

Chapter 1

Introduction

Work of the committee

1.1 The Senate Standing Committee on Regulations and Ordinances (the committee) scrutinises all disallowable instruments of delegated legislation, such as regulations and ordinances, to ensure their compliance with non-partisan principles of personal rights and parliamentary propriety.

1.2 In most years, thousands of instruments of delegated legislation are made, relating to many aspects of the lives of Australians. Instruments of delegated legislation have the same force in law as primary legislation, and may form as much as half of the law of the Commonwealth of Australia.¹

1.3 The committee's work may be broadly described as technical legislative scrutiny, as it does not generally extend to the examination or consideration of the policy merits of delegated legislation. The scope of the committee's scrutiny function is formally defined by Senate Standing Order 23, which requires the committee to scrutinise each instrument to ensure:

- that it is in accordance with the statute;
- that it does not trespass unduly on personal rights and liberties;
- that it does not make the rights and liberties of citizens unduly dependent on administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- that it does not contain matter more appropriate for parliamentary enactment.

1.4 The committee's work is supported by processes for the registration, tabling and potential disallowance of legislative instruments, which are established by the *Legislative Instruments Act 2003*.²

1.5 This report on the work of the committee covers the period of the 42nd Parliament.³

Committee membership

1.6 Senate Standing Order 23(1) provides that committee is appointed at the commencement of each Parliament. The committee has six members: three senators drawn from the government party and three senators drawn from non-government parties. The committee is chaired by a government senator.

1 *Odger's Australian Senate Practice*, 13th Edition (2012), p. 416.

2 The *Legislative Instruments Act 2003* and the disallowance process are discussed in Chapter 2.

3 The 42nd Parliament was opened on 12 February 2008 and dissolved on 19 July 2010.

1.7 Current members at March 2013 were as follows:

- Senator Mark Furner (Chair);⁴
- Senator the Hon Richard Colbeck (Deputy Chair);⁵
- Senator Claire Moore;⁶
- Senator Louise Pratt;⁷
- Senator Scott Ryan;⁸ and
- Senator Arthur Sinodinos AO.⁹

1.8 The following senators were also members of the committee during the 42nd Parliament:

- Senator Chris Back;¹⁰
- Senator Andrew Bartlett;¹¹
- Senator Carol Brown;¹²
- Senator Michaelia Cash;¹³
- Senator the Hon Jacinta Collins (Chair);¹⁴
- Senator Mathias Cormann;¹⁵
- Senator Concetta Fierravanti-Wells;¹⁶
- Senator the Hon Kay Patterson;¹⁷
- Senator the Hon Michael Ronaldson (Deputy Chair);¹⁸
- Senator Claire Moore;¹⁹

4 Appointed 01.07.11 (elected Chair on 07.07.11).

5 Appointed 16.03.12 (appointed Deputy Chair on 22.03.12).

6 Committee member from 01.07.02 to 01.07.05; and appointed on 14.02.08.

7 Appointed 21.06.12.

8 Appointed 18.11.10.

9 Appointed 07.02.13.

10 Member from 12.03.09 to 02.02.10.

11 Member from 25.11.98 to 30.06.08.

12 Member from 13.09.05 to 01.07.11.

13 Member from 02.02.10 to 07.02.13.

14 Member from 12.05.10 to 27.09.10 (Chair from 13.05.10 to 27.09.10).

15 Member from 13.02.08 to 27.09.10.

16 Member from 09.02.06 to 11.02.08.

17 Member from 23.03.07 to 11.02.08.

18 Member from 13.02.08 to 16.03.12 (Deputy Chair from 19.02.08 to 16.03.12).

- Senator John Watson (Chair);²⁰ and
- Senator Dana Wortley (Chair).²¹

Independent legal adviser

1.9 The committee is assisted by an independent legal adviser, who examines and reports on each instrument that comes before the committee, and provides other advice relevant to the committee's scrutiny work. The committee's legal adviser during the reporting period was Professor Stephen Bottomley.

The committee's mode of operation

Delivery of instruments

1.10 Legislative instruments must be registered and, within six sitting days of registration, tabled in both Houses of Parliament.²² Once registered, the instruments are delivered to the two Houses for tabling, and to the committee secretariat.

1.11 In relation to non-legislative disallowable instruments, the individual department administering the authorising Act under which any such instrument is made is responsible for delivering copies to both Houses for tabling, as well as to the committee secretariat.

Scrutiny of instruments

1.12 Instruments received by the committee secretariat are recorded and copies sent to the committee's legal adviser, who provides a report to the committee on the instruments' compliance with the committee's scrutiny principles. The committee meets regularly, during sittings of Parliament, to consider whether any instruments received may breach its scrutiny principles.

1.13 Where an instrument raises a concern referable to the committee's scrutiny principles, the committee's usual approach is to write to the responsible minister seeking further explanation or information, or seeking an undertaking for specific action to address the issue of concern.

Committee's use of the disallowance process

1.14 The committee's scrutiny of instruments is generally conducted within the timeframes that apply to the disallowance process, as set out in Chapter 2. Working within these timeframes ensures that the committee is able, if necessary, to seek disallowance of an instrument about which it has concerns. Disallowance motions based on the recommendation of the committee have, without exception, been adopted by the Senate.²³

19 Member from 01.07.02 to 01.07.05; and appointed 14.02.08.

20 Member from 01.07.05 to 11.02.08 (Chair from 11.08.05 to 11.02.08).

21 Member from 01.07.05 to 12.05.10 (Chair from 19.02.08 to 12.05.10).

22 *Legislative Instruments Act 2003*, sections 30, 38 and 39.

23 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 424.

1.15 In cases where the 15 sitting days available for giving a notice of motion for disallowance is likely to expire before a matter is resolved, the committee may give a notice of motion for disallowance in order to protect the Senate's ability to subsequently disallow the instrument in question. Such notices are referred to as 'protective notices'.²⁴

Undertakings

1.16 In many cases, ministers and other instrument makers provide an undertaking to address the committee's concern through the taking of steps at some point in the future. Typically, an undertaking will relate to the making of amendments to primary or delegated legislation. The acceptance of such undertakings has the benefit of securing an outcome agreeable to the committee, without interrupting the administration and implementation of policy by disallowance of the instrument in question.

Committee publications and resources

1.17 The following committee publications and resources may be accessed at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments.

Disallowable instruments list

1.18 The 'Senate disallowable instruments list' (SDIL) is a list of all disallowable instruments tabled in the Senate.²⁵ This online resource may be used to ascertain whether and when an instrument has been tabled in the Senate, and how many sitting days remain in which a notice of motion for disallowance may be given.

1.19 The SDIL is updated after each sitting day.

'Disallowance alert' webpage

1.20 The 'Disallowance alert' webpage (alert) is a list of all instruments subject to a notice of motion for disallowance (whether at the instigation of the committee or an individual senator or member). The progress and outcome of any such notice is also recorded.

Delegated Legislation Monitor

1.21 The *Delegated Legislation Monitor* (the monitor) is an online publication which records all disallowable instruments tabled in the Senate for a given period of sittings or for a consolidated year. The monitor provides a range of information for

24 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 432.

25 As instruments may be tabled on different dates in the Senate and the House of Representatives respectively (and hence have different disallowance timeframes), there is also a House of Representatives disallowable instruments list. This list is also available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments.

each instrument (authorising Act, administering department, FRLI number et cetera) as well as some statistical information.²⁶

Ministerial correspondence

1.22 Approximately twice a year, the committee tables in the Senate volumes of ministerial correspondence relating to its scrutiny of delegated legislation.²⁷

Senate Procedure Office seminar on delegated legislation and the Senate

1.23 The Senate Procedure Office conducts half-day seminars on the Senate's scrutiny of delegated legislation. These are tailored to parliamentary staff, government officers and other stakeholders whose work or interests intersect with the work of the committee.

1.24 Information on seminar dates and booking inquiries may be accessed through the Senate website.²⁸

Structure of the report

1.25 Chapter 2 provides an overview of delegated legislation, the disallowance process and the *Legislative Instruments Act 2003*.

1.26 Chapter 3 reports on the work of the committee during the 42nd Parliament.

Acknowledgements

1.27 The committee wishes to acknowledge the work and assistance of its legal adviser, Professor Stephen Bottomley.

1.28 The committee also wishes to acknowledge the assistance of ministers and associated departments and agencies during the reporting period. The responsiveness of ministers, departments and agencies to the committee's inquiries is critical to ensuring that the committee can perform its scrutiny function effectively.

26 Since 2013 the monitor includes reporting on the work of the committee and details matters raised in relation to instruments tabled in the Senate and subsequently scrutinised by the committee.

27 Ministerial correspondence is incorporated into the monitor when the committee concludes its interest in the relevant matter. Prior to 2013, the committee tabled separate volumes of ministerial correspondence.

28 See Parliament of Australia website, 'Seminars for public servants' http://www.aph.gov.au/About_Parliament/Senate/Public_Information_and_Events/Seminars_for_public_servants.