



Mr Toby Hemming
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Legal, Legislation and Governance Group
1 Treasury Place
EAST MELBOURNE VIC 3000

24 April 2021

Dear Mr Hemming

REGULATORY IMPACT STATEMENT FOR SUBORDINATE LEGISLATION (LEGISLATIVE INSTRUMENTS) REGULATIONS 2021

I would like to thank your staff at the Department of Premier and Cabinet (DPC) for working with the team at Better Regulation Victoria on the preparation of a Regulatory Impact Statement (RIS) for Subordinate Legislation (Legislative Instruments) Regulations 2021 (the proposed Regulations).

As you know, the Commissioner for Better Regulation provides independent advice on the adequacy of analysis provided in all RISs in Victoria. A RIS is deemed to be adequate when it contains analysis that is logical, draws on relevant evidence, is transparent about any assumptions made, and is proportionate to the proposal's expected effects. The RIS also needs to be written clearly so that it can be a suitable basis for public consultation.

I am pleased to advise that the final version of the RIS received by us on 23 April 2021 meets the adequacy requirements set out in the *Subordinate Legislation Act 1994* (the Act).

Background

Regulatory scrutiny is important and involves assessing the impacts (costs and benefits) of legislative and regulatory proposals. The current Regulations, the Subordinate Legislation (Legislative Instrument) Regulations 2011, followed amendments to the Act to expand regulatory scrutiny, including preparing RISs, to cover legislative instruments (statutory rules were already covered). This was to ensure that legislative instruments which have significant impacts on the Victorian community were scrutinised including via preparation of a RIS.

Subordinate legislation comprises instruments or statutory rules made under Acts of Parliament that affect people's rights or interests. Regulatory scrutiny requirements for subordinate legislation, including preparing RISs, are outlined in the Act.

The Regulations categorise instruments for the purposes of the Act. The Regulations prescribe instruments made under certain provisions in a range of Acts and statutory rules as:

- not legislative instruments and exempt from regulatory scrutiny requirements (in Schedule 1);
- legislative instruments and subject to regulatory scrutiny requirements (in Schedule 2); and
- legislative instruments and exempt from regulatory scrutiny requirements (in Schedule 3, and the body of the Regulations).

The Act and its Guidelines explain that a legislative instrument is a type of subordinate legislation that is of ‘legislative character’ and is not one of several specific types of instruments. An instrument will generally be considered to have legislative character if it contains “mandatory requirements with general application to undertake certain action(s), often accompanied by penalties or sanctions for non-compliance “.

The Act sets out specific processes and requirements for making subordinate legislation including legislative instruments. These processes include preparing a RIS, publishing a notice in the Victoria Government Gazette, tabling in Parliament and review by the Scrutiny of Acts and Regulations Committee (SARC). The schedule an instrument falls under determines what processes must be followed. Instruments made under provisions on Schedule 3 and in the main body of the Regulations are automatically exempt from preparing a RIS, tabling in Parliament and review by SARC. These instruments are the focus of analysis in this RIS.

The Office of General Counsel (OGC) in DPC manages the Regulations. Victorian Government departments and agencies can request changes be made to the Regulations including that a provision is added to a schedule or removed from a schedule. OGC works with the Office of the Chief Parliamentary Counsel to assess requests. DPC generally updates the Regulations annually to make changes departments and agencies request.

Problem and objectives

DPC explains in the RIS that if the current Regulations are allowed to expire, instruments made under roughly 600 provisions that are automatically exempt from requirements in the Act would no longer be exempt and additional costs would be incurred for limited benefits.

DPC explains that these provisions were placed on Schedule 3 or the body of the Regulations because the instruments made under the provisions would be likely to receive a Ministerial exemption from preparing a RIS under the Act in any case. This is generally because the instruments:

- are not expected to have a significant burden on the public; or
- face appropriate scrutiny and consultation as part of another process; or
- are not made for more than 12 months and respond to an urgent public emergency, public safety or environmental issue.

In addition, DPC explains that some provisions are automatically exempt because the costs of subjecting those instruments to additional scrutiny outweighs the benefits.

DPC explains that the objectives of the Proposed Regulations are to:

- assist Victorian Government departments and agencies to allocate their resources efficiently and ensure they are not subject to excessive burden in making or amending legislative instruments;
- minimise unnecessary delays in making or amending legislative instruments; and
- ensure legislative instruments are identifiable, publicly available and an appropriate level of public and parliamentary scrutiny is applied to the legislative instruments.

Options analysis

DPCs analyses two options in the RIS against the base case of allowing the current Regulations to expire:

- Option 1 proposes to prescribe instruments made under 593 provisions as automatically exempt from certain requirements of the Act, for the reasons noted above; and
- Option 2 proposes a similar but narrower set of provisions to be automatically exempt (506 provisions).

The following categories of legislative instruments would be exempt under Option 1 but not exempt under Option 2 (a total of 87 provisions):

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

DPC assesses both options using a multi-criteria analysis against the three objectives noted above.

DPC estimates that the net avoided cost under both options to Victorian Government departments and agencies is about \$800,000 per year, comprising:

- the avoided cost of 5 RISs being prepared per year (about \$600,000); plus
- the avoided costs of preparing about 300 Ministerial exemption certificates of about \$300,000 per year; less
- the additional costs of preparing and updating the Regulations, averaging about \$100,000 per year over the life of the Regulations.

Option 1 avoids slightly higher costs as it automatically exempts more provisions.

DPC notes that it is difficult to precisely estimate the impacts of the Options, so has provided upper and lower bound estimates of the impact of the options. The lower bound estimates of net avoided costs is about \$500,000 for both options, while the upper bound estimate of net avoided costs is about \$2.5 million for Option 1 and \$2.4 million for Option 2.

DPC explains that Option 1 is preferred over Option 2 because:

- Option 1 would lead to a slightly more efficient use of Government resources (reflected in slightly higher avoided costs). Option 1 would also reduce unnecessary delays more than Option 2 because an additional 87 provisions would be automatically exempted.

- While Option 1 reduces scrutiny more than Option 2, additional scrutiny under Option 2 would be of limited value because these instruments already undergo alternative scrutiny process and would very likely qualify for a Ministerial exemption from preparing a RIS anyway.

Implementation and Evaluation

In the RIS, DPC notes that compliance with the Regulations is unlikely to be an issue given the Regulations provide exemptions from requirements under the Act. DPC explains that implementation is likely to be relatively straightforward given DPC's process for reviewing and annually updating the Regulations will continue and the proposed Regulations are similar to the current Regulations.

DPC notes that it will continue to evaluate requests for provisions to be added to or deleted from the Regulations. It notes that the proposed Regulations will sunset in 10 years, which will provide an opportunity to evaluate all the provisions and whether they are on the appropriate schedule.

Should you wish to discuss any issues raised in this letter, please do not hesitate to contact my office on 03 7005 9772.

Yours sincerely



Anna Cronin
Commissioner for Better Regulation