

2002-2003

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**LEGISLATIVE INSTRUMENTS BILL 2003**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
the Honourable Daryl Williams AM QC MP)

# LEGISLATIVE INSTRUMENTS BILL 2003

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## LEGISLATIVE INSTRUMENTS BILL 2003

### OUTLINE

This Bill establishes a comprehensive regime for the registration, tabling, scrutiny and sunseting of Commonwealth legislative instruments. The Bill originated from a 1992 report of the Administrative Review Council, *Rule Making by Commonwealth Agencies*. That report described the framework governing Commonwealth legislative instruments as "patchy, dated and obscure". Previous versions of the Bill were introduced into Parliament in 1994, 1996 and 1998. The Bill contains some important advances on the previous versions of the Bill, to take advantage of advances in technology and to remove potentially adverse impacts on effective administration.

The Bill will introduce a consistent system for registering, tabling, scrutinising and sunseting all Commonwealth legislative instruments. It will establish an authoritative, complete and accessible register of those instruments, which will include a reliable source of compilations and explanatory statements.

The Bill defines the term "legislative instrument" so that the coverage of the Bill is certain. The definition specifically excludes particular instruments and provides a mechanism for the issue of an Attorney-General's certificate to resolve doubt if the application of the definition is unclear.

The Bill encourages rule-makers to consult experts and those likely to be affected by an instrument before it is made, but does not compel this where it would be inappropriate or unnecessary. This focuses on sending a clear message about the importance of consultation particularly in cases where a proposed instrument is likely to have a direct or substantial indirect effect on business, or restrict competition. The Bill also identifies certain circumstances where consultation may not be appropriate, for example, in the case of minor or machinery amendments, implementation of certain Budget decisions, and instruments relating to national security.

To encourage high standards in the drafting of legislative instruments, the Bill gives the Secretary of the Attorney-General's Department the statutory power to cause steps to be taken to promote their legal effectiveness, clarity and intelligibility. The Secretary must also cause steps to be taken to prevent the inappropriate use of gender-specific language.

The Bill establishes the Federal Register of Legislative Instruments, which will comprise a comprehensive and complete database of all legislative instruments, all explanatory statements in relation to legislative instruments made on or after the commencing day, and all compilations in relation to legislative instruments, that have been registered under the Bill. The Register will be publicly accessible via the Internet and will be maintained by the Attorney-General's Department. Any legislative instrument made after the commencement of the Bill must be registered to be enforceable. There will also be a process to ensure the registration of instruments made before the commencing day.

The Register will also contain compilations, which are versions that incorporate all the amendments to a particular instrument so that the reader may see at a glance the current state of a particular legislative instrument. These compilations will be taken to be complete and accurate unless the contrary is proven. The Register will also contain explanatory statements for each legislative instrument, thereby further enhancing the value of the Register to users.

The Bill provides a comprehensive regime for Parliamentary scrutiny (via tabling and disallowance mechanisms) of legislative instruments. In regard to tabling, all registered legislative instruments

will be tabled under a consistent regime. In relation to disallowance, the Bill substantially re-enacts those parts of Part XII and section 46A of the *Acts Interpretation Act 1901* that relate to regulations and disallowable instruments and extends their operation to all legislative instruments. The *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* will make consequential amendments to the Acts Interpretation Act so that those provisions will only apply to non-legislative instruments.

The Bill provides for sunseting (automatic repeal) of legislative instruments after a period lasting approximately ten years except for a limited range of particular instruments which are exempt from the sunseting regime. This period can be extended for 12 months in specified circumstances when a legislative instrument cannot be remade by the sunseting date. Sunseting will ensure that legislative instruments are regularly reviewed and only remain operative if they continue to be relevant.

The Bill provides for a review of the operation of the legislation to take place three years after commencement and for a review of the general sunseting provisions twelve years after commencement.

### **FINANCIAL IMPACT STATEMENT**

Approximately \$1.2 million was spent in 1994-96 to establish an image-based computer system to implement the Federal Register of Legislative Instruments under an earlier version of the Bill. Since then, a further \$0.5m has been expended on maintenance of that system, which operates as the Legislative Instruments Database. The existing system has been reviewed and is reaching the end of its life. The Department is considering the development of a new system to meet contemporary standards and the changed requirements of the new Bill. On the commencing day, that system will become the Register as provided for in clause 36.

Approximately \$950,000 per annum for salaries and administration will be required to operate the Register in future years.

No provision has been made for any additional costs over a period of time in respect of the backcapture and sunseting processes. Any costs are to be absorbed by the originating agency out of its normal running costs. It is likely that some costs will be offset by savings within agencies as a result of more efficient processing of legislative instruments under the new scheme.

## NOTES ON CLAUSES

### Part 1 - Preliminary

The purpose of this Part is to set out the introductory material for the Bill. It deals with such matters as the objects of the Bill, definition of terms (including the definition of a legislative instrument) and the commencement, construction and effect of the repeal of legislative instruments.

#### Clause 1: Short title

The short title of this Act is the *Legislative Instruments Act 2003*.

#### Clause 2: Commencement

This clause provides that clauses 1 and 2 of the Bill and any other provision that is not specifically mentioned in the commencement provision commence on the day on which the Act receives the Royal Assent.

This clause also provides that the remainder of the Bill (that is, clauses 3 to 62) commences on a single day to be fixed by Proclamation. The date to be fixed by Proclamation must be either 1 January or 1 July. However, if a date has not been proclaimed within 12 months after Royal Assent, then the remainder of the Bill will automatically commence on the next 1 January or 1 July after that 12 month period.

The specification of 1 January or 1 July will assist in the administration of the Bill.

#### Clause 3: Object

Clause 3 sets out the object of the Bill to provide readers with a general overview of what the Bill is about. The object of the Bill is to provide a comprehensive regime for the management of Commonwealth legislative instruments. It does this by:

- establishing the Federal Register of Legislative Instruments (see Part 4);
- encouraging rule-makers to undertake appropriate consultation before making legislative instruments (see Part 3);
- encouraging high drafting standards to promote the legal effectiveness, clarity and intelligibility of legislative instruments (see Part 2);
- improving public access to legislative instruments (see Part 4);
- establishing improved mechanisms for Parliamentary scrutiny of legislative instruments (see Part 5); and
- establishing mechanisms for sunseting legislative instruments (see Part 6).

The Bill will ensure that there is an efficient and effective process for making, tabling, scrutinising and reviewing Commonwealth legislative instruments.

#### **Clause 4: Definitions**

Subclause 4(1) defines various expressions for the purposes of the Bill. Some of those definitions are explained in the discussion of the provision in which they appear, the remainder are self-explanatory.

Subclause 4(2) makes provision for the calculation of times applicable for complying with requirements under the Bill. If an act or thing must be done within a specified number of working days after a particular event, then it may be done during normal business hours on the day of the event (if it is a working day) or on a working day included in the specified number of days after the event. A "working day" is defined in subclause 4(1) to exclude Saturdays, Sundays and public holidays in the Australian Capital Territory.

Subclause 4(3) explains what is meant by the term "rule-maker" for the purposes of the Bill. Where, under the enabling legislation the rule-maker is the Governor-General, then the reference to "rule-maker" in clause 13 of the Bill (Construction of legislative instruments) is a reference to the Governor-General. Where, under the enabling legislation the rule-maker is the Governor-General and the reference to "rule-maker" is in any other provision of the Bill, then the reference means the responsible Minister (subclause 4(1) defines "responsible Minister" as the Minister administering the enabling legislation for that instrument). Where, under the enabling legislation, the "rule-maker" is someone other than the Governor-General, for example, a Minister or a Council, then a reference to "rule-maker" anywhere in the Bill is a reference to that other person or body.

A reference to "rule-maker" includes a reference to the person or body that is authorised to make the legislative instrument, even if the legislative instrument is not actually made. This extension of the definition is necessary to ensure that provisions that deal with matters that arise before the instrument is made, for example in relation to consultation, apply to the "rule-maker".

#### **Clause 5: Definition—a legislative instrument**

This clause provides a substantive definition of a legislative instrument, which aims to provide certainty for both rule-makers and administrators about the scope and application of the Bill. The definition is comprehensive, and focuses on the legislative character of the instrument as the relevant issue, rather than what the instrument is called.

Subclause 5(1) provides the general requirement that a legislative instrument is an instrument in writing, is of a legislative character, and is or was made in the exercise of a power delegated by the Parliament (legislative instruments can be made by a variety of rule-makers, including persons and bodies outside central government). An instrument that does not have these basic features will not be a legislative instrument for the purposes of the Bill.

Subclause 5(2) sets out some of the circumstances in which an instrument is taken to be of a legislative character. This provides clarification and additional certainty. If the instrument determines or alters the content of the law, rather than applying the law in a particular case, and 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, it will be taken to have a legislative character. For example, an instrument that lays down a binding rule (which would be enforced by a court in an appropriate case) would be of legislative character because it is determining the law. Whereas an instrument that sets out an administrative decision (for example, that a particular person is not entitled to a particular visa) is not of a legislative character, because it is applying the law in a particular case and not determining what that law is.

Subclause 5(3) is a significant way in which any uncertainty about the nature of the instrument can be resolved. It provides that an instrument that is registered under the Bill is taken, by virtue of that registration and despite anything else in the Bill, to be a legislative instrument. Under subclause 4(1), instrument is defined as not including an explanatory statement or compilation. This is to avoid any inference that those instruments would become legislative instruments following their registration.

Subclause 5(4) provides additional clarification by stipulating that if some provisions of an instrument are of a legislative character, the instrument is taken to be a legislative instrument for the purposes of the Bill.

### **Clause 6: Instruments declared to be legislative instruments**

This clause provides that certain instruments (whether made before, on or after the commencement of this Bill) are automatically legislative instruments for the purposes of the Bill notwithstanding the content of the instrument. These instruments are:

- Regulations, regardless of when the delegation by Parliament of the power to make them has occurred.
- Instruments coming under the *Statutory Rules Publication Act 1903* regime, where the delegation by Parliament of the power to make them occurred before the commencing day of this Bill.
- Ordinances, and certain instruments made under them, relating to a non-self-governing Territory, regardless of when the delegation by Parliament of the power to make them has occurred.
- Instruments which are either declared to be a disallowable instrument for the purposes of section 46A of the Acts Interpretation Act or otherwise disallowable under Part XII of that Act, where the delegation by Parliament of the power to make them occurred before the commencing day of this Bill.
- Proclamations made under enabling legislation.

The specification of these instruments as legislative instruments provides certainty for rule-makers, removing any doubt about the status of certain existing and new instruments.

### **Clause 7: Instruments declared not to be legislative instruments**

Subclause 7(1) provides that certain instruments are not legislative instruments for the purposes of the Bill. Under this subclause, those instruments listed in the table in the subclause are not legislative instruments for the purposes of the Bill. In addition, a legislative instrument will not be a legislative instrument for the purposes of the Bill, if its enabling legislation (which commences after the commencement of this Bill, and contains an instrument making power), declares that such instruments are not legislative instrument for the purposes of the Bill.

The list of instruments that are not legislative instruments for the purpose of the Bill may also be expanded by regulations. As excluding the instrument from the operation of the Bill will only be possible via an Act or a disallowable instrument (including regulations), Parliament will be able to determine the appropriateness of the exclusion at the time the Act is debated or the instrument is scrutinised. This ensures the integrity of the regime established by the Bill.

There are two general reasons for including an instrument in the table (and thereby excluding it from the operation of the Bill). The first is to confirm that the instrument is not in fact a legislative instrument, where there is some prospect of doubt. The second is to recognise certain strong countervailing policy considerations that make registration undesirable or inappropriate, even though the instruments are legislative. For example, the need to avoid publicising the content of certain instruments, the need to avoid fettering employment arrangements and the need to avoid applying the Bill to certain applied laws.

Subject to these limited exemptions, all legislative instruments should be on the Register, and hence readily accessible and searchable in authoritative form, so that individuals and businesses can readily ascertain the laws to which they are subject. All registered legislative instruments are tabled in Parliament. Where appropriate, specific disallowance and sunseting exemptions can be provided for instruments subject to registration (see discussion on clauses 44 and 54).

Just as important as identifying when an instrument is not a legislative instrument for the purposes of the Bill is the need to provide that merely because an instrument is included in the table does not imply that an instrument of that kind would be a legislative instrument. This is addressed by subclause 7(2).

Subclause 7(3) deals with previously existing gazettal requirements. It explains that requirements for notification or publication in the *Gazette*, or for tabling in Parliament, in relation to instruments which are not legislative instruments for the purposes of the Bill are unaffected by this Bill regardless of whether the instrument is made before, on or after the commencing day.

#### **Clause 8: Definition—power delegated by the Parliament**

This clause defines power delegated by the Parliament to include a further power of delegation authorised by the Parliament. This ensures that the definition of legislative instrument, which is set out in subclause 4(1), covers instruments that are made under enabling regulations or other legislative instruments.

#### **Clause 9: Rules of court are not legislative instruments**

This clause provides that rules of court for the High Court, the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court are not legislative instruments for the purposes of the Bill. However, the legislation that enables the making of rules of court for each of the federal courts is amended by the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* to establish a court-specific regime applying modified parts of the Bill to those rules. In effect, the rules of the federal courts are treated as if they were legislative instruments for most purposes and hence are subject to registration, disallowance and sunseting.

This treatment recognises the traditional independence of courts.

#### **Clause 10: Attorney-General may certify whether an instrument is legislative instrument or not**

Clause 10 deals with the situation where a rule-maker is uncertain as to whether an existing or proposed instrument is legislative in character. It establishes a mechanism to provide certainty for rule-makers where the application of the definition does not resolve the question of whether an instrument of that kind is a legislative instrument.



Subclause 10(1) deals with instruments made before the Bill commences and that have not been registered and subclause 10(2) deals with instruments proposed to be made on or after the Bill commences. In either case, if the person or body having authority to make an instrument of that kind is uncertain whether an instrument of that kind is or will be a legislative instrument, he or she may apply in writing to the Attorney-General to determine the matter.

Subclause 10(3) provides that the content and form for applying and manner of making the application is to be prescribed.

Subclause 10(4) provides that the Attorney-General must issue a certificate determining whether the instrument, or an instrument of that kind, is or will be a legislative instrument and a copy of that certificate must be given to the applicant. As the certificate is a legislative instrument, it must be lodged with the Attorney-General's Department (see clause 25) and registered on the Federal Register of Legislative Instruments (see clause 27). Subclause 10(5) provides that a certificate by the Attorney-General is conclusive of the question whether the instrument, or an instrument of that kind, is legislative or not and therefore whether the rule-maker must comply with the Bill.

Rule-makers are entitled to rely on the Attorney-General's certificate. Anything done (or not done) in reliance on the certificate will not impact on the validity of the legislative instrument.

#### **Clause 11: Reconsideration and review of Attorney-General's certificate**

This clause deals with the review of the Attorney-General's certificate and provides a mechanism to manage the consequences of that review. The provisions fully insulate the rule-maker and the instrument itself from any additional review and any negative implications arising from such legal action.

If the Federal Court makes an order to quash or set aside the original decision, subclause 11(1) requires the Attorney-General to reconsider that decision and issue a replacement certificate. However, subclause 11(2) provides that the original certificate does not cease at the time of the court's decision, but remains effective until it is replaced. Anything done in reliance on the certificate before it is replaced is protected and valid.

Subclauses 11(3) and 11(4) contain savings provisions where a replacement certificate reverses the result of the original certificate. This means that the requirements for gazettal (if any, for a non-legislative instrument) and registration for legislative instruments may be satisfied and the instrument remain valid notwithstanding the failure to do so in reliance on the original certificate. For example, where the replacement certificate provides that what was a non-legislative instrument is in fact legislative, the requirement for registration under the Bill is satisfied if the rule-maker lodges the instrument before the last day for lodgment or within three working days of the replacement certificate. In addition, if the replacement certificate provides that an instrument that was certified to be legislative is in fact non-legislative, the valid operation of the administrative instrument is preserved, but if the instrument is required to be notified in the *Gazette* it must be published in the *Gazette* within three working days of the issue of the replacement certificate.

Subclauses 11(5) and (6) address the situation where the Attorney-General's certificate on a reconsideration of a decision confirms the original decision. In these circumstances, the requirements for registration or gazettal are unaffected.

Subclause 11(7) provides that where the Court quashes or sets aside a decision under clause 10 to issue a certificate, the Attorney-General must notify the person or body having authority to make the instrument the subject of the Court's decision. The Attorney-General must also give a copy to both the applicant (for the review) and the person or body having authority to make the instrument. This need not be the person or body that made the actual instrument, but the person or body that has the authority to make such instruments.

As with the original certificate, the replacement certificate is a legislative instrument, and therefore it must be lodged with the Attorney-General's Department (see clause 25) and registered on the Federal Register of Legislative Instruments (see clause 27).

### **Clause 12: When do provisions of legislative instruments take effect?**

Subclause 12(1) provides the mechanism for determining the commencement day of a legislative instrument. It provides that a legislative instrument or a provision of an instrument takes effect from a date specified in the instrument (this may be by reference to the commencement of an Act or a provision of an Act or the occurrence of a nominated event). The ability to commence a legislative instrument by reference to the occurrence of an event (eg. the entering into force of a treaty) is an expansion from the existing provisions in the Acts Interpretation Act and ensures maximum flexibility.

If the commencement of the instrument is not specified then the instrument will take effect from the first moment of the day next following the day when it is registered. Notwithstanding the ability to set a date for the commencement of a legislative instrument, a legislative instrument is not enforceable unless it is registered (see discussion on clause 32).

Subclause 12(2) provides that if a legislative instrument is expressed to take effect from a time before it is registered, but the instrument (or a provision of it) would adversely affect the rights of, or impose liabilities on a person at a time before the instrument is registered, the instrument or provision has no such effect in relation to the period before the instrument is registered. This ensures against legislative instruments retrospectively adversely affecting rights.

However, subclause 12(3) makes it clear that the effect of subclauses 12(1) and (2) is subject to any contrary intention in the enabling Act. For example, the enabling Act could disapply subclause 12(2) and allow an instrument to commence retrospectively even if it impacts on the rights of a person. This needs to be express in the enabling legislation, which itself is fully scrutinised.

Clause 12 standardises the method of determining when a legislative instrument commences with that used for non-legislative instruments. The equivalent provision for non-legislative instruments is section 46B of the Acts Interpretation Act (inserted by the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003*).

### **Clause 13: Construction of legislative instruments**

Subclause 13(1) provides that the Acts Interpretation Act applies to a legislative instrument as if it were an Act, that expressions used in the instrument have the same meaning as in the enabling Act and that the instrument is to be read so that it is consistent with the enabling Act and within the power of the rule-maker.

Subclause 13(2) provides a power to uphold a legislative instrument to the extent that it can be read as within power. If a legislative instrument would be construed as being in excess of power, it may be taken to be a valid instrument to the extent that it is not made in excess of power.

Subclause 13(3) provides that where an instrument requires identification (by way of specification, declaration or prescription) of matters or things, the rule-maker may identify those matters or things by referring to a class or classes.

The equivalent provision for non-legislative instruments is section 46 of the Acts Interpretation Act (inserted by the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003*).

#### **Clause 14: Prescribing matters by reference to other instruments**

Clause 14 enables legislative instruments to make provision for matters by applying, adopting or incorporating (with or without modification) the provisions of any Commonwealth Act, or any disallowable legislative instrument as in force at the time of incorporation or from time to time. The clause also enables legislative instruments to make provision for matters by applying, adopting or incorporating (with or without modification) the provisions of any other instrument or writing which is in force at the time of incorporation.

Subclause 14(2) makes it clear that unless the enabling legislation allows instruments in this latter category to be incorporated "from time to time", then they may only be incorporated in the form that exists as at the date of incorporation. However, where the matter to be incorporated is in an instrument that has been scrutinised by Parliament (such as an Act or a disallowable legislative instrument) then it may be incorporated from time to time.

The equivalent provision for non-legislative instruments is section 46AA of the Acts Interpretation Act (as inserted by the *Legislative Instruments (Transitional and Consequential Amendments) Act 2003*).

#### **Clause 15: Effect of repeal of legislative instrument**

Clause 15 sets out the effect of the repeal of a legislative instrument or a provision of a legislative instrument. Subject to any contrary intention in the Act or legislative instrument which is effecting the repeal, the repeal does not, for example:

- revive anything not in force at the time of the repeal;
- affect how the instrument operated or anything done under the instrument;
- affect any rights, privileges or obligation acquired, incurred or accrued under the instrument;
- affect any penalty or punishment incurred in respect of any offence committed against the instrument; or
- affect an investigation, legal proceedings or remedy in respect of any such right, privilege, penalty or punishment.

Therefore, notwithstanding the repeal of a legislative instrument (or a provision of a legislative instrument) any investigation, legal proceeding or remedy may be instituted, continued or enforced as if the repeal had not occurred. A repeal does not impact on rights or responsibilities that have already accrued.

## **Part 2 - Drafting standards**

### **Clause 16: Measures to achieve high drafting standards for legislative instruments**

Clause 16 gives effect to the object of the Bill that relates to encouraging a high standard of drafting of legislative instruments. To achieve this objective, the Secretary of the Attorney-General's Department is to cause steps to be taken to promote the legal effectiveness, clarity and intelligibility of legislative instruments.

Subclause 16(2) sets out examples of the steps that could be taken. These include:

- drafting (or supervising the drafting of) legislative instruments;
- checking and advising on drafts of legislative instrument;
- providing training;
- arranging for the secondment of employees to other Departments and agencies to assist with drafting; and
- providing precedents for others to follow.

Subclause 16(3) provides that the Secretary must also cause steps to be taken to prevent the inappropriate use of gender-specific language and to notify both Houses of Parliament when a rule-maker has included such language in a legislative instrument. This role is, however, advisory only and cannot affect the legal effectiveness of an instrument. The reference to discouraging gender-specific language is intended to reflect the objectives of plain English drafting, but does not prevent gender specific language where appropriate to identify persons by sex. It reflects the current practice in drafting Acts and subordinate legislation.

## **Part 3 - Consultation before making legislative instruments**

This Part encourages rule-makers to undertake appropriate consultation before making a legislative instrument. This complements existing measures implementing Government policy about consultation (eg. Regulation Impact Statements and the role of the Office of Regulation Review). Instead of mandatory rules about consultation, the Bill focuses on sending a clear message about the importance of consultation. Decisions about consultation will be subject to the transparency mechanism of a rule requiring that explanatory statements to legislative instruments include a description of consultation undertaken or an explanation of why none was appropriate. The statement will be available to the public on the Federal Register of Legislative Instruments and will be tabled in Parliament.

### **Clause 17: Rule-makers should consult before making legislative instruments**

This clause provides that before a rule-maker makes a legislative instrument, the rule-maker must be satisfied that appropriate and reasonably practicable consultation has taken place, particularly where the instrument is likely to have a direct or substantial indirect effect on business, or restrict competition. This makes it clear that while the rule-maker does not need to actually undertake the consultation, nevertheless, the rule-maker has the onus of being satisfied that appropriate consultation has in fact taken place. (In some circumstances, it might be that no consultation is appropriate (for example, see clause 18)).

In determining whether the consultation (if any) was appropriate, the rule-maker may look at such things as the extent to which experts, stakeholders and persons likely to be affected by the proposed instrument have been involved.

### **Clause 18: Circumstances where consultation may be unnecessary or inappropriate**

The clause recognises that in certain circumstances the nature of the instrument may be such that consultation is either unnecessary or inappropriate.

Subclause 18(2) lists examples of such instruments. This list includes:

- instruments that are minor or machinery in nature or which do not substantially change the law;
- urgent instruments;
- instruments implementing Budget decisions;
- instruments relating to national security;
- instruments relating to employment; and
- instruments relating to management of, or to the service of members of, the Australian Defence Force.

The explanatory statement in relation to a legislative instrument is to set out a description of the nature of the consultation that has taken place. Alternatively, if none has taken place, then the explanatory statement is to contain an explanation as to why (see the definition of explanatory statement in subclause 4(1)).

### **Clause 19: Consequences of failure to consult**

While the Bill encourages appropriate consultation, it makes it clear that a failure to undertake consultation does not affect the validity or enforceability of a legislative instrument. However, an explanation why no consultation was undertaken must be documented in the explanatory statement (see the definition of explanatory statement in subclause 4(1)).

## **Part 4 - The Federal Register of Legislative Instruments**

The purpose of this Part is to provide for the establishment of the Federal Register of Legislative Instruments, which will be a complete on-line register of all Commonwealth legislative instruments, all explanatory statements in relation to legislative instruments made on or after the commencing day, and all compilations in relation to legislative instruments, that have been registered under the Bill.

The Register will be user-friendly, fully text searchable, authoritative and will result in the Commonwealth having one of the most accessible and advanced legislative instruments regimes. This Part is divided into six Divisions as follows:

- Division 1 - The Register;
- Division 2 - Registration of legislative instruments made, or treated as made, on or after commencing day;
- Division 3 - Registration of certain legislative instruments made before commencing day;
- Division 4 - Effect of registration;
- Division 5 - Compilations; and

- Division 6 - Early backcapturing.

## **Division 1 - The Register**

### **Clause 20: Federal Register of Legislative Instruments**

This clause provides for the Secretary of the Attorney-General's Department to cause to be maintained a register known as the Federal Register of Legislative Instruments.

The aim of the Federal Register of Legislative Instruments is to enhance the public's access to the laws that affect them. While many legislative instruments are already made public in various places and formats, in relation to many other legislative instruments there is no requirement to publish them at all. As such, even though legislative instruments are the law, some currently may not be made available to the public.

The Register is intended to be complete and comprehensive. As such, subclause 20(2) provides that the Register consists, at any particular point in time, of a database of all legislative instruments, all explanatory statements in relation to legislative instruments made on or after the commencing day, and all compilations in relation to legislative instruments.

The requirement that all explanatory statements be produced in relation to all legislative instruments is new. As such, the clause makes it clear that the Register will only contain explanatory statements that relate to legislative instruments made after the Bill commences. In addition, the Register will only include compilations that have been registered under the Bill (see clauses 33 and 36). So, for example, the Register will not include compilations in relation to legislative instruments that have ceased to be in force before the Bill commences.

### **Clause 21: Manner of keeping Register**

This clause provides that the regulations may prescribe the way in which the Register is to be kept.

The regulations may, for example, require that any person required to lodge a legislative instrument for registration must also lodge such information relating to the legislative instrument as the regulations provide, in such form as the regulations provide, to ensure that the Register is as useful as possible to persons wishing to use it.

The regulations may also provide for the manner in which the Register is required to be kept including the manner of recording information required to be included in the Register, the manner of altering information required to be included in the Register, and for giving a unique identifier to each legislative instrument or compilation that is registered.

The provision is permissive only; there is no requirement that regulations be made. If none are made, the manner in which the Register is kept will be governed by the Bill.

### **Clause 22: The status of the Register and judicial notice of legislative instruments and compilations**

The design of the Register is an important part of the new regime for legislative instruments. One aspect of the design of the Register is that it should be authoritative, that is, be able to be relied on by the user as providing accurate versions of the law. This also has advantages for administrators who have the responsibility to store and retrieve original signed paper versions, in that the Register

will be able to be relied on as providing authoritative versions without the need to find the original instrument. The concept of an authoritative database which provides certainty to users is not a new legal concept. For example, a certificate of title taken from a register established under the Torrens land title system is taken, in the absence of proof to the contrary, to be an accurate statement as to title.

Subclause 22(1) provides that the Register is to be taken to be a complete and accurate record of all legislative instruments included in it. This means that it may be relied upon as a correct statement of the law, including by courts. The accuracy of the Register extends to proof about the commencement of a legislative instrument as it appears on the Register (subclause 22(3)). This means that in any proceedings in which a legislative instrument is relied upon, proof about the coming into operation of that instrument will not be required.

Subclause 22(2) provides that a compilation on the Register is presumed to be a complete and accurate record of the legislative instrument to which it relates, unless the contrary is proved. Compilations have been given a lesser standard of authority than legislative instruments on the Register, in that they amalgamate principal instruments, amending instruments, and/or provisions of Acts, to produce the principal instrument as amended and in force at a particular time.

Subclause 22(5) provides that a document that purports to be an extract from the Register is what it purports to be, unless the contrary is proved. Subclause 22(6) further refines the presumption by providing that if it shows a particular date or time of registration then it is presumed that the document was registered in that Part of the Register on that date and at that time unless the contrary is proved. The date and time of registration is an important piece of information as that dictates the time from which the legislative instrument is enforceable (see clause 32).

### **Clause 23: Rectification of Register**

Subclause 23(1) deals with the situation where the Secretary to the Attorney-General's Department becomes aware that the Register is erroneous because of a mistake or omission.

Subparagraph 23(1)(b)(i) deals with errors in legislative instruments. If the Secretary is satisfied that the error is in the registered electronic version rather than in the original legislative instrument or other evidence of the text of the instrument (which is lodged at the same time as the electronic version), the Secretary must arrange for the error in the registered electronic version to be corrected. "Original legislative instrument" is defined in subclause 4(1) to mean the legislative instrument made by the rule-maker; or an instrument prescribed by the regulations. Other evidence of the text of the legislative instrument includes certified true copies and such other evidence as the Secretary considers acceptable.

Paragraph 23(1)(b)(ii) deals with errors in compilations. If the Secretary is satisfied that the compilation does not represent the state of the law, the Secretary must arrange for the error in the compilation to be corrected.

Subclause 23(2) provides that these corrections to the Register do not affect rights or privileges accrued or acquired through previous reliance on the Register, or impose or increase any obligation or liability that was incurred before the correction was made.

## **Division 2 - Registration of legislative instruments made, or treated as made, on or after commencing day**

This Division deals with the registration of legislative instruments made on or after the commencement of this Bill. It also deals with the registration of legislative instruments that have been made but not finally dealt with before that commencement (see clause 55). Division 3 deals with registration of certain legislative instruments made before commencement of the Bill.

### **Clause 24: Legislative instruments required to be registered under this Division**

This clause provides that legislative instruments that are made on or after commencing day or which are to be treated as made on commencing day (see clause 55) must be registered in accordance with Division 2. There is a cross-reference to subclause 29(2) which deals with the registration of legislative instruments that amend existing legislative instruments. Clause 31 provides that a legislative instrument that is required to be registered under Division 2 is not enforceable by or against the Commonwealth, or by or against any other person or body, unless the instrument is registered.

The requirement for registration as the condition precedent to enforceability of a legislative instrument is a primary feature of this Bill and ensures the integrity and accuracy of the Register.

### **Clause 25: Lodgment for registration under this Division**

Clause 25 provides that if a legislative instrument is to be registered, the rule-maker must lodge the instrument in electronic form for registration with the Attorney-General's Department. At the same time, or as soon as practicable after this lodgment, the rule-maker must also lodge the original legislative instrument ("Original legislative instrument" is defined in subclause 4(1) to mean the legislative instrument made by the rule-maker; or an instrument prescribed by the regulations) or a certified true copy of the original signed instrument.

Paragraph 25(2)(c) provides that if the rule-maker cannot provide the original legislative instrument or a certified true copy of it, the text as published in the *Gazette* (or elsewhere), in accordance with the enabling legislation, must be lodged. If the rule-maker cannot provide such a text, under paragraph 25(2)(d) the rule-maker must provide such other evidence of the text as the Secretary considers acceptable.

The purpose of these provisions is to provide a mechanism whereby the electronic version that is about to be registered can be checked for accuracy against the hard-copy version that would have traditionally been regarded as authoritative (or the next best alternative). If there is an error in the electronic version, then it may be amended before registration.

### **Clause 26: Explanatory statements**

Clause 26 provides that the rule-maker must lodge for registration a statement in electronic form to be known as the explanatory statement, explaining the purpose and operation of the instrument. The definition of explanatory statement in subclause 4(1) stipulates that the explanatory statement must contain a description of any documents incorporated in the instrument by reference, and how these documents may be obtained. The definition of explanatory statement also stipulates that information in relation to consultation must be included, as well as such other information that may be prescribed.



The explanatory statement is generally tabled in each House of Parliament with the legislative instrument to which it relates to explain the meaning of the legislative instrument.

A failure of the rule-maker to provide the explanatory statement does not affect the validity or enforceability of the instrument.

### **Clause 27: Registration under this Division**

Once legislative instruments and explanatory statements have been lodged, clause 27 provides that the Secretary must cause those instruments and statements to be registered. Subclause 4(1) defines “register” as follows: register, in relation to an instrument, an explanatory statement, or a compilation, means recording the instrument, explanatory statement or compilation in the Register in electronic form.

Subclause 27(1) specifies that the instrument that is to be registered is that lodged under subclause 25(1). In other words, it is the electronic version which is registered after it is checked for accuracy against the hard-copy version lodged under subclause 25(2).

The regulations may specify procedures to be followed in registering these instruments and explanatory statements. Again this is a permissive provision: the absence of regulation will not impact on the requirement for registration.

### **Division 3 - Registration of certain legislative instruments made before commencing day**

This Division deals with the registration of legislative instruments made before the commencing day. Where such instruments are already included on a database maintained by the Attorney-General’s Department, they will be backcaptured under the terms of Division 6 of this Part, without the rule-maker being required to lodge additional information. They will then be taken to have been registered in order to comply with this Division (see clause 36).

### **Clause 28: Legislative instruments required to be registered under this Division**

Clause 28 provides that any legislative instrument which is in force, which was made before the commencing day (and is not to be treated as if it had been made on the commencing day), must be registered under this Division.

### **Clause 29: Lodgment for registration under this Division**

This clause sets out the mechanisms by which legislative instruments made before the commencing day are to be lodged for registration. Subclause 29(1) contains a table setting out the deadlines for lodgment for such instruments.

Under subclause 29(1), instruments required to be registered under clause 28, must, unless the regulations otherwise provide, be lodged in electronic form with the Department, for registration, by the applicable deadline. If the instrument amends another legislative instrument that has not already been registered (the principal legislative instrument), then both the amending instrument and the principal legislative instrument and any other legislative instruments that amend the principal legislative instrument must be registered under this Division.

For example, if instrument A was made in the period three years before the commencing day, it must be lodged by the first day of the 12<sup>th</sup> month after the commencing day.

If instrument B was made seven years before the commencing day, it must be lodged for registration by the first day of the 36<sup>th</sup> month after the commencing day.

However, if instrument A amended instrument B, instrument B would have to be lodged for registration at the same time as instrument A. Any other instrument that has also amended instrument B also has to be lodged at that time.

Under subclause 29(2), if a legislative instrument is made on or after the commencing day, and it amends another legislative instrument made before the commencing day that has not already been registered, the rule-maker must, unless the regulations otherwise provide, lodge the instrument that has been amended plus any other legislative instruments that amend it.

For example, if instrument A is made after commencing day and it amends instrument B that was made seven years before commencing day (and has not as yet been registered), then instrument B must be lodged at the same time as the new instrument A. Any other instrument that has also amended instrument B also has to be lodged at that time.

Subclause 29(4) determines the applicable lodgment deadline when the circumstances set out in subclause 29(2) applies. The amending and amended instruments must be lodged by the date set out in subclause 29(1), or within 28 days after the registration of the new instrument, whichever first occurs.

Under subclause 29(3) at the same time (or as soon as practicable after) this lodgment, the rule-maker must also lodge the original legislative instrument (as defined in subclause 4(1)) or a certified true copy of the original legislative instrument.

If the rule-maker cannot provide the original legislative instrument or a certified true copy of it, the text as published in the *Gazette* (or elsewhere) in accordance with the enabling legislation, must be lodged. If the rule-maker cannot provide such a text, the rule-maker must provide such other evidence of the text as the Secretary considers acceptable.

The purpose of these provisions is to provide a mechanism whereby the electronic version that is about to be registered can be checked for accuracy against the hard-copy version that would have traditionally been regarded as authoritative (or the next best alternative). If there is an error in the electronic version, then it may be amended before registration.

Subclause 29(5) is for the avoidance of doubt and states that subclause 32(3) does not affect the requirements of this clause. Subclause 32(3) provides that some legislative instruments continue in force even if they are not lodged for registration as required by this clause.

### **Clause 30: Registration under this Division**

Clause 30 states that the Secretary of the Attorney-General's Department must cause to be registered each instrument lodged under Division 3.

#### **Division 4 - Effect of registration**

The purpose of this Division is to set out the consequences that follow from non-registration of an instrument that is required to be registered under Division 2, or from a failure to lodge an instrument that is required to be registered under Division 3.

##### **Clause 31: Effect of failure to register a legislative instrument required to be registered under Division 2**

Clause 31 states that legislative instruments required to be registered under Division 2 (legislative instruments made on or after the commencing day), are not enforceable until they are registered.

However, subclause 31(2) deals with the situation where a legislative instrument is required to be registered under Division 2, but because of technical difficulties the instrument is temporarily unable to be registered. In this situation, the Secretary of the Attorney-General's Department may cause the instrument to be published in full in the *Gazette*. This alternate scheme will only be used in extreme cases where immediate registration (and hence enforcement) is essential because of the nature of and circumstances surrounding the instrument. Merely because there may be technical difficulties that temporarily prevent registration of an instrument will not mean that all instruments that cannot be registered that time will be Gazetted. The situation must be extreme to justify this cause of action and will only be possible on the exercise of the Secretary's discretion.

If an instrument is Gazetted in these extreme cases, the Bill will have effect as if the instrument was registered at the time of publication, but the Secretary must, as soon as practicable, cause the instrument to be entered in the Register with an annotation as to the day and time at which the instrument is taken to have been registered.

##### **Clause 32: Effect of failure to lodge a legislative instrument required to be registered under Division 3**

Clause 32 provides for the consequences of a failure to register a legislative instrument under Division 3 (instruments made before the commencing day). The instrument must be registered by the relevant cut-off date to remain enforceable. If it is not registered by the last lodgment date it ceases to be enforceable and is deemed to be repealed.

Subclause 32(3) removes these effects in relation to an instrument that is connected with the collection of revenue, where the Attorney-General certifies in writing that the responsible officer was unaware of the requirement to register the instrument, and that this was reasonable under the circumstances. Where this occurs, and where the instrument is lodged for registration within 28 days of the responsible officer becoming aware of the registration requirement, the instrument is taken to have continued in force after the last lodgment day.

Under subclause 32(4) the officers responsible for such instruments are the Commissioner of Taxation, the Chief Executive Officer of Customs, or the Secretary of the relevant Department.

## **Division 5 - Compilations**

The purpose of this Division is to provide for the registration of compilations. Under subclause 4(1), a compilation is an instrument as amended and in force at a particular time. This means they have been produced by incorporating all the amendments to an instrument, into the instrument. Many users find these easier to access instead of reading the principal and amending instruments or Acts together to discover the law at a particular point in time.

### **Clause 33: Compilations to be registered**

Clause 33 requires that if a legislative instrument is amended by an Act or another legislative instrument, the Secretary of the Attorney-General's Department must cause to be registered a compilation in relation to that instrument. This must be done as soon as practicable after the commencement of the amendments. Under subclause 22(2), a compilation on the Register is presumed to be a complete and accurate record of the legislative instrument to which it relates, unless the contrary is proved.

Subclause 33(2) deals with the situation where there has been disallowance of an instrument, or part of an instrument, after a compilation has been registered.

If the disallowance means the compilation is no longer required, the Secretary must cause the Register to be annotated to explain why a compilation is no longer required.

If the disallowance means that the compilation is still required but the registered compilation ceases to represent the state of the law, the Secretary must cause a new compilation to be registered with effect from the date of the disallowance.

Subclause 33(3) states that subclauses (1) and (2) do not require the registration of a compilation in relation to a principal legislative instrument until the registration of that principal legislative instrument occurs.

Under subclause 36(3), compilations contained in a pre-existing database will be taken to have been registered under this Division.

### **Clause 34: Secretary may require provision of compilations for registration purposes**

Clause 34 provides that if a rule-maker is required to lodge for registration a legislative instrument, and that instrument amends another instrument, the Secretary of the Attorney-General's Department may give written notice to the rule-maker requiring the rule-maker to lodge a compilation (incorporating the text of amendments) in electronic form. The notice must require the lodgment of the compilation as soon as practicable after the lodgment of the principal legislative instrument or the amending legislative instrument, whichever last occurs.

If an Act amends a legislative instrument, the Secretary of the Attorney-General's Department may give written notice to the rule-maker requiring the rule-maker to lodge a compilation in electronic form as soon as practicable after the coming into force of the provisions of the amending Act or the lodgment of the principal legislative instrument, whichever last occurs.

If a compilation has been registered, and the Secretary of the Attorney-General's Department is satisfied that because of the disallowance (complete or partial) an amending legislative instrument, the compilation no longer accurately reflects the law, the Secretary may give written notice to the rule-maker requiring the lodgment of a revised compilation as soon as practicable after the giving of the notice.

### **Clause 35: Information to be included with a compilation**

This clause provides that compilations, that are registered, must include certain information, including information that is specified in the regulations.

### **Division 6 - Early backcapturing**

This Division deals with the prior existence of Government databases containing legislative instruments.

### **Clause 36: Inclusion in database established in anticipation of the enactment of this Act**

Subclause 36(1) provides that if, before the commencing day, there is an electronic database of legislative instruments and compilations (as defined in the Bill), that database becomes the Federal Register of Legislative Instruments.

Subclause 36(2) provides that the instruments contained in such a database are taken to have been registered under Division 3 of Part 4 of the Bill.

Subclause 36(3) provides that the compilations contained in such a database are taken to have been registered under Division 5 of Part 4 of the Bill.

Subclause 36(4) provides that references in subclause (2) to legislative instruments are to be taken to include references to rules of court. These rules are also taken to have been registered under Division 3 of Part 4 as that Division is applied in relation to rules of court.

## **Part 5 – Parliamentary Scrutiny of Legislative Instruments**

### **Clause 37: The purpose of the Part**

The purpose of this Part is to set out a new tabling regime to facilitate Parliamentary scrutiny of registered legislative instruments, to set out the manner in which such instruments may be disallowed, and to set out the consequences of disallowance. The Part also identifies legislative instruments that are tabled but which are exempt from the disallowance regime.

### **Clause 38: Tabling of legislative instruments**

Clause 38 sets out the mechanism for one of the Bill's main improvements to transparency in relation to legislative instruments, which is that all registered legislative instruments are subject to tabling in Parliament, including those not subject to disallowance under this Part.

The clause indicates that a copy of each legislative instrument required to be registered, must be laid before each House of Parliament not later than 6 sitting days of that House, after the instrument has been registered. It must be delivered to that House by the Attorney-General's Department. If the

instrument is not so laid before each House in accordance with the clause, it will cease to have effect immediately after the last day for it to be so laid.

**Clause 39: Additional material to be tabled with the legislative instrument**

Clause 39 requires that the explanatory statement that was lodged with the Attorney-General's Department must be delivered by the Attorney-General's Department to each House to be laid before it with a copy of the legislative instrument.

Under subclause 39(2), if the rule-maker fails to lodge the explanatory statement with the Attorney-General's Department before delivery of a copy of the instrument to a particular House has been arranged, the rule-maker must effect delivery of a copy of the explanatory statement to that House, along with a written statement as to why the explanatory statement was not provided to the Department in time to be delivered to the House with the legislative instrument.

**Clause 40: Regulations may specify manner of delivery of certain documents**

Clause 40 states that regulations may specify the manner by which documents required to be laid before a House of Parliament may be delivered to that House.

**Clause 41: Incorporated material may be required to be made available**

Clause 41 specifies that a House of Parliament may require any document incorporated by reference into an instrument which is subject to disallowance, to be made available for inspection. For example, a document that establishes a standard in relation to a particular area of activity may be incorporated by reference into an instrument that regulates that area of activity. This clause is to allow Parliament to examine the complete law as made by that instrument before exercising its power of disallowance in relation to that instrument.

**Clause 42: Disallowance of legislative instruments**

Clause 42 provides the general mechanism for the disallowance of legislative instruments that are subject to disallowance under the Bill. It ensures that the existing power of the Parliament to disallow not only whole legislative instruments, but also provisions of legislative instruments is preserved, and is neither diminished nor extended by the Bill. The term "provision" is currently used in section 46A of the Acts Interpretation Act.

Paragraph 42(1)(a) re-enacts with some modifications, the provisions of subsections 48(4), (5) and (5A) of the Acts Interpretation Act and provides for the various methods by which a legislative instrument or a provision of such an instrument, may be disallowed, and cease to have effect. In every case, the pre-condition is that, once a legislative instrument has been laid before a House, a notice of motion of disallowance is given within 15 sitting days of that House. Subclause 42(2) provides that where a notice of motion to disallow a legislative instrument has been given in a House and has not been withdrawn or the motion finally dealt with, or its consideration deferred, the legislative instrument is taken to be disallowed and ceases to have effect at the end of fifteen sitting days of that House.

Subclause 42(3) outlines the procedure if Parliament is dissolved, expires, or is prorogued before the notice of motion to disallow an instrument has been dealt with. The legislative instrument is taken to be laid before that House on the first sitting day in which a notice of motion of disallowance must be given. It commences again from that time. Subclause 42(4) provides that a

resolution may be passed deferring consideration of a motion of disallowance, for a period of up to 6 months. The deferral is to enable the remaking or amendment of the instrument or provision within the deferral period to achieve an objective specified in the resolution.

**Clause 43: Deferral of consideration of disallowance motion to enable remaking of legislative instrument**

Clause 43 deals with the situation where:

- a copy of a legislative instrument is laid before a House of Parliament on a particular day, and within 15 sitting days after that day, notice of a motion to disallow the legislative instrument or a provision of the instrument, is given;
- then, within 15 sitting days of that House after the giving of that notice, the House passes a resolution deferring consideration of the motion for a period of time ending within 6 months of the day the resolution is passed (the deferral period). The resolution is expressed to defer consideration of the motion so as to enable the remaking or the amendment of the instrument or provision within the deferral period to achieve an objective specified in the resolution.

Under subclause 43(2), if the situation above exists, and notice of a motion to disallow an instrument or provision is given in a House of Parliament before the end of the first sitting day of that House after the deferral period, and at the end of 15 sitting days of that House after the giving of that notice of motion:

- the notice has not been withdrawn and the motion has not been called on; or
- the motion has been called on, moved and seconded and has not been withdrawn or otherwise disposed of;

then the instrument or provision that is specified in the motion is taken to have been disallowed. It will cease at that time to have effect.

Subclause 43(3) deals with the situation where the set of circumstances outlined in the first paragraph under this item exists, and notice of a motion to disallow the instrument or provision is given in a House of Parliament within 15 sitting days of that House after a copy of the instrument was laid before that House, and before the end of the deferral period applicable to that notice of motion the House of Representatives is dissolved or expired, or the Parliament is prorogued.

In this situation, subclause 43(3) provides that if, at the time of the dissolution, expiry or prorogation:

- the notice has not been withdrawn and the motion has not been called on; or
- the motion has been called on, moved and seconded and has not been withdrawn or otherwise disposed of;

then the legislative instrument is taken, for the purposes of subclauses 42(1) and 42(2), to have been laid before the House of Parliament on its first sitting day after the dissolution, expiry or prorogation.

Subclause 43(4) provides that when a new instrument is made in order to remake or amend an instrument in the situation clause 43 applies to, the rule-maker must lodge it for registration as normal under the Act. The subclause also provides that the explanatory statement in relation to the instrument must indicate that the instrument has been prepared in accordance with this section of the Act to achieve an objective specified in the resolution deferring consideration. The instrument and explanatory statement will then be delivered to each House of Parliament by the Attorney-General's Department.

#### **Clause 44: Legislative instruments that are not subject to disallowance**

Clause 44 provides that certain legislative instruments are exempt from the disallowance regime established by the Bill.

Subclause 44(1) provides that instruments made under enabling legislation that facilitates an intergovernmental body or scheme involving the Commonwealth and one or more States are not subject to the disallowance provisions of this Act, unless the enabling legislation has the effect that the instrument is disallowable. This is because there is an argument that the Commonwealth Parliament should not, as part of a legislative instruments regime, unilaterally disallow instruments that are part of a multilateral scheme. However, the Parliament, in creating the relevant enabling legislation, would be in a position to determine that such instruments should be disallowable.

Subclause 44(2) contains a table. Clauses 42 and 43 of the Bill (the disallowance regime) does not apply to any legislative instrument included in that table. The table may also be expanded by regulations. As such, any decision to add to the exemptions will be subject to Parliamentary scrutiny and disallowance.

Some of the rationales for inclusion of particular types of instrument in the table include:

- where there is an alternate parliamentary role in relation to that type of instrument. For example, certain broadcasting standards can be directly amended by a House of Parliament, under the *Broadcasting Services Act 1992*;
- where the rule-making process has been appropriately depoliticised. For example, certain instruments made under the *Quarantine Act 1908* may only be able to be justified in the international trade context if they are manifestly divorced from the political process;
- where the instrument is an internal management tool for Government. For example, the table includes instruments made under the *Public Service Act 1999* which relate to the classification of Government employees;
- where the exposure of instruments to potential disallowance would cause problems such as commercial delay or commercial uncertainty. For example, the table includes instruments made under the *Radiocommunications Act 1992* which relate to the procedures for allocating spectrum licenses; and
- where Executive control is intended. For example, the table includes Ministerial directions.



**Clause 45: Effect of a legislative instrument ceasing to have effect**

Clause 45 re-enacts subsections 48(6) and (7) of the Acts Interpretation Act in relation to the effect of an instrument ceasing to have effect.

Under subclause 45(1), if a legislative instrument or a provision of a legislative instrument ceases to have effect because of the operation of subclauses 38(3) (not tabled as required), 42(1) or (2) or 43(2) (disallowed) then it is as if the instrument or provision had been repealed. In addition, if the legislative instrument or provision repealed in whole or in part another provision, than that repealed provision is revived (but not if it has already sunsetted under Part 6 of this Bill).

**Clause 46: Legislative instrument not to be remade while required to be tabled**

Clause 46 re-enacts section 48A of the Acts Interpretation Act. It prevents a legislative instrument, which is the same in substance as the original registered legislative instrument, being made during the period of time defined in subclause 46(2) unless both Houses of Parliament approve by resolution.

Subclause 46(3) provides that an instrument made in contravention of this section has no effect.

**Clause 47: Legislative instruments not to be remade while subject to disallowance**

Clause 47 re-enacts section 48B of the Acts Interpretation Act preventing the making of an instrument or provision of a legislative instrument the same in substance as an instrument or provision which is the subject of a notice of a motion to disallow, unless the notice has been withdrawn or the motion has been finally dealt with.

Subclause 47(3) states that a legislative instrument or provision made in contravention of this section has no effect. Subclause 47(4) provides that the clause does not limit the operation of clauses 46 (legislative instruments not to be remade while required to be tabled) or clause 48 (disallowed legislative instruments not to be remade unless disallowance resolution rescinded or House approves).

Subclause 47(5) refers to the situations governed by clause 43, where a resolution has been made in relation to a legislative instrument or a provision of a legislative instrument. Clause 47 does not prevent the making of an instrument whose sole effect is to remake or amend the legislative instrument or provision so as to achieve an objective specified in such a resolution.

**Clause 48: Disallowed legislative instruments not to be remade unless disallowance resolution rescinded or House approves**

Clause 48 re-enacts subsection 48(1) of the Acts Interpretation Act. If under clause 42 or clause 43 a legislative instrument or provision is disallowed, another legislative instrument or provision which is the same in substance as the original instrument or provision must not be made within 6 months after the day the original instrument was taken as being disallowed. If the original instrument was disallowed by resolution and that resolution has been rescinded by the House by which it was passed, or by resolution approval is given in the making of an instrument or provision of the same substance as the original instrument, then the latter instrument or provision is exempt.

Clause 48(2) provides that any legislative instrument or provision made in contravention of this section has no effect.

## **Part 6 – Sunsetting of Legislative Instruments**

This Part provides for the automatic repeal or sunsetting of each legislative instrument 10 years after the date that the instrument must be placed on the Register. Ten years has been chosen as an appropriate period of time to prevent the persistence of antiquated or unnecessary legislative instruments, and enable ample time for review and re-making of legislative instruments that may still be required. A shorter time span would be more resource intensive.

### **Clause 49: The purpose of the Part**

The purpose of Part 6 is to encourage regular review and re-making of legislative instruments thereby ensuring that they are kept up to date and only remain in force for so long as they are needed.

### **Clause 50: The sunsetting of legislative instruments to which this Part applies**

Clause 50 sets out the mechanism by which sunsetting operates. Sunsetting means that an instrument, on a particular day, ceases to be in force as though it had been repealed by another instrument.

Subclause 50(1) applies to instruments made before the commencing day which do not amend an earlier legislative instrument. Such an instrument will sunset together with the provisions of any other legislative instrument that amends or otherwise affects it, on whichever of 1 April or 1 October falls on, or next follows, the tenth anniversary of the day on which the instrument is required to be lodged for registration.

For example, if instrument A is made one year before the commencing day, it must be lodged for registration by the first day of the 12<sup>th</sup> month after the commencing day (ie two years after it is made). It will then sunset (along with the provisions of any other instrument that amends or otherwise affects it) on whichever of 1 April or 1 October falls on, or next follows, the tenth anniversary of that day.

Subclause 50(2) applies to instruments made on or after the commencing day which do not amend an earlier legislative instrument. Such an instrument will sunset together with the provisions of any other legislative instrument that amends or otherwise affects it, on whichever of 1 April or 1 October falls on, or next follows, the tenth anniversary of the day of the day the instrument commenced. Under subclause 50(5), if there are two or more days of commencement, the earliest of those two days is the relevant one.

For example, instrument B is made and registered on the commencing day, and commences that day. That means it will sunset (along with the provisions of any other instrument that amends or otherwise affects it) on whichever of 1 April or 1 October falls on, or next follows, the tenth anniversary of that day.

Subclause 50(3) explains how sunsetting works in relation to an instrument (the *partially amending legislative instrument*) which contains some provisions which amend an earlier legislative instrument, and some which do not. In this situation the provisions that do not amend an earlier legislative instrument, and the provisions of any other legislative instrument that amend, or otherwise affect, the operation of those provisions, sunset together.

Subclause 50(4) provides for the day on which such provisions sunset.

Where the *partially amending legislative instrument* is made before the commencing day, the provisions referred to above sunset on whichever of 1 April or 1 October falls on, or next follows, the tenth anniversary of the day it is required to be lodged for registration.

Where the *partially amending legislative instrument* is made on or after the commencing day, the provisions referred to above sunset on whichever of 1 April or 1 October falls on, or next follows, the tenth anniversary of the date of commencement of the provisions that do not amend an earlier legislative instrument. Under subclause 50(6), if there are two or more days of commencement, the earliest of those two days is the relevant one.

### **Clause 51: Attorney-General may defer sunset in certain circumstances**

The Attorney-General may issue a certificate extending the sunset period for a legislative instrument by a period up to 1 year where the Attorney-General is satisfied that the relevant legislative instrument cannot be remade by the sunset date, or the dissolution, expiration, or prorogation of Parliament makes it inappropriate to remake the instrument before a new Government takes office, or the instrument is expected to cease to have effect within 12 months of the sunset date.

The rule-maker seeking a certificate from the Attorney-General must clearly indicate the steps that the rule-maker has taken to deal with the ceasing to be in force of the sunset instrument.

If the Attorney-General issues a certificate extending the sunset period for an instrument, the Attorney-General must include a statement of the reasons for the issue of the certificate, and cause a copy of the certificate to be laid before each House of Parliament. The certificate is a legislative instrument and will therefore be registered under Part 4.

### **Clause 52: Attorney-General must lay lists of instruments due for sunset before each House of the Parliament**

The Attorney-General must, on the first sitting day of each House of Parliament occurring within 18 months before each sunset day, arrange for the laying before each House a list of the principal legislative instruments and provisions of other legislative instruments that affect the operation of those principal legislative instruments that will cease to be in force on that particular sunset day.

This means that both Houses of Parliament will be aware of instruments that are about to sunset. This will put them in a position to exercise their powers under clause 53 (if necessary).

After the laying before Parliament of such a list, the Attorney-General's Department must arrange for a copy of that list to be provided to each rule-maker responsible for each principal legislative instrument and each provision appearing on that list. This is in order to remind rule-makers of instruments that are about to sunset so that necessary arrangements can be made if they have not already been made.

Subclause 52(4) clarifies that the clause need only be complied with in relation to the earlier of two days on which the Attorney-General may have been required to arrange for the laying of lists.

### **Clause 53: Resolution that instruments continue in force**

Either House of Parliament may, by resolution passed within 6 months after the laying of a list, or a certificate from the Attorney-General deferring sunset, indicate which legislative instruments and provisions on that list or in that certificate should continue in force.

### **Clause 54: Instruments to which this Part does not apply**

Clause 54 provides that Part 6 of the Bill (the sunset regime) does not apply to certain legislative instruments. In some instances this may be because the nature of the instrument makes sunset inappropriate (eg. the instrument it is intended to be enduring). In other cases this may be because the nature of the rule-maker makes sunset inappropriate (eg. the rule-maker is an intergovernmental body).

Subclause 54(1) provides that instruments made under enabling legislation that facilitates an intergovernmental body or scheme involving the Commonwealth and one or more States are not subject to sunset. This is because the instruments are part of a multilateral agreement and should therefore not be subject to a unilateral sunset process which would cause them to cease to exist in only one of the jurisdictions that are party to the agreement.

Subclause 54(2) contains a table. Part 6 of the Bill (the sunset regime) does not apply to any legislative instrument included in that table. The table may also be expanded by regulations. As such, any decision to add to the exemptions will be subject to Parliamentary scrutiny and disallowance.

Some of the rationales for inclusion of particular types of instrument in the table include:

- where the rule-maker has been given a statutory role independent of Government, or is operating in competition with the private sector. For example, the table includes instruments made under the *Australian Postal Corporation Act 1989*;
- where the instrument is clearly designed to be enduring and not subject to regular review. For example, the table includes instruments establishing flags under the *Flags Act 1953*; and
- where commercial certainty would be undermined by sunset. For example, the table includes plans of management made under the *Fisheries Management Act 1991* – substantial investments are made in reliance on plans that are intended to be in force for substantially longer periods than 10 years.

In assessing whether particular instruments would fall within the exemptions at items 43 and 44 of the table, it is the whole instrument (including any amendments to it) to which the “sole purpose, or a primary purpose” test should be applied.

## **Part 7 - Miscellaneous**

### **Clause 55: Instruments made but not finally dealt with before the commencing day**

This clause deals with the relationship between this Bill and existing legislative provisions which set out steps (including gazettal and disallowance regimes) that must be followed in relation to certain legislative instruments. Subclause 55(1) defines the legislative instruments to which the

clause applies and this includes those made before commencement and which are disallowable instruments for the purposes of section 46A of the Acts Interpretation Act and those that must be published in the *Gazette*. On the day this Bill commences, there may be legislative instruments in relation to which some commencement steps are incomplete, even though the legislative instrument has already been made.

Subclause 55(2) provides that where an instrument that was made but not Gazetted (where required) before the commencement of this Bill, that instrument is taken to have been made on commencement day. This means that the registration requirements set out in Part 4 Division 2 of the Bill apply to that instrument and the Gazettal obligations cease to apply. Subclause 55(3) makes it clear that in these circumstances, the requirement to explain any delay in lodging or tabling an explanatory statement (as set out in clause 39) do not apply.

Subclause 55(4) provides that where an instrument was made and Gazetted before the commencement of this Bill but where the obligations under Part XII of the Acts Interpretation Act (in relation to disallowance) and/or under the *Statutory Rules Publications Act 1903* have not been completed, then those obligations continue notwithstanding the repeal of the relevant provisions by the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003*. The obligations under Part XII of the Acts Interpretation Act may arise because the instrument is declared to be a disallowable instrument for the purposes of section 46A of the Acts Interpretation Act or the sections in Part XII may expressly apply to the instrument.

#### **Clause 56: Relationship of certain gazettal requirements to registration requirements**

This clause deals with the situation where, after the commencement of this Bill, the particular enabling legislation in relation to a legislative instrument continues to provide that the text of the instrument or the particulars of its making should be published in the *Gazette*. In such circumstances, the requirement for such notification in relation to instruments made on or after the commencement of this Bill is satisfied if the instrument is registered under the requirements of this Bill.

However, if the enabling legislation is enacted or amended after this Bill commences and it provides that the text of the instrument or the particulars of its making should be published in the *Gazette*, then this publication requirement is in addition to the requirement for registration under this Bill.

#### **Clause 57: Effect on existing tabling and disallowance requirements**

This purpose of this clause is to deal with the relationship between this Bill and existing statutory requirements in relation to tabling and disallowing legislative instruments.

Subclauses 57(1) and 57(4) deal with tabling requirements in existing legislation. Subclause 57(1) provides that compliance with the tabling requirements of this Bill (see clause 38) is taken to constitute compliance with the tabling requirements in existing legislation. Subclause 57(4) deals with provisions in existing legislation which specify particular requirements in addition to the tabling requirements, for example a requirement that a report be prepared and laid before the Parliament at the same time as the instrument. The subclause provides that those provisions continue to have effect on and after the commencing day of this Bill.

Subclauses 57(2) and 57(5) deal with disallowance provisions in existing legislation. Subclause 57(2) provides that the disallowance provisions of this Bill (see Part 5) are taken to apply in lieu of the disallowance provisions in the enabling legislation. However, this is subject to subclause 57(5)

which provides that the regulations may specifically prescribe special disallowance regimes so that that regime and not this Bill will continue to apply to the legislative instrument.

Subclause 57(2) excludes from its operation enabling legislation that applies without modification the disallowance provisions of Part XII of the Acts Interpretation Act (which would include enabling legislation that declares an instrument to be a disallowable instrument for the purposes of section 46A of the Acts Interpretation Act). After the commencement day such instruments are automatically legislative instruments for the purposes of this Bill and hence automatically subject to the disallowance regime in this Bill. In addition, the provisions of the Acts Interpretation Act are repealed by the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* and therefore the continued reference in the enabling legislation is of no effect.

Subclause 57(3) deals with provisions in existing legislation specifying particular consequences that follow a particular circumstance to do with the tabling, non-tabling, disallowance or non-disallowance of a document in accordance with those provisions. The subclause provides that the consequences specified in the existing legislation as following those circumstances, are to follow a like circumstance under this Bill.

### **Clause 58: Delegation**

This clause provides that the Secretary of the Attorney-General's Department may delegate to an officer of the Attorney-General's Department any of the powers or functions imposed by the Bill, except the power to delegate.

### **Clause 59: Review of operation of this Act**

This clause provides that there is to be a review of the operation of the Bill three years after it commences. To this end, the Attorney-General must, in the three months after the Bill's third anniversary, appoint persons to a body to review the Bill. The body must review all aspects of the operation of the Bill and any related matters referred to it by the Attorney-General, and report within 15 months of that third anniversary.

The Attorney-General must table the report within 6 sittings days of its receipt.

The requirement for a review recognises the importance of ensuring that the Bill is operating as intended. However, as the impact of the sunset provisions cannot be assessed over this time period, clause 61 provides for a separate review of those provisions.

### **Clause 60: Review of operation of the sunset provisions**

This clause provides that there is to be a review of the operation of Part 6 of the Bill (which deals with the sunset of legislative instruments) twelve years after it commences. The report is required to be completed within 9 months of the twelfth anniversary and tabled within 6 sitting days of its receipt by the Attorney-General.

The 12 year review period (as opposed to three years for the remainder of the Bill) recognises that there is a 10 year sunset period and therefore the operation of the provisions cannot be assessed after a shorter period.

The review must address all aspects of the operation of the sunset regime and any related matters specified by the Attorney-General. The purpose of the review is to ensure that the

requirement for rule-makers to periodically review and remake legislative instruments is operating in an efficient and effective manner to maintain an accurate and up-to-date register of legislative instruments.

### **Clause 61: Existing references to Legislative Instruments Act**

This clause provides that any reference in a law of the Commonwealth to the *Legislative Instruments Act 1994* or any subsequent years is taken to be a reference to this Bill. This means that existing legislation which has been made in anticipation of a legislative instruments Act but which has the incorrect year, need not be amended to change the reference to the year.

For example, section 40 of the *Health Insurance Commission (Reform and Separation of Functions) Act 1997* provides that:

To avoid doubt, an instrument made under this Part (other than regulations under section 53) is not taken to be a legislative instrument for the purposes of the *Legislative Instruments Act 1997*.

On commencement of this Bill, the reference to the 1997 Act will be taken to be a reference to the 2003 Act.

In some cases, the existing provision is expressed to commence on the commencement of a particular Legislative Instruments Act and is purporting to amend that Act. In these circumstances, the change in reference to the particular year will make the amendment meaningless. Where this does not matter, no amendment is necessary.

For example, subsection 2(6) of the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997* provides that:

If the *Legislative Instruments Act 1997* does not commence before 1 July 1997, the amendments of that Act made by this Act commence immediately after the commencement of the *Legislative Instruments Act 1997*.

Item 37 of Schedule 1 of the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997* is in the following terms:

Schedule 1  
*Legislative Instruments Act 1997*

37 Schedule 2 (table row relating to the *Radiocommunications (Permit Tax) Act 1983*)

Repeal the row.

This item purports to amend the proposed list of legislation providing for legislative instruments likely to have an effect on business which did appear in earlier versions of this Bill. However, as that schedule no longer exists the change in the reference from 1997 to 2003 has become meaningless and nothing needs to be done.

However, where there is a need to ensure that the existing provision operates in relation to the 2003 Act as it was intended to operate in relation to the nominated Act, then necessary consequential

amendments have been made (for example, see items 27 and 28 of the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003*).

**Clause 62: Regulations**

This clause is the standard regulation making power enabling the Governor-General to make regulations prescribing all matters required or permitted by the 2003 Act to be prescribed or necessary or convenient to be prescribed or carrying out or giving effect to the 2003 Act.