

Chapter 2

Delegated legislation and the disallowance process

Introduction

2.1 This chapter provides an overview of delegated legislation, the disallowance process and the *Legislative Instruments Act 2003* (LIA).

What is delegated legislation?

2.2 Many Acts of Parliament delegate to executive government the power to make regulations, ordinances, rules and other instruments (such as determinations, notices, orders and guidelines). Such instruments supplement their authorising Act, and have the same force in law. 'Delegated legislation' is a collective term referring to such instruments.

2.3 Because they are made under a delegated power, instruments of delegated legislation are not directly enacted by the Parliament, as must happen for a bill to become an Act with the force of law. Therefore, to ensure that Parliament retains effective oversight, any such instrument is usually: (a) required to be registered on the Federal Register of Legislative Instruments (FRLI);¹ (b) required to be tabled in the Parliament; and (c) subject to a disallowance process prescribed by the LIA, which may be initiated by any member of either the Senate or the House of Representatives.

What is a disallowable instrument?

2.4 A 'disallowable instrument' is an instrument of delegated legislation that is subject to the disallowance process prescribed by the LIA (see below for a description of the disallowance process).

Legislative instruments

2.5 The LIA generally requires that disallowable instruments will be those instruments that are 'legislative' in character, meaning those instruments which define the law as opposed to those which apply the law in a specific case (and are therefore 'non-legislative' in character);² and which affect a privilege, interest or right. Specifically, section 5 of the LIA states that a legislative instrument is:

...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.

1 FRLI may be accessed at <http://www.comlaw.gov.au/>.

2 An example of this distinction is that an instrument which grants a licence applies the law whereas an instrument that sets out the criteria for the grant of a licence defines or establishes the content of the law (and hence would be a legislative instrument subject to disallowance under the LIA).

(2) Without limiting the generality of subsection (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.

2.6 The LIA also declares certain instruments to be legislative instruments, thereby making all such instruments subject to its general scheme. Specifically, subsection 5(3) provides that an instrument registered on FRLI is taken, by virtue of that registration, to be a legislative instrument; and section 6 provides that particular types of instrument, such as regulations and ordinances, are to be classed as legislative instruments. Subsection 5(4) provides that an instrument of mixed character (that is, one that has both a legislative and non-legislative character) is deemed to be a legislative instrument.

Disallowable non-legislative instruments

2.7 An instrument that is non-legislative in character may nevertheless be subject to the scheme of the LIA by virtue of the operation of the *Acts Interpretation Act 1901* (the AIA).

2.8 Subsection 46B of the AIA provides, inter alia, that where an Act confers a power to make a non-legislative instrument, and that Act provides that the instrument is a disallowable instrument, then it is subject to the same procedures for parliamentary scrutiny as a legislative instrument.

Exemptions from disallowance

2.9 The LIA provides that certain instruments are exempt from disallowance by providing either that a type of instrument is not a legislative instrument for the purposes of the LIA or is otherwise not subject to disallowance.

2.10 Section 7 declares certain instruments not to be legislative instruments for the purposes of the LIA. This includes legislative instruments listed in the table set out in the provision, and legislative instruments that are declared not to be legislative instruments by the Act or instrument under which they were made.

2.11 Section 44 of the LIA provides that the disallowance process contained in section 42 does not apply to certain legislative instruments, including those instruments listed in the table set out in that provision.

Legislative Instruments Act 2003

2.12 Prior to 2005, the committee's scrutiny of delegated legislation was wholly governed by the AIA, which contained the scheme requiring regulations and other disallowable instruments to be tabled in Parliament and subject to the disallowance regime.

2.13 On 1 January 2005, the AIA scheme was replaced by the scheme set out in the LIA. While the LIA largely replicates the previous scheme, it includes a number of

important innovations, such as the requirement for the registration of instruments on FRLI.

2.14 The main elements of the scheme contained in the LIA are:

- instruments of delegated legislation that are of a legislative character are subject to the disallowance process outlined in the Act;
- such instruments must be registered on FRLI, along with an explanatory statement;
- once registered, such instruments must be delivered within six sitting days to each House of Parliament for tabling;³ and
- any member of the Senate or the House of Representatives may initiate the process to disallow any such instrument within 15 sitting days of it being tabled. Once such a notice has been given, a further period of 15 sitting days is available to resolve the motion.

Disallowance

Purpose

2.15 The ability of the executive—usually ministers and other executive office holders—to make delegated legislation without parliamentary enactment is a 'considerable violation of the principle of the separation of powers, [and] the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government'.⁴

2.16 The ability of senators and members of the House of Representatives to seek disallowance of legislative instruments is therefore critical to ensuring that Parliament retains effective oversight of delegated legislation.

The disallowance process

2.17 The disallowance process is set out in subsection 42(1) of the LIA, which provides:

(1) If:

(a) notice of a motion to disallow a legislative instrument or a provision of a legislative instrument is given in a House of the Parliament within 15 sitting days of that House after a copy of the instrument was laid before that House; and

(b) within 15 sitting days of that House after the giving of that notice, the House passes a resolution, in pursuance of the motion, disallowing the instrument or provision;

the instrument or provision so disallowed then ceases to have effect.

3 Under subsection 38(3), an instrument that is not tabled in each House within six sitting days of registration ceases to have effect immediately after the sixth day.

4 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 413.

2.18 In summary, subsection 42(1) provides that any member of the Senate or House of Representatives may, within 15 sitting days of a disallowable legislative instrument being tabled, give notice that they intend to move a motion to disallow the instrument or a provision of that instrument. There is then a further 15 sitting days in which the motion may be resolved.

2.19 The maximum time for the entire disallowance process to run its course is therefore 30 sitting days (assuming the maximum available period elapses for both the giving of notice and the resolution of the motion to disallow the instrument or provision).

Unusual disallowance processes

2.20 In some cases, the disallowance process may be modified by the authorising legislation under which an instrument is made, affecting the period available for giving or resolving a notice of motion for disallowance.

2.21 For example, for a determination made under section 20(1) or (2) of the *Financial Management and Accountability Act 1997*, the time available for both giving and resolving a notice of motion for disallowance is only five sitting days.⁵

Effect of disallowance

2.22 Subsections 42(1) and 45(1) of the LIA provide that, where a motion is passed to disallow a legislative instrument or a provision of an instrument, that instrument or provision ceases to have effect from the time the motion was passed.

2.23 If the disallowed instrument or provision repealed all or part of an earlier instrument, then that earlier instrument or part is revived.⁶

2.24 Subsection 42(2) of the LIA provides that, where a notice of motion to disallow a legislative instrument or a provision of an instrument remains unresolved after 15 sitting days of being given (for example, where it has not been withdrawn or put to the question), the instrument or provision is deemed to have been disallowed and therefore ceases to have effect from that time. This provision ensures that the disallowance process cannot be frustrated by allowing a motion for disallowance to be adjourned indefinitely.

Restrictions on re-making legislative instruments

2.25 In order to ensure that Parliament's power of disallowance may not be circumvented, and to preserve the Parliament's intention in any case where a House has disallowed an instrument, the LIA imposes restrictions on the re-making of legislative instruments that are the 'same in substance' as an existing or recently disallowed instrument. These are:

5 *Financial Management and Accountability Act 1997*, section 22 (this provision was preserved by Schedule 4 to the Legislative Instruments Regulations 2004).

6 LIA, subsection 45(2).

- for a period of seven days, unless approved by resolution by both Houses of Parliament, an instrument may not be made that is the same in substance as a registered instrument that has been laid before both Houses of Parliament (or, if it was tabled on different days, seven days after it was last tabled). This prevents the disallowance provisions from being circumvented by an instrument being successively repealed and remade;⁷
- an instrument may not be made that is the same in substance as an existing instrument that is subject to a notice of motion for disallowance (unless the notice is withdrawn; the instrument is deemed to have been disallowed under subsection 42(2); or the motion is withdrawn, otherwise disposed of or subject to the effect of subsection 42(3)). This prevents an instrument simply being remade in response to notice of a motion for disallowance; and
- for a period of six months, an instrument may not be made that is the same in substance as an instrument that has been disallowed under section 42 (unless the House which disallowed the instrument, or in which the instrument was deemed to have been disallowed, rescinds the resolution that disallowed the instrument or approves it being made). This prevents an instrument that has been disallowed, or deemed to have been disallowed, from simply being remade.⁸

Senate procedures relating to the disallowance process

2.26 A number of the Senate's procedures are relevant to the disallowance process in the LIA.

2.27 Standing Order 78(3) is a significant example of one such procedure, whereby any senator has the opportunity to take over a motion for disallowance if the original mover seeks to withdraw that motion. This ensures that the Senate is not denied the right to disallow an instrument where the time for giving notice has passed; and that the right of individual senators to move for disallowance is not lost by the withdrawal of the notice.⁹

2.28 Another example is Standing Order 86, which prevents the proposing of a question that is the same in substance as any question that has been determined during the same session (the same question rule). This order is qualified by the proviso that it shall not prevent a motion for the disallowance of an instrument substantially the same in effect as one previously disallowed.

2.29 For further detail on Senate procedures relevant to delegated legislation and disallowance, see *Odgers' Australian Senate Practice*, 13th Edition (2012), Chapter 15.

7 LIA, section 46.

8 LIA, sections 46, 47 and 48. For more detail see *Odgers' Australian Senate Practice*, 13th Edition (2012), pp 420, 434-435.

9 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 430.