The Senate

Standing Committee on Regulations and Ordinances

Report on the work of the committee in 2015-16

July 2015 – December 2016

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Committee information

Current members (March 2018)

Senator John Williams (Chair)	New South Wales, NAT
Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator Anthony Chisholm	Queensland, ALP
Senator Linda Reynolds	Western Australia, LP
Senator the Hon Lisa Singh	Tasmania, ALP
Senator Amanda Stoker	Queensland, LP

Members July 2015 – December 2016[1]

Senator John Williams (Chair)	New South Wales, NAT
Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator Anthony Chisholm (from 1.9.16)	Queensland, ALP
Senator Sam Dastyari (to 12.11.15)	New South Wales, ALP
Senator Jane Hume (from 1.9.16)	Victoria, LP
Senator Claire Moore (from 12.11.15 to 1.12.16)	Queensland, ALP
Senator Nova Peris OAM (to 9.5.16)	Northern Territory, ALP
Senator Linda Reynolds CSC	Western Australia, LP
Senator the Hon Lisa Singh (from 1.12.16)	Tasmania, ALP
Senator the Hon Zed Seselja (to 9.5.16)	Australian Capital Territory, LP

1 It is noted that the committee was not in existence between 9 May and 1 September 2016, due to the dissolution of the Senate and full Senate election.

Secretariat 2015-16[2]

Mr Ivan Powell, Secretary
Ms Toni Dawes, Secretary
Ms Jessica Strout, Principal Research Officer
Dr Patrick Hodder, Senior Research Officer
Ms Eloise Menzies, Senior Research Officer
Ms Morana Kavgic, Legislative Research Officer
Ms Ingrid Zappe, Legislative Research Officer

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2 The secretariat is staffed by parliamentary officers drawn from the Department of the Senate's Legislative Scrutiny Unit, who regularly work across multiple scrutiny committee secretariats. The secretariat usually comprises three to four staff.

Table of Contents

Chapter 1

Introduction

Work of the committee

1.1 The Senate Standing Committee on Regulations and Ordinances (the committee) was established in 1932. The role of the committee is to examine the technical qualities of all disallowable instruments of delegated legislation and decide whether they comply with the committee's non-partisan scrutiny principles, which focus on statutory requirements, the protection of individual rights and liberties, and ensuring appropriate parliamentary oversight.

1.2 In most years, thousands of instruments of delegated legislation are made, relating to many aspects of the lives of people living in, trading with, or seeking to live or work in Australia. Instruments of delegated legislation have the same force in law as primary legislation, and may form as much as half of the law of the Commonwealth of Australia.[1]

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

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

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

1.5 This report on the work of the committee covers the period between July 2015 and December 2016. This report, unusually, covers an 18-month period; the committee proposes to report on a calendar year basis from 2017 onwards.

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1 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 432.

2 On 5 March 2016 the *Legislative Instruments Act 2003* became the *Legislation Act 2003* due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015*. The *Legislation Act 2003* and the disallowance process are discussed in Chapter 2.

Committee membership

1.6 Senate standing order 23(1) provides that the committee is appointed at the commencement of each Parliament. The committee has six members: three senators drawn from the government party and three from non-government parties. The committee is chaired by a government senator. The current committee membership, as well as the list of members from the period covered by this report, can be found at the beginning of this report. Current membership, as updated from time to time, can also be found on the committee's website.[3]

The committee's mode of operation

1.7 In undertaking its work the committee is supported by a secretariat usually comprised of a secretary, a principal research officer, a senior research officer and a legislative research officer. The committee also obtains advice from an external legal adviser who is appointed by the committee with the approval of the President of the Senate. Mr Stephen Argument served as the committee's legal adviser during the reporting period.

Delivery of instruments

1.8 Legislative instruments must be registered on the Federal Register of Legislation as soon as practicable after being made and, within six sitting days of registration, tabled in both Houses of Parliament. Once registered, the instruments are delivered by the Office of Parliamentary Counsel to Parliament for tabling, and to the committee secretariat.[4]

Scrutiny of instruments

1.9 Instruments tabled in Parliament are scrutinised by the committee secretariat and legal adviser with reference to the committee's scrutiny principles.

1.10 The committee meets regularly, during sittings of Parliament, to consider any instruments that may give rise to concern in relation to its scrutiny principles.

1.11 Where an instrument raises a concern referable to the committee's scrutiny principles, the committee's usual approach is to comment on it in its *Delegated legislation monitor*, then write to the responsible minister seeking further explanation or information, or requesting specific action to address the issue of concern.

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3 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Committee_Membership

4 *Legislation Act 2003*, sections 15G and 38 (previously *Legislative Instruments Act 2003*, sections 30, 38 and 39).

The committee's use of the disallowance process

1.12 The committee's scrutiny of instruments is generally conducted within the timeframes that apply to the disallowance process, as set out in chapter 2. Working within these timeframes ensures that the committee is able, if necessary, to seek disallowance of an instrument about which it has concerns. The Senate has never rejected a recommendation from the committee that an instrument should be disallowed.[5]

1.13 In cases where the 15 sitting days available for giving a notice of motion for disallowance are likely to expire before a matter is resolved, the committee may give a notice of motion for disallowance in order to protect the Senate's ability to subsequently disallow the instrument in question.[6]

1.14 In the vast majority of cases, such 'protective' disallowance notices are resolved when the committee receives a satisfactory explanation or undertaking from the relevant minister, for example to amend the instrument or its explanatory statement in a way which will address the committee's scrutiny concerns. The usual process is for the chair to withdraw the notice of motion, having notified the Senate of his or her intention to do so.[7]

Undertakings

1.15 In many cases, ministers provide an undertaking to address the committee's concerns through the taking of steps at some point in the future. Typically, an undertaking will relate to the making of amendments to the relevant instrument or its explanatory statement. The acceptance of such undertakings by the committee has the benefit of securing an acceptable outcome without interrupting the administration of government by disallowing the instrument in question.

Interaction with other legislative scrutiny committees

1.16 The Regulations and Ordinances Committee is one of three legislative scrutiny committees in the Commonwealth Parliament. The work of the three committees is complementary in many respects. The committee therefore monitors the work of the two other legislative scrutiny committees—the Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights—and, where appropriate, considers relevant matters raised by these committees or refers matters to them.

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5 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 437.

6 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 438.

7 Senate standing order 78 provides that any other senator may take over a notice of motion for disallowance once the intention to withdraw is advised to the chamber, before the notice is withdrawn. A senator who does so may then pursue the disallowance motion on any grounds he or she wishes.

Committee publications and resources

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

Senate disallowable instruments list

1.18 The 'Senate disallowable instruments list' is a list of all disallowable instruments tabled in the Senate.[8] This online resource may be used to ascertain whether or when an instrument has been tabled in the Senate, and how many sitting days remain in which a notice of motion for disallowance may be given.

1.19 The list is updated after each sitting day.

Delegated legislation monitor

1.20 The *Delegated legislation monitor* (the monitor) is the regular scrutiny report on the work of the committee, and is published in each sitting week of the Senate. The monitor details matters of concern in relation to disallowable instruments of delegated legislation that are tabled in the Senate and scrutinised by the committee. The monitor also contains comments on any instruments that have been misclassified as exempt from disallowance, or misclassified as disallowable.

1.21 Once responses are received from ministers in relation to instruments of concern, the monitor sets out details of the responses, the committee's comment on them, and any relevant action taken.

Index of instruments

1.22 The 'Index of instruments' is an alphabetical list of all instruments about which the committee has raised a concern in a particular year. Full comments on individual matters are contained in the monitor referenced in the index.

Disallowance Alert

1.23 The 'Disallowance Alert' is a webpage listing all instruments for which a notice of motion for disallowance has been lodged in either House (whether by the committee or an individual senator or member). The progress and outcome of all disallowance notices is also recorded.

Senate seminar on scrutiny of delegated legislation

1.24 The Senate Procedure and Research Section organises half-day seminars on *Senate scrutiny of delegated legislation* (previously called *Delegated legislation and*

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

the Senate). These are tailored to parliamentary staff, government officers and other stakeholders whose work or interests intersect with the work of the committee.

1.25 Information on seminar dates and booking inquiries may be accessed through the Senate website.[9]

Acknowledgements

1.26 The committee acknowledges the assistance of its legal adviser during the reporting period, Mr Stephen Argument.

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

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

Chapter 2

Delegated legislation and the disallowance process

Introduction

2.1 This chapter provides an overview of delegated legislation, the disallowance process and the *Legislation Act 2003* (Legislation Act).[1]

What is delegated legislation?

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

2.3 Because they are made under a delegated power, instruments of delegated legislation are not directly enacted by Parliament, as must happen for a bill to become an Act with the force of law. Therefore, to ensure that Parliament retains effective oversight, legislative instruments are usually: (a) required to be registered on the Federal Register of Legislation;[2] (b) required to be tabled in Parliament; and (c) subject to disallowance by either House of Parliament under a process prescribed by the Legislation Act.

What is a legislative instrument?

2.4 Section 8 of the Legislation Act defines a legislative instrument. This includes any instrument declared as such by the primary law empowering or requiring it to be made, and any instrument registered as a legislative instrument on the Federal Register of Legislation. More generally, subsection 8(4) states that an instrument is a legislative instrument if:

> (a) the instrument is made under a power delegated by the Parliament; and
>
> (b) any provision of the instrument:
>
> > (i) determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and

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1 On 5 March 2016 the *Legislative Instruments Act 2003* (LIA) became the *Legislation Act 2003* due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015*.

2 Following the changes to the LIA (see previous note), the Federal Register of Legislative Instruments is now called the Federal Register of Legislation and may be accessed at https://www.legislation.gov.au.

(ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

2.5 The Legislation Act provides that particular types of instruments, such as regulations and ordinances, are to be classed as legislative instruments.[3]

2.6 In addition, the Legislation Act provides that certain instruments are not legislative instruments. These include notifiable and commencement instruments, rules of court, and other instruments declared by an Act or particular regulations not to be legislative instruments.[4]

Requirements of the Legislation Act

2.7 The main elements of the scheme contained in the Legislation Act for legislative instruments are:

- legislative instruments must be registered on the Federal Register of Legislation, along with an explanatory statement;
- once registered, such instruments must be delivered within six sitting days to each House of Parliament for tabling;[5] and
- any member of the Senate or the House of Representatives may initiate the process to disallow any such instrument within 15 sitting days of it being tabled. Once such a notice has been given, a further period of 15 sitting days is available to resolve the motion.

2.8 The Legislation Act details various other requirements relating to legislative instruments and their accompanying explanatory statements.

Disallowance

Purpose

2.9 The ability of the executive to make delegated legislation without parliamentary enactment appears to be 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'.[6]

2.10 The ability of either the Senate or the House of Representatives to disallow legislative instruments is therefore critical to ensuring that Parliament retains effective oversight of delegated legislation.

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3 *Legislation Act 2003,* section 10.

4 *Legislation Act 2003,* subsections 8(6) and 8(8).

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

6 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 429.

2.11 All legislative instruments are subject to disallowance unless they are exempted by law. Section 44 of the Legislation Act exempts certain legislative instruments from disallowance, including instruments listed in regulations made under that section.[7] Another Act may also expressly exempt particular instruments from the disallowance provisions of the Legislation Act.

The disallowance process

2.12 The disallowance process is set out in subsection 42(1) of the Legislation Act, which provides that any member of the Senate or House of Representatives may, within 15 sitting days of a disallowable legislative instrument being tabled, give notice that they intend to move a motion to disallow the instrument or a provision of the instrument. There is then a further 15 sitting days in which that motion may be resolved. During that period, if the House in which the motion was given resolves to disallow the instrument or provision, it ceases to have legal effect.

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

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

Unusual disallowance processes

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

2.16 For example, for determinations made under subsections 78(1) or (3) of the *Public Governance, Performance and Accountability Act 2013*, the time available for both giving and resolving a notice of motion for disallowance is only five sitting days.[8]

Effect of disallowance

2.17 Where a legislative instrument or a provision of an instrument is disallowed, that instrument or provision ceases to have effect from the time the disallowance motion was passed or was deemed to have passed.[9] Disallowance does not remove

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7 See the Legislation (Exemptions and Other Matters) Regulation 2015 [F2018C00024].

8 *Public Governance, Performance and Accountability Act 2013*, section 79.

9 *Legislation Act 2003,* subsections 42(1), 42(2) and 45(1).

the legal effect of the instrument, or acts done under it, between the time it commenced and the time it was disallowed.

2.18 If the disallowed instrument or provision repealed all or part of an earlier instrument, then that earlier instrument or part is revived.[10]

Restrictions on re-making legislative instruments

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

- for a period of seven days, unless approved by resolution by both Houses of Parliament, an instrument may not be made that is the same in substance as a registered instrument that has been tabled before Parliament;[11]
- an instrument may not be made that is the same in substance as an existing instrument that remains subject to an unresolved notice of motion for disallowance ;[12] and
- for a period of six months, an instrument may not be made that is the same in substance as an instrument that has been disallowed under section 42 (unless the House which disallowed the instrument, or in which the instrument was deemed to have been disallowed, rescinds the resolution that disallowed the instrument or approves it being made).[13]

Senate procedures relating to the disallowance process

2.20 A number of the Senate's procedures are relevant to the disallowance process in the Legislation Act.

2.21 Standing order 78 is a significant example of one such procedure, whereby any senator has the opportunity to take over a motion for disallowance if the original mover seeks to withdraw that motion. This ensures that the Senate is not denied the right to disallow an instrument where the time for giving notice has passed; and that the right of individual senators to move for disallowance is not lost by the withdrawal of the notice.[14]

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10 *Legislation Act 2003*, subsection 45(2).

11 *Legislation Act 2003*, section 46.

12 *Legislation Act 2003*, section 47.

13 *Legislation Act 2003*, section 48. For more detail see *Odgers' Australian Senate Practice*, 14th Edition (2016), pp. 444-449.

14 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 455.

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

2.23 For further detail on Senate procedures relevant to delegated legislation and disallowance, see *Odgers' Australian Senate Practice*, 14th Edition (2016), Chapter 15.

Chapter 3

Work of the committee from July 2015 to December 2016

3.1 This chapter provides information about the work of the committee, including statistics, matters of note and some routine matters in the reporting period. Examples provided under the entries for 'matters of note' and 'routine matters' illustrate the committee's approach to its scrutiny role and identify matters of concern as assessed against the scrutiny principles outlined in Senate standing order 23(3).

Statistics

Number of instruments considered

3.2 The committee held 20 private meetings from July 2015 to December 2016, at which it considered 2904 instruments.[1]

3.3 The number of disallowable instruments examined was greater than the number examined in 2014–15 (1656) and 2013–14 (1614), even taking into account the difference in the length of the reporting period.

3.4 In addition, the committee examined 131 replacement or supplementary explanatory statements to instruments in the reporting period.

Delegated legislation monitors

3.5 In the reporting period from July 2015 to December 2016 the committee tabled 19 scrutiny reports, called *Delegated legislation monitors* (No. 8 of 2015, tabled 12 August 2015, to No. 10 of 2016, tabled 30 November 2016).[2]

3.6 In total, the committee made 471 comments in its reports, including initial, further and concluding comments. Initial concerns were raised and ministers requested to respond in relation to 256 instruments; a further response was required for 33 instruments; advice only comments were made in relation to 63 instruments; and concluding comments were made on 243 instruments.[3]

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1 Any instruments that were initially misclassified as disallowable but that are actually exempt from disallowance are not counted in this figure.

2 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor/mon2015/index and https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor/mon2016/index.

3 The discrepancy between the number of response required entries and the number of concluded entries arises because some instruments not concluded in this period will have been concluded in the next reporting period.

Instruments of concern

3.7 Of the 2904 instruments examined by the committee in the reporting period, 319 were identified as raising a concern, either requiring a response from relevant ministers or written about as advice only to the ministers.[4]

3.8 As mentioned in chapter 2, the *Delegated legislation monitor* (the monitor) also contains comments on any instruments that were erroneously classified as exempt from disallowance, or misclassified as disallowable.

3.9 The issues raised by the examined instruments were referable to the committee's scrutiny principles as shown in Table 1.

Table 1: Issues identified by the committee from July 2015 to December 2016

Type of comment	Instruments with issues against scrutiny principles under Senate standing order 23(3)				Total
	(a)	(b)	(c)	(d)	
Response required	167	22	2	11	202
Further response required	16	7	2	2	27
Advice only	43	4	0	6	53
Concluded	158	22	1	8	189
TOTAL	384	55	5	27	**471**

3.10 As Table 1 demonstrates, the large majority of issues raised by the committee were referable to scrutiny principle (a), which requires that instruments of delegated legislation are made in accordance with statute, including the *Legislation Act 2003*, the *Acts Interpretation Act 1901*, the Commonwealth Constitution, and the authorising Act (or regulations) under which the instrument is made. The broad nature of this principle generally captures a wide variety of issues. The spread of issues across the committee's remaining scrutiny principles is broadly comparable with previous years.

3.11 Drawing on the information from 'response required' and 'advice only' entries, Figure 3.1 shows the breakdown of instruments by issues against the committee's principles as recorded in the reporting period.

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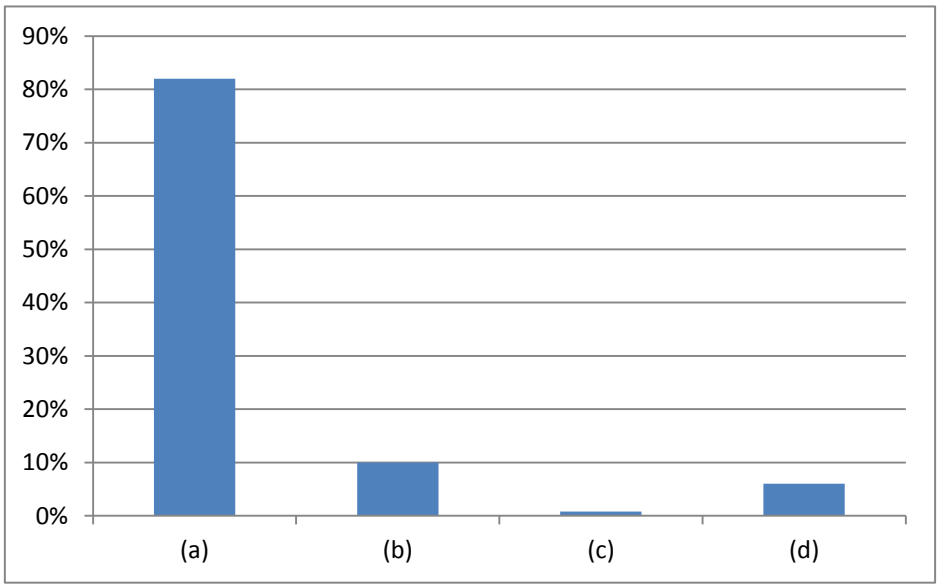
4 Details of these instruments may be found on the 'Index of Instruments' webpage at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index. The 453 instances in which the committee raised the failure to identify the relevance of subsection 33(3) of the *Acts Interpretation Act 1901* are not included in the index.

Figure 3.1: Instruments with issues against scrutiny principles



Ministerial responses

3.12 In the reporting period the committee received 150 responses from ministers and instrument-makers in relation to instruments that had raised concerns. Ministers' responses to the committee were published in the monitor containing the committee's comments on them.

Disallowance notices

3.13 The committee gave 32 notices of motion for disallowance in the reporting period. All of these were subsequently withdrawn following the receipt of a satisfactory ministerial response or a minister's undertaking to address the committee's concerns in relation to the relevant instruments.

3.14 Aside from the committee's process, during the same period 14 notices of motion for disallowance were given by individual senators in the Senate, and one was given by an individual member of the House of Representatives, in their own capacity. Three instruments were disallowed by the Senate. Further details are provided on the committee's 'Disallowance Alert' webpages for the relevant years.[5]

Impact of the committee's work

3.15 In recent years the committee has developed a consistent position in relation to several long-standing matters of concern. It may be expected that the committee's

5 The Disallowance Alert webpages are available from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

consistent commentary has had a positive impact in reducing the number of instruments introduced that raise these types of scrutiny concerns.[6]

3.16 The concerns raised by the committee relate to a number of matters, including, but not limited to:

- manner of incorporation by reference of documents and free access to incorporated documents;
- insufficient description of consultation undertaken in making instruments;
- omission of a statement of compatibility with human rights;
- unclear basis for determining fees;
- trespassing unduly on personal rights and liberties, including privacy;
- disadvantage to persons caused by the retrospective effect of instruments;
- significant penalty and offence provisions in delegated legislation;
- failure to provide for independent merits review of discretionary decisions;
- broad sub-delegation of legislative or administrative power;
- addition of matters to Schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997; and
- misclassification of instruments.

3.17 While difficult to quantify, the committee has had an 'unseen influence' on the drafting of instruments. Legislative drafters in both the Office of Parliamentary Counsel and government agencies increasingly refer to the reports, guidance and long-standing scrutiny concerns of the committee.

3.18 The committee's work also resulted in enhancements and other amendments to numerous explanatory statements (ESs) for instruments, and, in some cases, amendments made to instruments, in the reporting period. One example of this is in relation to instruments made by the Civil Aviation Safety Authority (CASA), where the ESs have increasingly referred to actions taken or matters included in response to the committee's scrutiny concerns.

3.19 In addition to the committee's influence on the development of bills and legislative instruments through improving the legislative drafting process and seeking amendments to legislative instruments and explanatory material, the committee's work and published commentary also contributes to more informed consideration of

6 During this reporting period, 10.98 per cent of the instruments examined by the committee raised issues of concern. In the year between July 2014 and June 2015, 20.11 per cent of instruments raised concerns; and in the 2013-14 year, 14.93 per cent of instruments raised concerns.

relevant issues in other parliamentary committees' reports, and more informed debate in the Senate, the House of Representatives and committees.

3.20 During the reporting period the committee developed a guideline on incorporation of documents, which was then included in relevant monitors and made available on the committee's website.[7]

3.21 The committee's influence is also reflected in formal government guidance available to departments and agencies as part of their legislative drafting process. In particular, the Office of Parliamentary Counsel's *Instruments Handbook*[8] and the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*[9] draw attention to long-standing scrutiny concerns of the committee.

3.22 The following section notes some significant developments relevant to the committee's mandate during the reporting period, as well as highlights of the committee's work in relation to some of its key scrutiny concerns.

7 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents. (The webpage now contains the most recent version of the guideline, as at March 2018.)

8 Office of Parliamentary Counsel, Document release 3.0, reissued July 2016, available from http://www.opc.gov.au/about/documents.htm.

9 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, available at https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf.

Matters of note

The 'new' *Legislation Act 2003*

3.23 On 5 March 2016 the *Legislation Act 2003* (Legislation Act) commenced. This was the result of the enactment of the *Acts and Instruments (Framework Reform) Act 2015,* which made a number of significant amendments to the *Legislative Instruments Act 2003* (LIA), including changing its name. The amendments included the establishment of the new Federal Register of Legislation, clarification of the definitions of 'legislative instrument' and 'legislative in character', and new provisions relating to notifiable instruments, disallowance and sunsetting.

Introduction of the Legislation (Exemptions and Other Matters) Regulation 2015

3.24 The Legislation (Exemptions and Other Matters) Regulation 2015 [F2015L01475] (LEOM regulation) was made in September 2015 under the *Legislation Act 2003*, and commenced on 5 March 2016 along with the new Legislation Act.

3.25 The LEOM regulation repealed and replaced the Legislative Instruments Regulations 2004, which up until then had set out exemptions from legislative instrument status, disallowance by Parliament and sunsetting for particular instruments and classes of instrument. The LEOM regulation also aimed to consolidate in regulations the list of instruments and classes of instrument exempted from disallowance and sunsetting, some of which had previously been listed in the *Legislative Instruments Act 2003,* in order to improve the accessibility of the law.

Exemption of migration instruments from disallowance

3.26 Sections 9 and 10 of the LEOM regulation prescribed particular instruments and classes of instrument as not subject to disallowance. The item-by-item description of section 10 provided justifications for the exemption of particular instruments from disallowance—with one exception, item 20 of the table in section 10, which exempted:

- an instrument (other than a regulation) made under Part 1, 2 or 9 of the *Migration Act 1958* (Migration Act); and
- an instrument made under Part 1, 2 or 5 of, or Schedule 1, 2, 4, 5A or 8 to, the Migration Regulations 1994 (Migration Regulations).

3.27 In *Delegated legislation monitor 14 of 2015* (11 November 2015), the committee wrote to the then Attorney-General about its concerns in relation to this matter. The committee noted that this exemption extended to a large number of instruments relating to a broad range of matters, including the conditions pertaining to the arrival, presence and departure of persons in Australia; labour market testing; and the designation of a country as a 'regional processing country'. However, the ES

only stated that the 'instruments made under the Migration Act and Migration Regulations were appropriate for executive control', and did not provide information on the nature of exempted instruments, the justification for their exemption, or whether it was appropriate to apply such a broad exemption from disallowance to instruments of this character, thereby removing them from the effective oversight of Parliament.

3.28 The committee therefore sought information from the Attorney-General in relation to the justification for exempting instruments under item 20 of section 10 from disallowance. In response, the Attorney-General advised that the exemption was appropriate, to ensure certainty in the operation of the immigration program and for the rights and obligations of individuals with regard to visa and migration status. The Attorney-General stated that the instruments were largely administrative in nature, and expressed concern that if the instruments were subject to disallowance, 'the Government would be less agile in addressing issues relating to trends in global population movements'.

3.29 The committee concluded its examination of the matter in *Delegated legislation monitor 16 of 2015* (2 December 2015).[10]

Misclassification of instruments

3.30 During the period the committee drew attention to a number of instruments that had been erroneously registered and/or tabled either as exempt from disallowance when they were in fact disallowable, or as disallowable when they were in fact exempt from disallowance.

3.31 The committee is concerned in both cases, noting that the erroneous classification of instruments as exempt from disallowance will cause more concern due to the potential impact on parliamentary oversight of such instruments.

Instruments misclassified as exempt from disallowance

3.32 In *Delegated legislation monitor 5 of 2016* (3 May 2016), the committee wrote to the then Minister for Immigration and Border Protection about three instruments that initially appeared to the committee to be misclassified as disallowable, because the ESs to the instruments stated that they were subject to disallowance.[11] The purpose of the instruments was to define a class of persons as fast track applicants for the purposes of paragraph 5(1)(b) of the Migration Act.

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10 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor/mon2015/index.

11 Migration Act 1958 - Specification of Class of Persons Defined as Fast Track Applicants 2016/010 [F2016L00377], Migration Act 1958 - Specification of Class of Persons Defined as Fast Track Applicants 2016/007 [F2016L00455] and Migration Act 1958 - Specification of Class of Persons Defined as Fast Track Applicants 2016/008 [F2016L00456].

The committee wrote to the minister in similar terms in relation to a fourth instrument,[12] in *Delegated legislation monitor 6 of 2016* (14 September 2016).

3.33 The four instruments were made under Part 1 of the Migration Act, so the committee understood them to be exempt from disallowance by virtue of section 10 of the LEOM regulation.

3.34 The committee noted that the instruments provided a substantive definition relating to classes of persons who were fast track applicants for the purposes of the Migration Act. In this respect, it was unclear to the committee that the instruments were characterised as providing merely for 'administrative matters to support the machinery of the migration program', so as to justify their exemption from disallowance (and thereby being effectively removed from the oversight of Parliament). The committee sought a response to its concerns.

3.35 The first response[13] received from the Minister for Immigration and Border Protection drew the committee's attention to subsection 5(1AD) of the Migration Act, which overrode the general exemption from disallowance in the LEOM regulation in relation to these particular instruments, to make them subject to disallowance.

3.36 Following the minister's advice that the instruments were subject to disallowance, the committee stated its concern that the instruments had therefore been improperly classified and tabled in Parliament as exempt from disallowance, effectively removing them from the oversight of Parliament. The committee further stated its concern that it was unable to determine how this had occurred, and requested a further response in relation to whether there was any further action that needed to be taken to correct the situation, both for these particular instruments and for the classification process generally.

3.37 The second response[14] from the minister stated that:

> The Explanatory Statements that accompany the instruments in question correctly state that the instruments are subject to disallowance. That is the method by which I state whether or not instruments are disallowable.
>
> However, when the instruments were provided to the Office of Parliamentary Counsel (OPC) for registration on the Federal Register of Legislation, my Department mistakenly indicated that the instruments were not subject to disallowance by ticking the wrong box when submitting the instruments. I understand this to be an isolated error and not the result of a failing in my Department's processes.

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12 Migration Act 1958 - Class of Persons Defined as Fast Track Applicants 2016/049 [F2016L00679].

13 See *Delegated legislation monitor 7 of 2016* (12 October 2016).

14 See *Delegated legislation monitor 8 of 2016* (9 November 2016).

> My Department's enquiries suggest that OPC may have relied on this incorrect information and provided it to the Parliament's Table Office which, in turn, may have provided the incorrect information to the Committee. This suggests that OPC and the Table Office do not obtain information about disallowance from the instrument and the Explanatory Statement, but from the metadata obtained as part of the process for submitting instruments for registration.

3.38 In response, the committee reiterated its concern about the classification process generally, and the potential for administrative errors such as this one to hinder the effective oversight of instruments by Parliament. The committee was interested in any remedial actions to avoid future errors of this nature, and drew this to the attention of ministers, instrument-makers and the Office of Parliamentary Counsel, recommending that administrative errors resulting in the incorrect classification of instruments be remedied at the earliest opportunity. The committee also drew the initial incorrect classification of the instruments to the attention of senators.

3.39 The committee further resolved to place 'protective' disallowance notices of motion on each of the instruments to extend their disallowance period by 15 sitting days, in an effort to redress the effect of the initial misclassification of the instruments on Parliament's oversight of them.[15]

3.40 The examination of the matter was finalised in *Delegated legislation monitor 8 of 2016* (9 November 2016).

Instruments misclassified as disallowable

3.41 In *Delegated legislation monitor 6 of 2016* (14 September 2016), the committee wrote to the Minister for Immigration and Border Protection in relation to seven migration instruments that were exempt from disallowance but were initially misclassified as disallowable.[16]

3.42 The committee understood these instruments to be exempt from disallowance because they were made under schedules or parts of the Migration

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15 See Parliament of Australia, *Disallowance Alert 2016*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts/alert2016.

16 Migration Regulations 1994 - Working Holiday Visa - Definitions of Specified Work and Regional Australia 2016/041 [F2016L00757]; Migration Regulations 1994 - Specification of Designated Areas - IMMI 16/044 [F2016L00777]; Migration Regulations 1994 - Specification of Regional Certifying Bodies and Regional Postcodes - IMMI 16/045 [F2016L00778]; Migration Regulations 1994 - Specification of Arrangements for Resident Return Visa Applications 2016/042 - IMMI 16/042 [F2016L00785]; Migration Regulations 1994 - Specification of Arrangements for Other Visas 2016/043 - IMMI 16/043 [F2016L00786]; Migration Regulations 1994 - Specification of Visa Subclass for the Purposes of the Health Requirement - IMMI 16/067 [F2016L01126].

Regulations specified in section 10 of the LEOM regulation. However, the ESs to the instruments stated that they were disallowable.

3.43 The minister's response informed the committee that the ESs to the instruments contained an error, and the minister confirmed that the instruments were exempt from disallowance. The committee concluded its examination of these instruments in *Delegated legislation monitor 7 of 2016* (12 October 2016).

3.44 In addition, during the reporting period the committee secretariat identified other instruments which were misclassified as disallowable when they were first registered on the Federal Register of Legislation. In these cases the secretariat made early contact with the Office of Parliamentary Counsel to seek correction of the classification before the instruments were tabled in Parliament.

Impact of the *Williams* cases on the work of the committee

3.45 In its June 2012 judgment in *Williams v Commonwealth* ([2012] HCA 23) (*Williams*), the High Court held that the Commonwealth executive did not have the power to enter into contracts with private parties and spend public monies without statutory authority. This had the effect of casting doubt over the constitutional validity of a significant proportion of Commonwealth expenditure.[17]

3.46 The government's response was to enact a legislative amendment allowing the authorisation of expenditure on government programs via the making of regulations.[18] Since 1 July 2014, this process has been undertaken by adding items to Schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) regulations).

3.47 In June 2014, the High Court delivered its judgment in *Williams (No. 2)* [2014] HCA 23 (19 June 2014) (*Williams No. 2*). In this case the High Court held that a constitutional head of power is required to support spending programs.

3.48 Since the High Court's judgments in the two *Williams* cases, the committee has scrutinised all regulations adding matters to Schedule 1AB of the FF(SP) regulations, in accordance with its scrutiny principles. The committee's consideration has focused on three matters in particular:

- constitutional authority for the expenditure;
- previously unauthorised expenditure; and
- availability of independent merits review of funding decisions.

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17 For a fuller account of the decision, see Glenn Ryall, *Williams v. Commonwealth—A Turning Point for Parliamentary Accountability and Federalism in Australia?*, Department of the Senate, Papers on Parliament No. 60, March 2014, available from https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops.

18 *Financial Framework (Supplementary Powers) Act 1997*, section 32B.

Addition of matters to Schedule 1AB of the FF(SP) regulations: constitutional authority for expenditure

3.49 In the relevant period, the committee reported on the following regulations in relation to the constitutional authority for expenditure on various programs:

- Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572];[19]
- Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulation 2016 [F2016L00166];[20]
- Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 1) Regulation 2016 [F2016L00513];[21]
- Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 3) Regulation 2016 [F2016L01576];[22] and
- Financial Framework (Supplementary Powers) Amendment (Health Measures No. 4) Regulation 2016 [F2016L01751].[23]

3.50 Taking account of the High Court's decision in *Williams No. 2*, the committee consistently noted that items of expenditure purportedly authorised by the addition of items to Schedule 1AB of the FF(SP) regulations must be supported by a head of power under section 51 of the Constitution. While each instrument provided a bare listing of constitutional heads of power relied on for the expenditure, the committee consistently stated its expectation that the ES for these regulations should include a clear statement of the relevance and operation of each constitutional head of power relied on to support the programs or initiatives added to Schedule 1AB.

Addition of matters to Schedule 1AB of the FF(SP) regulations: previously unauthorised expenditure

3.51 Pursuant to a request made to the committee in 2014 by the Senate Standing Committee on Appropriations and Staffing, the committee monitors

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19 See *Delegated legislation monitor 6 of 2015* (17 June 2015), where the committee requested a response from the minister; and *Delegated legislation monitors 8 and 10 of 2015* (12 August 2015 and 10 September 2015), where the committee requested a further response from the minister.

20 See *Delegated legislation monitor 4 of 2016* (16 March 2016) (the committee did not require a response from the minister, but drew it to the minister's attention).

21 See *Delegated legislation monitor 5 of 2016* (3 May 2016) (the committee requested a response from the minister).

22 See *Delegated legislation monitor 8 of 2016* (9 November 2016) (the committee requested a response from the minister).

23 See *Delegated legislation monitor 10 of 2016* (30 November 2016) (the committee requested a response from the minister).

expenditure authorised by regulation for items of expenditure inappropriately classified as the ordinary annual services of the government. This is because, post *Williams*, it is possible for items inappropriately classified as ordinary annual services of the government to be included in FF(SP) regulations without direct parliamentary approval, effectively reducing the scope of the Senate's scrutiny of government expenditure.[24]

3.52 Where the committee identifies items of expenditure that may have been inappropriately classified as the ordinary annual services of the government, the committee draws this fact to the attention of the Senate and the relevant standing committee.

3.53 In the reporting period, the committee drew the attention of the Senate and relevant standing committees to programs authorised by the following regulations, which may not constitute expenditure on the ordinary annual services of government:

- Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572];[25]
- Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 5) Regulation 2015 [F2015L00767];[26]
- Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 6) Regulation 2015 [F2015L00939];[27]
- Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 1) Regulation 2015 [F2015L02001];[28]

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24 While the Senate may not amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government, it may directly amend an appropriation bill not for the ordinary annual services of the government (section 53 of the Constitution). In June 2010, the Senate reaffirmed its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. It stated that appropriations for expenditure on new policies not previously authorised by special legislation shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

25 See *Delegated legislation monitor 6 of 2015* (17 June 2015), where the committee requested a response from the minister; and *Delegated legislation monitors 8 and 10 of 2015* (12 August 2015 and 10 September 2015), where the committee requested a further response from the minister.

26 See *Delegated legislation monitor 8 of 2015* (12 August 2015) (having drawn the matter to the attention of the Senate, the committee did not require a response from the minister).

27 See *Delegated legislation monitor 8 of 2015* (12 August 2015) (having drawn the matter to the attention of the Senate, the committee did not require a response from the minister).

- Financial Framework (Supplementary Powers) Amendment (Employment Measures No. 1) Regulation 2015 [F2015L02008];[29]
- Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 3) Regulation 2016 [F2016L01576];[30] and
- Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 5) Regulation 2016 [F2016L01739].[31]

3.54 The committee's examination of this issue provides an informative example of Parliament's role in approving appropriations and authorising revenue and expenditure.

Addition of matters to Schedule 1AB of the FF(SP) regulations: availability of independent review of decisions

3.55 The committee's scrutiny principle (c) requires it to ensure that instruments of delegated legislation do not make the rights and liberties of citizens unduly dependent on administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

3.56 In the reporting period, the committee reported on the following regulations in relation to the availability of independent review of decisions under programs authorised by inclusion in Schedules 1AA and 1AB of the FF(SP) regulations, and drew its concerns to the attention of the Senate:

- Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572];[32]
- Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 6) Regulation 2015 [F2015L00939];[33]

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28 See *Delegated legislation monitor 1 of 2016* (3 February 2016) (having drawn the matter to the attention of the Senate and relevant committees, the committee did not require a response from the minister).

29 See *Delegated legislation monitor 1 of 2016* (3 February 2016) (having drawn the matter to the attention of the Senate, the committee did not require a response from the minister).

30 See *Delegated legislation monitor 8 of 2016* (9 November 2016) (having drawn the matter to the attention of the minister and the Senate, the committee did not require a response from the minister).

31 See *Delegated legislation monitor 10 of 2016 (*30 November 2016) (having drawn the matter to the attention of the minister and the Senate, the committee did not require a response from the minister).

32 See *Delegated legislation monitor 6 of 2015* (17 June 2015), where the committee requested a response from the minister; and concluded on this matter in *Delegated legislation monitor 8 of 2015* (12 August 2015).

33 See *Delegated legislation monitor 8 of 2015* (12 August 2015) (the committee requested a response from the minister).

- Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulation 2016 [F2016L01555];[34] and
- Financial Framework (Supplementary Powers) Amendment (Health Measures No. 4) Regulation 2016 [F2016L01751].[35]

Instruments or provisions the 'same in substance' as ones previously disallowed

3.57 As noted in chapter 2, section 48 of the Legislation Act places limitations on the remaking of instruments after disallowance, including that an instrument that is 'the same in substance' as a previously disallowed instrument may not be remade within six months after that disallowance (unless the House of Parliament that disallowed the instrument specifically approves the making of the second instrument).

3.58 In 2015 an action was brought before the Federal Court by Mr Graham Perrett MP and others, challenging the validity of a legislative instrument, the Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015 [F2015L01138] (the new regulation), which set the rate of certain Family Court and Federal Circuit Court fees.[36]

3.59 The validity of the regulation was challenged on the basis that it was the 'same in substance' as an instrument previously disallowed (the first regulation) and had been made within six months of the disallowance.[37]

3.60 Schedule 2 of the first regulation sought to increase family law fees from 1 July 2015 by various amounts for different services, ranging between $65 and $350, and for other fees, an average increase of 10 per cent. The new regulation was the same as the first except for altering each fee amount increase by an amount of $5 or an average of 11 per cent.

3.61 The ES to the new regulation stated:

> Family law fee increases that were intended to commence on 1 July 2015 under Schedule 2 of the Federal Courts Legislation Amendment (Fees) Regulation 2015 were disallowed by the Senate on 25 June 2015. The Government will reintroduce those family law fee increases under the Regulation with an additional $5 increase.

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34 See *Delegated legislation monitor 8 of 2016* (9 November 2016) (the committee requested a response from the minister).

35 See *Delegated legislation monitor 10 of 2016* (30 November 2016) (the committee requested a response from the minister).

36 *Perrett v Attorney-General of the Commonwealth of Australia [2015] FCA 834* available at http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2015/2015fca0834

37 Federal Courts Legislation Amendment (Fees) Regulation 2015 [F2015L00780], disallowed by the Senate on 25 June 2015.

3.62 The new regulation was subject to a motion of disallowance in the Senate given on 10 August 2015, and was disallowed in full on 11 August 2015.[38]

3.63 In *Delegated legislation monitor 10 of 2015* (tabled 10 September 2015), the committee wrote to the then Attorney-General about its concerns over the new regulation, noting that in a number of material respects, the Federal Court's interpretation of the concept of 'the same in substance' in the Perrett case may be regarded as in conflict with the decision of the High Court in *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)*.[39] In that decision, Chief Justice Latham stated that the question of whether an instrument is the same in substance as a disallowed instrument must be determined by seeking 'to determine in each case whether such differences as exist between the disallowed regulation and the new regulation are differences in substance'.[40]

3.64 Notably, Chief Justice Latham concluded that an equivalent provision to section 48 of the then *Legislative Instruments Act 2003* prevented the re-enactment 'within six months of disallowance, of any regulation which is substantially the same as the disallowed regulation *in the sense that it produces substantially, that is, in large measure, though not in all details, the same effect as the disallowed regulation*' [emphasis added].[41] The Chief Justice went on to state that this approach 'prevents the result that a variation in the new regulation which is real, but quite immaterial in relation to the substantial object of the legislation, would exclude the application' of the same in substance provision.[42]

3.65 The committee noted that the decision of the Federal Court in relation to the new regulation therefore raised issues central to the committee's function of ensuring that instruments of delegated legislation are made in accordance with statute. It sought advice from the Attorney-General as to whether he regarded the new regulation as being the same in substance as the first instrument for the purposes of section 48 of the *Legislative Instruments Act 2003*, and whether he had been provided with legal advice on the matter.

3.66 In his response, the then Attorney-General referred to the finding by Justice Dowsett, stating that:

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38 See Parliament of Australia, *Disallowance Alert 2015*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts/alert2015.

39 [1943] HCA 21; (1943) 67 CLR 347.

40 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* (1943) 67 CLR 362.

41 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* (1943) 67 CLR 364.

42 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* (1943) 67 CLR 364.

> In reaching this conclusion, his Honour found that the 'same in substance' is not merely 'substantially similar'. Rather, section 48 requires 'virtual identity (or sameness) between the objects of comparison'. In Victorian Chamber of Manufacturers v Commonwealth (Women's Employment Regulations) [1943] HCA 32; (1943) 67 CLR 347, Latham CJ distinguished between 'substance and detail – between essential characteristics and immaterial features'. In applying this principle, Justice Dowsett stated that it is difficult to accept that any increase in fee could be described as 'detail' or an 'immaterial feature' of the measure. Rather, the amount of a fee or the proposed increase is at the heart of each measure.

3.67 The then Attorney-General further noted that any further comment on his part was not appropriate due to the decision being the subject of an appeal before the courts, and that his response in relation to any legal advice received was unnecessary given that the regulation was no longer in effect (following its disallowance by the Senate).

3.68 The committee concluded its consideration of the regulation in *Delegated legislation monitor 2 of 2016*, noting that tensions remained between the interpretation of the concept of 'the same in substance' by the Federal Court and the authoritative decision of the High Court in *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)*.

3.69 The committee further noted that its examination of any 'same in substance' issues in the future would continue to take into account relevant jurisprudence on this question, as well as the broader concepts of parliamentary sovereignty and accountability which inform the application of the committee's scrutiny principles.

3.70 A Senate research paper on the matter states that:

> …while the Perrett judgment has cast significant doubt on the correct interpretation of the same in substance provisions, a legal resolution in the form of a further, definitive judgment of a court is not necessary for the committee to be able to continue to adequately consider any same in substance matters that arise in future. This is because it is open to the committee to draw upon the lessons of history and its own scrutiny principles to interpret the same in substance prohibition in a way that preserves the effectiveness of the disallowance power, which is so critical an element of the parliament's oversight of delegated legislation.[43]

43 Ivan Powell, *The Concept of 'The Same in Substance': What Does the Perrett Judgment Mean for Parliamentary Scrutiny?* (2017), available from https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Articles_addresses_and_other_publications_by_Senate_staff.

Matter more appropriate for parliamentary enactment

3.71 Scrutiny principle (d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation).

3.72 In *Delegated legislation monitor 6 of 2016* (14 September 2016), the committee requested advice from the then Attorney-General in relation to the Legal Services Amendment (Solicitor-General Opinions) Direction 2016 [F2016L00645] (the directions).

3.73 The directions amended the Legal Services Directions 2005 to insert new provisions about seeking opinions on questions of law from the Solicitor-General. The amendments operated to require the consent of the Attorney-General before the advice of the Solicitor-General on questions of law could be sought. The committee commented that this appeared to narrow the scope of the Solicitor-General's functions prescribed under subsections 12(a)(i)–(a)(vii) of the *Law Officers Act 1964.* The committee's view was that, in effect, this altered the operation of section 12 of the *Law Officers Act 1964*, which prescribed the functions of the Solicitor-General and specifically allowed the Solicitor-General to accept instructions from government officers other than the Attorney-General.

3.74 The committee considered that the changes effected by the direction may have been more appropriate for parliamentary enactment, which would ensure that any significant proposed changes were subject to the full legislative processes by Parliament prior to commencement.

3.75 The Attorney-General's response indicated that the procedure established by the direction gave effect to subsection 12(b) of the *Law Officers Act 1964*; and that the direction was not intended to narrow the operation of subsection 12(a).

3.76 The committee concluded its examination of the instrument in *Delegated legislation monitor 8 of 2016* (9 November 2016), leaving the question of whether the instrument effected a significant change to the operation of section 12 of the *Law Officers Act 1964*, and was therefore more appropriate for parliamentary enactment, to the Senate as a whole.

3.77 Following a disallowance motion instigated in the Senate on 13 September 2016, the instrument was disallowed in full on 23 November 2016.

Routine matters

3.78 This section lists some of the routine matters that the committee reported on during the relevant period.

Incorporation of documents

3.79 Scrutiny principle (a) of the committee's terms of reference requires the committee to ensure that instruments are made in accordance with statute, their authorising Acts, as well as any other applicable laws or legal requirements.

3.80 Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any document in writing which exists at the time the legislative instrument is made. Examples of these may include Commonwealth legislative instruments that are exempt from disallowance, state and territory legislative instruments, treaties, guidelines, or Australian and international standards.

3.81 However, subsection 14(2) provides that such documents may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, and not as in force from time to time (unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides this).

3.82 In addition, paragraph 15J(2)(c) of the Legislation Act requires the ES to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained. The committee's expectation is that incorporated documents can be readily and freely accessed by anyone affected by or interested in the law, without charge.

3.83 As previously noted, in the reporting period the committee developed a guideline on incorporation of documents, which it then included in relevant monitors and made available on the committee's website.[44]

3.84 On numerous occasions, the committee's comments in the relevant period raised concerns in relation to the manner of incorporation of documents, and in relation to access to documents incorporated in delegated legislation. The committee wrote to ministers requesting information on these matters, and/or requesting that replacement ESs to the instruments be registered containing the required information.

3.85 The committee commented on 16 instruments in relation to incorporation matters between July and December 2015.

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44 Regulations and Ordinances Committee, *Guideline on incorporation of documents,* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents. (The webpage now contains the most recent version of the guideline, as at March 2018.)

3.86 In 2016, the committee commented on 70 instruments which did not specify the manner of incorporation of documents, and on 27 instruments which didn't indicate either whether incorporated documents were available free of charge, or where they could be obtained free of charge.

3.87 During the period, the committee also listed numerous instruments which incorporated by reference Commonwealth Acts or other disallowable legislative instruments, without stating their manner of incorporation.[45]

Description of consultation

3.88 Section 17 of the *Legislation Act 2003* requires that, before making a legislative instrument, the instrument-maker must be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. Section 15J of the Act requires that ESs describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, to explain why none was undertaken.

3.89 In the reporting period, the committee identified 65 instruments in relation to which these requirements were not fully adhered to, and wrote to relevant ministers in relation to each matter.

Automatic repeal of spent and redundant instruments and provisions

3.90 Since November 2013, the secretariat has monitored the number of instruments automatically repealed because they (only) amend another instrument and those amendments have taken effect. Following the commencement of the *Legislation Act 2003* on 5 March 2016, this automatic repeal occurs under Division 1 of Part 3 of Chapter 3 of the Legislation Act. Between July 2015 and December 2016 inclusive, 1,205 of 3,272 instruments registered on the Federal Register of Legislation were repealed under this provision (approximately 36 per cent).

3.91 The committee notes that the power to effect mass repeal of redundant instruments of delegated legislation improves the utility of the Federal Register of Legislation by making clear which instruments have no continuing effect. Such mass repeals do not generally contribute to the reduction of 'red tape', however, due to the fact that the instruments are already spent.

3.92 However, during the period the committee became aware of some instances of confusion as to whether such instruments remained subject to disallowance, due to their listing on the Federal Register of Legislation as 'Repealed/Ceased'. The committee would be concerned if parliamentarians or citizens were deterred from

45 Under relevant provisions of the *Legislation Act 2003* and the *Acts Interpretation Act 1901,* Commonwealth Acts and disallowable legislative instruments may be incorporated either as in force from time to time, or as in force at a particular time.

making objections to an instrument of delegated legislation because of a mistaken belief that it was no longer subject to disallowance.

3.93 Accordingly, the committee considers that any future review of the Federal Register of Legislation should consider the addition of a note to the current entry for instruments repealed under Division 1 of Part 3 of Chapter 3 of the *Legislation Act 2003* to make clear that, notwithstanding the fact that such instruments are repealed or ceased, they remain subject to disallowance for the full 15 sitting days from the date of tabling.

3.94 The committee remains concerned and will continue to monitor this issue.

Instruments that appear to rely on subsection 4(2) of the Acts Interpretation Act 1901

3.95 Some of the instruments reported on during the relevant period were made in reliance on empowering provisions that had not yet commenced. While this approach is authorised by subsection 4(2) of the *Acts Interpretation Act 1901* (which allows, in certain circumstances, the making of legislative instruments in anticipation of the commencement of relevant empowering provisions), the ESs to the instruments did not identify the relevance of subsection 4(2) to their operation.

3.96 The committee considers that, in the interests of promoting clarity and intelligibility of instruments to anticipated users, any such reliance on subsection 4(2) of the *Acts Interpretation Act 1901* should be clearly identified in the accompanying ESs.

Instruments that appear to rely on subsection 33(3) of the Acts Interpretation Act 1901

3.97 Subsection 33(3) of the *Acts Interpretation Act 1901* provides that the power to make an instrument includes the power to vary or revoke the instrument. If instruments rely on this power, the committee considers it would be preferable for the ES for any such instrument to identify the relevance of subsection 33(3), in the interests of promoting the clarity and intelligibility of the instrument to anticipated users.

3.98 In the reporting period, the committee identified 453 instruments that appeared to rely on subsection 33(3) of the *Acts Interpretation Act 1901.*

Senator John Williams

Chair