

Appendix 6

Committee Practice Notes

Exemptions

- **Dating Certificates.** The Subcommittee has occasionally been presented with undated exemption certificates. The Subcommittee expects all certificates to be dated.
- **Reasons for Exemption.** The Subcommittee has occasionally received regulations or legislative instruments exempted under section 9 with certificates of exemption which fail to adequately explain the reasons for granting the exemption or with reasons for granting the exemption contained in the Explanatory Memorandum. It should be noted that it is a requirement of section 8(3) of the *Subordinate Legislation Act 1994* (Vic) that certificates of exemption ‘specify the reasons for the exemption’. The Subcommittee expects all exemption certificates to contain adequate explanations of the reasons for granting the exemptions.
- **Extension of Regulations for Periods up to 12 months.** Regulations expire 10 years after they have been made. The Subcommittee has been presented with a number of regulations made under sections 8(1)(e)(iii) and 5A(1) extending regulations due to expire for periods up to 12 months. Before an extension of time can be granted, the Minister must certify that due to ‘special circumstances’ there is insufficient time available to comply with the formal regulation-making requirements of the *Subordinate Legislation Act 1994*. The Subcommittee expects details of the ‘special circumstances’ to be contained in the section 5A(1) certificate itself as required by the *Subordinate Legislation Act 1994*. Please see additional general comments below.
- **Using Appropriate Exemption Categories.** Department and agency officers need to be careful when determining which category to use when exempting regulations or legislative instruments from the Regulation Impact Statement process.
- **Typographical Errors.** Department and agency officers need to be careful when preparing certificates to ensure that they do not contain typographical errors.

Extension of time

The Subcommittee is often presented with regulations which require an extension of time for a period of twelve months. Such regulations are accompanied by a section 5A(1) certificate of special circumstances which outlines the particular reasons for the extension. It is difficult for the Subcommittee to know whether any particular regulation has been accompanied by a previous extension of time certificate. Ongoing extensions of time in respect of a particular regulation are clearly matters upon which the Subcommittee would make adverse comment.

The Subcommittee expects that in the event that a second or subsequent extensions of time are sought for a regulation (in addition to an initial request), the Minister inform it that this is the case.

Explanatory Memoranda

The Subcommittee expects Explanatory Memoranda to comply with the requirements contained in Paragraph 189 of the Premier's Guidelines. An Explanatory Memorandum must contain: –

- A brief outline of each provision;
- An explanation of the changes effected by each provision;
- A statement of the reasons for making the rule;
- Where applicable, the reasons why no regulatory impact statement was prepared; and
- a statement as to whether consultation has taken place, and if it has not taken place, an explanation as to why a decision was made not to consult.

Fee Increases: 8(1)(D) and 8(2)

Regulations governing fee increases are made under section 8(1)(d) of the *Subordinate Legislation Act 1994* (Vic). For each financial year a percentage increase is set by the Treasurer. The Treasurer notifies the Subcommittee in writing of the relevant percentage increase.

A regulation may increase a number of fees, with some individual fee increases falling outside the rate set by the Treasurer. However when the total average of fee increases for that regulation is calculated, it falls within the rate fixed by the Treasurer. This practice is referred to as the 'basket approach'. Paragraph 103 of the Premier's Guidelines¹¹³ provides that:-

103. A statutory rule can set a package of fees. This is often known as a 'basket approach'. Where there is to be an increase in one or more individual fees within a basket of fees that exceeds the Treasurer's annual rate by a small amount, but the increase to the basket of fees as a whole is within that rate, a RIS process will not need to be undertaken if the responsible Minister considers that those individual fee increases will not have a significant impact on the community and business.

Section 8(2) of the *Subordinate Legislation Act 1994* (Vic) validates the rounding up of fee increases to the nearest whole dollar. Sometimes the total average increase may be greater than that set by the Treasurer but may be validated on the basis that there has been rounding up to the nearest whole dollar. The Subcommittee may only approve such increases where the extra amount can be considered trifling when compared to the whole fee. Where the amount is significant in proportion to the whole fee, the Subcommittee may request the Minister to reconsider the increase.

The Subcommittee is of the view that fee increases and the Guidelines need to be read in a commonsense manner. Clearly, it is often sensible to introduce a 'basket' package of fees. It is a more efficient and streamlined manner of introducing a large number of routine fee increases. In this instance monetary increases were extremely small.

The Subcommittee will examine each regulation carefully. The Subcommittee is conscious of its statutory obligations. The Subcommittee's view is that it is a matter of balance. The 'basket' of fees in its entirety must not exceed the Treasurer's approved annual rate. However if, in a package of a number of fees, two or three slightly exceed the Treasurer's annual rate then that may not necessarily be an immediate cause for concern. Rather, the Subcommittee will examine each fee increase, the monetary amount and what the fee is for. Each Regulation will be examined on its merits and in context.

¹¹³ Paragraph 103, *Premier's Guidelines*, July 2016

The Subcommittee will continue to carefully scrutinise the Regulations and the Guidelines.

The preparation of a table showing new and old fees and including an indication of the percentage increase or decrease is of great assistance to the Subcommittee. The Subcommittee provides the following as an example:

Description	Current Fee	Proposed Fee	% Increase
Application for	\$100.00	\$105.00	5.0
Application for ...	\$320.00	\$325.00	1.6

Independent Advice Certificates: 10(3)

Under section 10(3) of the *Subordinate Legislation Act 1994* (Vic) a Minister must ensure that independent advice as to the adequacy of a Regulation Impact Statement is obtained. The provision of that independent advice assists the Subcommittee in its review of the regulations.

Legislative Instruments outside the Subordinate Legislation Act 1994

The Subcommittee plays a vital role in ensuring that rights are adequately protected. It cannot do this if provisions are incorporated in legislative instruments outside its scrutiny. The Subcommittee prefers department and agency officers not to use Guidelines and Codes of Practice. Where Guidelines and Codes of Practice are used the Subcommittee would like those Guidelines and Codes of Practice to be published and available to the public at the same time as the regulation commences operation.

Provision of Documentation to Regulation Review Subcommittee

The Subcommittee needs to receive Explanatory Memoranda, all certificates, Regulation Impact Statements and comments and submissions made in relation to Regulation Impact Statements within 10 days after a regulation or legislative instrument has been made. The Subcommittee has a limited time within which to review regulations. If the Committee wants to move for disallowance of a regulation it must do so within 18 sitting days of that regulation or legislative instrument being tabled in Parliament. Prior to the Committee moving a motion for disallowance, the Subcommittee corresponds and negotiates with the particular Minister. The Subcommittee needs sufficient time for this process to take place. The Subcommittee notes that pursuant to sections 15A and 16C of the Act, documentation must be forwarded to the Committee within 10 days of its making.¹¹⁴

Paragraph 201 of the Premier's Guidelines also provides that: -

201. Sections 15A (statutory rules) and 16C (legislative instruments) of the Act require new statutory rules and legislative instruments to be sent to SARC. The Act also specifies documents which must accompany the new statutory rule or legislative instrument when sent to SARC.¹¹⁵

¹¹⁴ See sections 15A and 16C of the Act.

¹¹⁵ Paragraph 201, *Premier's Guidelines*, July 2016.

Recommendations

The Subcommittee notes that some regulations are made on the recommendation of a Minister or some other authorised body. If the Subcommittee is provided with a copy of the recommendation, it can certify that the regulations have been validly made in accordance with that recommendation. The Subcommittee would appreciate receiving copies of all recommendations.

Legislative Instruments

(1) Scrutiny – Timing Provision of Documents

It is important that the Committee receives the material in sufficient time to scrutinise it prior to relevant events. The Committee is supportive of initiatives by any agency to inform applicants for exemptions of the necessary lead time to process such applications. The Committee notes that a time period of three months prior to an event, in line with other government agency websites may be appropriate. The Committee therefore recommends that all material be forwarded to it in sufficient time so that it can perform its scrutiny role in accordance with the Act.

(2) Additional documents must be sent to SARC

Paragraphs 201-203 of the Premier's Guidelines are extracted¹¹⁶:-

201. *Sections 15A (statutory rules) and 16C (legislative instruments) of the Act require new statutory rules and legislative instruments to be sent to SARC. The Act also specifies documents which must accompany the new statutory rule or legislative instrument when sent to SARC.*

202. *Accompanying documents required by the Act:*

- *any applicable document required to be laid before Parliament (see Part 3, Division 5 of these Guidelines);*
- *if a Premier's exemption certificate has been issued – the reasons given by the responsible Minister to the Premier as to why the public interest requires that the proposed statutory rule or legislative instrument be made without preparing a RIS; and*
- *if a RIS has been prepared – the RIS and a copy of all comments and submissions received.*

203. *The following additional documents must also be sent to SARC:*

- *a copy of the CBR's independent assessment of any RIS (see Part 3, Division 3 of these Guidelines);*
- *copies of any explanatory memoranda;*
- *copies of any notices published in the Government Gazette, newspapers or other publications advertising a RIS; and*
- *copies of any notices advising of the decision to make or not make a proposed statutory rule or legislative instrument.*

¹¹⁶ Paragraphs 201-203, *Premier's Guidelines*, July 2016. CBR refers to the Commissioner for Better Regulation.