Chapter 15

DELEGATED LEGISLATION AND DISALLOWANCE

THE POWER TO ENACT LAWS is a primary power of Parliament. Parliament, however, frequently enacts legislation containing provisions which empower the executive government, or specified bodies or office-holders, or the judiciary, to make regulations or other forms of instruments which, provided that they are properly made, have the effect of law. This form of law is referred to as "delegated legislation", "subordinate legislation" or "legislative instruments". The last is the statutorily-established term. This is law made by the executive government, by ministers and other executive office-holders, without parliamentary enactment. This situation has the appearance of a considerable violation of the principle of the separation of powers, the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government. The principle has been largely preserved, however, by a system for the parliamentary control of executive law-making. This system, which has been built up over many years, principally by the efforts of the Senate, is founded on the ability of either House of the Parliament to disallow, that is, to veto, such laws made by executive office-holders.

Executive law-making

The Constitution does not explicitly authorise the Commonwealth Parliament to delegate power to make laws. However, the High Court's decision in *Baxter v Ah Way* 1910 8 CLR 626 has been held to support the Parliament's power to do so. In this case O'Connor J. of the High Court rationalised the power to make regulations in the following terms:

> Now the legislature would be an ineffective instrument for making laws if it only dealt with the circumstances existing at the date of the measure. The aim of all legislatures is to project their minds as far as possible into the future, and to provide in terms as general as possible for all contingencies likely to arise in the application of the law. But it is not possible to provide specifically for all cases, and, therefore, legislation from the very earliest times, and particularly in more modern times, has taken the form of conditional legislation, leaving it to some specified authority to determine the circumstances in which the law shall be applied, or to what its operation shall be extended, or the particular class of persons or goods to which it shall be applied. (*Baxter v Ah Way* 1910 8 CLR 626 at 637-8)

The essential theory of delegated legislation is that while the Parliament deals directly with general principles, the executive, or other body empowered to make subordinate legislation, attends to matters of administration and detail. As the theory was expressed in 1930 by Professor K.H. Bailey: "It is for the executive in making regulations to declare what Parliament itself would have laid down had its mind been directed to the precise circumstances." (Evidence to the Senate Select Committee on the Standing Committee System, PP S1/1929-31, p. 20.)

Other justifications for the use of delegated legislation include reducing pressure on parliamentary time, and allowing legislation to be made so as to accommodate rapidly changing or uncertain situations, or cases of emergency.

Regulations are the primary form of delegated legislation. Many Acts of Parliament contain a provision allowing the Governor-General (who exercises this power on the advice of the ministry) to make regulations "required or permitted" by the statute to be made or "necessary or convenient to be prescribed for carrying out or giving effect" to the statute. Many statutes also refer to specific matters to be prescribed by regulation. Other instruments are made by a variety of executive and administrative authorities, including ministers, heads of departments and agencies, and their delegates.

The making of instruments is governed by statutory provisions contained in the *Legislative Instruments Act 2003* (LIA). The main provisions are that legislative instruments must be registered in the Federal Register of Legislative Instruments (FRLI) and laid before each House of the Parliament within 6 sitting days, and are then subject to disallowance by either House.

Some instruments are subject to special provisions which vary from those of the LIA, for example, as to the period for tabling or disallowance. Some are subject to affirmation by both Houses. Special control provisions of this kind have occasionally been included in statutes by amendments moved in the Senate. There are also some instruments which are not subject to tabling and disallowance, either because they are not legislative in character (that is, not in the nature of laws) or because they are statutorily exempted from the tabling and disallowance process, by the LIA or another statute.

The LIA largely replicates the provisions for parliamentary control of delegated legislation formerly contained in the *Acts Interpretation Act 1901*.

Types and volume of delegated legislation

The types of legislative instruments are extremely diverse. In 1970 there were only three different kinds; by the 1990s this had increased to over 100. They include:

- regulations
- determinations
- ordinances of territories
- plans of management, for example, for fisheries
- declarations, approvals, principles and notices
- by-laws of statutory authorities
- navigation and aviation orders
- notices, such as broadcasting service notices
- standards, such as accounting standards
- declarations, such as health legislation declarations
- directives, such as airworthiness directives
- guidelines, such as aged care and child care guidelines.

The volume of instruments is considerable and increasing in the long term. The table below sets down details of the numbers in recent years:

Year	Disallowable Instruments
1985-1986	855
1986-1987	832
1987-1988	1035
1988-1989	1352
1989-1990	1258
1990-1991	1645
1991-1992	1562
1992-1993	1652
1993-1994	1803
1994-1995	2087
1995-1996	1900
1996-1997	1791
1997-1998	1888
1998-1999	1672
1999-2000	1655
2000-2001	1859
2001-2002	1546
2002-2003	1661
2003-2004	1561
2004-2005	2432
2005-2006	2449
2006-2007	2349
2007-2008	2982

(See Supplement)

Generally speaking, about half of the law of the Commonwealth by volume consists of delegated legislation rather than acts of Parliament.

Parliamentary control: historical background

As has been noted, a system has been built up, principally through the efforts of the Senate, whereby delegated legislation is subject to parliamentary control, mainly through the power of either House of the Parliament to disallow any delegated legislation. This gives the Senate basically the same power it has in relation to other proposed laws: the power of veto. It was through recognition by the Senate of the need to preserve the principle of parliamentary control of law-making that this system was established.

At an early stage in its history the Parliament recognised the need for direct parliamentary control over subordinate legislation. In enacting customs and excise legislation, for example, provision was made, in the face of ministerial resistance, for tabling of regulations and their disallowance by either House within a prescribed period. The *Acts Interpretation Act 1904*

included the basic framework for handling subordinate legislation, namely notification in the *Gazette* and laying before each House within 30 sitting days (reduced to 15 in 1930 and 6 in 2003). A vital component of that framework, inserted by amendment in the Senate but based on provisions in other legislation, was the capacity to move, within 15 sitting days of tabling, that regulations be disallowed. This was further amended in the House of Representatives so that only notice of motion was required within 15 sitting days.

At this stage, however, there was no provision in either House (or any other parliament) for active scrutiny. It was in the 1920s and 30s that public and parliamentary concern led to the establishment of parliamentary procedures to ensure that exercise of regulation-making power became an active subject of scrutiny and liable to a measure of control.

Credit for rousing public opinion is often accorded to Lord Hewart, Lord Chief Justice of England, in his book, *The New Despotism*, published in 1929. The book represents "the outstanding landmark in the development of the theory and practice of delegated legislation" (G.S. Reid, 'Parliament and delegated legislation', *Parliament and Bureaucracy*, 1982, p. 151).

By coincidence Hewart's book was published at the time when the Senate had established a select committee to consider, report and make recommendations about establishing standing committees of the Senate on "statutory rules and ordinances". When the select committee reported, it proposed a committee to review "Regulations and Ordinances".

Simultaneously, the Senate, in which senators supporting the government were in a minority, was challenging regulations made by the Scullin Government under the *Transport Workers Act 1928*, using powers contained in the Acts Interpretation Act. When the initial regulations were disallowed, the regulations were promptly remade. This led the Senate unsuccessfully to petition the Governor-General to refuse to approve further regulations which were the same in substance as regulations already disallowed by the Senate. There was also litigation in the High Court challenging the validity of the regulations (*Dignan v Australian Steamships Pty Ltd* 1931 45 CLR 188).

With this controversy in the background, the Senate, following the general election of 1931, resolved to incorporate in the standing orders a requirement that a Standing Committee on Regulations and Ordinances be appointed at the commencement of each session of Parliament (4/3/1932, J.27-8). Only the House of Lords, when it created a committee in 1925 to examine regulations requiring an affirmative resolution to become law, had previously acted in this field. Eventually many houses of parliaments followed a similar course of establishing a committee to oversee statutory instruments, but one which has not done so is the Australian House of Representatives. Thus responsibility in the Commonwealth for active and systematic scrutiny of this extensive field of legislation falls upon the Senate. Maurice Blackburn, later a Labor member of the House of Representatives, had explicitly contended in 1930 that:

> the House of Representatives is not likely to do that work well, or, in fact, to do it at all. Upon its vote turns the fate of the ministry. The regulation is made by the ministry, and a proposal for its disallowance would certainly be treated as a vote of want of confidence, and would be tested on party lines. No ministry depends on the vote of the Senate and it is quite likely that in that chamber a regulation would be considered on its merits.... (Evidence to the 1929 Select Committee, PP S1/1929-30, p. 23.)

Parliamentary scrutiny of subordinate legislation was further strengthened in 1932 by amendment of the Acts Interpretation Act designed to address the issues which had arisen during dispute over the Transport Workers regulations. The amendment prohibited remaking of disallowed regulations within six months of disallowance, or the making of new regulations "substantially similar", unless their introduction was preceded by a motion rescinding the earlier disallowance.

Five years later the Act was consolidated. An important addition, included following observations by Maurice Blackburn in the House of Representatives about the ease with which a motion to disallow could be by-passed, was a provision compelling action on a motion for disallowance: if a motion to disallow was not resolved, the regulations would be deemed to have been disallowed.

In 2005 the *Legislative Instruments Act 2003* came into effect. This legislation, which had been introduced, scrutinised by the Regulations and Ordinances Committee and amended by the Senate in various forms on a number of occasions between 1994 and 1998, consolidated and reformed the law relating to delegated legislation in accordance with recommendations made by the Administrative Review Council in 1992. It retained and enhanced the provisions for parliamentary control.

Making of delegated legislation

The procedures for making delegated legislation are markedly different from those used in enactment of a statute. There are no stages for legislative passage or opportunity for amendment, and there are no procedural restraints upon rushed legislation.

The LIA:

- defines a legislative instrument as an instrument that is of legislative character, and that is made in the exercise of a power delegated by the Parliament (s. 5)
- establishes the Federal Register of Legislative Instruments, an authoritative source for all delegated legislation accessible in, and maintained in, electronic form (ss 20-22)
- requires that (unless specifically exempted) all legislative instruments be registered (s. 24), and provides that no legislative instrument will be enforceable unless it is registered (s. 31)
- requires the provision of an explanatory statement to accompany each instrument (s. 26)
- encourages rule-makers to undertake appropriate consultation, and to report on that consultation in the explanatory statement (ss 17-19).

There is a prohibition on retrospectivity of delegated legislation where the rights of a person are affected to the disadvantage of that person, or where liabilities are imposed on a person. These limits do not, however, apply to the rights of the Commonwealth or a Commonwealth authority (LIA, s. 12(2)).

Tabling

Section 38 of the LIA provides that copies of all legislative instruments be laid before each House of the Parliament within 6 sitting days of that House after registration. Instruments not laid before each House within the prescribed period after registration cease to have effect (LIA, s. 38(3)).

This system to enforce tabling, which was similar under the earlier legislation, may not be totally fool-proof. In 1990 it was discovered that disallowable rules under the Aboriginal and Torres Strait Islander Commission Act for election of regional councils and special rules for election and composition of the Torres Strait Islands regional council had not been tabled as required. The Act required that elections be held under rules in force at the time when elections were called. As it happened, when the elections were called the time for tabling had not expired. Thus, as the Federal Court found, the elections themselves were valid (*Thorpe v Minister for Aboriginal Affairs* 1990 97 ALR 543).

Normally instruments required to be tabled are forwarded by the responsible department to the Clerk of the Senate, and are tabled by the Clerk at a convenient time in the proceedings.

On occasions failure by departments to forward instruments for tabling has caused considerable legal difficulties. Such a situation was revealed by a statement by the Minister for Industry, Science and Technology, SD, 26/6/1995, pp 1737-9; the instruments in question had to be validated retrospectively by amendments to the Export Market Development Grants Amendment Bill 1994 and by the Industry Research and Development Amendment Bill 1995, and in each case the Senate made amendments to preserve the rights of persons affected by adverse decisions under the invalid instruments to seek redress by litigation. There have been other significant failures by government departments to forward delegated legislation for tabling within the statutory time limit, resulting in that legislation ceasing to have effect, with serious consequences (see statements by the Regulations and Ordinances Committee, SD, 10/10/1996, pp 3854-6; 3/12/1996, pp 6566-8).

It is not essential, however, that regulations be provided for tabling by a minister, or any other member of the government. Once an instrument has come into effect, it is open to any senator to seek to table it. On 26 March 1931 (J.253-5), Transport Workers (Waterside) Regulations were tabled by the Leader of the Opposition in the Senate, Senator Pearce, in conformity with an order of the Senate. Senator Pearce had quoted the gazetted regulations earlier in the day during a speech on a motion for adjournment to debate a matter of urgency; in tabling the regulations he was responding to a motion under then standing order 364 (now 168(2)) that they be laid on the table. The regulations were subsequently disallowed.

(See Supplement) Private senators have tabled regulations on other occasions. On 14 December 1989 (J.2380), Senator Patterson tabled regulations made under the National Health (Pharmaceutical Benefits) Act; these were disallowed on 22 December 1989 (J.2463). On 2 June 1994 (J.1743) Senator Bell tabled regulations under the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act.

Remaking instruments subject to tabling and disallowance

Once a legislative instrument has been made, no instrument the same in substance may be made within a defined period unless approved by both Houses by resolution. The defined period ends seven days after the original instrument has been laid before both Houses, or the later of the two days when the instrument is tabled on different days in the Houses; or after the last day on which the instrument could have been so tabled (LIA s. 46).

Similarly, where notice of a motion to disallow a legislative instrument has been given in either House within 15 sitting days of the instrument being laid before that House, another instrument the same in substance may not be made unless the notice has been withdrawn; the instrument is deemed to have been disallowed under section 42(2); the motion has been withdrawn or otherwise disposed of; or section 42(3) has applied in relation to the instrument (see below). Similar restrictions also apply to instruments if they are deemed to have been tabled again following a dissolution, expiration or prorogation of the House of Representatives (s. 42(2)).

These provisions were inserted in the statute in 1988 after the Regulations and Ordinances Committee pointed out that the disallowance provisions could be defeated by a succession of instruments repealing and remaking their predecessors (82nd report of the committee, PP 311/1987).

The expression "the same in substance" has been judicially construed to refer to "any regulation which is substantially the same …. in the sense that it produces substantially, that is, in large measure, though not in all details, the same effect" (*Victorian Chamber of Manufactures v the Commonwealth* 1943 67 CLR 347 at 364).

See also Remaking of instruments following disallowance, below.

Disallowance

Section 42(1) of the LIA provides:

> 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.

Where a session of the Parliament ends because the House of Representatives is dissolved or expires, or the Parliament is prorogued, and a notice of motion to disallow has not been withdrawn or otherwise disposed of, the instrument in question is deemed to have been laid before the relevant House on the first sitting day of the new session (s. 42(3)). The opportunity to move disallowance is then renewed.

If, at the expiration of 15 sitting days after notice of a motion to disallow any instrument, given within 15 sitting days after the instrument has been tabled, the motion has not been resolved, the instrument specified in the motion is deemed to have been disallowed (s. 42(2)).

This provision ensures that, once notice of a disallowance motion has been given, it must be dealt with in some way, and the instrument under challenge cannot be allowed to continue in force simply because a motion has not been resolved. The provision greatly strengthens the Senate in its oversight of delegated legislation.

For precedents of instruments disallowed by effluxion of the prescribed time after giving notice, see 28/11/1985, J.637; 17/4/1986, J.925; 26/5/1992, J.2316-7.

On 5 March 1992 (J.2073-4) Senator Parer gave notice of motion to disallow all regulations made under the *Political Broadcasts and Political Disclosures Act 1991*. The notice was set down for the day on which the Government tabled the legal advice it had received on the validity of the regulations. The legal advice was not tabled and with the effluxion of time the regulations were deemed to be disallowed.

The disallowance provisions allow for the disallowance of an instrument or a "provision" of an instrument. A provision is regarded as any reasonably self-contained provision which can stand or fall alone.

Under the previous legislation, a regulation had to be disallowed in its entirety and could not be disallowed in part. While on its face more restricted than the current provisions, this gave rise to issues still relevant under the current legislation. A regulation, in a set of regulations, is one of the numbered series of provisions into which such a set is divided. The way in which the disallowance provisions applied to other kinds of delegated legislation depended on their form, but generally speaking a numbered item in a piece of legislation could be disallowed. This feature of disallowance procedure was the source of concern as a limitation on the Senate's control over delegated legislation (for the views of the Standing Committee on Regulations and Ordinances, see 80th report, PP 241/1986). On 9 October 1990 (J.307-8) Senator Harradine withdrew a motion to disallow certain regulations relating to the Human Rights and Equal Opportunity Commission on the ground that he was unable to disentangle those he wished to disallow from the remainder. A notice was withdrawn by Senator Bartlett in similar circumstances in 2000, but only after a government undertaking to amend the regulations in question (11/10/2000, J.3375; see also SD 11/9/2003, pp 14926-30; 9/10/2003, pp 16008-11).

On 1 May 1986 the Senate disallowed export control orders which were self-contained and separately numbered, but which were contained in a single amending order. The Attorney-General's Department and the Solicitor-General argued that the orders had not been validly disallowed and were still in force, on the basis that the Senate could disallow only the complete amending order. When the matter was litigated, however, the Federal Court found that the regulations had been disallowed (*Borthwick v Kerin* 1989 87 ALR 527). The Court suggested, without deciding, that "a regulation" means "each of the serially numbered collocations of words" in a set (at 537). (For this matter see SD, 15/6/1989, pp 4123-6.)

In light of this history, the interpretation of "provision" suggested here is likely to be adopted in future cases.

The question has also arisen of the interpretation of the expression "sitting day" in section 42 of the LIA. This question has not been adjudicated. Where two sittings of the House occur on one day, it is considered that this should be regarded as one sitting day; there would be two sittings, but it is not thought that there would be two sitting days. Where a sitting commences on one day and extends for a period beyond midnight (possibly a very short period) and a new sitting does not commence on the next day, the view taken is that the fact of continuation beyond midnight would not constitute an additional "sitting day". Where one sitting extends over two or more full days, without the intervention of an adjournment, but by the process of suspension of the sitting, the view taken is that, while it may be argued that there has been only one sitting day, it should for safety be assumed that each of those days is a sitting day.

In June 2000 the Senate disallowed some regulations under the Customs Act which had already been deemed to be disallowed in the House of Representatives because of the expiration of the statutory time limit for resolving a notice of a disallowance motion given in the House (20/6/2000, J.2813). The purpose of this seemingly unnecessary action was to ensure that the regulations could not be remade without the consent of the Senate (see below, under Remaking of instruments following disallowance).

Another question which has arisen is whether it is possible for the Senate to pass a motion disallowing instruments which have already been held to be invalid by a court. On 25 August 1983 the Attorney-General's Department submitted an opinion to the President that it was not possible for the Senate to do so. The Attorney-General subsequently took a point of order to this effect in the Senate, but no ruling was made in response to the point of order, and the notice of motion to disallow the regulations in question was withdrawn. A contrary opinion presented by Senate officers was that, just as invalid instruments may be repealed, they may also be disallowed by a House of the Parliament, either of those actions, repeal or disallowance, having the effect of terminating the existence of the invalid instruments. For text of opinions, see SD, 15/12/1983, pp 3858-9.

There are some forms of subordinate legislation with different approval or disallowance procedures. Some instruments require affirmative resolutions of both Houses to bring them into effect, while others do not take effect until the period for disallowance has passed. The Senate has amended bills to insert such provisions where it was thought that particular instruments merited special control procedures (see 12/12/1989, J.2355-61; 15/10/1992, J.2919-20; 25/11/1992, J.3115; 30/8/1995, J.3735-6; 23/8/2001, J.4732; 26/6/2002, J.477-8; 4/12/2003, J.2871; 4/3/2004, J.3085-6). One such amendment provided that a statute was not to operate until the regulations made under it were approved (12/12/1989, J.2358).

Disallowance motions in the Senate may be based on recommendations of the Regulations and Ordinances Committee, which have been, without exception, adopted by the Senate.

Disallowance motions may be moved other than at the initiation of the committee, and are often motivated by opposition to the policy manifested by the delegated legislation. Disallowance may

also be on the basis that the matter should be addressed by legislation (for example, Artificial Conception Ordinance 1986, 9/4/1986, J.875).

On 3 February 1994 (J.1190), pursuant to notice, a senator moved a motion to disallow an instrument of delegated legislation (guidelines for eligible child care centres), identical in terms to a motion to disallow the same instrument which was negatived on 8 December 1993 (J.940). No point of order was taken to the effect that this was contrary to the same question rule. (See also 29/5/1997, J.2030.) A motion may not be moved it if is the same in substance as a motion which has been determined during the same session, unless the latter was determined more than six months previously (SO 86). As explained in Chapter 9, the same question rule is seldom applied, because it seldom occurs that a motion is exactly the same as a motion moved previously. Even if the terms of a motion are the same as one previously determined, the motion almost invariably has a different effect because of changed circumstances and therefore is not the same motion. There may also be different grounds for moving the same motion again.

This consideration arises particularly in relation to delegated legislation. A senator may move to disallow an instrument of delegated legislation on policy grounds, and the Regulations and Ordinances Committee may give notice of a motion to disallow the same instrument on grounds related to the committee's criteria of scrutiny; the two motions are regarded as entirely separate, and the determination of one does not affect the other. Moreover, it could be argued that the same question rule could not prevent the operation of the relevant statutory provisions, which provide for disallowance subject only to the statutory time limit for giving notice. Therefore any disallowance motion may operate (and operate automatically if not withdrawn or determined) provided only that notice of it is given within the statutory time.

Having given a notice for a disallowance motion, a senator cannot be compelled to move the motion before the day for which the notice is given (see Chapter 9, Motions and Amendments, under Notice of motion).

The following are precedents for unusual proceedings involving disallowance: disallowance motion brought on early 9/10/1986, J.1273; disallowance notice given or deferred while instruments referred to committee 23,24,25/8/1988, J.850, 856, 885; 17/10/1988, J.1013; 11/10/1994, J.2252; regulations requiring approval to bring legislation into operation disallowed 16/5/1990, J.92; instruments subject to approval and amendment considered together with bill 17/12/1990, J.584, 589; disallowance motions ordered to be taken together 13/5/1991, J.1011; 29/8/2000, J.3139-40; 27/11/2000, J.3573; disallowance motion moved pursuant to contingent notice 17/11/1993, J.788; two disallowance motions moved together 29/5/1997, J.2030; 1/11/2000, J.3466.

Disallowance motion without notice

While the statutory provisions refer to notice being given of a motion for disallowance, the Senate may disallow tabled regulations without notice if standing orders are suspended to do so. When the matter came before the High Court in the case concerning the Transport Workers Regulations, Rich J. held that the statutory provisions as to notice are directory, not imperative (*Dignan v Australian Steamships Pty Ltd* 1931 45 CLR 188 at 198).

The Senate may also suspend standing orders to enable a notice of motion of disallowance, having effect for that day, to be given and the motion then moved. This occurred on 20 June 1967 (J.153) when a special meeting of the Senate was held, at the request of an absolute majority of senators, in order to have the opportunity to move for disallowance of certain postal and telephone regulations. After some formal business, the Leader of the Opposition, Senator L.K. Murphy, moved:

> That so much of the Standing Orders be suspended as would prevent a Notice of Motion from being now given by Senator Murphy, and having effect for this day, for the disallowance of the Regulations contained in Statutory Rules 1967, Nos. 74, 75, 76 and 77, and made under the Post and Telegraph Act 1901-1966.

The motion being agreed to, Senator Murphy then gave notice of motion for the disallowance of the regulations. Then he moved, pursuant to that notice, that the regulations be disallowed, which motion was agreed to (20/6/1967, J.153).

Given that notice is not necessary, this elaborate procedure need not be followed. For a motion moved by leave after notice was given of it on the same day, see 1/11/2000, J.3466.

For disallowance motions moved by leave immediately after the tabling of the regulations by a minister, see 19/12/1991, J.1990; 19/6/2002, J.402-3; pursuant to a contingent notice immediately after tabling, 24/11/2003, J.2692-3.

Precedence of disallowance motion

A motion to disallow or disapprove any regulation or other instrument subject to disallowance or disapproval by either House is placed on the Notice Paper as Business of the Senate. As such, it takes precedence over Government and General Business for the day on which it is set down for consideration (SO 58).

This procedure further strengthens the Senate in exercising the power of disallowance, and ensures that disallowance motions are given appropriate attention.

The Notice Paper indicates the number of sitting days remaining within which a motion for disallowance must be disposed of before the instrument will be deemed to have been disallowed.

Tabling as a condition of disallowance

A legislative instrument not laid before each House within 6 sitting days after registration ceases to have effect (LIA s. 38(3)). The question arises whether it is necessary for a regulation to be tabled before disallowance is initiated.

In *Dignan v Australian Steamships Pty Ltd* 1931 45 CLR 188, the High Court by a majority (Rich, Starke and Dixon JJ. — Gavan Duffy, C.J. and Evatt J. dissenting) held that the disallowance by the Senate of certain Transport Workers (Waterside) Regulations on 26 March 1931 (J.254-5), after they had been tabled (as noted earlier) by the Leader of the Opposition in the Senate (Senator Pearce) rather than a minister, was an effective disallowance.

In 1942, Senator Spicer, the then Chairman of the Senate Regulations and Ordinances Committee, prepared a memorandum on the subject with the aim of determining the practice which should be followed by the Senate. His memorandum concluded:

> An analysis of the judgments in this case (ie. *Dignan's* case) discloses, therefore, that only two of the five Judges committed themselves to the view that the regulations need not be laid before the House before disallowance, but a majority of the Court, including the two Judges referred to, held that the regulations had been effectively laid before the House, by reason of the motion under S.O. 364.
>
> In these circumstances the question whether disallowance will be effective in a case in which a regulation has not been laid before the House at all is still an open one as far as the High Court is concerned. Any doubt on the matter can be avoided if motions for disallowance are not moved before regulations are laid before the House either by a member of the Executive or by order of the Senate, and this would seem to be ample justification for continuing to follow that procedure.
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> Although *Dignan's* case was decided under section 10 of the *Acts Interpretation Act* 1904-1930, which has since been repealed by the Act of 1937 (No. 10), the new section, 48, which has been inserted in its stead is for this purpose not materially different from the section with which the High Court had to deal. It seems to me that the views I have expressed above are as applicable to the new section as to the section which was under consideration in *Dignan's* case.

In support of his contention that notice of disallowance should be given subsequent to the tabling of the regulations and within fifteen sitting days of such tabling, Senator Spicer instanced the speeches of ministers, the submissions of counsel for the government, and the judgment of at least one High Court Judge (Dr H.V. Evatt). "With this backing", he submitted, "there is learned and authoritative justification for the view that to require notice of disallowance to be delayed until after the regulations are tabled is giving effect to the proper intention of the provision in the Acts Interpretation Act."

This analysis applies equally to the provisions of the LIA.

In 1988 (23/8/1988, J.850) Senator Puplick gave notice of a motion to disallow regulations before they were tabled. The notice was withdrawn on 25 August 1988 (J.878) but revived four days later when the regulations were eventually tabled. (See also Workplace Relations Regulations, 15-16/2/1999, J.436, 450-1.)

In 2002 a disallowance motion was moved by leave immediately after a minister, in response to a resolution of the Senate, tabled the regulations in question. Notice of a motion to disallow the same regulations, given before the regulations were tabled, was withdrawn (18/6/2002, J.381; 19/6/2002, J.402-3, 408).

Amendment of disallowance motion

The following principles apply to amendment of notices of motion for disallowance and amendment of disallowance motions after they are moved:

- an amendment to reduce the scope of a motion (for example, by confining it to particular regulations or a lesser number of regulations) may be made regardless of

whether the time for giving notice has expired, because the original notice is effective for the statutory purpose of giving notice within the statutory time limit

- an amendment to expand the scope of a motion (for example, by extending it to other regulations not covered by the original motion) may not be made unless the time for giving notice has not expired, because the original notice is not effective for that purpose.

On 14 November 1935 (J.125) a motion of disallowance was amended by leave to confine it to a lesser number of regulations. A point of order was taken that the amendment was not in order in that the law required that disallowance motions be submitted after notice had been given within a specified time, and no notice had been given of the motion as amended. President Lynch, for the reasons submitted, ruled the amendment not in order. This ruling was not correct and has not since been followed. Notice had been given of a motion for the disallowance of the whole of the regulations, and the notice extended to any of the regulations. A court would probably have held the proposed motion for disallowance, as amended, to be lawful, given the view of *Dignan v Australian Steamships Pty Ltd* 1931 45 CLR 188, that the provision as to notice is directory and not imperative.

Thus on 26 May 1972 (J.1016-7) a motion was moved for disallowance of the Legal Practitioners Ordinance of the Australian Capital Territory and an amendment proposed to limit the disallowance to sections 10 and 11. No objection was taken to the propriety of the amendment. For further precedent, see 4/5/1987, J.1801 (amended on Notice Paper 4/5/1987). For motions amended by leave, see 8/11/2000, J.3523; 30/11/1995, J.4310; 28/11/1996, J.1143.

For a case of a disallowance motion amended by leave to restrict its scope, and an amendment moved to expand its scope within the original notice, see Parliamentary Entitlements Amendment Regulations, 20/8/2003, J.2249-50.

Although there is at least one precedent, in 1987, for an amendment to a notice of motion for disallowance to reduce its scope by means of a letter under standing order 77, this practice is not followed because a senator who wishes to support the disallowance of certain regulations, for example, may find that a notice has been amended so that it no longer covers those regulations without the senator being aware of the amendment. This problem potentially arises regardless of whether the time for giving notice has expired. Therefore, when a senator wishes to amend a notice of motion to reduce its scope, this is done by way of giving notice of intention to amend the notice, similar to the notice of intention under standing order 78. If the time for giving notice has not expired, another senator can then give a fresh notice to cover the particular items the senator wishes to disallow. If the time for giving notice has expired, another senator can take over the notice in so far as it relates to such items (23/6/1997, J.2165). For a notice narrowed in scope by a standing order 77 notice (after notice of intention), and an amendment moved to further narrow it, see Notice Paper 24/3/2004 and 24/3/2004, J.3223.

An example of a notice of motion to disallow extended in scope when the time limit for giving notice had not expired occurred on 28 April 1992 when Senator Harradine, pursuant to standing

order 77, amended an original notice to extend its scope (Notice Papers, 28/4/1992, p. 1; 29/4/1992, p. 22). (See Supplement)

Words may be added to a disallowance motion to give reasons for disallowance; for precedents, see 30/4/1969, J.452; 9/11/1978, J.455.

For amendments to substitute words not having the effect of disallowance, see 13/5/1991, J.1013; 26/10/1995, J.4057-8.

Consideration in committee of the whole

There is a precedent (26/5/1904, J.49) for the consideration of the disallowance of regulations in committee of the whole. The circumstances were that a motion was moved for the disallowance of a series of regulations under the Defence Act, and it was considered that the advantages of the committee procedure of debate, where senators can speak more than once to a question, were more suited to the nature of the motion. In addition, each regulation could be considered seriatim. To be effective, any resolution of the committee of the whole would have to be adopted by the Senate, on report.

Withdrawal of notice of motion

If a senator, having given notice of a motion for disallowance, seeks to withdraw the notice, provision is made for another senator to take over the motion, thus averting the possibility that the Senate could be denied an opportunity of considering disallowance where the time for giving notice has passed. Standing order 78 provides:

> (1) A senator who wishes to withdraw a notice of motion standing in the senator's name to disallow, disapprove, or declare void and of no effect any instrument made under the authority of any Act which provides for the instrument to be subject to disallowance or disapproval by either House of the Parliament, or subject to a resolution of either House of the Parliament declaring the instrument to be void and of no effect, shall give notice to the Senate of the intention to withdraw the notice of motion.
>
> (2) Such notice of intention shall be given in the same manner as a notice of motion, shall indicate the stage in the routine of business of the Senate at which it is intended to withdraw the notice of motion, and shall not have effect for the day on which it is given; except that, if given on a day on which by force of the statute the instrument shall be deemed to be disallowed if the motion has not been withdrawn or otherwise resolved, or on a day on which by force of the statute the motion must be passed in order to be effective, such notice of intention may have effect for a later hour of that day.
>
> (3) If another senator, at any time after the giving of such notice of intention and before the withdrawal of the notice of motion, indicates to the Senate an objection to the withdrawal of the notice of motion, that senator's name shall be put on the notice of motion, the name of the senator who wishes to withdraw the notice of motion shall be removed from it, and it shall not be withdrawn; but if no senator so objects to the withdrawal of the notice of motion, it may be withdrawn in accordance with such notice of intention.

These provisions ensure that the right of any senator to move disallowance is not lost by the withdrawal of a notice.
(See Supplement)

For instances of senators taking over disallowance motions, see 14/11/1986, J.1398; 18/12/1989, J.2389; 24/3/1992, J.2093; 10/9/1996, J.546. In each instance, a senator was taking over the motion to disallow from the Regulations and Ordinances Committee chair. (See Supplement)

Where a senator wishes to withdraw a notice of motion for disallowance on the last day for resolving the notice and there is not time for notice of intention to withdraw to be given, the notice may be withdrawn by leave, but only after senators present have an opportunity to take over the notice (11/10/2000, J.3375). (See Supplement)
(See Supplement)
A notice of intention to withdraw a disallowance motion has the effect of postponing a notice which would otherwise be called on earlier to the time of intended withdrawal, unless another senator takes over the notice before that time, in which case it is called on at its due time. (See Supplement)

For the withdrawal without notice or leave of a notice of motion for disallowance which was not regarded as effective because it was given before the regulations concerned were tabled, see 19/6/2002, J.402-3, 408. For the withdrawal of a notice after the regulations concerned were disallowed, see 24/11/2003, J.2693.

An unusual resolution was passed on 30 June 1994 (J.2002) on the motion of the chair of the Regulations and Ordinances Committee to allow the committee to withdraw from the Notice Paper a notice of motion for the disallowance of certain Industrial Relations Court Rules during the winter long adjournment of the Senate. It was explained that, if the committee received a satisfactory undertaking from the Industrial Relations Court concerning the making of substitute rules, the withdrawal of the notice of motion would allow the Court to make substitute rules without waiting for the next meeting of the Senate and without running the risk of the new rules being held to be invalid under the predecessor of section 47 of the LIA. As explained above, this provision prohibits the making of delegated legislation the same in substance as legislation which is the subject of an unresolved disallowance motion. The High Court has taken a broad view of the meaning of "the same in substance" (*Victorian Chamber of Manufactures v Commonwealth* 1943 67 CLR 347), and new rules, while overcoming the objections of the Regulations and Ordinances Committee, might be legally the same in substance as the previous rules. The resolution preserved the right of any senator to prevent the withdrawal of the notice of motion until the Senate next met, thus keeping the spirit of standing order 78.

Standing order 83(2) provides that a motion not moved when the notice is called on is withdrawn. If, however, a senator declines to move a disallowance motion when the notice is called on (in the circumstance, for example, of the Senate rejecting a motion by the senator to postpone it), it is not withdrawn under standing order 83(2) until other senators have an opportunity to take it over and move it in accordance with standing order 78. On the senator declining to move the motion when the notice is called on, the chair designates either a time on the next day of sitting or a time later in the sitting (depending on whether it is the last day for resolving the matter) by which the notice will be withdrawn if no other senator takes it over. A senator taking over a disallowance notice in these circumstances is entitled to specify a future day for moving the motion, provided that that day is within the statutory time limit for resolving the notice. (17/10/2002, J.914)

Standing order 78 is regarded as applying to any disallowance-type provision even if it does not strictly fall within the language of the standing order. Thus leave was required to withdraw a notice of motion to amend disability standards under the *Disability Discrimination Act 1992*, the standards being subject to amendment and approval provisions inserted into the statute by amendment by the Senate (23/10/2002, J.967-8).

Effect of end of a Parliament or session

As has been noted above, the LIA, s. 42(3) contains an important safeguard to ensure that the opportunity to disallow a legislative instrument is not lost when a Parliament or a session ends. As explained in Chapter 7, either of those occurrences terminates the business before the Senate, including notices of motion. An unresolved disallowance notice, however, results in the instrument in question being deemed to be tabled again on the first sitting day of the next session, so that disallowance action may start afresh.

Ministerial undertakings

The Standing Committee on Regulations and Ordinances follows a practice of giving notices of motions to disallow regulations or other subordinate legislation within the prescribed period, and then withdrawing the notices after correspondence with the responsible minister satisfies the committee's concerns.

Giving notices of motions to disallow indicates concern about the delegated legislation in question, and these are known colloquially as protective notices of motion, in that they protect the right of the committee, and of any senator, to move disallowance if it is subsequently decided that this is appropriate. Such concern is often allayed by further explanatory material from the minister or an undertaking to amend the legislation. Where the committee's concerns are met, the notice of motion to disallow is withdrawn (although it may be taken over by another senator). There are some occasions where the responsible minister does not satisfy the committee and the motion to disallow proceeds.

Frequently a protective notice of motion is withdrawn on the basis of undertakings from a minister to take action addressing the matters causing concern, usually by amending the legislation in question.

The practice of ministerial undertakings has the benefit of securing an outcome agreeable to the committee without necessarily interrupting administration and implementation of policy by disallowance of the instruments in question.

Undertakings, however, must be carried out promptly for this system to work. This is a source of serious, continuing and active concern to the committee. During a period when there was a particularly notable failure to fulfil undertakings promptly, the committee observed:

> A highly unsatisfactory situation arises when undertakings by Ministers are not carried out promptly and expeditiously, in that provisions recognised to be defective are allowed to stand and the public effectively lack the protection which the disallowance procedure and the Committee are designed to give. (62nd report, PP 203/1978)

In its annual report for 1986-87 the committee again recorded its apprehensions about delays in giving effect to ministerial undertakings:

> The Committee is concerned that it could undermine the whole basis of parliamentary honour on which the undertaking convention is based, if the implementation of undertakings is not expedited as quickly as possible after a Minister has given his or her word to act. To countenance excessive delay is not only a discourtesy to the Senate but it is also a continuing affront to principles of freedom, justice, fairness and propriety if objectionable provisions are left on the delegated statute book in spite of parliamentary requests for amendments and in contravention of ministerial commitments to make amendments. (83rd report, PP 377/1988)

See also a statement by the chair of the committee, SD, 6/2/1995, pp 515-9.

It is customary for the committee, in its general reports, to record all undertakings which have been given and discharged, and those which have been given and are still to be implemented.

Senators other than the chair of the committee also occasionally withdraw disallowance motions on the basis of ministerial undertakings (30/11/1994, J.2627, SD, pp 3585-9; 28/6/1995, J.3551-2, SD, pp 1932-3). Undertakings may also be accepted by the Senate in determining whether to disallow instruments (19/10/1995, J.3972; SD, 30/11/1995, pp 4393-400). (See Supplement)

For a precedent of ministerial undertakings given following report of a committee on regulations, see the report of the Legal and Constitutional Affairs Committee on the Australian Nuclear Science and Technology Organisation Regulations, presented on 8 November 1994 (PP 222/1994), and Senate Debates of the same date, pp 2585-91.

Remaking of instruments following disallowance

Section 48 of the LIA provides:

> (1) If, under section 42, a legislative instrument or a provision of a legislative instrument is disallowed, or is taken to have been disallowed, a legislative instrument, or a provision of a legislative instrument, that is the same in substance as the first-mentioned instrument or provision, must not be made within 6 months after the day on which the first-mentioned instrument or provision was disallowed or was taken to have been disallowed, unless:
>
> (a) if the first-mentioned instrument or provision was disallowed by resolution—the resolution has been rescinded by the House of the Parliament by which it was passed; or
>
> (b) if the first-mentioned instrument or provision was taken to have been disallowed—the House of the Parliament in which notice of the motion to disallow the instrument or provision was given by resolution approves the making of a legislative instrument or provision the same in substance as the first-mentioned instrument or provision.
>
> (2) Any legislative instrument or provision made in contravention of this section has no effect.

For the meaning of "the same in substance" see above, under Remaking instruments subject to tabling and disallowance.

The statute was amended in 1932 to include this provision that a disallowed regulation was not to be remade unless the resolution of disallowance was rescinded. Introducing the amending legislation to the Senate, the Acting Attorney-General (Senator McLachlan) recalled the events of the previous year relating to the disallowance of regulations and the re-enactment of others which were substantially the same. Those circumstances were the subject of an address to Governor-General Isaacs requesting that he refuse to sanction further regulations, during the then session, being the same in substance as those already disallowed (28/5/1931, J.292). Although the Governor-General, in his reply (10/6/1931, J.294-5), could not comply with the Senate's request, the subsequent amending legislation met the wishes of the Senate.

The standing orders were also amended in 1932 to ensure that the general rule that the same question is not to be again proposed during the same session should not operate to prevent the proposal of a motion for the disallowance of an instrument substantially the same as one previously disallowed during the same session (SO 86). But in view of the statutory restrictions on the remaking of disallowed instruments, this provision in the standing orders can, in practice, relate only to instruments remade more than six months after the date of disallowance.

Motions to allow the remaking of delegated legislation disallowed by the Senate usually arise from the complex character of that legislation: the Senate is often not able to disallow provisions regarded as objectionable without also striking down some acceptable provisions. For precedents see 25/6/1992, J.2633-5; 17/10/1994, J.2298; 9/10/1996, J.668; 4/12/1996, J.1192. As explained in Chapter 9, these motions are not technically rescission motions and are now not treated as such (13/5/2004, J.3415). (See Supplement)

(See Supplement)

See under Disallowance, above, for disallowance of instruments already disallowed or invalidated and repetition of the same disallowance motion.

For an analysis of the same question rule, see Chapter 9, Motions and Amendments, under that heading. See also that chapter for an analysis of the meaning of rescission, and the point that motions to permit the remaking of delegated legislation are not technically rescission motions.

Disallowance of a repealing instrument

The disallowance of an instrument which repeals, in whole or in part, an earlier instrument revives the repealed provision from and including the date of disallowance of the repealing instrument. (LIA, s. 45(2))

In its 66th report in 1979, the Regulations and Ordinances Committee considered the question of whether the disallowance of an instrument which repeals another instrument has the effect of reviving the repealed instrument. There appeared then to be obscurity in the law on this matter and the committee considered that the obvious solution was for the legislation to be amended so as to provide explicitly for the effect of the disallowance of a repealing instrument. The committee was strongly in favour of the common law rule of revival being applied to the disallowance of regulations and other instruments. The common law rule of revival is that repeal of a statute which has repealed an earlier statute has the effect of reviving the earlier repealed

statute. (PP 116/1979; SD, 8/6/1979, pp 2932-3) (In relation to statutes, however, the common law rule has been reversed.) On 26 May 1981 (SD, pp 2084-6) the Attorney-General informed the Senate that the Government had decided to introduce amendments to the legislation to implement the committee's recommendation, that is, that the common law rule of revival should, by statute, be applied to the parliamentary disallowance of all instruments. This was done in 1982. (See Supplement)

In 1996 a new government adopted the tactic of disallowing the regulations of its predecessor in the House of Representatives, thereby avoiding the making of repealing regulations which could be disallowed by the Senate. The Senate passed a motion condemning this practice (27/6/1996, J.422-3).

"Sunsetting" of instruments

Part 6 of the LIA contains provisions for "sunsetting" of legislative instruments, that is, ceasing their operation, generally after ten years. Sections 52 and 53 provide for the tabling of lists of instruments to be "sunsetted", and for either House to resolve, within 6 months after tabling, that particular instruments or provisions continue in effect. In effect, each House is empowered to veto a "sunsetting".

Consultation

Part 3 of the LIA provides for rule-makers to consult with interested parties before making instruments. Section 19, however, provides that failure to consult does not affect the validity of an instrument. It likewise does not affect parliamentary control, although it may be an issue in parliamentary scrutiny.

National uniform legislation

National schemes of legislation, also known as uniform legislation, have always presented difficulties for Senate scrutiny of legislation because they are framed by agreement between the Commonwealth and state and territory executive governments and then presented to the respective parliaments as unchangeable because the parliaments cannot change the intergovernmental agreements. The two legislative scrutiny committees, the Regulations and Ordinances Committee and the Scrutiny of Bills Committee, combined to present on 16 October 1996 a position paper on this subject. The position paper suggested two possible solutions: a national committee for the scrutiny of such legislation and the adoption of parliamentary procedures so that legislation commented on by a scrutiny committee would not proceed until the government reported on the matters raised. No action has yet been taken on these suggestions. (See also statement by the committee, SD, 12/3/1998, p. 892-4.)

Regulations and Ordinances Committee

All disallowable legislative instruments stand referred to the Standing Committee on Regulations and Ordinances for scrutiny and recommendation as to any further parliamentary action including disallowance.

The Standing Committee on Regulations and Ordinances is appointed at the commencement of each Parliament under standing order 23(1). It is composed of six senators, three from the government party; and three from other parties, including usually at least two from the Opposition parties. The committee chair is elected from the government members. The committee has a quorum of four. The chair, or the deputy chair when acting as chair, has a casting vote in the event of equality of voting.

Standing order 23(2) provides:

> All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the Committee for consideration and, if necessary, report.

The committee scrutinises each instrument to ensure:

> (a) that it is in accordance with the statute;
>
> (b) that it does not trespass unduly on personal rights and liberties;
>
> (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
>
> (d) that it does not contain matter more appropriate for parliamentary enactment. (SO 23(3))

These terms of reference have governed the committee's proceedings throughout its history with only minor amendment in 1979 largely occasioned by creation of the Administrative Appeals Tribunal. The four principles are interpreted broadly to include every possible deficiency in delegated legislation affecting parliamentary propriety and personal rights.

In its fourth report in 1938 the committee recorded that it had determined in 1933 that "questions involving government policy in regulations and ordinances fell outside its scope" (PP S1/1937-8, p. 4). The committee does not consider policy issues arising in delegated legislation, but does not refrain from finding provisions contrary to its principles and recommending their disallowance simply on the basis that they reflect government policy.

The committee interprets its terms of reference as requiring it to scrutinise instruments to ascertain whether they:

- are in accordance with the spirit of the statute even though legally authorised by the statute
- contain reversals of the onus of proof in criminal matters
- abridge traditional civil liberties; for example by providing for searches of premises without warrant

- allow for administrative decisions affecting rights and liberties without objective criteria to govern such decisions and without a right of appeal to a judicial or other independent body by an aggrieved person

- allow retrospective imposts, particularly involving payment of moneys with long periods of retrospectivity.

The committee reports regularly to the Senate and makes general reports on its scrutiny of delegated legislation. In respect of many instruments these reports record that the instruments have been changed when the committee has pointed out defects in them. The chair of the committee also frequently makes statements on its behalf in the Senate recording action taken by the committee in relation to particular instruments. These statements are often accompanied by tabling of the committee's correspondence with ministers and other rule-making authorities. As noted above, the committee frequently gives notices of motions for disallowance and withdraws the notices when satisfactory explanations or undertakings are given by ministers or other rule-making authorities.

In its 101st report, in June 1995 (PP 97/1995), the committee asserted its right, and that of the Senate, to scrutinise rules of court and other instruments made by judicial bodies. These instruments, like other forms of delegated legislation, are subject to disallowance by the Senate (see also statements by the committee, SD 23/6/1997, pp 4868-70).

Occasionally the Senate refers to the committee for special report particular matters relating to delegated legislation. Thus in 1994 and subsequently the committee considered and reported in detail on the Legislative Instruments Bill, which significantly affected the system for the making of delegated legislation (PP 176/1994; 264/2003; see also Chapter 16, Committees, under Legislative Scrutiny Committees).

In its scrutiny of delegated legislation the committee is supported not only by its staff but by advisers who have been drawn from both the practising and academic sides of the law profession. The legal adviser reports to the committee on every instrument it considers. In framing advice the legal adviser also peruses supporting documentation, including explanatory memoranda issued by the rule-making authority. The committee usually meets in private. It has the power to sit during recess, but it does not have the power to move from place to place.

The committee, supported by the statutory provisions for disallowance, has established an effective system for the parliamentary scrutiny and control of delegated legislation. This system has since been widely copied in other jurisdictions in Australia and around the world (see the 71st report of the committee, PP 47/1982; 85th report, PP 464/1989; and subsequent annual reports).

In assessing the committee's achievements over half a century, Professor Gordon Reid observed that it had "established itself as bipartisan in all of its work" and had "maintained its working momentum, whichever political party has been in power". Reid further observed that the committee's record demonstrated that so far as ministerial responsibility is concerned, ministers have been "held primarily responsible to the Senate and only incidentally to the House of Representatives in their use of delegated legislation" (Reid, *op. cit.*, pp 157, 159).

SCRUTINY OF DELEGATED LEGISLATION