

19 Disallowance

Many Acts of Parliament delegate to the executive government the power to make detailed rules and regulations (*delegated or secondary legislation*) that supplement the parent Act and have the same legal force. Such rules and regulations are not passed directly by both Houses of the Parliament, as bills are, but either House may veto (or disallow) them. A plethora of similar types of instruments also exist, and the Senate has a role in overseeing some of these.

1. The disallowance of legislative instruments

The *Legislation Act 2003* (the Act) – formerly the Legislative Instruments Act – provides, among other things, for the disallowance of legislative instruments. It establishes the regime under which they are made, registered and published online, and also provides for compilations of instruments to be published and incorporating any amendments made to them.

What are legislative instruments?

Generally, an instrument is a legislative instrument if it is made under a power delegated by the Parliament and:

- it *determines* the law or alters the *content* of the law, rather than *applying* 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.

Picking up that definition, section 8 of the Act defines each of the following as a legislative instrument:

- an instrument described or declared by a law to be a legislative instrument, for example by using language such as:
 - “The Minister may, by legislative instrument, determine conditions...” or
 - “An instrument made under subsection (1) or (2) is a legislative instrument.”
- an instrument registered on the Federal Register of Legislation as a legislative instrument;
- an instrument made under a power delegated by the Parliament that determines the law or alters its content, as noted above.

Legislative instruments are available on the [Federal Register of Legislation](#).

The Act also declares certain types of instruments – such as regulations – to be legislative instruments (s.10), as well as instruments made as ‘disallowable instruments’ under legislation in force before 1 January 2005, when the predecessor to the current Act commenced (s.57A). There are also various ways that instruments that would otherwise be legislative instruments may be declared not to be (s.8(6) to (8)), so that requirements for tabling and registration do not apply.

Requirements for registration and tabling of legislative instruments

The Federal Register of Legislation established under section 15A of the Act contains a complete record of registered Commonwealth laws, including Acts, legislative instruments, another category

of documents known as *notifiable instruments*, together with associated documents, such as explanatory memoranda for bills and explanatory statements for instruments. The Act provides for the registration and tabling of legislative instruments:

- as soon as practicable after making a legislative instrument, the rule-maker must lodge the instrument and its explanatory material for registration (s.15G) – instruments are not enforceable unless they are registered (s.15K(1)); and
- the Office of Parliamentary Counsel must arrange for the instrument to be tabled in each House within 6 sitting days of being registered (see s.38).

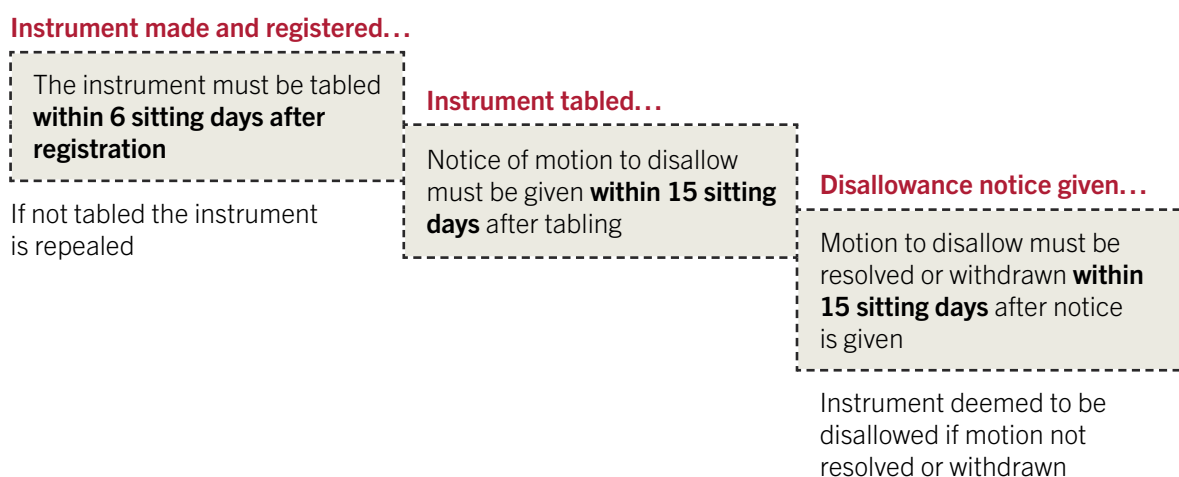
Even if these technical requirements are met, generally provisions of instruments do not operate retrospectively to disadvantage or impose liabilities upon any person, other than the Commonwealth (s.12(2)). Advice can be sought on this question, and it may be the subject of comment by committees which examine instruments (see below), however, the question is ultimately one for the courts and not the Senate.

The disallowance process

The Act provides the framework for the standard disallowance regime, which is reflected in the standing orders. The key features are as follows:

- 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) (s.42);
- 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;
- an instrument ‘the same in substance’ cannot be made again (s46-48):
 - 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; and
 - within 6 months after being disallowed (without the approval of the House that disallowed the regulation).

Figure 1: Usual disallowance process



A single 'sitting day' can extend into the following day if a House sits beyond midnight. In other words, where a sitting day spills over to the following day it is only counted as one sitting day (even if this includes a period of suspension) (*Acts Interpretation Act 1901*, s.2M). For example:

The Senate begins sitting at 9 am on Thursday and extends (with or without a suspension of the sitting) until it is adjourned at 3 pm on Friday. Thursday is a sitting day for the Senate but Friday is not. This example applies equally to the House of Representatives.

2. Exemptions and unusual disallowance provisions

Legislative instruments may be exempted from the disallowance process by the Legislation Act, or a regulation made under that Act (s.44), or by the Act under which they are made. Some legislative instruments also have unusual disallowance provisions which may be specified in the Act under which they are made, so that for instance the time for giving notice or resolving a disallowance motion may vary. Advice should be sought on whether, and if so how, these instruments may be disallowed.

3. Standing order 78 – a safety valve

No action of the Senate can extend the usual 15 sitting day 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.

4. Scrutiny of Delegated Legislation Committee

This committee, established in 1932 as the Regulations and Ordinances Committee, scrutinises all instruments of delegated legislation to ensure that they:

- are made in accordance with the enabling Act, the Legislation Act and other applicable Acts
- 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; and
- 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*, or the committee's [web pages](#).

In 2019, the Senate agreed to modernise and overhaul the committee's ability to scrutinise delegated legislation, including instruments that require positive affirmation, or approval, by the Houses of Parliament. The changes also provide the committee with general inquiry and reporting powers, similar to other standing committees of the Senate.

5. Human Rights Committee

Statements of compatibility with human rights must be included in the explanatory statements for legislative instruments (s.15J). The Joint Committee on Human Rights examines all instruments against seven specified international human rights conventions and reports its findings to both Houses. For further information, see the committee's [web pages](#).

Disallowance notices

Notices of disallowance motions (other than those given by the Scrutiny of Delegated Legislation Committee) should be drafted by the relevant Senate officer (non-government senators: Clerk Assistant (Procedure) x 3380 or ca.procedure.sen@aph.gov.au; government senators: Clerk Assistant (Table) x 3020 or ca.table.sen@aph.gov.au).

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