



Legal briefing

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Legislative Instruments Act 2003

The *Legislative Instruments Act 2003* (LIA) significantly enhances 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
- ensuring that the legislation is easy to understand and use
- 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.



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The genesis for the LIA was 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.

This briefing:

- outlines the measures in the LIA dealing with the making, registration, parliamentary scrutiny and sunseting of 'legislative instruments'
- summarises the responsibilities of rule-makers
- summarises the responsibilities of the First Parliamentary Counsel.

This briefing is a companion to Legal Briefing 102 that discusses some of the common issues arising in trying to ensure that legislative instruments achieve their purpose.

It should also be read with the *Legislative instruments handbook* available on the Office of Parliamentary Counsel's website (www.opc.gov.au).

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What does the Act do?

The LIA establishes a comprehensive regime for the registration, tabling, parliamentary scrutiny and sunseting (automatic repeal) of legislative instruments. It 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.

The tabling and disallowance provisions of the *Acts Interpretation Act 1901* (AIA) apply to some instruments that are not legislative instruments for the purposes of the LIA.

The LIA applies to some legislative instruments with far-reaching legal, social and financial consequences – for example, determinations made under many different Acts of amounts payable to the States and Territories for various purposes.

The LIA 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 LIA does not affect a delegate’s power to make legislative instruments or the way in which an instrument is actually made.

The LIA applies to some legislative instruments with far-reaching legal, social and financial consequences.

What aspects of the legislative process are affected?

The LIA:

- establishes the Federal Register of Legislative Instruments (which is publicly accessible via the internet)
- 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 First Parliamentary Counsel to cause steps to be taken to promote the quality of legislative instruments
- provides for mechanisms for parliamentary scrutiny and disallowance of registered instruments
- provides for sunseting of most legislative instruments after a period of approximately 10 years.

Note: The commencement and scope for retrospective operation (the latter by reference to registration) of legislative instruments is dealt with in s 12 of the LIA. Further, ss 13 and 14 contain general rules for construction of and incorporation by reference within legislative instruments.

What is a legislative instrument?

Section 5(1) of the LIA defines a legislative instrument, subject to ss 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.

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 (s 5(2)).

The Explanatory Memorandum to the Legislative Instruments Bill 2003 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.

Any uncertainty about the status of an instrument is resolved by s 5(3) that provides that a registered instrument is taken to be a legislative instrument despite anything else in the Act.

A power delegated by the Parliament includes a power sub-delegated with parliamentary authority (s 8).

Some examples of instruments that, subject to ss 7 and 9, are legislative instruments include:

- regulations
- statutory rules in force on commencing day (1 January 2005)
- other instruments that were disallowable under the system that existed before the LIA, including those declared to be disallowable for the purposes of s 46A of the AIA
- proclamations, whether made before or on or after the commencing day (see s 6).

What is not a legislative instrument?

In addition to instruments that would not be covered by the LIA because they do not fall within s 5 (for example, because they are instruments of appointment or delegation or comprise non-binding guidelines), the LIA also declares that instruments of specified kinds or made under specified laws are not legislative instruments (s 7). Regulations may prescribe additional instruments that are not legislative instruments. Regulation 7 read with Schedule 1 prescribes additional instruments. As regulations are legislative instruments, any additions will be subject to parliamentary scrutiny and disallowance under the LIA.

The Explanatory Memorandum to the Legislative Instruments 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 concerning some instruments that are legislative.

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

- certain instruments relating to aviation security
- certain instruments made under the *Corporations Act 2001* – for example, that exempt specified persons from the rules under that Act

- determinations under s 273 of the *Customs Act 1901*
- instructions under s 9A of the *Defence Act 1903* and determinations under ss 58B and 58H of that Act
- machinery of government changes under s 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*
- fair work instruments under the *Fair Work Act 2009* and decisions and orders of the Fair Work Commission
- 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 – see s 9 of the LIA. (The enabling legislation for these rules provides for the modified application of the LIA to those rules.)
- explanatory statements or compilations relating to legislative instruments (the definition of ‘instrument’ in s 4(1) of the Act expressly excludes them).

Inclusion in the list does not imply that an instrument would be a legislative instrument if it were not included (s 7(2)).

Resolving whether an instrument is a legislative instrument

On application by a rule-maker the Attorney-General may certify that an instrument is or is not a legislative instrument and give a copy of the certificate to the applicant. The Attorney-General’s certificate, itself a legislative instrument, is conclusive of the question for all purposes, subject only to reconsideration by the Attorney-General, following judicial review, in accordance with s 11 (s 10).

Who is a rule-maker?

A ‘rule-maker’ 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 the legislative instrument is authorised to be made by the Governor-General other than in s 13
- a reference to the Governor-General in s 13, where the legislative instrument is authorised to be made by the Governor-General.

Section 13 deals with construction of legislative instruments, not the duties and functions of rule-makers. For example it applies the AIA in a legislative instrument as if it were an Act and each provision were a section of an Act (s 13(1)(a)) and gives expressions used in the instrument the same meaning as in the enabling legislation as in force from time to time (s 13(1)(b)). A reference to a ‘rule-maker’ in s 13 is to be read as a reference to whichever person (including the Governor-General) made the instrument.

Drafting standards

The First Parliamentary Counsel has responsibility for drafting standards and ‘must cause steps to be taken to promote the legal effectiveness, clarity, and intelligibility to anticipated users, of legislative instruments’ (s 16(1)). Steps that may be taken include drafting, supervising the drafting of, and providing advice and training on the drafting of, legislative instruments. Staff performing duties in the Office of Parliamentary Counsel may also be seconded to, and drafting precedents may be provided to, other agencies for this purpose (s16(2)).

Importantly, a failure to consult ‘does not affect the validity or enforceability of a legislative instrument’ (s 19).

The First Parliamentary Counsel is able to delegate to specified senior employees within the Office of Parliamentary Counsel and the Attorney-General’s Department ‘any of the powers or functions of the First Parliamentary Counsel’ under the LIA (s 58).

Consultation before making legislative instruments

The LIA 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.

Importantly, a failure to consult ‘does not affect the validity or enforceability of a legislative instrument’ (s 19). However, the relevant explanatory statement will need to include a description of consultation undertaken or, if there was no consultation, an explanation for lack of consultation s 26(1A). Failure to consult may lead to criticism in the course of parliamentary scrutiny or disallowance or both.

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’ (s 17(1)).

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’ (s 17(2)). Consultation could involve notifying bodies, or organisations representative of persons, likely to be affected by the proposed instrument and inviting submissions from them (s 17(3)).

Instruments for which consultation may be unnecessary or inappropriate include instruments of the following kinds:

- 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
- that relate to the ‘management of, or to the service of members of, the Australian Defence Force’ (s 18(2)).

The Federal Register of Legislative Instruments

The Register

The Federal Register of Legislative Instruments (the Register) is the 'centrepiece' of the arrangements under the LIA. The First Parliamentary Counsel is obliged to cause instruments, explanatory statements and compilations to be registered.

A person required to lodge a legislative instrument for registration must also lodge information including a 'brief description' of the instrument and a 'reference identifying any document incorporated by reference in the instrument' (*Legislative Instruments Regulations 2004* (LI Regs), reg 5).

The Register has a significant status; it is, 'for all purposes, to be taken to be a complete and accurate record of all legislative instruments that are included' in it and '[i]n any proceedings, proof is not required about the provisions and coming into operation ... of a legislative instrument as it appears in the Register' (s 22(1)).

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' (s 22(2)).

The First Parliamentary Counsel may, in certain circumstances, rectify the Register to deal with errors or omissions. Rectification does not affect rights or privileges accrued and obligations or liabilities incurred before the alteration was made (s 23).

Registration of instruments – prospective

Legislative instruments made on or after the 'commencing day' are required to be registered (s 24).

Lodgment of instruments

A rule-maker must lodge an instrument in electronic form with the Office of Parliamentary Counsel 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 (for example, the hard copy) legislative instrument or other specified evidence of the text of that instrument (s 25).

Lodgment of explanatory statements

If a legislative instrument is lodged for registration, the rule-maker must also lodge the explanatory statement for that instrument in electronic form at the same time or as soon as practicable thereafter (s 26).

An explanatory statement is defined in s 4 (read with s 26(1A)) 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 as to why no consultation was undertaken
- if the legislative instrument is subject to disallowance, contains a statement of compatibility prepared under s 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*

- contains any other information that is prescribed (at the date of publication nothing was prescribed).

Registration of instruments – ‘backcapturing’

The LIA includes ‘backcapturing’ provisions that apply to legislative instruments made before the commencing day.

Effect of registration

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’ (s 31(1)).

The First Parliamentary Counsel is empowered to publish instruments in full in the *Gazette* where ‘because of technical difficulties the instrument is temporarily unable to be ... registered’ (s 31(2)). Where this is done, the LIA ‘has effect as if the instrument had been registered’ at that time. Once the instrument is able to be entered in the Register, the First Parliamentary Counsel is obliged to do so and include an ‘annotation as to the day and time at which the instrument is taken to have been registered’(s 31(3)). These provisions enable instruments to be registered promptly where necessary that they become enforceable.

Compilations

Where a legislative instrument is amended by an Act or another legislative instrument, the First Parliamentary Counsel must cause to be registered a compilation, in electronic form, for the amended instrument as soon as practicable after the amendments commence (s 33(1)).

The compilation is effectively required to ‘represent the state of the law’. This means 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’)(s 33(2)).

Registration of a compilation for an instrument is not required until the instrument itself is registered (s 33(3)).

The First Parliamentary Counsel may require rule-makers to lodge, in electronic form and as soon as practicable after specified events, compilations for legislative instruments that, in effect, represent the state of the law (s 34(1)).

A registered compilation must include 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’ (s 35).

Parliamentary scrutiny of legislative instruments

Tabling

'All registered legislative instruments [are] required to be tabled' (See Australia, House of Representatives 2003, *Debates*, No 10, p 17626 (Daryl Williams)).

The Office of Parliamentary Counsel 'must arrange for a copy of each' registered legislative instrument that was made 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) (s 38(1)). The regulations may provide for electronic delivery (s 40).

Failure to comply with the requirement in s 38(1) means that the instrument 'ceases to have effect immediately after the last day for it to be so laid' (s 38(3)).

If a 'rule-maker lodges an explanatory statement relating to a legislative instrument' at the time of lodging the legislative instrument for registration or before that instrument is delivered to each House of the Parliament to be laid before it, the Office of Parliamentary Counsel must also arrange for a copy of the explanatory statement to be delivered to each House (s 39(1)).

If a rule-maker fails to lodge an explanatory statement with the Office of Parliamentary Counsel before the Office arranges for delivery of the relevant instrument to a House of the Parliament, the rule-maker must deliver to that House a copy of the explanatory statement as soon as possible afterward, along with a statement explaining why it was not provided to the Office in time (s 39(2)).

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' (s 41).

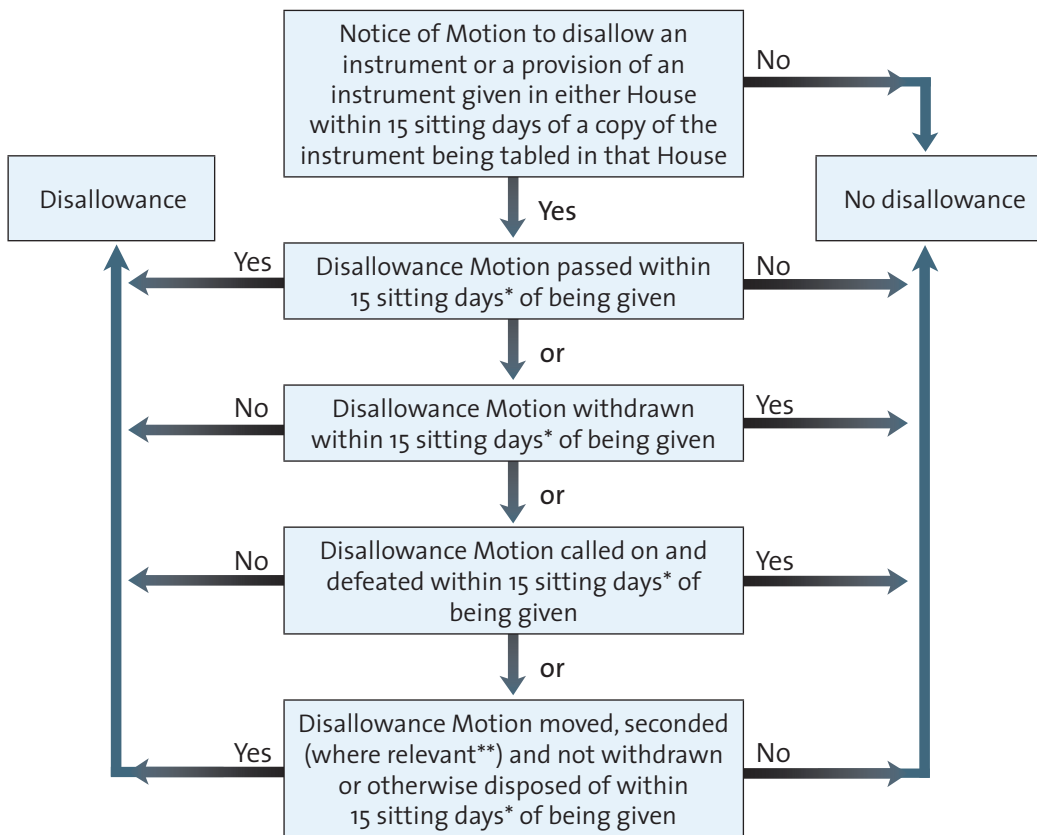
Disallowance

All legislative instruments are, by default (but with specified exceptions), disallowable (s 42).

Section 44 describes instruments that are not subject to disallowance. The regulations may prescribe additional instruments not subject to disallowance. Regulation 8 read with Schedule 2 to the LI Regs makes this additional prescription. As regulations are legislative instruments, any additions will be subject to parliamentary scrutiny and disallowance under the LIA. Examples of these kinds of instruments include:

- certain instruments under the telecommunications legislation regime
- certain determinations under the *Australian Citizenship Act 2007*
- relevant Tariff Concession Orders
- 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.

Scrutiny and disallowances



* 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.

Disallowance does not apply to some instruments made by an intergovernmental body or for the purposes of a relevant scheme involving the Commonwealth and one or more States (s 44(1)).

The LIA also deals with the consequences of a legislative instrument ceasing to have effect in accordance with the disallowance rules and other related matters (such as limiting when an instrument that is the same in substance as another may be 'remade' while the other is still required to be tabled or is subject to disallowance) (ss 45-48).

Sunsetting of legislative instruments

Spent legislative instruments and provisions

Part 5A of the LIA provides for the automatic repeal of:

- legislative instruments or provisions of legislative instruments that only amend or repeal other legislative instruments (ss 48A and 48C)
- legislative instruments or provisions of legislative instruments that only provide for the commencement of other legislative instruments, Acts or provisions of other legislative instruments or Acts (ss 48B and 48D).

However, these sections apply only to legislative instruments that were made on or after 23 September 2012. In general, the automatic repeal occurs on the day after the instrument or provision takes effect. The automatic repeal does not affect the amendment, repeal or commencement made by the automatically repealed legislative instrument or provision.

The regulations may repeal a 'legislative instrument or a provision of a legislative instrument'. However, before such a regulation can be made, 'the Attorney-General must be satisfied that the instrument or provision ... is spent or is no longer required' (s 48E).

Substantive legislative instruments

The basic rule is that legislative instruments sunset (automatically repeal) approximately 10 years after the date that they commence or are required to be lodged for registration.

Regulation 9 and Schedule 3 to the LI Regs prescribe additional instruments to those specified by s 54 as being excluded from the application of the sunset provisions. As regulations are legislative instruments, any additions will be subject to parliamentary scrutiny and disallowance under the LIA. As with disallowance, sunseting does not apply to instruments relating to intergovernmental bodies or schemes.

The Attorney-General may, in limited circumstances certify, in effect, that the sunseting of an instrument should be deferred for a period (until 'whichever of ... 1 April and 1 October next following the sunseting day the Attorney-General specifies as the more appropriate'), and the day specified becomes, in effect, the new sunseting day. In those circumstances, this would allow for deferring sunseting for up to 1 year. The Attorney-General's certificate is a legislative instrument required to be registered (s 51(3)). 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.

On application by the rule-maker the Attorney-General may declare a common sunseting date for instruments (s 51A). The power is subject to disallowance and is subject to the following conditions:

- the Attorney-General must be satisfied that instruments are, or will be, subject to a single review, and
- the new sunseting date may be earlier than would otherwise apply, but can be no more than 5 years from the earliest sunseting date that currently applies.

The Attorney-General must arrange for the laying before each House of the Parliament on a specified day of a list of legislative instruments, that would cease to be in effect on the sunseting day. The Office of Parliamentary Counsel must arrange for a copy of the list to be provided to relevant rule-makers as soon as practicable thereafter (s 52).

By resolution passed within 6 months after either House of the Parliament has a list or Attorney-General's certificate laid before it, either House may indicate the instruments that it considers should continue in force. The selected instruments continue in force as if registered on the date on which they would otherwise have been repealed (s53(2)).

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This briefing is a revision of an earlier briefing prepared by Peter Lahy and Charles Beltz and was prepared by Damian Page, Tara McNeilly and Jenny Francis.

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