



NO. 1—DISALLOWANCE

Many Acts of Parliament delegate to the executive government the power to make detailed rules and regulations (*delegated legislation*) which supplement the parent Act (*primary legislation*) and have the same legal force. Such rules and regulations are not passed directly by both Houses of the Parliament (like bills) but either House may veto (or *disallow*) them.

The Legislative Instruments Act

Previously, Part XII of the *Acts Interpretation Act 1901* provided for the disallowance of delegated legislation. Since 1 January 2005, these provisions have been found in the *Legislative Instruments Act 2003*. This Act establishes a complete and authoritative electronic register of legislative instruments and compilations of instruments. A legislative instrument is defined as an instrument in writing that is of a legislative character and 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:

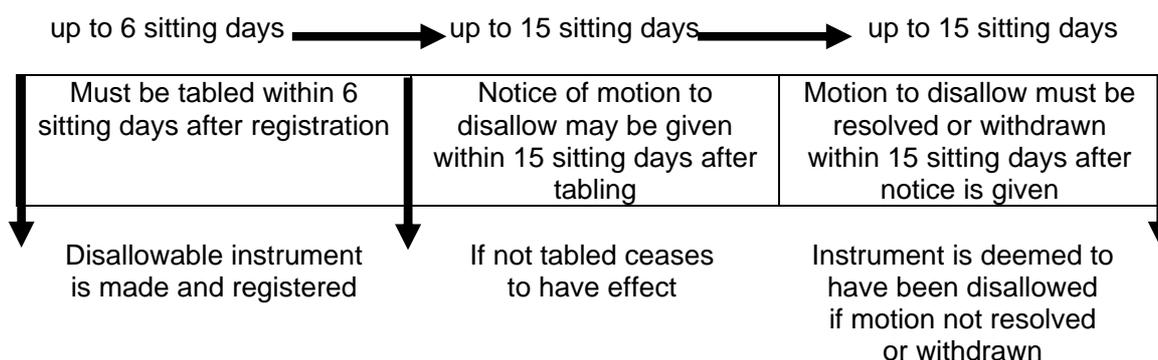
- it determines the law or alters the content of the law, rather than applies the law in a particular case; and
- it affects a privilege or interest, imposes an obligation, creates a right, or varies or removes an obligation or right

Instruments described as regulations or as disallowable instruments are declared to be legislative instruments. Instruments are not legislative instruments if they are listed in the exemptions in section 7 of the Act or if the Attorney-General certifies that they are not legislative. Once an instrument is registered, it is taken to be legislative. Among other things, the Act provides that:

- as soon as practicable after making a legislative instrument, the maker must lodge the instrument and its explanatory material with the Attorney-General's Department for registration – instruments are not enforceable unless they are registered;
- the Department must arrange for the instrument to be tabled in each House within 6 sitting days of being registered;
- instruments that operate retrospectively to disadvantage any person (other than the Commonwealth) are of no effect;
- within 15 sitting days after tabling a senator or member of the House of Representatives [but in practice usually the former] may give notice of a motion to disallow the instrument (in whole or in part);
- if the motion is agreed to, the instrument is disallowed and it then ceases to have effect;
- if a notice of motion to disallow the instrument has not been resolved or withdrawn within 15 sitting days after having been given, the instrument is *deemed* to have been disallowed and it ceases to have effect;

- disallowance has the effect of repealing the instrument – if the instrument repealed all or part of an earlier instrument then disallowance also has the effect of reviving that part of the earlier instrument;
- a similar instrument cannot be made again:
 - within 7 days after tabling (or, if the instrument has not been tabled, within 7 days after the last day on which it could have been tabled) (unless both Houses approve);
 - while it is subject to an unresolved notice of disallowance;
 - within 6 months after being disallowed (without the approval of the House that disallowed the regulation);

Figure 1: Usual disallowance system



While an instrument is subject to disallowance, either House of the Parliament may require any document which the instrument incorporates by reference to be made available for inspection.

Section 44 of the Act lists those legislative instruments which are not disallowable.

Section 46B of the *Acts Interpretation Act 1901* allows for the possible disallowance of certain non-legislative instruments (eg rules of court).

Unusual disallowance provisions

Some legislative instruments have unusual disallowance provisions which are peculiar to the Act under which they are made. The time for giving notice or resolving a notice may be varied in particular cases. These instruments may be exempted from the disallowance provisions of the Legislative Instruments Act (and so retain their unusual disallowance provisions) by regulation (see s 57(5)). Advice should be sought on how these instruments might be disallowed.

Standing order 78 – a safety valve

No action of the Senate can extend the period available for giving a disallowance notice. However, the Senate's standing orders require a senator to give notice of his or her intention to withdraw a disallowance notice. This provides an opportunity for another Senator to take over the disallowance notice even if the initial 15 days for giving notice has elapsed.

Regulations and Ordinances Committee

Established in 1932, this committee scrutinises all disallowable legislative and non-legislative instruments to ensure that they:

- are in accordance with the enabling Act;
- do not trespass unduly on personal rights and liberties;
- do not make rights and liberties of citizens unduly dependent on administrative decisions that are not subject to independent merits review;
- do not contain matter more appropriate for an Act of Parliament.

For further information about the committee, see chapter 15 of [Odgers' Australian Senate Practice, 11th edition](#).

Disallowance Notices

Proposed disallowance notices should be drafted by the relevant Senate officer (non-government senators: extension 3380; government senators: extension 3020).

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