement a particular policy (which has undergone a national assessment of costs and benefits) within a set timeframe. If Victoria were to delay this through its own requirements under the SLA, then this could impact on the overall implementation of the policy to the detriment of those benefiting (both Victorians and all Australians) and to the relationship with other State governments and the Commonwealth.

MULTI-CRITERIA ANALYSIS

The nature of the problem is such that it is difficult to fully calculate all costs and benefits in terms of a dollar value. Therefore, while some cost indications have been given in the options above for some costs, a multi-criteria analysis has been prepared to analyse the impact of each of the options against a number of criteria.

In a multi-criteria analysis, a qualitative score is assigned, depending on the impact of the option on each of the criteria measured relative to the Base Case. The multi-criteria analysis technique requires judgments about how proposed options will contribute to a series of criteria that are chosen to reflect the benefits and costs associated with the proposals. It requires developing criteria based on the objectives of the regulations, weighting the criteria, and assigning scores to the different options. Further, it is prudent to ensure that criteria that represent benefits are weighted equally against those that represent costs. The following sections consider each element of the multi-criteria analysis approach.

Criteria

The criteria developed for the multi-criteria analysis relate to the objectives of the policy outlined previously in this RIS. The criteria are described in more detail below:

BENEFIT CRITERIA

1. Clarity of SLA requirements, efficiency, and effective use of government resources
   Regulations to complement the recent SLA amendments were always intended to be made to help clarify to instrument-makers when they should prepare a RIS and undertake consultation and when this is not necessary for legislative instruments. The amendments to the SLA were made to capture a small number of legislative instruments that may pose a significant cost or burden on businesses or the community, so clarifying which instruments makes it easier for instrument-makers know which instruments should be subject to greater scrutiny before being made. Further, requiring every single legislative instrument to either have an exemption certificate prepared or to undergo rigorous analysis and consultation would be an inefficient use of limited government resources, as little benefit would be gained in most cases.

2. Minimise unnecessary delays in making or amending legislative instruments
   As discussed above, in many instances, an exemption would apply, which is much less resource intensive to achieve than undertaking a RIS and associated consultation process. However, further efficiencies can be gained by permanently exempting legislative instruments under regulations. By granting permanent exemptions, delays in making legislative instruments can also be reduced or removed. In some cases, urgency or timeliness is particularly important to the effective use of legislative instruments.

COST CRITERIA

3. Ensure an appropriate level of parliamentary and public scrutiny when making legislative instruments
   The final criterion deals with the risk created by removing some of the parliamentary and public scrutiny that legislative instruments would otherwise be subject to. In analysing the options above, the emphasis has been on ensuring that the level of scrutiny is appropriate for the scale and impact of each legislative instrument. However, in removing some of the scrutiny that legislative instruments would otherwise be subject to, the risks discussed above become apparent. This is the key potential downside in both of the proposed options and, accordingly, has been scored negatively in the analysis below. A negative score indicates less parliamentary and public scrutiny that may result in lower net benefits for society and/or adverse human rights outcomes.

Weighting

Each criterion is considered to be of equal importance. The preferred option should achieve clarity of SLA requirements to maximise the efficient and effective use of government resources, should minimise unnecessary delays, and should ensure an appropriate level of public scrutiny. Nonetheless, so that the weight given to the benefit criteria equals the cost criteria, the criteria of achieving clarity of SLA requirements to maximise the efficient and effective use of government resources, and minimising unnecessary delays are weighted 25 per cent each, while the criteria of ensuring an appropriate level of public scrutiny is weighted 50 per cent.

Scores

The summary of the multi-criteria analysis in Table 4 below shows that Option 1 provides the greatest benefits overall. The analysis used to reach the scores given against each criterion is outlined in the following sections. The options are assessed against each criterion with a score of between -5 and 5.

Clarity, efficiency and effective use of limited government resources

In terms of improving clarity, Option 1 is the best to ensure that legislative instruments are clearly defined as administrative, legislative or exempt. In terms of the 86 provisions proposed to be legislative instruments for the purposes of the SLA, instruments made under these provisions could be eligible for an exemption under section 12F of the SLA in particular instances, however they are most likely to always be subject to the full requirements of the SLA.

Option 2 is less clear in that respect. Any instruments made under the 31 provisions that will not be exempt under Option 2 will most likely always be eligible for an exemption under section 12F of the SLA. While only a small number of instruments are affected, it will be confusing each time these are used to determine their nature, what the requirements should be, and whether or not an exemption applies. There is a higher risk here of misclassifying instruments which could be exempt, and undertaking the RIS and associated consultation process unnecessarily, as it would duplicate a similar process required nationally or by the legislative instrument's authorising Act.

Option 1 will also result in the most efficient use of government resources. Due to the risk outlined above, and given the additional work required to seek exemption to avoid the duplication of processes, Option 2 is less efficient at utilising government resources. Focussing resources on such processes means other priority areas of work may be forgone. Given the wider demands on legal branches within departments and agencies in taking part in a challenging legislative program, any changes that can make the process more efficient, without unjustifiably detracting from other important themes such as accountability and transparency, should be viewed positively.

As Option 1 will achieve clarity, efficiency and effective use of government resources, it has been scored 5 out of 5, while Option 2 has received a score of 4 given that some confusion and efficiency loss is likely to occur regarding the 31 instruments affected.

Minimising unnecessary delay

Option 1 ensures the most efficiency in terms of having legislative instruments made in a timely manner, without delays which are considered unnecessary given the size, nature or impact of those legislative instruments proposed for exemption. As delays are minimised to the maximum extent under this option, it receives a score of 5.

Option 2 would lead to delays for the 31 instruments discussed previously, which are proposed for exemption under the RIS-equivalency and national uniform legislation criteria under Option 1, but will be legislative instruments for the purposes of the SLA under Option 2. While there is arguably some benefit in doing so, the impact would likely be more detrimental overall. Delays also run the risk of, for

example, impacting on State-Commonwealth relations if a particular legislative instrument was delayed by a repetitive RIS and associated consultation process, which impacted on overall implementation timeframes agreed to at a Commonwealth level. Given that the delay impacts of the 31 instruments that are not made exempt under this option could be quite costly, this option has been scored 3 out of 5.

Risk to the parliamentary and public scrutiny processes

Option 1 poses a somewhat greater risk of legislative instruments being made that impose a significant cost or burden, without having undergone adequate analysis and consultation. Parliamentary scrutiny is forgone for exempt legislative instruments, due to forgoing the processes of legislative instruments in Parliament and having SARC scrutinise each one. However, not all instruments need to face such a rigorous process. In fact, there is a converse risk in not making the proposed Regulations. As SARC would be required to scrutinise a much larger number of legislative instruments under the Base Case, without the proposed Regulations SARC's ability to effectively scrutinise each instrument may be compromised.

Therefore, in determining which legislative instruments are proposed to be exempt, care has been taken to ensure that each instrument undergoes an adequate level of scrutiny. Those that are exempt are those which do not require such an intensive assessment as offered through the RIS, consultation, parliamentary and SARC processes, and those that are not exempt are those that should be more intensively assessed.

In summary, it has been determined that the cost to departments or agencies in preparing a RIS and undertaking consultation, and the impact on parliamentary processes and SARC resources, outweighs any benefits in having legislative instruments go through this process before they are made. Nonetheless, due to the large number of instruments being proposed for exemption, the overall risk has been scored negatively, in recognition that these instruments could be used, unforeseeably, in a way that imposes a significant cost or burden without adequate scrutiny. This option has been scored -2.

Option 2 focuses on those instruments which are likely to impose a significant cost or burden, but where an alternative and equally rigorous process is in place to ensure that burden is well justified. Removing those instruments from exemption ensures they face a more rigorous process, reducing the risk slightly that a significant cost or burden will be imposed without scrutiny. This option has been scored -1.

Total score

The multi-criteria analysis demonstrates that Option 1 has the greatest net benefit when scores are assigned to each of the criteria. In total, Option 1 receives a weighted score of 1½ compared to Option 2 which receives a weighted score of 1¼. The scores are significantly in excess of the score of the Base Case of zero. The total scores for Option 1 and Option 2 are quite similar because the options are judged to have only small differences in their impact for each option. Nonetheless, Option 1 receives the highest score and so has been judged to be the preferred option. As well as the score, the reasons that Option 1 is the preferred option are discussed in more detail below.

The total scores are not significantly sensitive to the assigned weightings. When each of the criteria is weighted equally (by one third each), Option 1 scores 2⅔ while Option 2 scores 2. Option 1 continues to receive the highest weighted score until the weighting to the third criterion (ensure an appropriate level of parliamentary and public scrutiny when making legislative instruments) exceeds 60 per cent. Either Option 1 or Option 2 is preferred over the Base Case unless the third criterion is assigned a weighting of over 70 per cent.

As disproportionately high weightings on one criterion are not considered appropriate when seeking an outcome that maximises the net benefit across several criteria, this brief sensitivity analysis shows that Option 1 receives the highest score across a range of appropriate weights.

TABLE 4: MULTI-CRITERIA ANALYSIS
(SCORE BETWEEN -5 AND 5)

CRITERIA	WEIGHTING	BASE CASE	OPTION 1		OPTION 2	
			Assigned score	Weighted score	Assigned score	Weighted score
Benefit criteria						
› Clarity of SLA requirements, efficiency, and effective use of government	¼	0	+5	+1¼	+4	+1
› Minimise unnecessary delays in making or amending legislative instruments	¼	0	+5	+1¼	+3	+¾
Benefit criteria	**½**	**0**	**+5**	**+2½**	**+3½**	**+1¾**
Cost criteria						
› Ensure an appropriate level of parliamentary and public scrutiny when making legislative instruments.	½	0	-2	-1	-1	-½
Cost criteria	**½**	**0**	**-2**	**-1**	**-1**	**-½**
Total	1	0		+1½		+1¼

COMPETITION ASSESSMENT

As this particular proposal relates to the assessment of legislative instruments before introduction, which is largely undertaken by public sector entities, it is unlikely the proposal will have any impact on competition.

Individual legislative instruments may impact competition as they are introduced. The identified legislative instruments proposed for exemption under regulation have been assessed as:

- unlikely to impact competition;
- may have an impact on competition, but this will be considered through a RIS-equivalent or national legislative process;
- may have an impact on competition, but are proposed for exemption on public interest grounds, due to other overriding factors.

The vast majority of proposed instruments are unlikely to have a competition impact; for example, Orders constituting school councils have a low chance of impacting competition. In contrast, some exempt instruments could restrict competition, but are subject to analysis through RIS-equivalent processes; a number of the instruments analysed by the Essential Services Commission fall into this category.

In addition, some instruments may have a competition impact, but are proposed for exemption because of they meet criteria under section 12F or there is an overriding public interest. For example, some instruments regulating use and sale under the *Agricultural and Veterinary Chemicals (Control of Use) Act 1992* could impact on competition, but are proposed for exemption under the urgent public safety or environmental issue category under section 12F because the instruments are used to respond to urgent situations. In another example, the Order regarding architects' insurance cover (and similar instruments for other industries) is proposed for exemption on public interest grounds. While there could be a competition impact from the order, the authors consider that there is a net benefit from having closed and flexible commercial negotiations that seek to guarantee the availability of insurance products that meet industry requirements, including affordability for the industry's members.

For those legislative instruments that are not exempt, and may lead to an impact on competition, assessment of this impact will be made during the preparation of each RIS. The public, including affected businesses, will then have an opportunity to comment through consultation.

THE PREFERRED OPTION AND ITS EFFECT

Prescribed legislative instruments

The preferred option is Option 1, implementing the proposed Regulations. This will have the effect of prescribing 646 legislative instruments as exempt from the SLA requirements, except the requirement to publish new instruments in the Victoria Government Gazette.

The process to identify that these instruments should be exempt from the SLA requirements has taken place over a number of years, which has included extensive consultation with other departments and agencies and public consultation on a draft list of exempt instruments. In each case, instruments are not expected to pose a significant burden, the benefits of meeting the SLA requirements are outweighed by the cost of doing so (that is, there is a net benefit in exempting them), or there are mitigating factors, such a need for an urgent response for public health or safety concerns.

The making of legislative instruments will be monitored from 1 July 2011 to ensure that the legislative instruments being proposed for exemption do not impose a significant, unchecked burden on a sector of the public. As outlined below, the Regulations will be reviewed in four years, and exemptions can be removed as part of any future amendments to the Regulations.

Future amendments will also provide an opportunity to include new provisions to make legislative instruments on the list of exempt instruments, where this is appropriate.

A small number of legislative instruments are being proposed for a short-term exemption; that is, they will not be exempt for the full 10 year life of the regulation. The date that these exemptions cease is specified in the proposed Regulations and Attachment A. In future amendments, and where the exemption is redundant (that is, the full time period of the exemption has passed), these will be removed from the Regulations. Similarly, where provisions to make amendments are repealed in the authorising Acts, these would also be removed in amendments to the Regulations.

The preferred option is shown in the multi-criteria analysis above to be the best option to meet the objectives set out in this RIS. Namely, the proposed Regulations will:

- Clarify which legislative instruments can have an impact that should be analysed by a RIS and should face public consultation;
- Assist instrument-makers in allocating limited government resources efficiently, and ensuring they are not faced with an excessive burden in the monitoring and making of legislative instruments;
- Minimise unnecessary delays in making or amending legislative instruments; and
- Ensure that each legislative instrument faces an appropriate level of scrutiny by Parliament and SARC, based on the expected impact it will have.

Members of the public

By exempting a number of legislative instruments from the RIS process and consultation, the opportunity for public comment or consultation on these instruments may be restricted. However, the exempt legislative instruments are largely limited to those not imposing a significant burden on the public or that have their own public consultation process. Further, the costs of undertaking analysis and consultation would likely outweigh the benefits of such exercises.

Recent amendments to the SLA, which saw the introduction of legislative instruments to the RIS and consultation requirements, have on the whole increased opportunities for public involvement. Previously, any legislative instrument that was not a statutory rule could be made without public consultation, even where it imposed a significant burden on the public, or a sector of the public. These legislative instruments are now subject to the same requirements as statutory rules, which was the main intention of the amendments.

Reasons for rejecting other options

The Base Case and Option 2 are not preferred for the following reasons.

Base Case

As shown above, the Base Case would lead to the imposition of high exemption certificate costs or RIS and associated consultation process costs on instrument-makers from 1 July 2011. The estimated total cost of seeking exemption certificates is between $1.74 million and $1.94 million over 10 years. Fully developed cost estimates are not able to be made for RIS and associated consultation processes that would occur without the proposed Regulations; however, the current average cost for this is $92,800 each time. Because these costs would likely be met within current departmental budgets, an opportunity cost would occur, where departments would have fewer resources to allocate to other, more significant project.

The Base Case would also see up to 500 additional instruments being reviewed by SARC each year. While the intention of this would be to ensure greater Parliamentary scrutiny of all legislative instruments being made by delegates authorised under the relevant Acts, it could also be detrimental. SARC's ability to focus on those legislative instruments that have significant impacts may be compromised by the sheer volume of legislative instruments that would be submitted.

Option 2

Under Option 2 instruments that face a RIS-equivalent process or are part of a national uniform legislation scheme would not be exempt. Because these instruments would always or almost always be granted a case-by-case exemption from the responsible Minister under section 12F, the Department of Premier and Cabinet considers that not exempting them permanently under the proposed Regulations will bring little additional benefit.

These instruments are more likely to impose a significant burden; however, they are not without alternative scrutiny processes that will ensure any significant burden is justified. In the case of RIS equivalency, three criteria were applied. The alternative process must have required the preparation of a policy assessment, independent analysis on that policy assessment and formal public consultation for at least 28 days. For national uniform legislation, an assessment of the costs and benefits should be made.

There is a risk it could be more confusing for instrument-makers to have some legislative instruments not exempted under Regulations, but where an exemption certificate could be sought each time from the responsible Minister instead. It would also require additional resources be allocated to preparing and seeking an exemption. Alternatively, in some cases, it may be assumed the RIS and associated consultation process should be followed, which further increases the resources required. This would be unnecessarily duplicative, and could confuse stakeholders during consultation.

For any legislative instruments being prepared to implement national uniform legislation, any delays in implementing the instrument at a State level could have a detrimental impact on the agreed timeframes for implementation, which would delay the benefits of the proposed policy, and on State-Commonwealth relations generally.

Statement of Regulatory Burden

The changes to the SLA will increase the requirement on departments and agencies, which will be required to prepare a RIS and undertake consultation for a wider range of subordinate legislation. This added burden is largely borne by public departments and agencies, rather than business or private entities.

The preferred option tempers the increased requirements for RIS preparation and consultation, by prescribing upfront a list of exempt legislative instruments. This prevents the costs otherwise imposed on departments or agencies in either seeking an exemption to the requirements or preparing a RIS and consulting where it is not really necessary.

It is not anticipated that any further regulatory burden will be imposed on any person or organisation as a result of the proposed regulations.

Regulatory Change Measurement

The Government has replaced the Victorian Standard Cost Model, which was used to measure cost savings achieved through the Reducing the Regulatory Burden initiative, with an expanded and refined methodology as outlined in the Victorian Regulatory Change Measurement (RCM) manual. The RCM manual took effect from 1 January 2010.

An RCM is required where there is prima facie evidence that the change in regulatory burden is likely to be material. A regulatory change is material if:

- the change in administrative burden experienced by the affected sector is greater than $250,000 per annum; or
- the change in the sum of compliance costs (including administrative and substantive compliance costs) and costs of delays, experienced by the affected population, is greater than $500,000 per annum.

The RIS notes that this proposal does not result in a material change to the regulatory burden, consequently a RCM has not been undertaken.

COMPLIANCE, ENFORCEMENT AND EVALUATION

Compliance issues are expected to be minimal given that the proposed Regulations allow for instrument-makers to be exempt from the RIS process. Compliance with the SLA, including the requirement to conduct a RIS, is the responsibility of relevant portfolio Ministers, and occurs under the oversight of SARC.

SARC is part of the compliance process through its responsibility of examining regulations to ensure that they do not exceed the powers conferred by an Act and do not unduly trespass on rights and freedoms. Amongst other things, SARC ensures that there has been compliance with the practical or procedural requirements of the SLA.

To ensure that the intention of the SLA and the proposed Regulations is achieved, it is intended that the proposed Regulations be evaluated following their implementation. As well as ongoing monitoring and evaluation, a review will be conducted after four years following the implementation of the Regulations, or earlier. This will provide for a stocktake of the Regulations to ensure that they are having the intended impact. This will include ensuring that where exemptions were granted in the overall public interest, that the exemption is still appropriate, as the costs of not having the exemption continue to outweigh the benefits of additional scrutiny.

Evaluation of the proposed Regulations will involve ongoing monitoring of new instruments that are published. Under the SLA, publication in the Victorian Government Gazette must occur for instruments that are both subject to the requirements of the SLA and those that are exempt, either under these Regulations or on a case-by-case basis.

As well as monitoring the number of instruments made, evaluation will involve consideration of how many RISs are prepared. The nature of the instruments for which a RIS is prepared or not will also be considered. Then an assessment will be made as to whether exemptions have been granted as per intended or if improvements to the Regulations are necessary. A particular focus of the monitoring and evaluation, if prescribed as exempt, will be instruments exempted on the basis of being subject to RIS-equivalent processes.

The results of this ongoing review and evaluation process, and the stocktake review, may make it apparent that it is appropriate for the Regulations to be amended from time to time. Such amendments may also be required to prescribe new subordinate instruments (that is, instruments authorised by new or amended provisions of Acts or statutory rules), as well as remove any redundant exemptions, for example where a limited exemption has ceased or where the provision has been repealed in the primary legislation.

As per the SLA, the proposed Regulations will sunset in 10 years. This will provide a further important opportunity for a full review of the instruments and exemptions in the Regulations. It will ensure that the intention of the changes in the SLA and proposed Regulations is achieved in an ongoing manner.

CONSULTATION

In preparing these regulations, the Department of Premier and Cabinet consulted with the government departments responsible for the legislative instruments prescribed in the regulations:

- Department of Human Services
- Department of Health
- Department of Education and Early Childhood Development
- Department of Transport
- Department of Business and Innovation (formerly the Department of Innovation, Industry and Regional Development)
- Department of Planning and Community Development
- Department of Treasury and Finance
- Department of Primary Industries
- Department of Sustainability and Environment
- Department of Justice.

The departments were consulted about the appropriateness of exempting certain legislative instruments from the RIS process and consultation requirements. The preferred option reflects the views of departments about the grounds for legislative instruments which should be prescribed.

The Department of Premier and Cabinet also consulted with the Scrutiny of Acts and Regulations Committee of Parliament.

In 2010, the Department of Premier and Cabinet completed a public consultation on the amendments to the SLA as well as a draft list of legislative instruments under consideration to be prescribed as exempt. Thirteen submissions were received. A detailed discussion of the issues raised, and the previous Government's response to these issues, can be found on the Department of Premier and Cabinet's website (www.dpc.vic.gov.au). Key issues raised in the consultation include: the proposed definition of legislative instrument; consultation requirements; the RIS trigger; the revised definition of 'appreciable burden'; responsibility for issuing and tabling certificates; and the role of SARC.

A number of submissions also raised points about the exemption processes and criteria. A few submitters proposed instruments that should be exempt from the RIS process, while others proposed that some instruments should not be exempt. The Government has considered the instruments highlighted by submitters and changes have been included the lists of instruments in this RIS. This RIS also provides another opportunity for stakeholders to raise any concerns with the proposed lists of instruments prescribed as instruments or for exemption under the proposed Regulations.

Some submitters focused particularly on exemptions on the grounds of RIS equivalency, with some questioning the appropriateness of RIS-equivalent processes. The Government response outlined the equivalency of some specific instruments. The RIS also details the criteria that have been used for RIS-equivalency. This includes a requirement for an independent assessment of the analysis, the need for which was highlighted by some submitters. Moreover, instruments exempt on the grounds of RIS equivalency will be a particular focus of the monitoring and evaluation of the implementation of the Regulations.

As well as previous consultation, further consultation will be conducted as part the process for this RIS. The SLA requires a minimum public consultation of 28 days. This RIS will be available for public consultation from 4 April 2011 till 17 May 2011.

The availability of the RIS will be advertised in the Victoria Government Gazette and a daily newspaper circulating generally throughout Victoria. Members of the public and bodies and offices affected by the regulations will be able to make submissions to the Department of Premier and Cabinet on the proposed regulations. Departments, agencies and relevant statutory office holders will be informed directly about the RIS.

Authorised by the Victorian Government, Melbourne.

ACCESSIBILITY

If you would like to receive this publication in an accessible format, such as large print or audio, please telephone the Subordinate Legislation Amendment Bill Project Team on 9651 5111 or email slaconsultation@dpc.vic.gov.au

This document is also available in PDF and Word format on the Internet at www.dpc.vic.gov.au

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