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Legislative Instruments Act 2003

On 17 December 2003, the *Legislative Instruments Act 2003* ('the Act') received Royal Assent. The Act will significantly enhance the democratic quality of government at the federal level by:

- ensuring that the text of delegated legislation and explanatory material is authoritatively stored and available to people affected by it and that the legislation is easy for them to understand and use, and
- encouraging consultation with experts and people likely to be affected by proposed delegated legislation before it is made, particularly where there is likely to be an effect on business or a restriction of competition.

The genesis for the Act is the Administrative Review Council's 1992 report *Rule Making by Commonwealth Agencies* (Report No. 35). The Report recommended improving the quality and accessibility of Commonwealth delegated legislation made under Commonwealth Acts. The Act has had a difficult history, previous Bills having been introduced in 1994, 1996 and 1998 without securing passage through the Parliament, despite broad support for the underlying principles.

The short title and commencement provisions of the Act, and any other provisions not specifically mentioned in the commencement provision, commence on Royal Assent. The substantive provisions of the Act (sections 3–62) will commence, in accordance with section 2, either by Proclamation on 1 January 2004 or 1 July 2004, or by default on 1 January 2005. We understand that the Government does not intend the Act to commence on or before 1 July 2004. On this basis, the Act will commence on 1 January 2005 ('the commencing day').

This Briefing:

- outlines the measures in the Act dealing with the making, registration, Parliamentary scrutiny and sunsetting of 'legislative instruments'
- summarises the new responsibilities of rule-makers, and
- summarises the new responsibilities of the Secretary of the Attorney-General's Department.

What Does the Act Do?

The Act establishes a comprehensive regime for the registration, tabling, Parliamentary scrutiny and sunsetting (automatic repeal) of legislative instruments. The Act also establishes an authoritative, complete and accessible register of those instruments, including compilations (the electronic equivalent of up-to-date reprints) and explanatory statements. A legislative instrument must be registered in order to be enforceable, and there is a process to ensure registration of instruments made before the commencing day.

The Act replaces provisions of the *Acts Interpretation Act 1901* and the *Statutory Rules Publication Act 1903* in so far as they dealt with

such matters in relation to regulations and certain other instruments that are now legislative instruments. The Acts Interpretation Act will continue to have tabling and disallowance provisions that will operate in relation to some instruments that are not legislative instruments for the purposes of the Act (the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* which was also assented to on 17 December 2003 deals with such matters).

The Act also applies to some legislative instruments previously subject to publication requirements otherwise than under the Acts Interpretation Act, and others that were not subject to publication or Parliamentary scrutiny requirements, or both. These include some significant instruments with far-reaching legal, social and financial consequences, such as determinations made under many different Acts of amounts payable to the States and Territories for various purposes.

The Act also includes measures designed to improve the quality of legislative instruments, particularly those currently drafted 'in-house' by various Australian Government departments and agencies.

Note: The Act does not affect a delegate's power to make legislative instruments, or the way in which an instrument is actually made.

What Aspects of the Legislative Process Are Affected?

The Act:

- establishes the Federal Register of Legislative Instruments (which will be publicly accessible via the Internet and will improve public access to and understanding of the law)
- encourages rule-makers to consult with experts and people likely to be affected by proposed legislative instruments, in particular where instruments are likely to affect business or restrict competition
- obliges the Secretary of the Attorney-General's Department to cause steps to be taken to promote the quality of legislative instruments
- provides for improved mechanisms for Parliamentary scrutiny and disallowance of registered instruments
- provides for sunsetting of most legislative instruments after a period of approximately 10 years.

Note: The commencement and scope for retrospective operation of legislative instruments (the latter by reference to registration) is dealt with in section 12 of the Act. Further, sections 13–15 contain general rules for construction of, incorporation by reference within, and the effect of repeal of, legislative instruments.

What Is a Legislative Instrument?

Section 5(1) of the Act defines a legislative instrument, subject to sections 6, 7 and 9, as:

> an instrument in writing: (a) that is of a legislative character; and (b) that is or was made in the exercise of a power delegated by the Parliament.

Section 5(2) provides that, without limiting the generality of section 5(1), an instrument is '*taken to be of a legislative character*' if:

(a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and

(b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

The Explanatory Memorandum to the Legislative Instruments Bill 2003 (the Bill) provides the following example:

> … an instrument that lays down a binding rule (which would be enforced by a court in an appropriate case) would (be) of legislative character because it is determining the law. Whereas an instrument that sets out an administrative decision (for example, that a particular person is not entitled to a particular visa) is not of a legislative character, because it is applying the law in a particular case and not determining what that law is.

Section 5(3) is important in resolving uncertainty in that it provides that a registered instrument is taken to be a legislative instrument despite anything else in the Act.

Section 8 defines what is meant by 'a power delegated by the Parliament' (it includes a power sub-delegated with Parliamentary authority).

Section 6 sets out, without limiting the generality of section 5(1), some examples of instruments that *are*, subject to sections 7 and 9, *legislative instruments*. These include:

- regulations
- statutory rules currently in force
- other instruments that are disallowable under the current system, including those declared to be disallowable for the purposes of section 46A of the Acts Interpretation Act
- proclamations, whether made before or on or after the commencing day.

What Is Not a Legislative Instrument?

In addition to instruments that would not be covered by the Act because they do not fall within section 5 (for example, because they are instruments of appointment or delegation or comprise non-binding guidelines), section 7 deals expressly with instruments that are *not legislative instruments*.

The Explanatory Memorandum to the Bill states that the reasons for exemption are either to confirm that an instrument is not legislative in certain areas of doubt, or because of strong countervailing policy considerations in relation to some instruments that are legislative.

Section 7(1)(a) provides that an instrument 'is not a legislative instrument for the purposes of this Act if … it is included in the table below'. The table contains 24 items describing instruments of specified kinds or made under specified laws. Item 24 is designed to provide scope as follows for further additions to the table: 'Instruments that are prescribed by the regulations for the purposes of this table'. As regulations are legislative instruments, any additions to the table will be subject to Parliamentary scrutiny and disallowance under the Act.

Examples of the kinds of instruments that are not legislative instruments include:

- certain instruments relating to aviation security
- certain ministerial directions to Commonwealth companies and authorities
- certain instruments made under the *Corporations Act 2001*, for example, that exempt specified persons from the rules under the Act
- determinations under section 273 of the *Customs Act 1901*
- instructions under section 9A of the *Defence Act 1903* and determinations under sections 58B and 58H of that Act
- machinery of government changes under section 72 of the *Public Service Act 1999*
- certain instruments under the *Superannuation Industry (Supervision) Act 1993*, for example, that exempt particular persons from the rules under that Act

- public and private rulings under the *Taxation Administration Act 1953*
- awards, agreements and orders made by the Australian Industrial Relations Commission, under the *Workplace Relations Act 1996*
- instruments that comprise, in their entirety, directions to delegates
- an instrument declared by its enabling legislation not to be a legislative instrument
- an instrument certified by the Attorney-General *not* to be a legislative instrument (see below)
- rules of court but they are to be treated as if they were legislative instruments under their enabling legislation
- explanatory statements or compilations relating to legislative instruments (the definition of 'instrument' in section 4(1) of the Act expressly excludes them).

It may not always be clear whether such instruments would be legislative instruments if not included in the table. Section 7(2) provides that inclusion does not imply that an instrument would be a legislative instrument if not included.

Resolving whether an Instrument Is a Legislative Instrument

As it may not always be clear whether an instrument is a legislative instrument, section 10 empowers the Attorney-General to determine this issue. The Attorney-General does this by certifying, at the application of a rule-maker, whether the instrument is or is not a legislative instrument and thereafter providing a copy of the certificate to the applicant. The Attorney-General's certificate, which by virtue of section 10(6) is a legislative instrument required to be registered, is conclusive of the question for all purposes, subject only to reconsideration by the Attorney-General, following judicial review, in accordance with section 11.

Who Is a Rule Maker?

Section 4(3) of the Act specifies what is meant by references in the Act to a 'rule-maker'. Unless the contrary intention appears, this is, put broadly: a reference to the person authorised to make the legislative instrument, where that person is not the Governor-General; a reference to the responsible Minister, where that person is the Governor-General, except in section 13; and a reference to the Governor-General in section 13, where that person is the Governor-General.

Section 13 deals with construction of legislative instruments, not the duties and functions of rule-makers. So, a reference to a 'rule-maker' in section 13 is to be read as a reference to whichever person (including the Governor-General) made the instrument.

Drafting Standards (Part 2)

Under section 16, the Secretary of the Attorney-General's Department must cause steps to be taken to promote the legal effectiveness, clarity, and intelligibility to anticipated users, of legislative instruments. This is to be done to 'encourage high standards in the drafting of legislative instruments'.

Section 16(2) refers to some of the steps that may be taken in this regard, which include, put broadly, drafting, supervising the drafting of, and providing advice and training in relation to the drafting of, legislative instruments. Staff performing duties in the Attorney-General's Department may also be seconded to, and drafting precedents may be provided to, other agencies for this purpose.

The Secretary must also cause steps to be taken to prevent the inappropriate use of gender-specific language in legislative instruments and to provide advice to rule-makers about, and notify Parliament, where this has occurred in legislative instruments that have already been made.

Note: Under section 58, the Secretary is able to delegate to an APS employee who is performing duty in the Department any of the powers or functions of the Secretary under the Act, other than the power of delegation.

Consultation before Making Legislative Instruments (Part 3)

The Act encourages appropriate consultation before legislative instruments are made without being prescriptive as to how this is done. It also specifies circumstances where consultation may be inappropriate or unnecessary. The consultation provisions vary considerably from those that were included in the Bills that failed to secure passage through the Parliament.

Importantly, a failure to consult does not affect the validity or enforceability of a legislative instrument (section 19). However, the relevant explanatory statement will need to include a description of consultation undertaken, or if there was no consultation, an explanation why. Failure to consult may lead to criticism in the course of Parliamentary scrutiny, or disallowance, or both.

Section 17 provides that before a legislative instrument is made, the rule-maker 'must be satisfied that any consultation that is considered by the rule-maker to be appropriate and that is reasonably practicable to undertake, has been undertaken'. This applies, in particular, where the proposed instrument is likely to have 'a direct, or a substantial indirect, effect on business' or to restrict competition.

Section 17 also provides that in determining whether any consultation that was undertaken is appropriate, the rule-maker may have regard, among other relevant matters, to the extent to which the consultation drew on the knowledge of relevant experts and ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.

Finally, it indicates that consultation could involve notification of bodies, or organisations representative of persons, likely to be affected by the proposed instrument, and inviting submissions from them.

Section 18 provides that, despite section 17, the nature of an instrument may be such that consultation may be unnecessary or inappropriate, and sets out some examples where this may be the case. In short, these are instruments:

- that are of a 'minor or machinery nature' that do not substantially alter existing arrangements
- required 'as a matter of urgency'
- that give effect to certain Budget-related decisions
- that are required 'because of an issue of national security'
- in relation to which appropriate consultation has already been undertaken by someone other than the rule-maker
- that relate to employment, or
- that relate to the management of or service of members of the Australian Defence Force.

The Federal Register of Legislative Instruments (Part 4)

THE REGISTER The Secretary of the Attorney-General's Department is responsible for maintaining a register, to be known as the Federal Register of Legislative Instruments, comprising a database of all legislative instruments, all explanatory statements in relation to legislative instruments made on or after the commencing day, and all compilations in relation to legislative instruments, that have been registered under the Act. The Secretary is obliged to cause steps to be taken to ensure that legislative instruments that are registered are available to the public.

The Register is the 'centrepiece' of the new arrangements under the Act. The Secretary is obliged to cause instruments, explanatory statements and compilations to be registered, as discussed below.

Under section 21, the Register is to be kept in the manner (if any) prescribed by regulations. The regulations may require that a person required to lodge a legislative instrument for registration must also lodge in a specified form other related information, 'to ensure that the Register is as useful as possible to persons wishing to use it' (section 21(2)).

Section 22 is a significant provision. It deals with the status of the Register and judicial notice of legislative instruments and compilations. In particular, the Register is, for all purposes, to be taken to be a complete and accurate record of all legislative instruments that are included in it, and in any proceedings, proof is not required about the provisions and coming into operation of a legislative instrument as it appears in the Register.

Further, a compilation in the Register relating to a particular legislative instrument is to be taken, unless the contrary is proved, to be a complete and accurate record of that legislative instrument as amended and in force at the date specified in the compilation. The Explanatory Memorandum to the Bill explains that compilations are thus given a lesser standard of authority than legislative instruments.

Section 23 deals with rectification (in relation to errors or omissions) of the Register by way of alteration by the Secretary in certain circumstances. It also provides, put broadly, that rectification does not affect rights accrued and obligations incurred before the alteration was made.

REGISTRATION OF INSTRUMENTS – PROSPECTIVE

Under section 24, legislative instruments made on or after the commencing day, or to be treated as having been made on the commencing day, are required to be registered. Certain instruments are treated as having been made on the commencing day if they were made before that day and were required to be published, or to have notice of their making published, in the *Gazette*, but the publication did not occur before that day.

Lodgment of instruments

A rule-maker must lodge such an instrument in electronic form with the Attorney-General's Department for registration 'as soon as practicable after making' the instrument. Also at that time, or as soon as practicable thereafter, the rule-maker must lodge the original (e.g., hard copy) legislative instrument or other specified evidence of the text of that instrument.

Lodgment of explanatory statements

If a legislative instrument is lodged for registration, the rule-maker must also lodge in electronic form for registration, at the same time, or as soon as practicable thereafter, the explanatory statement that relates to that instrument.

An explanatory statement is defined in section 4 as a statement prepared by the rule-maker that explains the purpose and operation of the instrument, contains a description of any documents incorporated by reference and how they may be obtained, contains a description of any consultation undertaken before the instrument was made, or an explanation of why no consultation was undertaken, and such other information as is prescribed.

Under section 26(2), failure by the rule-maker to lodge an explanatory statement in relation to an instrument does not affect the validity or enforceability of the instrument.

REGISTRATION OF INSTRUMENTS – 'BACKCAPTURING'

For an instrument already included in the electronic database established by the Attorney-General's Department in anticipation of the Act, the 'early backcapturing' discussed in section 36 of the Act will apply. The effect of this provision is that the database will become, on the commencing day, the

Federal Register of Legislative Instruments, and the instrument will be taken to have been registered on that day (the same applies in relation to the text of compilations in relation to instruments).

Otherwise, under section 28, legislative instruments made before the commencing day and in force must be registered.

Section 29(1) deals with the lodgment of legislative instruments made before the commencing day. The rules it establishes are subject to the regulations. If such an instrument is made during a period specified in the table set out in the section, the rule-maker must lodge the instrument for registration in electronic form with the Department before the relevant day set out in the table.

The day specified is the first day of the 12th month after the commencing day for instruments made in the period of 5 years before the commencing day, and the first day of the 36th month after the commencing day for instruments made before then.

However, where an unregistered legislative instrument amends another unregistered legislative instrument, the other instrument, and any other unregistered instruments that amend it, must be lodged for registration at the same time as the first-mentioned instrument, regardless of the time limits that might otherwise apply.

So, as the Explanatory Memorandum for the Bill explains:

> … if instrument A was made in the period three years before the commencing day, it must be lodged by the first day of the 12th month after the commencing day. ... However, if instrument A amended instrument B, instrument B would have to be lodged for registration at the same time as instrument A. Any other instrument that has also amended instrument B also has to be lodged at that time.

Section 29(2) deals with the situation in which a legislative instrument made on or after the commencing day amends an unregistered legislative instrument made before that day. The rules it establishes are subject to the regulations.

The rule-maker must lodge the instrument to be amended, and any other unregistered instruments that amend it, for registration in electronic form with the Department before a day determined in a specified manner (the first occurring of two possible days). The first is the day that would have applied to the instrument to be amended under the table (assuming it had not been amended); the second is the day 28 days, or such longer period as the regulations provide, after the registration of the amending instrument.

At the same time, or as soon as practicable after, lodging the instrument or instruments referred to above, the rule-maker must also lodge the original (e.g., hard copy), or other specified evidence of the text, of the instrument or instruments.

EFFECT OF REGISTRATION

Section 31(1) is very important in relation to legislative instruments that are required to be registered. This is because it provides that a legislative instrument made, in effect, on or after the commencing day, 'is not enforceable by or against the Commonwealth, or by or against any other person or body, unless the instrument is registered'.

Section 4 relevantly defines 'register' to mean 'recording the instrument, explanatory statement or compilation in the Register in electronic form'. Under section 31(2), the Secretary is empowered to publish instruments in full in the *Gazette* where, because of technical difficulties, the instrument is temporarily unable to be registered. Where this is done, the Act has effect as if the instrument had been registered at that time. Once the instrument is able to be entered in the Register, the Secretary is obliged to do so, along with an annotation as to the

day and time at which the instrument is taken to have been registered. These provisions should enable instruments to be registered promptly, where necessary, so as to become enforceable.

Section 32 provides for the effect of failure to lodge for registration (in accordance with section 29) an instrument made before the commencing day. On the day after the last day for lodgment, the instrument 'ceases to be enforceable by or against the Commonwealth, or by or against any other person or body' and 'is taken to have been repealed by this Act'.

If an instrument is connected with the collection of revenue and the Attorney-General certifies in writing that he or she is satisfied as to certain matters (relating to the relevant person being unaware of the requirement to register) and the instrument is lodged within 28 days after the relevant person becomes aware of that requirement, the instrument is taken to have continued in force after the last day for lodgment.

COMPILATIONS Where a legislative instrument is amended by an Act or another legislative instrument, section 33(1) requires the Secretary to cause to be registered a compilation, in electronic form, in relation to the amended instrument, as soon as practicable after the amendments commence.

Section 33(2) effectively requires that the compilation represent the state of the law, so that if a legislative instrument is amended by another such instrument that is disallowed, the Register should be annotated to explain either why no compilation is now necessary, or why the compilation as registered has ceased to represent the state of the law (and to cause to be registered a new compilation taking account of the disallowance).

Section 33(3) provides that the above provisions do not require the registration of a compilation in relation to an instrument until the instrument itself is registered.

Under section 34, the Secretary may, by written notice to rule-makers in various circumstances, require rule-makers to lodge, in electronic form and as soon as practicable after specified events, compilations in relation to legislative instruments that, in effect, represent the state of the law.

Section 35 specifies the information that must be included in a registered compilation. This includes matters relating to the legislative history of the instrument, the date the compilation was prepared and such further information as is specified in the regulations.

Parliamentary Scrutiny of Legislative Instruments (Part 5)

Section 37 provides that the purpose of this Part is 'to facilitate the scrutiny by the Parliament of registered legislative instruments and to set out the circumstances and manner in which such instruments, or provisions of such instruments, may be disallowed, as well as the consequences of such disallowance'.

TABLING Under the Act there are enhanced tabling requirements in that 'all registered legislative instruments will be required to be tabled' (the Second Reading Speech for the Bill).

Under section 38, the Attorney-General's Department must arrange for a copy of each registered legislative instrument that was made on or after the commencing day to be delivered to each House of the Parliament to be laid before each House within 6 sitting days of that House after the registration of the instrument (even if the legislation authorising the making of the legislative instrument was made before the commencing day or provides that the instrument is not disallowable). The regulations may provide for electronic delivery (section 40). However, the Government has accepted the recommendation of the Senate Standing

Committee on Regulations and Ordinances that the Attorney-General's Department not make provision for this at present (rather, the current requirement to provide hard copies for tabling will continue).

Under section 38(3), failure to comply with this requirement means that the instrument 'ceases to have effect immediately after the last day for it to be so laid'.

Section 39 provides that if a rule-maker lodges an explanatory statement relating to a legislative instrument before that instrument is delivered to each House of the Parliament to be laid before it, the Department must also arrange for the delivery to each House of a copy of the explanatory statement.

If a rule-maker fails to lodge an explanatory statement with the Department before the Department arranges for delivery of the relevant instrument to a House of the Parliament, the rule-maker must as soon as possible, deliver to that House a copy of the explanatory statement, along with a statement explaining why it was not provided to the Department in time.

Under section 41, a House of the Parliament may, at any time while a legislative instrument is subject to disallowance, require any document incorporated by reference in the instrument to be made available, as specified by the House, for inspection by that House.

DISALLOWANCE The remainder of Part 5 deals with disallowance of legislative instruments and related matters. Section 42 provides for the disallowance, by either House of the Parliament, of legislative instruments. These rules are broadly the same as they were in relation to regulations under the Acts Interpretation Act (see the diagram below), subject to the following comments.

All legislative instruments are, by default (but with specified exceptions), disallowable, whereas under section 46A of the Acts Interpretation Act, instruments other than regulations were disallowable only if the enabling legislation so provided.

Clause 43 of the Bill was not enacted. It would have provided for the making by either House, and the consequences of, a resolution deferring consideration of a disallowance motion. Clause 43 and other references to it were removed from the Bill during its passage through the Parliament. However, section 42 still refers to such deferral resolutions. A possible consequence of this is that there may be an exception, if such a resolution were to be passed, to the general rule that if a disallowance motion is not disposed of within 15 sitting days, the relevant instrument ceases at that time to have effect. This appears to be unlikely to occur in practice.

Section 44 contains a table that has 44 items which describe instruments that are *not* subject to disallowance. In relation to these instruments, section 44(2) provides that section 42 does not apply, unless the instruments are subject to disallowance under their enabling legislation or some other Act. Item 44 of the table is designed to provide scope as follows for further additions to the table: 'Instruments that are prescribed by the regulations for the purposes of this table'. As regulations are legislative instruments, any additions to the table will be subject to Parliamentary scrutiny and disallowance under the Act. Examples of these kinds of instruments include:

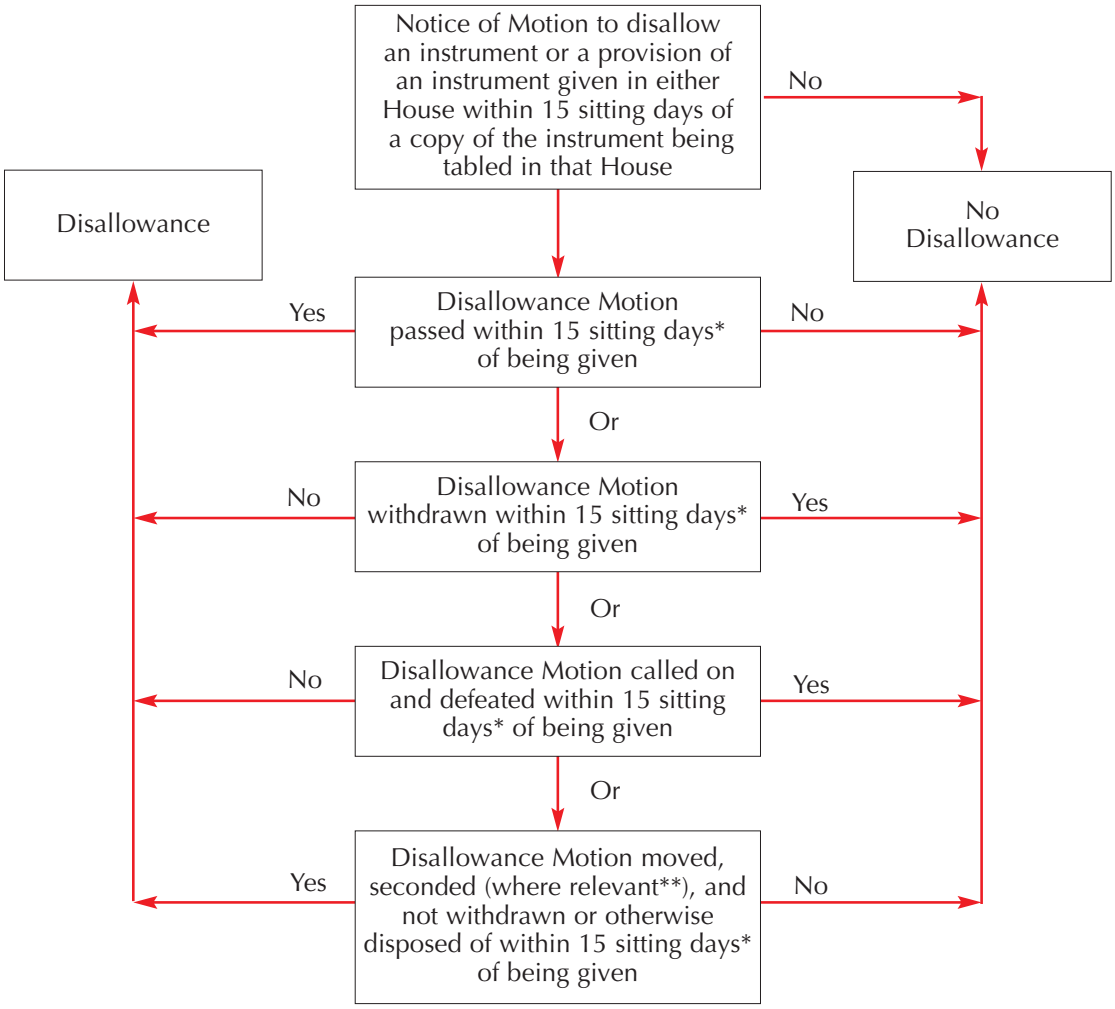
- certain instruments under the telecommunications legislation regime
- certain declarations under the *Australian Citizenship Act 1948*
- notifications under sections 28 or 43 of the *Commonwealth Authorities and Companies Act 1997*
- relevant Tariff Concession Orders
- certain determinations made for the purposes of the Commonwealth's Financial Management and Accountability regime

- particular legislative instruments made under the *Migration Act 1958* and Migration Regulations 1994
- certain instruments under the *Public Service Act 1999* and the *Parliamentary Service Act 1999*
- ministerial directions to any person or body.

Section 44(1) provides that section 42 does *not* apply to an instrument if the enabling legislation (not including the *Corporations Act 2001*) for the instrument facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States (defined in the Act to include the Australian Capital Territory and the Northern Territory) and authorises the instrument to be made by the body or for the purposes of the scheme. This rule applies unless the instrument is a regulation, or the enabling legislation or some other Act has the effect that the instrument is disallowable.

Sections 45–48 provide for the consequences of a legislative instrument ceasing to have effect in accordance with the disallowance rules, and related matters (such as limiting when instruments that are

Scrutiny and Disallowance



* Where Parliament is prorogued or the House of Representatives is dissolved or expires, the 15-day sitting period for dealing with a Disallowance Motion (subject to any deferral resolution being passed – see the discussion above of clause 43, which was not enacted) begins again from the first sitting day of the relevant House after the event.

** Motions are not presently seconded in the Senate.

the same in substance as another may be 'remade' while the other is still required to be tabled or is subject to disallowance). The rules are broadly the same as they were in relation to regulations under the Acts Interpretation Act.

Sunsetting of Legislative Instruments

Section 49 provides that the purpose of Part 6 is 'to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed'. The basic rule is that such instruments sunset (automatically repeal) approximately 10 years after the date that they commence or are required to be lodged for registration. The sunsetting provisions vary to some extent from those that were included in the Bills that failed to secure passage through the Parliament.

Section 50 establishes the rules for sunsetting of legislative instruments 'to which this Part applies'. However, section 54 lists 51 exemptions (see below).

Section 54 provides that Part 6 does *not* apply (described in the same way as in section 44(1) above) to instruments relating to intergovernmental bodies or schemes. Section 54 provides that the Part also does *not* apply to the instruments set out in a table, which contains 51 items describing legislative instruments that are not subject to sunsetting. Item 51 is designed to provide scope as follows for further additions to the table: 'Legislative instruments that are prescribed by the regulations for the purposes of this table'. As regulations are legislative instruments, any additions to the table will be subject to Parliamentary scrutiny and disallowance under the Act.

Section 50 provides that, subject to section 51(1), legislative instruments sunset on a date that is, in effect, approximately 10 years after a specified day. On that day, they 'cease to be in force ... as if they had been repealed by another legislative instrument'. The day specified varies for different instruments and provisions, according to the circumstances. However, none of the specified days is a day before the commencing day, so no sunsetting will occur until approximately 10 years after that day.

Section 50 also provides that the relevant sunset day for an instrument, or provisions of an instrument, where there may be more than one possible day, is the earliest of those possible days.

Section 51(1) provides the Attorney-General with power in limited circumstances to certify, in effect, that the sunsetting of an instrument should be deferred for a period (until whichever of 1 April and 1 October following the sunsetting day the Attorney-General specifies as the more appropriate), and the day specified becomes, in effect, the new sunsetting day. In those circumstances, this would allow for deferring sunsetting for up to one year.

Under section 51(3), the Attorney-General's certificate is a legislative instrument required to be registered. The Attorney-General must also provide reasons and cause a copy of the certificate and reasons to be laid before each House of the Parliament within 6 sitting days of that House after the certificate is issued.

The Attorney-General must, under section 52, arrange for the laying before each House of the Parliament on a specified day (the first sitting day of either House within 18 months of the relevant sunsetting day) of a list of legislative instruments, and provisions of instruments that amend them, that would cease to be in effect on the sunsetting day. The Attorney-General's Department must as soon as practicable thereafter arrange for a copy of the list to be provided to relevant rule-makers.

Under section 53, either House of the Parliament may, by resolution passed within 6 months after the laying before it of a list or Attorney-General's certificate, indicate the instruments and provisions

that the House considers should continue in force. Under section 53(2), the selected instruments and provisions continue in force as if remade on the date on which they would otherwise have ceased to be in force.

Miscellaneous (Part 7)

Sections 55–57 deal with aspects of the transition from the formerly applicable rules to those applicable under the Act, including in relation to instruments made but not finally dealt with under the former rules (section 55). Section 56(2) provides that enabling legislation may, on or after the commencing day, provide for publication requirements additional to those under the Act (specifically, publication of an instrument or notice of its making in the *Gazette*).

Section 57 provides for the effect of compliance with the tabling and disallowance provisions of the Act on existing tabling and disallowance requirements. For example, compliance with the tabling requirements in the Act will constitute compliance with the existing tabling requirements. Also, the disallowance provisions of the Act will generally apply in relation to a document that is a legislative instrument where the disallowance provisions of the Acts Interpretation Act were not applicable. (Instruments where the Acts Interpretation Act were applicable are automatically subject to the disallowance provisions of the Act.)

Section 59 requires the Attorney-General to appoint persons to a body to review the Act during the 3 months after the Act has been in operation for 3 years.

Section 60 requires the Attorney-General to appoint persons to a body to review the operation of the sunsetting provisions during the 3 months after the Act has been in operation for 12 years.

Section 62 provides for the making of regulations for the purposes of the Act.

Australian Government Solicitor

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