



INFORMATION, ANALYSIS
AND ADVICE FOR THE PARLIAMENT

INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 26 2003–04

Legislative Instruments Bill 2003

ISSN 1328-8091

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Published by the Department of the Parliamentary Library, 2003

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No. 26 2003–04

Legislative Instruments Bill 2003

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9 September 2003

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Legislative Instruments Bill 2003

Date Introduced: 26 June 2003

House: House of Representatives

Portfolio: Attorney-General

Commencement: Substantive provisions of the Act will commence on a date to be fixed by proclamation and must be either 1 January or 1 July whichever occurs first after the date of Royal Assent. If the Act has not commenced within 12 months of Royal Assent, it will commence on 1 January or 1 July whichever follows next.

Purpose

To establish a regime to reform and manage procedures for the making, scrutiny and publication of Commonwealth legislative instruments by

- establishing a Federal Register of Legislative Instruments
- encouraging rule-makers to undertake appropriate consultation
- encouraging high standards in drafting legislative instruments to promote their legal effectiveness, clarity and their intelligibility to users
- providing public access to legislative instruments
- establishing improved mechanisms for Parliamentary scrutiny of legislative instruments
- establishing ‘sunsetting’ mechanisms to ensure periodic review of legislative instruments and if they no longer have a continuing purpose, to repeal them¹.

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Background

Detailed discussion of the historical background to the Legislative Instruments Bill 2003 is contained in the two previous bills digests and reference should be made to those digests. They contain detailed discussion of the nature of subordinate legislation, the Commonwealth Parliament's capacity to delegate legislative power to subordinate bodies and the accountability and scrutiny mechanisms available for subordinate legislation.

There were four significant reports that contributed much to the development of the Bill in its present form. They are the report by the Administrative Review Council in 1992 entitled *Rule making by Commonwealth Agencies*; the *Cost of Justice Second Report: Checks and Imbalances* produced by the Senate Standing Committee on Legal and Constitutional Affairs in August 1993; the report *Clearer Commonwealth Law* produced by the House of Representatives Standing Committee on Legal and Constitutional Affairs in September 1993 and the *Access to Justice: An Action Plan* produced by the Access to Justice Advisory Committee in May 1994. The following digests consider these reports in some detail.

The previous two digests are:

- Legislative Instruments Bill 1996 Bills Digest No.38 1996-97
- Legislative Instruments Bill 1996 [No.2] Bills Digest No.148 1997-98

Chronological History

1994 Legislative Instruments Bill 1994 introduced into the Senate on 30 June 1994

1994 Legislative Instruments Bill 1994 – report of the Senate Standing Committee on Regulations and Ordinances, October 1994

1995 Legislative Instruments Bill 1994 – report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, February 1995

1996 Federal election 2 March 1996

1996 Legislative Instruments Bill 1996 introduced into the House of Representatives on 26 June 1996 and passed on 11 September 1996. Introduced into the Senate on 8 October 1996 and laid aside by the House on 5 December 1997 after disagreements about Senate amendments

1998 Legislative Instruments Bill 1996 [No.2] introduced into the House of Representatives on 5 March 1998; passed 12 March 1998. Introduced into the Senate on 23 March 1998. The bill did not pass the Senate before the Parliament was prorogued on 31 August 1998 before the Federal election on 3 October 1998.

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1998 Federal election 3 October 1998

2001 Federal election 10 November 2001

2003 Legislative Instruments Bill 2003 and the Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003 introduced on 26 June 2003

History of the Bill

The Legislative Instruments Bill has a long and tortuous history that commenced in 1992 with the report of the Administrative Review Council ‘Rule making by Commonwealth agencies.’ That report laid the basis for many of the principles incorporated into the various iterations of the Legislative Instruments Bill.

The Council had been prompted to examine Commonwealth subordinate legislation by a concern that there could be no satisfactory access to justice if the legislation governing citizens’ activities could not be readily found².

Legislative Instruments Bill 1994

On 30 June 1994, a Legislative Instruments Bill was introduced into the Senate. It proposed substantial change to both the *Acts Interpretation Act 1901* and the *Statutory Rules Publication Act 1903*. The bill was referred to the Senate Standing Committee on Regulations and Ordinances which reported back on 17 October 1994. The Committee generally endorsed the approach reflected in the Bill. On 10 November 1994 the Attorney-General asked the House of Representatives Standing Committee on Legal and Constitutional Affairs to report on the legislation. The Committee reported on 25 September 1995³. The bill was still awaiting passage when Parliament was prorogued prior to the 1996 election.

Legislative Instruments Bill 1996

The Legislative Instruments Bill 1996 was introduced into the House of Representatives on 24 June 1996 and passed the House. It was then introduced into the Senate on 8 October 1996 and was not debated until September 1997. It passed the Senate with a total of ‘18 Government and 36 non-government committee stage amendments. On 17 November, the House of Representatives considered the Senate amendments, rejected the non-government amendments, accepted the Government amendments and proposed a further 6 Government sponsored changes.’⁴ On 3 December 1997, the Senate insisted on the 36 non-Government amendments rejected by the House, accepted 4 of the 6 Government amendments made by the House on 17 November 1997. On 5 December 1997, the House laid the bill aside having reiterated its refusal to accept the non-Government amendments adopted by the Senate. The House further insisted on the two (disagreed) amendments made by it on 17 November 1997.⁵

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Legislative Instruments Bill 1996 [No.2]

The Legislative Instruments Bill 1996 [No.2] was reintroduced into the House on 5 March 1998 in the same form as the 1996 Bill becoming a potential double dissolution trigger. The Bill again passed the Senate with a raft of substantial amendments as previously. However, the Senate's message had not been considered by the House of Representatives when Parliament was prorogued for the 1998 Federal election.

Legislative Instruments Bill 2003

The 2003 Bill has been substantially revised and changed and was introduced into the House on 26 June 2003.

The Legislative Instruments Bill 2003 will help to overcome many of the problems that the Administrative Review Council considered in its report in 1992:

The traditional form of delegated instrument has been the statutory rule, most commonly the regulation, made by the Governor-General in Council, for which a framework for making, publication and scrutiny has developed over time. However, in recent years there has been a vast growth in the volume and diversity of delegated legislative instruments. Different and often inconsistent practices for drafting, consultation, scrutiny and publication apply. The extension of some of the procedures associated with statutory rules has overcome some anomalies but significant problems still remain. In particular, the framework of principles and procedures for the making of delegated legislative instruments is patchy, dated and obscure⁶.

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Statistics – Statutory Rules and Disallowable Instruments

There has been a rapid growth in the numbers and types of statutory instruments made during recent years. The Senate Standing Committee on Regulations and Ordinances provided the following table indicating the proportion of statutory rules to other disallowable instruments considered by the Committee which illustrates the point.

Year	Statutory Rules	Other Instruments	Total
1985-86	429	426	855
1986-87	322	510	832
1987-88	345	690	1035
1988-89	398	954	1352
1989-90	411	847	1258
1990-91	484	1161	1645
1991-92	531	1031	1562
1992-93	408	1244	1652
1993-94	490	1313	1803
1994-95	419	1668	2087
1995-96	398	1502	1900
1996-97	395	1396	1791
1997-98	454	1434	1888
1998-99	330	1342	1672
1999-2000	348	1307	1655
2000-2001	425	1434	1859
2001-2002	310	1236	1546
2002-2003	351	1310	1661

Source: Senate Standing Committee on Regulations and Ordinances

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Senate Amendments

The following is a table of the amendments proposed by the Senate to the Legislative Instruments Bill 1996 [No.2]. Stephen Argument categorised these Senate amendments which were seen as the stumbling blocks to the Bill passing both Houses⁷. The table uses his categorisations and applies them to the 2003 Bill.

Senate Amendment 1996 [No.2] Bill	Party Amendments Proposed by	Status in the Legislative Instruments Bill 2003
Elimination of gender-specific language	Opposition/Australian Democrats	Accepted in clause 16
Certificate issued under clause 8 (now clause 10) - disallowable	Opposition/Greens (WA)/Senator Colston	Certificates issued under clause 10 or 11 or subclause 51(1) are legislative instruments and subject to tabling in both Houses but are not disallowable instruments under clause 44
Legislative Instrument Proposals	Opposition/Greens (WA)	Deleted from the bill
Further exemption from consultation for instruments relating to insurance, banking or superannuation, regulation of financial markets	Opposition	Taken account of in clause 18
Remove exemption on disallowance for instruments relating to national legislative schemes	Opposition/Greens (WA)/Senator Colston	Not accepted – still part of the current Bill at clause 44 see reasons at page 12 of this digest
Give Parliament a supervisory role –sunsetting provisions	Opposition opposed sunsetting/Australian Democrats proposed role for Parliament	Accepted in clauses 51 to 53
Instruments dealing with terms and conditions of employment in APS - disallowable	Opposition/Greens (WA)/Senator Colston	Certain instruments referred to in items 29, 30, 32 and 33 of clause 44 are not disallowable instruments
Modify exemption from sunsetting provisions of instruments giving effect to international obligations or conferring heads of power on a self-governing territory	Australian Democrats	Both modifications accepted – see clause 54

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Main Provisions

The current bill has been substantially revised, reorganised and simplified from the previous Legislative Instruments Bill 1996 [No.2].

Object

Clause 3 states the aims of the bill and lists the factors through which the objects of the bill will be achieved.

Definitions

Clause 4 defines a number of terms used in the bill. Revised and new definitions included in clause 4 are ‘commencing day’, ‘compilation’, ‘explanatory statement’, ‘inappropriate use of gender-specific language’, ‘instrument’, ‘legislative instrument’, ‘original legislative instrument’ and ‘register’.

Legislative Instrument - Definition

Clause 5 defines ‘legislative instrument.’ This definition has been simplified and made clearer. The basic definition now includes two additional points. All instruments that are registered are considered to be legislative instruments (Subclause 5 (3)) and to clarify the situation where instruments that have legislative and administrative provisions those instruments will be taken to be legislative instruments.

The ARC report in 1992 had recommended that ‘legislative’ should not be defined in the Bill, however the House Committee’s report considered that a definition would “provide greater guidance and certainty but not to limit the meaning of ‘legislative instrument.’ The House Committee opted for an inclusive/indicative approach.”⁸

Clause 6 lists the instruments that are declared to be legislative instruments. These instruments include all the instruments that are currently laid before both Houses and are subject to parliamentary scrutiny and disallowance procedures and that are required to be printed and sold under the *Statutory Rules Publication Act 1903*. Other instruments declared to be legislative instruments are ordinances, rules, regulations or by-laws of a non-self-governing Territory, disallowable instruments falling within s.46A or Part XII of the *Acts Interpretation Act 1901* and proclamations.

Clause 7 lists the instruments that are not legislative instruments for the purposes of this bill and also provides that an Act or a disallowable legislative instrument can provide that an instrument is not a legislative instrument. In the Legislative Instruments Bill 1996 [No.2], instruments declared not to be legislative instruments were included in Schedule 1

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and numbered 16 items. This list is now contained in clause 7 and has been expanded to 24 items.

Clause 9 states that rules of court are not legislative instruments. However, a modified regime is applied to rules of court via amendments in the Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003.

Clause 10 provides that the Attorney-General may certify whether an existing or a proposed instrument is a legislative instrument for the purposes of this bill. **Subclause 10(6)** states that a certificate issued under clause 10 is itself a legislative instrument that is required to be registered. However under **clause 44** it is a legislative instrument that is not subject to disallowance. This was one of the difficulties experienced with the bill in the Senate in 1998. Certificates issued under clauses 10 and 11 and 51(1) are legislative instruments for the purposes of the bill but they are not subject to disallowance according to clause 44. A subclause 51(1) certificate enables the Attorney-General to defer the sunset day in certain circumstances. **Clause 11** provides that if certificates are reviewed by the Federal Court, a Federal Magistrates court or the High Court and an order is made to quash or set aside the decision, the Attorney-General must reconsider the decision and issue a replacement certificate.

Reference to other documents incorporated as law into the legislative instrument

Clause 14 authorises reference to any instrument, legislative or otherwise, to be ‘applied, adopted or incorporated’ into a legislative instrument. The legislative instrument can only incorporate documents as they exist at the time of incorporation unless the enabling legislation allows otherwise (**Clause 14(2)**). These additional instruments or documents do not require registration but **clause 41** requires that any instrument or document incorporated into an instrument be available for inspection by either House when required during the disallowance period.

Problems may arise in this area if a document incorporated by reference into an instrument is not of itself readily available. It would be difficult as Professor Pearce points out, to actually identify what the content of the law is if the document referred to is difficult to obtain. He illustrates this point with the example of a document produced by a private organisation, the content of which has been incorporated by reference into an instrument and given the status of law. The document may not be easily available because the organisation is not obliged to publish the document in the same way as a government organisation would. In the Victorian *Subordinate Legislation Act 1994* (Vic) section 20 states that a person cannot be convicted of an offence against the statutory rule or provision; or be prejudicially affected or made subject to any liability by the statutory rule or provision if the person could neither purchase or inspect the rule⁹.

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Drafting Standards

Clause 16 states that the Secretary of the Attorney-General's Department is responsible for taking the necessary steps that will encourage excellence in drafting standards being achieved. This includes, but is not limited to, activities such as supervising the drafting of legislative instruments, scrutinising preliminary drafts, the provision of advice and training, temporary secondment to other agencies and providing drafting precedents. The 2003 Bill dispenses with the position of Principal Legislative Counsel which was provided for by the earlier bills and instead places the responsibility for the encouragement and maintenance of high standards with the Secretary of the Attorney-General's Department. The Administrative Review Council in its report *Rule Making in Commonwealth Agencies* had recommended that the Office of Legislative Drafting be responsible for ensuring that delegated legislation be prepared to an appropriate standard¹⁰.

Gender-specific language

Under **subclause 16(3)** the Secretary is responsible for taking steps to prevent the inappropriate use of gender-specific language in legislative instruments, a change recommended by the Senate during the 1996 [No.2] Bill debate. The Secretary is also required to advise rulemakers of the inappropriate use of such language in existing instruments and to advise both Houses of occasions when such advice has been given. **Clause 4** defines 'inappropriate use of gender-specific language' to mean use of gender specific language when it is 'not necessary to identify persons by their sex'.

Consultation

Part 3 relating to consultation requirements has been greatly simplified, is less prescriptive and allows greater flexibility than in the earlier bills. **Clause 17** provides that the rulemaker be satisfied that the appropriate consultation has been carried out and in particular with legislative instruments that have a direct or substantial effect on business or restrict competition. The appropriate consultation can vary for the type of situation encountered and allows flexibility to make a judgment as to the level and nature of the consultation required. **Paragraph 17(2)(b)** ensures that the rulemaker takes into account the comments of affected persons in relation to any legislative instrument. **Subclause 17(3)** suggests ways in which consultation may be carried out but does not limit consultative processes to those suggestions. **Clause 4** of the bill defines an 'explanatory statement' as including a statement of the nature of the consultation undertaken for that instrument and if there was no consultation, an explanation for no consultation having taken place. The nature of the consultation is then subject to parliamentary scrutiny. The bill now provides for a general requirement to consult if appropriate to the circumstances and will relate to all legislative instruments generally unless exempt.

Clause 18 lists circumstances where consultation may be unnecessary or inappropriate. This differs substantially from the 1996 [No.2] Bill where instruments other than those

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affecting business were exempt from consultative requirements. The tenor of the section has now changed. It suggests circumstances where the nature of the instrument may dictate that consultation is not required or may be inappropriate. For example, where instruments are required urgently, are of a machinery nature, relate to national security or relate to Budget announced tax measures. The validity of the instrument is not affected if no consultation takes place (**Clause 19**).

Federal Register of Legislative Instruments

Clause 20 provides that the Secretary of the Attorney-General's Department is responsible for the Federal Register of Legislative Instruments. It will be the means by which all legislative instruments are published. This will apply to all legislative instruments and explanatory statements made on or after the commencing day, as well as all compilations in relation to legislative instruments registered under the Act. Commencing day is the day on which the Federal Register of Legislative Instruments comes into operation. There is also provision for existing legislative instruments to be 'backcaptured' (See Division 3). **The register will provide the authoritative version of the legislative instrument (Clause 22).**

Regulations will provide the detail for how the Register will be kept, the supporting documentation required to accompany each instrument, how the information on the register is to be recorded or altered and how each instrument will be identified (**Clause 21**).

The Secretary may amend any errors concerning the text in electronic form, that are not present in the original instrument or compilation (**Clause 23**). Such amendments will not affect rights or obligations incurred before the alterations were made (**Subclause 23(2)**).

Registration after commencing day

Division 2 instruments are legislative instruments made on or after the commencing day or which are covered by subclause 55(2).

Clause 24 provides that all such instruments must be registered. Existing instruments that have not been gazetted before commencing day will be treated as having been made on commencing day and so must also be registered under Division 2 (**Subclause 55(2)**). Legislative instruments are to be lodged in electronic form with the Attorney-General's Department (**Subclause 25(1)**). The original legislative instrument must also be lodged at the same time or shortly after or if the rulemaker cannot comply with this, a certified true copy or a copy of the instrument as published in the Gazette must be supplied (**Subclause 25(2)**). **Subclause 26(1)** provides that an explanatory statement must be lodged in electronic form for registration with the legislative instrument or shortly thereafter. The validity or enforceability of a legislative instrument is not affected if a statement is not lodged (**Subclause 26(2)**). If a legislative instrument has not been registered as requested under Division 2 it is unenforceable (**Clause 31**). If there are technical difficulties in

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registering the instrument, the Secretary may arrange for the instrument to be published in full in the Gazette until an appropriate time when it can be entered into the register (**Clause 31**). For instruments published in the Gazette, the gazettal date will be the date of registration (**Subclause 31(3)**).

Registration of instruments made before the Commencing Day

Division 3 instruments are instruments that are in force, were made before the commencing day and are not already registered¹¹.

Clause 28 states that all such instruments must be registered. Instruments made within certain periods prior to the commencing day have a fixed deadline for registration and all the relevant instruments, that is the principal instrument and its amending instruments must be lodged for registration in electronic form (**Clause 29**). Where an instrument made after the commencing day amends an unregistered instrument, then that instrument must be lodged and registered within the timeframe set out in subclause 29(4). Division 3 also contains procedures for electronic lodgement and lodgement of original instruments or certified copies. If instruments required to be registered under Division 3, are not lodged before the last lodgement day, they cease to be enforceable and are taken to have been repealed. However, instruments relating to the collection of revenue are an exception (**Clause 32**). **Division 6** refers to instruments already existing on a database maintained by the Attorney-General's Department. Such instruments will be backcaptured and taken to have been registered in order to comply with Division 3.

Compilations

A compilation within the meaning of subclause 4(1) is an instrument as amended and in force at a particular time. A compilation has been produced by incorporating all the amendments into the principal instrument so that it represents the law at a given point in time.

Clause 33 provides for the registration of compilations. Under **subclause 22(2)** a compilation that is registered is taken to be a complete and accurate record of that legislative instrument as amended.

Scrutiny and Disallowance Procedures

Part 5 deals with the procedures relating to the scrutiny of legislative instruments by Parliament. These procedures replace the provisions of Parts XI and XII of the *Acts Interpretation Act 1901*, specifically sections 46, 46A, 48, 48A, 48B, 49, 49A and 50, relating to the scrutiny and disallowance of regulations and 'disallowable instruments' as defined currently in s.46A of the *Acts Interpretation Act 1901*. **Subclause 38(2)** extends the procedures to legislative instruments made on or after the commencing day even if

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their enabling legislation was made before the commencing day and provided that instruments of that kind are not disallowable.

Subclause 38(1) provides that registered Division 2 legislative instruments are to be tabled before each House within **6 sitting days after registration**. The period between instruments being registered and tabled and therefore subject to parliamentary scrutiny is now much shorter. The current period between making and tabling is up to 15 sitting days. Instruments that are not tabled within 6 sitting days after registration cease to have effect (**Subclause 38(3)**).

Clause 39 provides that an explanatory statement must be tabled with the instrument. Regulations may specify the manner in which documents are delivered to Parliament and this may include delivery by electronic means (**Clause 40**).

Clause 41 provides that documents incorporated by reference into legislative instruments and subject to disallowance must be made available to either House on request.

Clause 42 provides for the circumstances in which instruments as a whole or a provision of an instrument may be disallowed or deemed to be disallowed. The current procedure of putting forward a motion to disallow within 15 sitting days of the instrument being tabled still applies.

During the debate on the disallowance provisions of the 1996 [No.2] Bill, the Senate had concerns about being able to disallow a part of an instrument if only a part of the instrument was objectionable and in response had proposed amendments to allow either House to disallow part of an instrument (the Senate **proposed new subclauses 61(1A) and (1B)**). The House did not accept this amendment for the following reasons:

In its Report on the Legislative Instruments Bill 1994, the House of Representatives Committee on Legal and Constitutional Affairs specifically considered this issue. The Committee noted the proposal that provision was being made for disallowance of a provision of a legislative instrument when only some of it was objectionable. The provision was so drafted so that it would apply to some discrete and self-contained part of the instrument that can be severed quite neatly and stand alone. This House agrees with the Committee's views on the matter.¹²

Clause 43 allows for a situation where a motion to disallow is made, and a resolution to defer consideration of that motion is passed by either House so as to enable the rulemaker to amend or remake that instrument within a period not exceeding 6 months. If at the end of that deferral period, a motion to disallow is put forward and not dealt with, the instrument is taken to be disallowed (**Subclause 43(2)**). **Subclause 43(3)** provides that if a motion to disallow is made, and within the 15 sitting day period the House of Representatives is dissolved or expires or Parliament is prorogued, without the instrument being dealt with, the instrument is deemed to have been laid before the House of Representatives on the first sitting day after the dissolution, expiry or prorogation. The deferred disallowance option “appears to comply with the House Committee’s

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recommendation 32 [1995]. That recommendation was that the bill should permit either House to pass a motion disallowing an instrument whilst simultaneously delaying the operation of the motion effecting disallowance.’¹³

Subclause 43(4) provides that if a new instrument is made in accordance with **paragraph 43(1)(c)** (motion is deferred to allow the remaking or amendment of the instrument) the rulemaker must again follow the procedure for registration of the instrument and the explanatory statement and indicate that it has been made in accordance with this section to comply with the objectives of the resolution deferring consideration of the instrument.

Clause 44 lists the instruments that are not subject to disallowance. This list is substantially expanded from that contained in the 1996 [No.2] Bill and contains 44 categories of instruments. Generally the enabling legislation of the instruments listed does not specify that instruments currently made under those acts are subject to disallowance. There are two exceptions. The following sections currently allow for the following instruments to be disallowable.

- Instruments of approval and determinations made under sections 245J, 245K and 495A of the *Migration Act 1958*.
 - S. 245J Approval of primary reporting systems
 - S. 245K Approval of fall-back reporting systems
 - S.495A Minister may arrange for use of computer programs to make decisions etc. **(Item 26)**
- Instruments (other than regulations) relating to superannuation **(Item 39)**

The 1996 [No.2] Bill provided that instruments made under a Commonwealth-State cooperative legislative scheme and certain other instruments such as those made under the *Quarantine Act 1908* are not disallowable. Those instruments designated in the 1996 [No.2] Bill have been included in **clause 44(2)**. In relation to cooperative schemes the Bills Digest for the 1996 [No.2] Bill commented:

The Senate also proposed an amendment to omit **subclause 61(7)** (now subclause 44(1)) which exempts from disallowance legislative instruments made under enabling legislation to facilitate the operation of an inter-governmental body or scheme involving the Commonwealth and one or more States. The House does not accept this amendment on the ground that the amendment fails to take into account proposals to strike a balance between the principles of accountability and the practical problems of maintaining the integrity of schemes requiring the co-operation of multiple governments¹⁴.

In relation to the 1996 [No.2] Bill, the Senate proposed removing **paragraph 61(8)(d)** (now part of subclause 44(2)) that provided a general exemption for proclamations made under the *Quarantine Act 1908* affecting the control of pests and diseases. The reasons put forward by the House for rejecting the Senate amendments were that:

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such Proclamations provide specific control mechanisms to prevent the entry into, and the spread of disease and pests affecting humans, animals and plants in Australia. Typically the detailed conditions under which importation of a particular commodity from a particular country or region may be allowed are set out in protocols developed by the Australian Quarantine and Inspection Service within the scope of the relevant quarantine Proclamation. Each set of protocol conditions is developed on the basis of consideration of relevant scientific information and risk analysis. Quarantine Proclamations have never been subject to disallowance by the Parliament¹⁵.

Clauses 46-48 re-enact the provisions of sections 48A, 48B and 49(1) of the *Acts Interpretation Act 1901* and prevent the remaking of legislative instruments or provisions of legislative instruments that are the same in substance as those already registered and about to be tabled, or instruments that are tabled and within the 15 sitting day disallowance period. Instruments cannot be remade within a 6 month period after being disallowed unless a resolution by the House in which the disallowance occurred rescinds the disallowance.

Any instruments made in contravention of these clauses have no effect (**Subclauses 46(3), 47(3) and 48(2)**). ‘The provisions of the Bill apply to all legislative instruments, not just those currently covered by the *Acts Interpretation Act 1901*.’¹⁶

Sunsetting

The Administrative Review Council in 1992 recommended that sunseting provisions be included in the Legislative Instruments Act and that all instruments be sunsetted 10 years after the principal instrument was first made. ‘Even though the sponsoring agency may keep all rules under review on an ongoing basis, sunseting provides a formal mechanism to ensure that rules do not become outdated¹⁷.’ Sunseting is an opportunity to clean up the statute books ‘concentrate the minds of rule-makers a lot more carefully and as a result, a lot of useless delegated legislation might be knocked off the statute books.’¹⁸ An example of the benefits of sunseting provisions comes from Stephen Argument who cites the example of New South Wales where sunseting provisions came into effect in 1990. ‘From 1 July 1990 to 1 May 2003, the number of pages of statutory rules were cut from 976 to 445 and the number of pages of rules dropped from more than 15,000 to just over 8000.’¹⁹

Even though the House Committee acknowledged that there was ‘bureaucratic reluctance’²⁰ to sunseting by various Commonwealth agencies, it nonetheless, recommended that there be a sunseting regime introduced.

Clause 50 provides that legislative instruments made on or after the commencement of the Act and those ‘backcaptured’ (see discussion on Division 3 clauses 28 to 30) will be subject to the sunseting provisions after 10 years. The 2003 Bill changes the sunseting period from the 5 years of the previous 1996 [No.2] Bill to a 10 year period that accords with the recommendation made by the Administrative Review Council in 1992 and takes

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account of concerns that the previous short five year period would have had adverse impacts on business and the community and government as well.

Clause 51 provides that the Attorney-General may defer the sunseting day up to a period of twelve months by issuing a certificate extending the sunseting day in specified circumstances. The certificate must state why it was issued and be tabled in each House within 6 sitting days of being made. The Attorney-General must table in both Houses a list of instruments where the sunseting day is due within 18 months and the Attorney-General's Department must ensure that a list of instruments is provided to the rulemaker responsible for making those instruments (**Clause 52**). Tabling the list 18 months in advance of sunseting days enables either House to pass a resolution that certain instruments should continue in force (**Clause 53**). These clauses take account of amendments suggested by the Australian Democrats. **Clause 54** exempts certain instruments from the sunseting provisions, such as those that facilitate the establishment or operation of an intergovernmental body or scheme. **Subclause 54(2)** lists categories of instruments that are not subject to the sunseting provisions. There are 51 items in this list.

Clause 59 provides that a review team will be appointed to conduct an independent review of the operation of the Act after three years. The review team will be appointed in the first three months after the third anniversary of the Act coming into effect. The review team must report to the Attorney-General within 15 months and he/she must table the report in both Houses within 6 sitting days of having received the report from the review team.

Clause 60 provides for a review of the sunseting provisions after the Act has been in operation for twelve years. During the three months following the 12 year anniversary, the Attorney-General will appoint a review team. The review team must report to the Attorney-General within 9 months after the 12th anniversary. The Attorney-General must table the report in both Houses within 6 sitting days of receiving the report from the review team.

Concluding Comments

The current Bill has had many iterations and been vigorously debated since its beginnings in 1992. The Bill contains a number of significant reforms and 'is an important and innovative attempt to impose some much-needed discipline onto Commonwealth delegated legislation.'²¹

When placed within the context of developments in other jurisdictions in Australia in the area of delegated legislation, it is quite evident that the Commonwealth has fallen a long way behind those jurisdictions. The most notable comparison is to be made with Victoria when it comes to the managing of legislative instruments. Most States now, to varying degrees, have legislative requirements relating to regulation impact statements (RIS),

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consultative procedures, improvements in the availability of instruments to the public and sunseting. These provisions have been in operation for some time.

The following table is taken from the annual report of the Productivity Commission on *Regulation and its Review 1999-2000* which sets out a summary of regulation review mechanisms in the States and Territories.

State and Territory regulation review mechanisms

<i>Jurisdiction</i>	<i>RIS* requirements for</i>		<i>Sunset clauses</i>	<i>RIS guidelines</i>	<i>RIS adequacy criteria</i>	<i>Regulatory plans</i>
	<i>Bills</i>	<i>subordinate instruments</i>				
New South Wales	a	✓	✓	✓	✓	
Victoria		✓b	✓	✓	✓	✓
Queensland		✓c	✓	✓		
South Australia	d	d	✓	✓		
Western Australia	e	e				
Tasmania	✓f	✓g	✓	✓	✓	
Australian Capital Territory	✓h	✓i		✓	✓	✓
Northern Territory	j	j				

a Cabinet submissions for new Bills must meet best practice requirements.

b For proposals that impose an appreciable economic or social burden.

c For proposals likely to impose an appreciable cost on business and/or the community.

d Agencies preparing Cabinet submissions must justify the use of legislation and identify costs and benefits for proposals that have a major impact.

e The Small Business Development Corporation publishes a watching brief on legislation and policies that adversely impact on small business. Cabinet submissions must indicate whether a proposal impacts on small business and the extent of any impact must be explained.

f For new Bills assessed by the Regulation Review Unit to contain a major restriction on competition.

g For new subordinate instruments imposing a significant cost, burden or disadvantage on any sector of the public.

h Exceptions apply for Bills that are mechanical or administrative in nature.

i For proposals the Micro-economic Reform Section considers to be major.

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j The Department of Industries and Business scrutinises proposed regulations and accompanying explanatory memoranda.

* Abbreviation: RIS – Regulation Impact Statement

Source: Correspondence from the States and Territories.

Source of Table: Productivity Commission *Regulation and its Review 1999-2000 Annual Report*

The Bill when it is passed will bring the Commonwealth into line with other jurisdictions and in some respects take it beyond the developments in those State jurisdictions, particularly in relation to the application of the legislation to various types of legislative instruments. Victoria is currently considering the adoption of the definition of ‘legislative instrument’ in the Commonwealth bill for application to the Victorian situation²².

The 1996 [No.2] Bills Digest referred to concerns having been raised over the costs of proposals in the Bill concerning consultative procedures and sunset provisions and that they may indeed raise the costs of government operations. However, as that Digest pointed out, these additional costs may in part be offset by improvements in decision-making. As Professor Pearce notes:

Much has been made in discussions of the ARC proposals of the cost of consultation. What is not added into the equation is the cost to the community of defective or inefficient legislation, the making of which could be avoided if those affected could point to the problems that it might cause²³.

The requirement for consultation is no longer mandatory but is more flexible in demanding that the rulemaker must be satisfied that appropriate consultation has been carried out in relation to all rules not just those that have a direct or substantial indirect effect on business or competition.

On an administrative level, the Government has implemented its policies relating to the improvement of the regulatory environment relating to matters of business and competition. The Office of Regulation Review (ORR), part of the Productivity Commission, is ‘the Commonwealth’s regulatory reform ‘watchdog’. Its role is to ‘vet and review regulations to ensure that they are properly formulated and do not impose undue costs on business and the community.’²⁴ This system has been in place for a number of years now and compliance has been monitored by the ORR.

The Prime Minister, in *More Time for Business (1997)* outlined the Government’s initiatives for regulation making and review. They expanded on earlier requirements to prepare Regulation Impact Statements (RIS) and cover most of the processes by which laws and regulations are developed. As well, the Council of Australian Governments has put in place two programs: to review existing legislation which restricts competition; and to ensure that Ministerial Councils and other national standard-setting bodies fully assess their regulatory proposals.²⁵

These Government policies have for some time now required that appropriate consultation for regulatory mechanisms be conducted. The Office of Regulation Review has in place

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various compliance mechanisms to ensure that consultation is undertaken and the impacts of proposed strategies canvassed with the appropriate stakeholders. Therefore compliance with such mechanisms is no longer new. The Bill requires a statement to be included in each explanatory statement with details of the nature of consultations undertaken and the extent to which such consultation was taken. If there was no consultation an explanation is required for its absence. These documents are tabled with the legislative instruments and therefore agencies will be accountable to Parliament for consultative procedures undertaken in the preparation of an instrument.

Prerogative Instruments

Other kinds of instruments that do not come within the purview of the Legislative Instruments Bill are prerogative instruments. They are an example of laws made under Letters Patent. They are not subject to the Legislative Instruments Bill 2003 because they are not made pursuant to an exercise of power delegated by Parliament. For example, such instruments set out the procedures for the granting of honours and awards and are not subject to parliamentary scrutiny and few if any review procedures²⁶. Prerogative instruments are published in the Commonwealth Gazette. The issue is one of the accessibility of these instruments to the public and the difficulty of knowing exactly how many of these instruments exist without conducting an exhaustive search of the Commonwealth Gazette.

It may be a policy decision as to whether such classes of instruments made under the Royal Prerogative should be subject to parliamentary scrutiny and disallowance procedures and for Parliament to determine what procedures should apply to such instruments. However to assist in managing these instruments effectively it may be possible to include them as a special class of instrument subject to the Legislative Instruments Bill 2003 at least in relation to their registration and ultimate availability to the public.

To Sum Up

Although the Legislative Instruments Bill 2003 has been very much simplified and reorganised and is different to the Legislative Instruments Bill 1996 [No.2], the comments made by Professor Pearce about the importance of the 1994 bill are still very relevant to the importance of the current Bill:

The Bill ... is a major step forward in making delegated legislation more accessible and of better quality. The Bill is to be warmly welcomed. There will undoubtedly be some teething problems in its implementation, but these must be overcome in order to secure the benefits that will flow to the community from the scheme that is proposed²⁷.

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Endnotes

- 1 Legislative Instruments Bill 2003 s.3 Object.
- 2 Dennis Pearce, 'Legislative Instruments Bill 1994: A Background Paper', *Canberra Bulletin of Public Administration*, No.79 February 1996 p. 54 at p. 54.
- 3 Bills Digest No. 38, 1996–97 Legislative Instruments Bill 1996 at pp. 3–4.
- 4 Bills Digest No. 148, 1997–98 Legislative Instruments Bill 19996 [No.2] at p. 2.
- 5 *ibid.*, at p. 2.
- 6 Administrative Review Council, 'Rule making by Commonwealth Agencies' Report No. 35 1992 at p. ix.
- 7 Stephen Argument, 'The Sad and Sorry Tale of the (Commonwealth) Legislative Instruments Bill', in *Administrative Law and the Rule of Law: Still Part of the Same Package?*, 1998 *AIAL Administrative Law Forum* at p. 259.
- 8 Bills Digest, Legislative Instruments Bill 1996 [No.2] at p. 11.
- 9 Dennis Pearce, 'The Importance of Being Legislative' (1999) *AIAL Forum* No. 21 at p. 32.
- 10 Administrative Review Council, *op cit.*, Recommendation 4 at p. xi.
- 11 Division 3 does not apply to instruments that are captured by Division 2.
- 12 Bills Digest, Legislative Instruments Bill 1996 [No.2] at p. 18.
- 13 *ibid.*, at p. 17.
- 14 Bills Digest, Legislative Instruments Bill 1996 [No.2] at p. 18.
- 15 House of Representatives Votes and Proceedings No. 126 17 November 1997 at Senate Amendment 30.
- 16 *ibid.*, at p. 18.
- 17 Administrative Review Council, *op. cit.*, at p. 82.
- 18 Stephen Argument, Transcript, *Report on the Legislative Instruments Bill 1994*, House of Representatives Standing Committee on Legal and Constitutional Affairs, 1995 at p. 65.
- 19 Stephen Argument, 'Clearing the federal legislative jungle,' *Australian Financial Review*, 18 July 2003, p. 56.
- 20 House of Representatives Standing Committee on Legal and Constitutional Affairs, '*Report on the Legislative Instruments Bill 1994*', at p. 65.
- 21 Stephen Argument, 'Legislative Instruments Bill—R.I.P.? *AIAL Forum*, No. 17 at p. 37.
- 22 Inquiry into the Subordinate Legislation Act 1994 Discussion Paper by Victorian Scrutiny of Acts and Regulations Committee, November 2000 at p. 5.
- 23 Bills Digest, Legislative Instruments Bill 1996 [No.2] at p. 20.
- 24 Office of Regulation Review www.pc.gov.au/orr/

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- 25 Regulation and Its Review 1997-98 Annual report ORR at p. vii.
- 26 Research Note, 'A Rare Form of Law Making: Legislation made outside Parliament', Roy Jordan 2003 (forthcoming).
- 27 Dennis Pearce, 'Legislative Instruments Bill 1994: A Background Paper', *Canberra Bulletin of Public Administration*, No.79, February 1996, 54 at p. 57.

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