2008 Review of the Legislative Instruments Act 2003

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Acknowledgments

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Legislative Instruments Act Review Committee

31 March 2009

The Hon Robert McClelland MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

We are pleased to present our report on the operation of the *Legislative Instruments Act 2003*. The report has been prepared in accordance with section 59 of the Act, which requires that you table it within six sitting days of receipt.

In preparing the report, we have reviewed the operation of the Act as required by section 59. We have also addressed the specific issues referred to us in the terms of reference as well as other issues raised with us by interested parties.

Yours sincerely

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Contents

Acknowledgments ii

Copyright ii

Abbreviations and key terms ix

Introduction 1

Findings of the review 3

Recommendations 7

1 The definition of a legislative instrument 13

1.1 The present definition of a legislative instrument 13

1.2 The operation and value of a definition 14

1.3 A new definition 15

1.3.1 Problems with the present definition 15

1.3.2 The exemption of instruments reviewable under the ADJR Act 16

1.4 Certifying whether an instrument is legislative 17

2 The commencement of legislative instruments 19

2.1 The default commencement 19

2.2 Exceptions to the default commencement 20

2.3 The operation of retrospective legislative instruments 20

3 An expanded Register 21

3.1 Desirable inclusions in an expanded Register 21

3.1.1 Other instruments not covered by the LIA 21

3.1.2 Information published in gazettes 21

3.1.3 Other instruments where there is a public interest in improved access 22

3.2 Consequences of registering other instruments 22

4 An authoritative repository 25

4.1 The accuracy and completeness of the Register 25

4.1.1 Events occurring after registration that affect the accuracy of the Register 25

4.1.2 Other instruments that amend or repeal an instrument on the Register 26

4.2 Compilations of legislative instruments 26

4.3 The authoritative status of the Register 27

4.4 Access to documents incorporated by reference 28

5 Operation of the Register 31

5.1 Criticisms of the Register's performance and useability 31

5.2 Inadequate technology 31

5.3 The absence of technical standards 32

6 The standard of documents on the Register 35

6.1 The impact of the LIA on standards 35

6.2 Better reporting on drafting standards 36

6.3 Promoting drafting services and training 36

6.4 Guidance on explanatory statements 37

7 Encouraging consultation 39

7.1 The importance of consultation 39

7.2 Guidance on consultation and reporting obligations 39

7.3 Justifying decisions not to consult 41

7.4 The consultation provisions and regulatory impact analysis 41

8 Parliamentary scrutiny of legislative instruments 43

8.1 Tabling legislative instruments not subject to disallowance 43

8.2 Information exchange between the Register and the Table Offices 43

8.3 A single disallowance regime for all instruments 44

8.4 Restrictions on remaking legislative instruments 45

9 Reviewing and sunsetting legislative instruments 47

9.1 The sunsetting provisions 47

9.2 Reviewing legislative instruments and preparing for sunsetting 47

9.3 Reducing the sunsetting period to five years....49

9.4 Review of the sunsetting provisions 50

10 Streamlining the LIA and providing assistance to users....51

10.1 Exemptions from all or part of the LIA....51

10.1.1 The appropriateness and consistency of exemptions 51

10.1.2 Exemption of legislative instruments made under national schemes of legislation 51

10.1.3 Review of instruments exempt from sunsetting 52

10.1.4 Determining the application of exemptions....52

10.1.5 Information on exemptions and divergences from the LIA 53

10.1.6 Guidance on exemptions 53

10.2 The clarity and intelligibility of the LIA....54

10.3 Better guidance for users of the LIA....55

11 Implementing the recommendations of this report....57

Appendix A – Terms of Reference....59

Appendix B – Submissions and comments received by the Committee 61

Appendix C – Public forum and meeting attendees 63

Appendix D – Exemptions from the LIA 65

Exemptions from the whole of the LIA 65

Exemptions from disallowance....65

Exemptions from sunsetting 66

Appendix E – General requirements of rule-makers 67

Abbreviations and key terms

ADJR Act	*Administrative Decisions (Judicial Review) Act 1977*
AGD	the Commonwealth Attorney-General's Department
agencies	Australian Government Departments and agencies
ComLaw	the website maintained by the Commonwealth Attorney-General's Department, which provides free public access to a range of Commonwealth law, including the Federal Register of Legislative Instruments, available at <http://www.comlaw.gov.au>
enabling legislation	the Act or legislative instrument that authorises the making of an instrument
gazette	an official publication for publishing notices
instrument	a formal legal document
Legislation Handbook	the guide to the procedures involved in making Commonwealth Acts prepared by the Department of the Prime Minister and Cabinet and available at <http://www.dpmc.gov.au>
Legislative Instruments Handbook	the guide to compliance with the *Legislative Instruments Act 2003* and related matters, prepared by the Commonwealth Attorney-General's Department and available at <http://www.ag.gov.au>
LIA	*Legislative Instruments Act 2003*
LI Regulations	*Legislative Instruments Regulations 2004*
registrable documents	explanatory statements and compilations of legislative instruments required by the *Legislative Instruments Act 2003* to be lodged for publication on the Federal Register of Legislative Instruments
the Register	the Federal Register of Legislative Instruments which is an online register of legislative instruments, explanatory statements and compilations of legislative instruments established by the *Legislative Instruments Act 2003* and which forms part of ComLaw

Introduction

The *Legislative Instruments Act 2003* (the LIA) which commenced operation on 1 January 2005 fundamentally changed the way in which Commonwealth legislative instruments are made, published and reviewed. It gives effect to important principles of access to the law and review of executive action which underpin open and accountable government.

This review has been conducted in accordance with section 59 of the LIA. On 25 March 2008 the Attorney-General, the Hon Robert McClelland MP, appointed a Committee to conduct the review. The members of the Committee are:

- Mr Anthony Blunn AO, former Secretary to a number of Australian Government Departments
- Mr Ian Govey, Deputy Secretary, Commonwealth Attorney-General's Department, and
- Professor John McMillan, Commonwealth Ombudsman and Alumni Professor of Administrative Law at the Australian National University (on leave).

The Committee's Terms of Reference are at **Appendix A**.

The Committee consulted a broad range of stakeholders. It released an issues paper for public comment on 9 April 2008, which was directly notified to more than 300 stakeholders and made publicly available at <http://www.ag.gov.au/lia-review>. The Committee received 63 submissions and comments in response which are listed in **Appendix B**. After the release of the issues paper, the Committee held a series of meetings with the stakeholders listed at **Appendix C**.

The Committee wishes to record its appreciation to the officers of the Commonwealth Attorney-General's Department who were involved in the by no means easy task of capturing our deliberations and views. In particular we wish to thank Ms Carmen Miragaya who provided substantial research, writing and secretariat support and was always cheerful and efficient in managing what was often a difficult task.

Findings of the review

1. The object identified in section 3 of the *Legislative Instruments Act 2003* (the LIA), namely:

   > to provide a comprehensive regime for the management of Commonwealth legislative instruments

   remains relevant and appropriate.

2. In terms of the measures identified in section 3 for achieving that object, and subject to the specific findings below, the LIA has, through the Federal Register of Legislative Instruments (the Register), substantially succeeded in:

   a) providing an authoritative repository of Commonwealth legislative instruments, explanatory statements and compilations

   b) improving public access to legislative instruments, and

   c) facilitating parliamentary scrutiny of legislative instruments

   but further work is required in relation to:

   d) encouraging rule-makers to undertake appropriate consultation before making legislative instruments

   e) encouraging high standards of drafting of legislative instruments to promote their legal effectiveness, their clarity and their intelligibility, and

   f) establishing mechanisms to ensure that legislative instruments are periodically reviewed and, if they no longer have a continuing purpose, repealed.

The definition of a legislative instrument

3. Defining 'legislative instrument' in the LIA provides important guidance to the courts, the public and to rule-makers about the intentions of the Parliament.

4. The practice of including specific provisions in legislation explicitly declaring whether or not an instrument is a legislative instrument is both sensible and appropriate.

5. The present definition in section 5 of the LIA could be improved, in particular, by addressing its circularity.

6. The generic exemption from the application of the LIA of instruments the making of which is reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) is confusing and unhelpful.

7. A certificate issued by the Attorney-General under section 10 of the LIA cannot resolve conclusively whether or not an instrument is a legislative instrument.

The commencement of legislative instruments

8. While the present provisions of the LIA for the commencement of legislative instruments are appropriate, more should be done to improve notification of commencement dates.

9. Not all events that result in the commencement of a legislative instrument are recorded on the Register.

10. The operation of subsection 12(2) of the LIA, which deals with retrospective legislative instruments and provisions of legislative instruments, is unpredictable.

An expanded Register

11. Limiting the scope of the Register to legislative instruments excludes other instruments which, whilst not legislative, should be accessible on the Register.

12. The provisions of the LIA regarding tabling, disallowance, sunsetting and failure to register an instrument should not automatically apply to any additional classes of instrument included in the Register.

An authoritative repository

13. The effectiveness of the Register as the authoritative repository of legislative instruments is adversely affected where up-to-date information on changes in the operation or application of an instrument is not available. This is particularly so in relation to the amendment or repeal of an instrument or its provisions.

14. The circumstances in which a compilation of a legislative instrument must be registered, as outlined in section 33 of the LIA, are too narrowly defined.

15. The practice of reproducing legislative instruments without identifying that the instrument as published on the Register is the authoritative version is likely to cause confusion and diminishes the role of the Register.

16. Consistent with the object of the LIA to establish an authoritative repository, the Register should be the primary means of providing access to legislative instruments, unless there are special reasons to the contrary.

17. It is inconsistent with the fundamental aims of the LIA for a legislative instrument to adopt by reference text from another document that is not readily available, or to otherwise make an understanding of the rights and obligations created by the legislative instrument dependent on being able to refer to such a document.

Operation of the Register

18. The computer systems which underpin the Register are inadequate and it is critical that the current work to upgrade them be completed as a matter of urgency.

19. The absence of consistent, enforceable technical standards for the registration of documents impedes the lodgment, registration and publication process, the creation of effective links within and between documents on the Register, and effective statistical reporting.

The standard of documents on the Register

20. Since the commencement of the LIA, there have been improvements in drafting standards for legislative instruments and compilations of legislative instruments, and in the preparation of explanatory statements, but in both areas standards vary widely between agencies.

Encouraging consultation

21. More needs to be done by rule-makers to fulfil their responsibilities under the LIA to ensure that appropriate and reasonably practicable consultation is undertaken and that consultation, or decisions not to consult, are reported to the Parliament.

22. Although there is a need for better consultation practices, and for better guidance in relation to consultation, it would not be appropriate or practical to mandate specific consultation requirements in the LIA or to make the validity of legislative instruments dependent on consultation having occurred.

23. There is evidence that the examples provided in subsection 18(2) of the LIA of situations where a rule-maker may be satisfied that consultation is unnecessary or inappropriate have been misconstrued as exemptions from consultation.

24. The current emphasis in subsection 17(1) of the LIA on the effects of a legislative instrument on business and competition causes confusion about the application of the LIA's provisions on consultation.

25. The LIA is not an appropriate vehicle to mandate the requirements for regulatory impact analysis.

Parliamentary scrutiny of legislative instruments

26. There is no reason to table registered instruments that are not subject to disallowance.

27. There is potential for efficiencies through the sharing of information electronically between the Register and the Table Office of each House of the Parliament.

28. The LIA should provide the only regime for disallowance of instruments, unless there is a special reason to the contrary.

Reviewing and sunsetting legislative instruments

29. Agencies are not sufficiently active in reviewing and culling legislative instruments for which they are responsible, and this will add to the challenges presented when sunsetting commences.

30. On the evidence available, a sunsetting period of 10 years is appropriate.

31. There is no compelling argument for changing the timing of the statutory review of the LIA's sunsetting provisions.

Streamlining the LIA and providing assistance to users

32. Disallowance of legislative instruments made under national schemes of legislation is more appropriately dealt with under the enabling legislation than by a general provision in the LIA.

33. There are benefits in requiring instruments exempt from sunsetting to be periodically reviewed.

34. It can be difficult to determine whether an instrument is exempt from some or all of the requirements of the LIA because no central source of information exists about exemptions, and the scope of some general exemptions specified in the LIA is unclear.

35. More guidance to agencies is needed on the application of the LIA and on the standards, practices and procedures to be followed in preparing, registering and updating legislative instruments, explanatory statements and compilations.

Implementing the recommendations of this report

36. There will be resource implications for the Attorney-General's Department (AGD) in addressing a significant number of the findings.

Recommendations

The Committee makes the following recommendations:

The definition of a legislative instrument

1. A definition of 'legislative instrument' in the *Legislative Instruments Act 2003* (the LIA) be retained.

2. The practice of explicitly declaring whether or not an instrument is a legislative instrument in the enabling legislation be supported.

3. Agencies review legislation that they administer to examine the desirability of including declarations about whether or not existing instruments are legislative instruments.

4. The definition of legislative instrument in the LIA be amended to remove the circularity in paragraph 5(1)(a) of the definition and to clarify the operation of paragraph 5(2)(a) referring to instruments that apply the law to a particular case.

5. Item 21 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004* (the LI Regulations) be repealed and that agencies clarify the status of instruments that have relied on this exemption.

6. The power conferred on the Attorney-General by section 10 of the LIA to issue a certificate determining whether or not an instrument is a legislative instrument be repealed.

The commencement of legislative instruments

7. An expanded Legislative Instruments Handbook draw attention to the implications of commencement dates and the need to provide advance notice wherever practicable of the commencement of instruments (see also recommendation 45).

8. The Federal Register of Legislative Instruments (the Register) display the date and time when an instrument comes into effect, as well as the date of registration and making (as is the case now).

9. Rule-makers be obliged to ensure that the Attorney-General's Department (AGD) is notified of events that result in the commencement of an instrument.

10. Subsection 12(2) of the LIA be amended to provide that an instrument applying retrospectively is of no effect to the extent only that it retrospectively disadvantages or places a liability on a person other than the Commonwealth.

An expanded Register

11. The LIA be amended to require registration of Administrative Arrangements Orders, Commonwealth Reserved Laws, prerogative instruments, information published in gazettes, and other classes of instrument specified in the LI Regulations.

12. For instruments brought into an expanded Register, the LIA provide that:

    a) registration satisfies any gazettal or other publication requirement

    b) failure to register an instrument does not affect the instrument's operation, unless it is required to be published or gazetted to be effective, and

    c) the tabling, disallowance and sunsetting provisions of the LIA do not automatically apply.

An authoritative repository

13. Rule-makers be obliged to ensure that AGD is notified of events that result in the repeal, modification or invalidity of a registered instrument.

14. The regulation-making power in the LIA be amended to authorise the Attorney-General to formally revoke registered instruments that are spent or invalid and to amend them to correct typographical errors. This should occur only after appropriate consultation with the responsible Minister or rule-maker.

15. The LIA be amended to provide that any instrument that amends or repeals an instrument on the Register be registered.

16. The LIA be amended to make it clear that a compilation of a legislative instrument is required to be registered where the instrument has been partially revoked or partially sunsetted.

17. The LIA be amended to require rule-makers to prepare and lodge for registration compilations of legislative instruments as soon as practicable after the event that triggers the need for the compilation.

18. Agencies and other bodies (including commercial publishers) providing access to the full text of a legislative instrument on another website or in hard copy be required to clearly identify that it is a copy of the authoritative version of the instrument as published on the Register, and that users should only rely on that version.

19. Agencies review gazettal or alternative requirements or arrangements for providing access to legislative instruments with a view to aligning them with the LIA, unless there are compelling reasons why that should not be done.

20. AGD explore the practicality and appropriateness of delegating to agencies that make large numbers of instruments the responsibility for registering and maintaining a separate repository of those instruments to form part of the Register.

21. Agencies ensure reasonable public access to material that is incorporated by reference into registered instruments but not published on the Register.

Operation of the Register

22. The development and introduction of a new ComLaw system be completed as a matter of urgency.

23. AGD promulgate consistent, enforceable technical standards for legislative instruments and registrable documents, as well as guidance on compliance with those standards (see also recommendation 45).

24. Agencies be required to bear the costs incurred by AGD in ensuring non-conforming instruments and documents meet those standards.

The standard of documents on the Register

25. AGD monitor and report to the Attorney-General on standards of drafting of legislative instruments and the preparation of compilations.

26. Agencies identified as not meeting the appropriate standards be required to arrange training for their officers as agreed with AGD, or to contract their drafting or compilations preparation to AGD.

27. AGD actively promote better drafting practices in agencies that draft legislative instruments, and explore the possibility of developing appropriate training in conjunction with tertiary education providers and other drafting offices.

28. An expanded Legislative Instruments Handbook include better guidance on the content and format of explanatory statements, as well as examples of best practice (see also recommendation 45).

Encouraging consultation

29. The Attorney-General remind rule-makers of their obligations under the LIA to both ensure that the required consultation has been undertaken and to report to the Parliament on consultation.

30. An expanded Legislative Instruments Handbook provide better guidance on consultation, including reporting on consultation in explanatory statements (see also recommendation 45).

31. Subsection 18(2) of the LIA be repealed to avoid any perception that the examples it contains are exemptions from consultation.

32. The reference to instruments affecting business or competition in subsection 17(1) of the LIA be repealed to avoid any perception that consultation is only required for those instruments.

Parliamentary scrutiny of legislative instruments

33. The LIA be amended to remove the tabling requirement for registered instruments that are not subject to disallowance.

34. AGD and the Table Office of each House of the Parliament actively pursue the potential for efficiencies through the electronic sharing of information.

35. The LIA's disallowance regime be adopted as the standard for all instruments, regardless of whether they are legislative.

36. Other disallowance regimes for legislative instruments be reviewed and aligned with the LIA, unless there are compelling reasons for not doing so.

Reviewing and sunsetting legislative instruments

37. The sunsetting provisions in the LIA be retained, but that the Attorney-General remind responsible Ministers:

    a) of the principle that legislative instruments remain in force for only as long as they are needed

    b) that all legislative instruments be subject to ongoing review and culling, and

    c) of the need to put timely arrangements in place to manage the commencement and ongoing operation of the sunsetting provisions.

38. Agencies take action to cull spent legislative instruments as soon as practicable and identify instruments that will need to be continued beyond their sunsetting date.

39. The 10-year sunsetting period be maintained pending the statutory review of the sunsetting provisions.

Streamlining the LIA and providing assistance to users

40. Legislative instruments exempt from sunsetting be periodically reviewed.

41. Exemptions in the LIA and the LI Regulations be removed where the issue can be dealt with by the use of declarations (see recommendation 2).

42. AGD prepare and publish on ComLaw a list of exemptions under the LIA, and of any statutory requirements relating to the publication, tabling, disallowance or review of legislative instruments that apply in addition to, or instead of, the LIA.

43. The Legislation Handbook provide better guidance on the application of the LIA and the need to explain any exemptions from the LIA in explanatory memoranda.

44. AGD give consideration to the detailed technical amendments suggested to the Committee in order to improve both the clarity and the intelligibility of the LIA.

45. AGD expand the Legislative Instruments Handbook to provide better guidance on the application of the LIA and on the standards, practices and procedures applicable to legislative instruments and registrable documents.

Implementing the recommendations of this report

46. Adequate funding be provided to improve the standards and the computer systems that underpin the Register and, if necessary, to give effect to other recommendations in this report.

1 The definition of a legislative instrument

The *Legislative Instruments Act 2003* (the LIA) uses a definition of 'legislative instrument' as the primary means of identifying the instruments to which it applies. This sets the LIA apart from regimes for the management of statutory instruments in the States and Territories which identify instruments by their type (for example, a statutory rule) or by their maker (for example, the Governor).

The Committee has been asked to consider the appropriateness of the LIA's definition of a legislative instrument, and the relationship between the LIA and the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act). In the public consultations conducted by the Committee, there was criticism of the lack of clarity about what is or is not a legislative instrument, and about the consequences of failing to register a legislative instrument.

1.1 The present definition of a legislative instrument

'Legislative instrument' is defined in section 5 of the LIA:

> (1) Subject to sections 6, 7 and 9, a ***legislative instrument*** is an instrument in writing:
>
> (a) that is of a legislative character; and
>
> (b) that is or was made in the exercise of a power delegated by the Parliament.
>
> (2) Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:
>
> (a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and
>
> (b) it 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.

Subsection 5(3) of the LIA provides that an instrument that is registered on the Federal Register of Legislative Instruments (the Register) is taken, by virtue of that registration and despite anything else in the LIA, to be a legislative instrument.

Section 6 of the LIA provides that certain classes of instrument, such as Regulations, are to be treated as legislative instruments, regardless of whether they meet the definition in section 5. Sections 7 and 9 provide that certain instruments are not legislative instruments.

Legislative instruments made before the LIA commenced were required to be lodged for registration by either 30 September 2006 or 31 December 2007 (depending on when the instrument was made) to remain in force.[1]

1.2 The operation and value of a definition

Most stakeholders supported retention of a definition, subject to some clarification. The Committee shares this view. Most stakeholders also commented positively on the practice that has developed since the commencement of the LIA of specifically declaring in a provision of the legislation which enables the making of an instrument whether or not the instrument will be a legislative instrument for the purposes of the LIA.

Such a declaration provides certainty about whether the LIA applies to an instrument. Declarations are now a regular feature of legislation passed since the LIA commenced. Responsibility for policy approval for these declarations lies with the Attorney-General's Department (AGD), so that the declarations are informed by the definition in section 5 of the LIA.

The Committee considers that the practice of explicitly declaring in the enabling legislation whether or not an instrument is a legislative instrument is both sensible and appropriate. There is still more work to be done in applying this practice to legislation enacted before the commencement of the LIA. Many instruments made under such legislation have already been registered and so no issue arises about their status. Other instruments were not registered on the basis that they were thought not to be legislative instruments. This judgement may be correct, but it would put the issue beyond doubt for the legislation to be amended to declare that they are not legislative instruments.

Some stakeholders believe that a better way of providing certainty about the application of the LIA would be to replace the definition with:

- a list of all instruments identified to date as being of legislative character
- a new definition that identifies legislative instruments as instruments that are registered on the Register, or declared to be legislative in the legislation that enables their making, or
- a new definition that identifies legislative instruments as instruments that possess certain features (for example, are made by a particular person).

The Committee is not persuaded by these views. Even if virtually all instruments are in practice covered by a declaration, the definition provides important guidance to the courts, the public and to rule-makers about the intentions of the Parliament. It encourages careful assessment of each declaration against those intentions on a case-by-case basis. Without the guidance provided by a definition, there is a risk that a more conservative view will gradually be taken as to what is a legislative instrument and that inconsistent practices will develop.

[1] Sections 29 and 32 of the LIA.

Another option considered but not supported by the Committee is to amend the LIA to provide a period of grace to register an instrument that is later found by a court to be legislative. By virtue of subsection 32(3) of the LIA a procedure of this kind already applies to instruments connected with the collection of revenue. A general provision to the same effect would address the problem exposed by *Roche*,[2] where an unregistered instrument thought to be administrative in character was later found by a court in proceedings under the ADJR Act to be of a legislative character. However, the Committee is of the view that the LIA rests on the important principle that failure to register a legislative instrument means that the instrument is not enforceable.

1. The Committee recommends that a definition of 'legislative instrument' in the LIA be retained.

2. The Committee supports the practice of explicitly declaring whether or not an instrument is a legislative instrument in the enabling legislation.

3. The Committee recommends that agencies review legislation that they administer to examine the desirability of including declarations about whether or not existing instruments are legislative instruments.

1.3 A new definition

1.3.1 Problems with the present definition

The Committee is of the view that the present definition of legislative instrument is workable, but that improvements should be made. There are three problems with the present definition: its circularity; uncertainty about the scope of the phrase 'applying the law in a particular case' in paragraph 5(2)(a); and the inappropriate exclusion of instruments that are reviewable under the ADJR Act. The first two of those problems are taken up in this section; the third is taken up in the next section.

There is an unhelpful circularity in paragraph 5(1)(a) of the definition, which defines a legislative instrument as an instrument 'that is of a legislative character'. It is difficult to see that this adds anything to the definition. The concept of 'legislative character' is defined in non-exclusive terms in subsection 5(2), and the Committee is not aware of any legislative instrument that is caught by paragraph 5(1)(a), but not subsection 5(2).

Moreover, as noted above, the practice has developed since the commencement of the LIA of explicitly declaring in the enabling legislation whether or not instruments are legislative instruments. The Committee is therefore of the view that the circular reference in paragraph 5(1)(a) could be removed without altering the intended operation of the definition.

The second problem with the definition is the distinction drawn in paragraph 5(2)(a) between an instrument that 'determines the law or alters the content of the law, rather

[2] *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451.

than applying the law in a particular case'. This wording reflects common law cases that have, for various reasons, drawn a distinction between legislative and administrative actions. The difficulty is in the second part of that phrase – what law is being applied, and what is it being applied to? The Committee proposes that this distinction be retained, but that it be spelt out more clearly.

A revision of subsections 5(1) and 5(2) along the following lines may address both of these issues.

> (1) Subject to sections 6, 7 and 9, a ***legislative instrument*** is an instrument in writing that:
>
> (a) is made in the exercise of a power delegated by the Parliament; and
>
> (b) includes at least one provision that:
>
> (i) determines the law or alters the content of the law, rather than determining cases or circumstances in relation to which the law set out in an Act or in another legislative instrument is to apply; and
>
> (ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

4. The Committee recommends that the definition of legislative instrument in the LIA be amended to remove the circularity in paragraph 5(1)(a) of the definition and to clarify the operation of paragraph 5(2)(a) referring to instruments that apply the law to a particular case.

1.3.2 The exemption of instruments reviewable under the ADJR Act

Item 21 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004* (the LI Regulations) provides that an instrument is declared not to be a legislative instrument if it is an instrument the making or issue of which is a decision that is reviewable under the ADJR Act. The ADJR Act applies only to the review of 'decision[s] of an administrative character'.[3]

This exclusion is problematic for three reasons. First, it wrongly assumes that a clear distinction can be drawn between instruments of a legislative and administrative character. While the concept of 'legislative' actions is defined briefly in the LIA, no matching definition of 'administrative' actions is provided in the ADJR Act. Occasional judicial rulings relating to the ADJR Act have held that an action is of a legislative rather than administrative character, and hence not reviewable under the ADJR Act.[4] Many more

[3] Section 3 of the ADJR Act.

[4] See for example *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185; *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451.

decisions have recognised that the distinction between legislative and administrative actions is not clear-cut, and that many actions can be classified as either administrative or legislative for a particular purpose.[5]

Secondly, an instrument can contain both administrative and legislative provisions. Subsection 5(4) of the LIA provides that such an instrument 'is taken to be a legislative instrument for the purposes of this Act', and hence would be required to be registered. Such an instrument would also be reviewable under the ADJR Act, at least as to its administrative provisions.

Thirdly, the assumption in the LIA that there are separate regimes for reviewing or scrutinising the making of legislative instruments and administrative actions breaks down in other ways. For example, the validity of a legislative instrument would be reviewable in the Federal Court under section 39B of the *Judiciary Act 1903*, or even under the ADJR Act in proceedings to review the validity of an administrative decision that rests for legal support upon a legislative instrument.[6]

For these reasons the Committee considers it both confusing and unhelpful for the LI Regulations to declare that an instrument is taken not to be a legislative instrument if it is reviewable under the ADJR Act. To the extent that a distinction should be drawn between legislative and administrative actions, the issue is covered by paragraph 5(2)(a) discussed above.

5. The Committee recommends that item 21 of Part 1 of Schedule 1 to the LI Regulations be repealed and that agencies clarify the status of instruments that have relied on this exemption.

1.4 Certifying whether an instrument is legislative

Section 10 of the LIA empowers the Attorney-General to certify whether or not an instrument is a legislative instrument for the purposes of the LIA. The power has not been used. The Attorney-General's certificate is judicially reviewable and therefore cannot provide the certainty it purports to provide. Explicitly declaring in the enabling legislation whether or not an instrument is legislative is a more certain and effective means of confirming whether the LIA applies to the instrument.

6. The Committee recommends that the power conferred on the Attorney-General by section 10 of the LIA to issue a certificate determining whether or not an instrument is a legislative instrument be repealed.

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[5] See for example *Federal Airports Corporation v Aerolineas Argentinas* (1997) 76 FCR 582 at 590; *Central Queensland Land Council Aboriginal Corporation v Attorney-General (Cth)* (2002) 116 FCR 390 at 408.

[6] *Magno v Minister for Foreign Affairs and Trade* (1992) 35 FCR 235.

2 The commencement of legislative instruments

In consultations conducted by the Committee, questions about the operation of the LIA's provisions on the commencement of legislative instruments and appropriate notification of the commencement of legislative instruments were raised.

2.1 The default commencement

Subsection 12(1) of the LIA allows a legislative instrument to specify that it will commence on a specific day, a specific day and time, or the day or day and time of a specific event.

If no commencement day is specified, the instrument commences on the first moment of the day next following the day of registration (the default commencement date).

If the instrument specifies a day of commencement, but no time, section 3 of the *Acts Interpretation Act 1901* provides that the instrument commences on the first moment of that day (the default commencement time).

Some stakeholders considered that the default commencement date should be later and that there should be a minimum period of one to two weeks between registration and commencement to allow sufficient time to ensure compliance with new instruments. Legislative instruments can impose a considerable compliance burden and necessitate significant changes to, for example, record-keeping practices and related information technology systems. The Committee is, however, of the view that, provided there has been adequate consultation as required by the LIA, a longer period is not required and, in any event, will not always be practicable. Advance notice of commencement is of course desirable where early action is not necessary.

The Committee favours retaining the present provisions for the commencement of legislative instruments since rule-makers can set commencement dates to accommodate compliance concerns. The Committee considers, however, that more should be done to improve notification of commencement dates.

Few stakeholders commented on the default commencement time. The Committee considers that, while it is consistent with accepted practice regarding the commencement of Acts, there should as a matter of best practice be greater transparency about when instruments commence.

7. The Committee recommends that an expanded Legislative Instruments Handbook draw attention to the implications of commencement dates and the need to provide advance notice wherever practicable of the commencement of instruments.

8. The Committee recommends that the Register display the date and time when an instrument comes into effect, as well as the date of registration and making (as is the case now).

2.2 Exceptions to the default commencement

Rule-makers can tie the commencement of an instrument to specific events, such as:

- the publication of a notice in a gazette or in commercial newspapers
- the commencement of an international treaty or treaty provision, or
- the signing of a document that is not readily available.

The occurrence of these events can be difficult, if not impracticable, for the general public to identify and the LIA does not require rule-makers to update the Register to include this information.

9. The Committee recommends that rule-makers be obliged to ensure that AGD is notified of events that result in the commencement of an instrument.

2.3 The operation of retrospective legislative instruments

Subsection 12(2) of the LIA provides that a legislative instrument or a provision of a legislative instrument will be of no effect if it commences before the date it is registered and it operates retrospectively to adversely affect the rights or liabilities of a person other than the Commonwealth.[7] Subsection 12(3) of the LIA provides that this is subject to a statement of contrary intention in the legislation under which an instrument is made.

The application of subsection 12(2) can be unpredictable, because it can be difficult to identify in advance the persons who will be affected by a retrospective provision. It can also be difficult to determine whether those to whom the instrument applies will in practice be disadvantaged by a provision of general application intended to be beneficial.

The Committee considers that subsection 12(2) should be amended to provide that the prohibition against retrospectivity applies to the extent only that an instrument or a provision of an instrument retrospectively disadvantages or places a liability on a person other than the Commonwealth.

This would preserve the retrospective operation of the instrument or provision to the extent that it benefits a person other than the Commonwealth, and would also ensure that it has prospective operation.

10. The Committee recommends that subsection 12(2) of the LIA be amended to provide that an instrument applying retrospectively is of no effect to the extent only that it retrospectively disadvantages or places a liability on a person other than the Commonwealth.

[7] A similar rule in subsection 46B(3) of the *Acts Interpretation Act 1901* applies to disallowable non-legislative instruments.

3 An expanded Register

The Register is the cornerstone of the LIA and critical to the achievement of its object. For the first time, the public has a single point of access to all legislative instruments, many of which were not regularly published before the LIA commenced.

The Committee's consultations with stakeholders identified other instruments that should be considered for inclusion in the Register so that they are published in a systematic way and in an authoritative electronic form.

3.1 Desirable inclusions in an expanded Register

3.1.1 Other instruments not covered by the LIA

In the Committee's view, the Register should include the following instruments even though they are not covered by the LIA:

- Administrative Arrangements Orders—these instruments provide for the appointment of Ministers, the allocation of their responsibilities and the establishment of Departments of State including the matters dealt with by each Department and the legislation administered by a particular Minister

- Commonwealth Reserved Laws—these laws are made by the Governor-General under the *Seat of Government (Administration) Act 1910* and apply in the Australian Capital Territory, notwithstanding self-government, and

- prerogative instruments—these instruments include those establishing Honours and Awards such as the Order of Australia and the National Medal and the procedures for granting them.[8]

3.1.2 Information published in gazettes

In addition to these specific categories, the Committee considers that the Register should include information that is currently gazetted.

There are at least 11 gazettes[9] presently published by various agencies, some of which are available in hard copy only. Of the gazettes available online, many have limited search and browse functions and are limited in their ability to present other useful information such as the legislative provision under which an instrument or notice is made or required

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[8] For more information, see R Jordan, *A Rare Form of Law Making: Legislation Made Outside Parliament*, Research Note 11 of 2003–04, Parliament of Australia, Canberra, 2003, viewed 25 June 2008, <http://www.aph.gov.au/Library/pubs/rn/2003-04/04rn11.htm>.

[9] These include the Government Notices Gazette, the Special Notices Gazette, the Periodic Notices Gazette, the Australian Public Service Gazette, the Australian Public Service Employment Gazette, the Business Gazette, the ASIC Gazette, the Tariff Concessions Gazette, the Chemical Gazette, the Australian Pesticides & Veterinary Medicines Authority Gazette and the Food Standards Gazette.

to be gazetted. Including this information in the Register would make it more readily accessible.

3.1.3 Other instruments where there is a public interest in improved access

In the Committee's view, it would be desirable for there to be the capability to include other instruments of public importance in the Register by prescribing them in the LI Regulations as registrable instruments.

Such a capability would provide the opportunity to improve public access to instruments that do not meet the definition of a legislative instrument. It would also enable consistent publication of certain instruments, brought to the Committee's attention during consultations, where the power to make them can produce instruments of either a legislative or non-legislative nature depending on the instrument's scope.[10]

11. The Committee recommends that the LIA be amended to require registration of Administrative Arrangements Orders, Commonwealth Reserved Laws, prerogative instruments, information published in gazettes, and other classes of instrument specified in the LI Regulations.

3.2 Consequences of registering other instruments

Amending the LIA to provide that registration will satisfy any gazettal or other publication requirement for instruments proposed for inclusion in an expanded Register would encourage a move from existing publication practices to use of the Register.

However, these instruments are not, and should not be treated as, legislative instruments and accordingly should not be automatically subject to tabling, disallowance or sunsetting under the LIA. If disallowance is considered desirable, instruments could be declared to be disallowable for the purposes of section 46B of the *Acts Interpretation Act 1901*.[11]

The instruments should be required to be lodged for registration as soon as possible, but because they are not legislative and do not determine the law, they should not generally be required to be registered to be enforceable. Accordingly, a failure to register these instruments should not affect their validity, unless they are required to be published or gazetted to be effective.

[10] For example, instruments made by the Australian Securities & Investments Commission under various provisions of the *Corporations Act 2001* exempting a person(s) from certain parts of the Act or modifying the Act's effect.

[11] Section 46B of the *Acts Interpretation Act 1901* provides for the application of the LIA's disallowance regime to non-legislative instruments.

12. The Committee recommends that, for instruments brought into an expanded Register, the LIA provide that:

a) registration satisfies any gazettal or other publication requirement

b) a failure to register an instrument does not affect the instrument's operation, unless it is required to be published or gazetted to be effective, and

c) the tabling, disallowance and sunsetting provisions of the LIA do not automatically apply.

4 An authoritative repository

The Register contains over 37 000 legislative instruments, as well as explanatory statements and compilations of legislative instruments, and has greatly improved access to this material. The registration of legislative instruments made before the LIA commenced will soon be completed,[12] and the Register will then contain a complete, accurate and authoritative record[13] of every legislative instrument in force from 1 January 2008.[14]

The consultations undertaken by the Committee highlighted ways in which the Register's accuracy and completeness can be adversely affected or brought into doubt.

4.1 The accuracy and completeness of the Register

The effectiveness of the Register as a single and authoritative repository is adversely affected where up-to-date information on changes in the operation or application of an instrument is not available on the Register. This is particularly so in relation to the amendment or repeal of an instrument or its provisions.

4.1.1 Events occurring after registration that affect the accuracy of the Register

The LIA requires that legislative instruments be registered before they come into force. If something occurs after registration that affects the instrument's validity or prevents it from coming into operation, the reliability of the Register will be affected. For example, it is possible that after registration an instrument may:

- be rendered a legal nullity and be taken to have never come into effect, for example, because a drafting error comes to light or the instrument is found to breach the restrictions on retrospectivity
- be found by a court or tribunal to be ineffective or otherwise invalid, or
- cease to have effect in whole or in part due to the disallowance or repeal of its enabling legislation.

Rule-makers do not always formally revoke registered instruments and lodge the revocation for registration in these circumstances. There is no other way of updating the Register in order to ensure users have accurate information about whether an instrument on the Register is in force, or when it ceased to have effect.

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[12] Approximately 16 500 instruments were lodged for backcapture as provided for in Division 3 of Part 4 of the LIA.

[13] Subsection 22(1) of the LIA provides that the Register is taken to be a complete and accurate record of the legislative instruments it contains. Subsection 22(3) provides that proof is not required about a legislative instrument as it appears in the Register.

[14] The LIA provided a 3-year period, to the end of 2007, during which legislative instruments that had been made before the LIA commenced and were still in force were to be progressively lodged for registration.

Minor typographical or drafting errors can also go unnoticed by the rule-maker before registration, which may raise doubts about the proper operation or application of an instrument. Again, rule-makers do not always amend these instruments.

In the Committee's view, it would be desirable for the LIA to authorise the making of Regulations to perform a housekeeping function for legislative instruments similar to that done by the Statute Law Revision Acts for Acts.

13. The Committee recommends that rule-makers be obliged to ensure that AGD is notified of events that result in the repeal, modification or invalidity of a registered instrument.

14. The Committee recommends that the regulation-making power in the LIA be amended to authorise the Attorney-General to formally revoke registered instruments that are spent or invalid and to amend them to correct typographical errors. This should occur only after appropriate consultation with the responsible Minister or rule-maker.

4.1.2 Other instruments that amend or repeal an instrument on the Register

Subsection 5(4) of the LIA provides that an instrument with both legislative and administrative provisions is a legislative instrument and accordingly must be registered.

If a later instrument amends or repeals only the administrative provisions of a registered instrument, that later instrument would not need to be registered because it would not be a legislative instrument. However, in the absence of registration, the Register's record of changes to the original instrument would be incomplete.

Item 33 of Part 1 of Schedule 1 to the LI Regulations provides that an instrument that varies or revokes an instrument that is not legislative is also not legislative, but the opposite rule does not appear in the LIA or the LI Regulations.

15. The Committee recommends that the LIA be amended to provide that any instrument that amends or repeals an instrument on the Register be registered.[15]

4.2 Compilations of legislative instruments

A compilation of a legislative instrument incorporates all amendments to the instrument made as at a particular date. Compilations help users understand what the law is and how it has been amended. Compilations published on the Register have the same legal status as legislative instruments: subsection 22(2) of the LIA provides that, unless the contrary is proved, they are taken to be a complete and accurate record of the instrument as amended and in force on the dates specified.

[15] This recommendation should also apply to any additional instruments included in an expanded Register.

The Committee considers that the circumstances in which a compilation must be registered, as outlined in section 33 of the LIA, are too narrowly defined.

Section 33 currently requires the registration of a compilation of an instrument where the instrument is amended or where the instrument is partially disallowed. While it appears that the 'amendment' of an instrument covers its variation or revocation, some doubts have been raised. In the Committee's view, a compilation should be required where an instrument has been partially revoked or partially sunsetted, because these events will affect the content of an instrument.[16]

In addition, the Committee is aware that compilations are not always provided in a timely manner. Consistent with the obligation in section 25 of the LIA for rule-makers to lodge legislative instruments as soon as practicable after their making, the LIA should require rule-makers to prepare and lodge for registration compilations of legislative instruments as soon as practicable after an instrument is amended, partially disallowed, partially revoked or partially sunsetted.

16. The Committee recommends that the LIA be amended to make it clear that a compilation of a legislative instrument is required to be registered where the instrument has been partially revoked or partially sunsetted.

17. The Committee recommends that the LIA be amended to require rule-makers to prepare and lodge for registration compilations of legislative instruments as soon as practicable after the event that triggers the need for the compilation.

4.3 The authoritative status of the Register

Some agencies and non-government bodies reproduce legislative instruments in hard copy or online without identifying that the instrument as published on the Register is the authoritative version. This undermines the role of the Register and is likely to cause confusion.

These reproductions are not authoritative, and those who rely on them are not protected if the information is later found to be incorrect. By comparison, subsection 23(2) of the LIA provides that, if the Register is in error and is rectified, the alteration does not:

- affect any right or privilege acquired or accrued by reason of reliance on the content of the Register before the alteration was made, or

- impose or increase any obligation or liability incurred before the alteration was made.

Inaccurate reproductions by agencies may also raise questions about the liability of the Commonwealth.

[16] Partial revocation is particularly common with prudential standards where the practice is to revoke only the standard attached to a determination rather than the entire determination.

18. The Committee recommends that agencies and other bodies (including commercial publishers) providing access to the full text of a legislative instrument on another website or in hard copy be required to clearly identify that it is a copy of the authoritative version of the instrument as published on the Register, and that users should only rely on that version.

Consistent with the object of the LIA to establish an authoritative repository, the Register should be the primary means of providing access to legislative instruments, unless there are special reasons to the contrary.

Providing access to a registered legislative instrument in a gazette is unnecessary, because section 56 of the LIA provides that registration will satisfy gazettal requirements, unless the requirement for gazettal was enacted before the LIA commenced.

There may, however, be some limited circumstances in which it is appropriate to gazette or provide access to a legislative instrument other than through the Register. For example, some legislative instruments are included in gazettes to notify communities with limited or unreliable internet access to legislative instruments that affect them.

In other circumstances it may be appropriate to make other websites part of the Register, particularly where the website provides access to legislative instruments made in large numbers and is more tailored to the special needs of specific users.[17]

19. The Committee recommends that agencies review gazettal or alternative requirements or arrangements for providing access to legislative instruments with a view to aligning them with the LIA, unless there are compelling reasons why that should not be done.

20. The Committee recommends that AGD explore the practicality and appropriateness of delegating to agencies that make large numbers of instruments the responsibility for registering and maintaining a separate repository of those instruments to form part of the Register.

4.4 Access to documents incorporated by reference

Section 14 of the LIA provides that a legislative instrument can incorporate some or all of another document, including documents not available on ComLaw, without having to reproduce the text of that document. This practice is known as incorporating documents by reference. Examples of incorporated documents include the Building Code of Australia,

[17] Examples might include websites providing access to Tariff Concession Orders as published in the Tariff Concessions Gazette <http://www.customs.gov.au/site/page.cfm?u=4402> and Airworthiness Directives <http://www.casa.gov.au/airworth/airwd/index.htm>.

aircraft manufacturers' maintenance manuals, Australian Standards and International Standards.[18] Some incorporated material can be difficult to access or costly to obtain.

The LIA does not require incorporated documents to be registered. Instead, section 41 provides that either House of the Parliament may, at any time while a legislative instrument is subject to disallowance, require a copy of any document incorporated by reference to be made available for inspection by that House. The definition of an explanatory statement in subsection 4(1) of the LIA also provides that rule-makers should describe any documents incorporated by reference and how to obtain them in the explanatory statement.

Users of the Register informed the Committee that information in explanatory statements is not always clear and can become out of date, particularly for website addresses. Some stakeholders advised that they had encountered difficulties locating incorporated documents.

It is inconsistent with the fundamental aims of the LIA for a legislative instrument to adopt text by reference from another document that is not readily available, or to otherwise make an understanding of the rights and obligations created by the legislative instrument dependent on being able to refer to such a document.

The incorporation of documents that are not freely available may increase the cost of compliance for the community and the risk of non-compliance with legislative instruments. While some persons affected by instruments that incorporate particular documents may purchase those documents as part of their general operations, not all are able to do so.

In the Committee's view, while agencies should consider the implications of mandating compliance with standards as part of the regulatory impact analysis for an instrument,[19] more should be done to ensure that the complete text of the law, in the form of documents incorporated by reference, is readily available. This could include measures to:

- limit the incorporation of documents that are not readily available
- provide free or low-cost access to incorporated documents, such as Australian Standards, for individuals or businesses required to comply with them,[20] and
- ensure the availability of hard copies of incorporated documents in major libraries through the Australian Government's Commonwealth Library Deposit and Free Issue Schemes.[21]

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[18] It is estimated that several hundred Commonwealth Acts and instruments currently in force refer to one or more Australian Standards or International Standards. The Committee was also advised of instances where incorporated material may consist of, or include, sensitive or classified information.

[19] See section 7.4 of this report.

[20] Buying a single Australian Standard, for example, costs an average of $80–$120. Actual costs can vary between $8 and $360 depending on the standard, its format and any bulk discounts that may apply.

[21] For more information see <http://www.finance.gov.au/e-government/service-improvement-and-delivery/publishing-information/lds.html>.

The Committee notes that these measures are consistent with recommendations of the Productivity Commission Research Report, *Standard Setting and Laboratory Accreditation*, in particular recommendations 7.3 and 7.4:

> 7.3 Mindful of the fundamental principle of transparency and accessibility of legal requirements, the Australian Government and other governments (through their agencies) should fund free or low-cost access to Australian Standards made mandatory by way of regulation.
>
> 7.4 The Australian Government and other governments should seek to minimise the number of referenced standards and cross references to other standards which make it necessary to purchase multiple Australian Standards documents.[22]

Where, for security or other acceptable reasons, incorporated documents cannot be made available, consideration should be given to means other than legislative instruments to authorise obligations.

21. The Committee recommends that agencies ensure reasonable public access to material that is incorporated by reference into registered instruments but not published on the Register.

[22] Productivity Commission, *Standard Setting and Laboratory Accreditation*, Research Report, Canberra, 2006, pp. 130–131.

5 Operation of the Register

The publication of legislative instruments online has made them readily accessible to the Parliament, the courts, government officials, lawyers and the general public.[23]

However, submissions to the Committee identified a number of serious problems with the Register's performance and useability, which limit public access and therefore frustrate the object of the LIA.

5.1 Criticisms of the Register's performance and useability

Key criticisms of the Register are:

- the available search function is limited and unreliable
- access to the Register is hampered by slow response times and freezing during downloading, and
- aspects of the structure and presentation of the Register, such as the division of instruments into 'select legislative instruments'[24] or 'legislative instruments', are confusing and do not make it easy to use and navigate.

Of particular concern was the comment from some stakeholders that legislative instruments could not be located using the search function even when the searcher knew that the instrument had been registered and used the registration number as a search term. This raises serious issues about how well the Register delivers access to, or can be effectively used by, the general public.

5.2 Inadequate technology

Issues with the Register's performance are largely attributable to the inadequacies of the computer systems which underpin the Register. These systems are not appropriate for the volume of, or level of demand for, information included in the Register.[25]

AGD is working on the development of a new ComLaw system due to be released in late 2009, which is expected to address most criticisms of the Register. It should also ensure that the Register will meet the demands of sunsetting, when the status and relationship between large numbers of instruments will need to be updated.

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[23] Some agencies advised that they have experienced a marked decline in requests for information since the introduction of the Register and its 'notify me when' service.

[24] Select legislative instruments are Regulations, Rules of Court and certain other legislative instruments, which were formerly published as the Statutory Rules series under the *Statutory Rules Publication Act 1903*.

[25] In its first month of operation (January 2005), ComLaw attracted just over 20 000 visitors. ComLaw is now attracting that same number of visitors a day, and about two-thirds of these use the Register.

A number of stakeholders commented that some of the best features of ScalePlus (which preceded the Register) are missing from the Register, such as being able to search for explanatory statements separately and having links to sections of the most recent compilation of a legislative instrument (rather that the instrument as it was originally made). AGD is aiming to incorporate the best features of both systems into the new ComLaw system and is considering specific suggestions made by stakeholders.

This work will be critical, not only for the ongoing publication of legislative instruments and related materials, but also for the implementation of any expanded Register.

22. The Committee recommends that the development and introduction of a new ComLaw system be completed as a matter of urgency.

5.3 The absence of technical standards

Doubts can arise about the authenticity of legislative instruments and documents lodged for registration, such as compilations of legislative instruments and explanatory statements, when they lack key features such as official letterhead, properly executed signature blocks and (in the case of compilations) an amendment history. Such deficiencies can result in delays in the registration process because more information has to be sought from the agency lodging the instrument or document.

Failure to apply consistent formatting or typesetting styles, or to provide basic navigational aids such as paragraph and page numbers and a table of contents in larger documents, can make it difficult for readers to locate specific information or follow cross-references.

In addition, the variety of formats in use across the Register is preventing AGD from using available technology to:

- eliminate substantial rekeying of data[26] in the lodgment/registration process
- create more effective links within and between documents on the Register, and
- facilitate the collection of statistical data from the Register.

Consistent and enforceable technical standards are needed for the presentation of instruments and registrable documents. Guidance, including the provision of templates and tools, is also needed to facilitate compliance with these standards.[27] Standards should cover the format and essential features of instruments and documents. Compliance should be enforced by requiring agencies to bear the costs incurred by AGD in ensuring that instruments and documents being published on the Register meet these standards.

[26] Data includes the title of a legislative instrument, the date of making and the legislation under which it is made. Other important data includes the size of the instrument, any consultation undertaken and the instrument's expected period of operation.

[27] See recommendation 45 of this report.

23. The Committee recommends that AGD promulgate consistent, enforceable technical standards for legislative instruments and registrable documents, as well as guidance on compliance with those standards.

24. The Committee recommends that agencies be required to bear the costs incurred by AGD in ensuring non-conforming instruments and documents meet those standards.

6 The standard of documents on the Register

The LIA requires the Secretary of AGD to encourage high drafting standards by taking steps to promote the legal effectiveness, clarity and intelligibility of legislative instruments.[28] The LIA also sets out what must be contained in an explanatory statement (subsection 4(1)) and the information that must be included with a compilation of a legislative instrument (section 35).

The Committee consulted stakeholders on the drafting standards used in legislative instruments. It also sought comments on action needed to encourage appropriate drafting standards and on the standard of compilations and explanatory statements.

6.1 The impact of the LIA on standards

Poor standards represent a significant cost to government and the community, especially business, because of the costs of uncertainty and misapplication and the need to interpret unclear provisions.

Many submissions to the Committee expressed the view that drafting standards had generally improved since the commencement of the LIA, particularly as a result of greater public exposure of legislative instruments on the Register and informal advice provided by AGD during the registration process. Other submissions drew the Committee's attention to examples of poorly drafted instruments[29] or poorly prepared compilations,[30] suggesting that much more could be done.

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[28] Subsection 16(2) of the LIA provides that these steps may include, but are not limited to:

- undertaking or supervising the drafting of legislative instruments
- scrutinising preliminary drafts of legislative instruments
- providing advice concerning the drafting of legislative instruments
- providing training in drafting and matters related to drafting to officers and employees of other Departments or agencies
- arranging the temporary secondment to other Departments or agencies of APS employees performing duties in the Department, and
- providing drafting precedents to officers and employees of other Departments or agencies.

Subsection 16(3) provides that the Secretary must also cause steps to be taken to prevent, and report on the use of, gender-specific language in legislative instruments.

[29] For example, general drafting errors, such as references to legislation or agencies that do not exist or are obsolete, and inconsistent titling, are common and can affect the clarity and intelligibility of legislative instruments.

[30] The Committee was advised that AGD has declined to register a number of compilations submitted by agencies because of a number of problems, including:

- unexplained changes in the text of an instrument when there have been no amendments to effect the change
- text shown in 'change tracking mode' and other formatting problems, and
- absent, incorrect or incomplete information in the instrument's amendment history (this information is required by section 35 of the LIA).

6.2 Better reporting on drafting standards

Information provided to the Committee indicates that there is room to improve drafting standards. It does not, however, provide a clear picture of how often problems with the drafting of instruments or preparation of compilations occur, or the extent to which the legal effectiveness, clarity and intelligibility of legislative instruments and compilations are affected. It is also not clear how arrangements for drafting legislative instruments or preparing compilations,[31] or the tendency for agencies to amend rather than remake instruments,[32] may affect the quality of drafting.

25. The Committee recommends that AGD monitor and report to the Attorney-General on standards of drafting of legislative instruments and the preparation of compilations.

26. The Committee recommends that agencies identified as not meeting the appropriate standards be required to arrange training for their officers as agreed with AGD, or to contract their drafting or compilations preparation to AGD.

6.3 Promoting drafting services and training

Many stakeholders commented positively on AGD's drafting expertise. They supported further action by AGD to promote high drafting standards and assist agencies to achieve them, primarily through the promotion of AGD as a provider of drafting and compilation services and as a source of advice for lay drafters.

Other assistance could include many of the suggestions for improving standards made to the Committee, such as:

- developing a drafting manual
- online training courses
- generic templates or precedents, and
- information technology tools for drafting and compiling instruments.

Some of these measures are already in progress, but not as part of a structured scheme for lifting standards.

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[31] Agencies advised of varying levels of involvement in drafting by their legal units. Some stakeholders also suggested that AGD be required to draft all legislative instruments. It would not, however, be feasible for AGD to take over all drafting. Only Regulations, Proclamations and Rules of Court are presently required to be drafted and compiled by AGD, although agencies can contract AGD to draft instruments and prepare compilations. Since the LIA came into force on 1 January 2005, AGD has drafted more than 2500 legislative and other instruments. This accounts for no more than 10% of all new instruments registered on the Register over that period.

[32] When changes to a legislative instrument are required, a rule-maker can either amend or remake the instrument. If a rule-maker amends the instrument, only the amendments are subject to disallowance. If a rule-maker remakes the instrument, every provision of the instrument will be subject to disallowance. Some stakeholders considered that amending rather than remaking instruments may make drafting errors more likely.

Many agencies have already expressed an interest in the availability of further drafting training. AGD provides training for potential drafters and drafting instructors every two to six weeks, as well as specialised training to agencies by arrangement. The Committee is aware that there is a high level of demand for the training currently offered by AGD.

27. The Committee recommends that AGD actively promote better drafting practices in agencies that draft legislative instruments, and explore the possibility of developing appropriate training in conjunction with tertiary education providers and other drafting offices.

6.4 Guidance on explanatory statements

The Senate Standing Committee on Regulations and Ordinances (the Senate Committee) advises that it 'places considerable reliance on explanatory statements to understand legislative instruments and to assess their purpose'.[33] More generally, explanatory statements assist in the interpretation of legislative instruments.[34]

While explanatory statements are prepared and registered for all legislative instruments,[35] there are ongoing issues with their quality. On 20 March 2008, the Senate Committee wrote to Ministers advising that:

> the quality and completeness of Explanatory Statements is vital in enabling the Committee to properly undertake its work ... It is the Committee's experience that inadequate or incomplete explanatory material occupies a disproportionate amount of its time.

A stakeholder also commented that 'Explanatory Statements have not always been drafted in a manner that provides clear insight into the intention behind the instrument'.[36]

The Legislative Instruments Handbook contains some useful information about what rule-makers should consider when writing explanatory statements, including reference to advice from the Senate Committee[37] and the *Federal Executive Council Handbook*,[38] but should be expanded.

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[33] Senate Standing Committee on Regulations and Ordinances, *Explanatory Statements*, Parliament of Australia, Canberra, n.d., viewed 23 May 2008, <http://www.aph.gov.au/Senate/committee/regord_ctte/explanatory_statements.htm>.

[34] Section 15AB of the *Acts Interpretation Act 1901* provides that consideration may be given to the use of extrinsic material, such as explanatory statements, to assist in ascertaining the meaning of legislation.

[35] Section 26 of the LIA requires rule-makers to lodge the explanatory statement for a legislative instrument at the same time or as soon as practicable after lodgment of the instrument.

[36] Migration Review Tribunal–Refugee Review Tribunal, *Submission*, 8 May 2008, p. 2.

[37] Senate Standing Committee on Regulations and Ordinances, *Explanatory Statements*.

[38] Department of the Prime Minister and Cabinet, *Federal Executive Council Handbook*, Federal Executive Council Secretariat, Department of the Prime Minister and Cabinet, Canberra, 2005, pp. 19–20. Available at <http://www.dpmc.gov.au/guidelines/docs/executive_handbook.pdf>.

Observance of the requirements in subsection 4(1) of the LIA for the content of explanatory statements would also be improved by moving those requirements to a more prominent position in the body of the LIA.[39]

28. The Committee recommends that an expanded Legislative Instruments Handbook include better guidance on the content and format of explanatory statements, as well as examples of best practice.

[39] See section 10.2 of this report.

7 Encouraging consultation

Section 17 of the LIA provides that before making a legislative instrument, rule-makers must be satisfied that any consultation they consider appropriate and reasonably practicable has been undertaken. Subsection 4(1) of the LIA provides that the explanatory statement for each instrument should include information about the nature of any consultation or, if none was undertaken, explain why.

The provisions were intended to send 'a clear message about the importance of consultation'.[40]

7.1 The importance of consultation

Consultation is essential to good law-making. It enables comment on how proposals could be improved before they are made, including about the date and time the proposed instrument will come into effect.

While some agencies have good processes in place to ensure appropriate consultation before a legislative instrument is made, others admitted informally to the Committee that they did not. Common consultation mechanisms included dedicated consultation or advisory committees, and formal notification and consultation processes. Some of these processes reflected specific statutory requirements for consultation, while others had been developed as a result of a conscious policy of engagement with stakeholders.

In the Committee's view, more needs to be done by rule-makers to fulfil their responsibilities under the LIA to ensure that appropriate and reasonably practicable consultation is undertaken and that consultation, or decisions not to consult, are reported to the Parliament.[41]

7.2 Guidance on consultation and reporting obligations

The LIA does not establish a minimum standard for consultation, but instead makes rule-makers responsible for determining the form and scope of consultation. The Committee considers that this is appropriate because the nature and extent of consultation should vary according to the nature of the legislative instrument. Accordingly, the Committee is not in favour of making consultation mandatory or providing that a failure to consult will affect the validity of an instrument.

Very little guidance is provided in the Legislative Instruments Handbook to remind rule-makers of their obligations or to help them decide what is appropriate and reasonably practicable consultation for a particular instrument.

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[40] Legislative Instruments Bill 2003, Explanatory Memorandum, p. 11.

[41] Subsection 4(3) of the LIA provides that where the rule-maker is the Governor-General, this responsibility would fall to the responsible Minister.

The Committee considers that the Legislative Instruments Handbook would benefit from additional guidance on consultation, consistent with the Australian Government's whole-of-government consultation policy[42] and advice contained in the *Best Practice Regulation Handbook*.[43] Stakeholders also suggested that the Legislative Instruments Handbook have regard to the United Kingdom's *Code of Practice on Consultation*.[44]

The Committee is also of the view that the Legislative Instruments Handbook should remind rule-makers of the need for inter-agency consultation. This kind of consultation is built into the approval processes for Bills.[45]

In its report on consultation under the LIA the Senate Committee indicated that a number of rule-makers are not observing the requirement to report to the Parliament on the nature of any consultation undertaken, or to provide an explanation why consultation was unnecessary or inappropriate.[46]

The Senate Committee's report also indicated that some of the information provided about consultation in explanatory statements to the Parliament is unsatisfactory because it is 'cursory, generic and unhelpful' and fails to describe 'the "nature" of the consultation that has been carried out'.[47]

In this Committee's view, the Legislative Instruments Handbook should contain guidance about reporting on consultation in explanatory statements, including reference to the Senate Committee's view that explanatory statements should cover:

- how the instrument was publicised
- how 'relevant persons' were identified
- how many comments were received
- whether any comments received were critical of the proposal, and
- how the comments received (if any) were taken into account.[48]

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[42] For more information see <http://www.finance.gov.au/obpr/consultation/gov-consultation.html>.

[43] The *Best Practice Regulation Handbook* outlines the seven best practice consultation principles applicable to all government departments, agencies, boards and statutory authorities when developing regulation (which is defined as including legislative instruments) and is available at <http://www.finance.gov.au/obpr/docs/handbook.pdf>.

[44] Available at <http://www.berr.gov.uk/files/file47158.pdf>.

[45] Department of the Prime Minister and Cabinet, *Legislation Handbook*, Department of the Prime Minister and Cabinet, Canberra, 2000, paragraphs 4.11–4.15.

[46] Senate Standing Committee on Regulations and Ordinances, *Consultation under the Legislative Instruments Act 2003 – Interim Report*, 113th Report, Senate Standing Committee on Regulations and Ordinances, Canberra, 2007, pp. 5–8.

[47] Senate Standing Committee on Regulations and Ordinances, *Consultation*, p. 6.

[48] Senate Standing Committee on Regulations and Ordinances, *Consultation*, p. 6.

29. The Committee recommends that the Attorney-General remind rule-makers of their obligations under the LIA to both ensure that the required consultation has been undertaken and to report to the Parliament on consultation.

30. The Committee recommends that an expanded Legislative Instruments Handbook provide better guidance on consultation, including reporting on consultation in explanatory statements.

7.3 Justifying decisions not to consult

The Senate Committee's report on consultation also indicated that the examples in subsection 18(2) of the LIA of when consultation may be unnecessary or inappropriate, having regard to the nature of the instrument, have been misconstrued as exemptions from consultation.

The Senate Committee considered that some of the reasons given for finding that consultation was unnecessary or inappropriate were misleading. For example, consultation was stated to be unnecessary on the basis that an instrument was minor or machinery-of-government in nature[49] when the stated effect of the instrument was, in fact, to overcome the effect of a court decision.[50]

There may be circumstances where consultation is unnecessary or inappropriate, but these should be fully explained to the Parliament.

31. The Committee recommends that subsection 18(2) of the LIA be repealed to avoid any perception that the examples it contains are exemptions from consultation.

7.4 The consultation provisions and regulatory impact analysis

The Committee has been asked to consider the operation of the LIA's consultation provisions and the Australian Government's regulatory impact analysis requirements. The Committee has also been asked to consider recommendation 7.11 of the *Rethinking Regulation* report to include requirements for good regulatory process in the LIA.[51]

Regulatory impact analysis is one of the means by which the impact of proposed Commonwealth regulation is measured. Compliance with the requirements is overseen by the Office of Best Practice Regulation. The requirements are applicable to all forms of regulation, whether in the form of an Act, a legislative instrument or a non-legislative instrument, but in practice they are largely concerned with the impacts of regulation on business or the economy.

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[49] Paragraph 18(2)(a) of the LIA.

[50] Senate Standing Committee on Regulations and Ordinances, *Consultation*, p. 8.

[51] Regulation Taskforce, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, Report to the Prime Minister and the Treasurer, Canberra, 2006, p. 157.

The level of analysis required for a proposed regulation will depend on the extent of the proposal's expected impact. All proposals must undergo a preliminary assessment to determine their likely impact.[52] Depending on the results a rule-maker may need to prepare a quantitative assessment of the compliance costs (using a standardised Business Cost Calculator), and undertake more detailed analysis and prepare a formal Regulatory Impact Statement (RIS).

While consultation is encouraged, there is no requirement to consult as part of the analysis with the exception of proposals likely to have a significant impact for which a statement on consultation is specifically required to be included in the RIS. Guidance prepared by the Office of Best Practice Regulation on regulatory impact analysis encourages agencies to consider the impacts of a proposal beyond those relating to compliance costs, but there remains a strong focus on the commercial implications of a proposal.

In contrast, the consultation provisions in the LIA are applicable to all legislative instruments, regardless of the extent of their impact or their commercial implications. Accordingly, consultation conducted in accordance with the regulatory impact analysis requirements might nonetheless fail to meet the LIA's requirement for consultation.

Amending the LIA to include reference to the regulatory impact analysis requirements would obscure the message that appropriate consultation is required to be undertaken in relation to all legislative instruments. The reference in subsection 17(1) of the LIA to consultation being especially relevant for instruments affecting business or competition already gives the impression that consultation is more important in relation to those instruments. This is not so and that reference should be removed to avoid confusion.

A statutory regulatory impact analysis requirement for legislative instruments might also become out of date as the requirements continue to develop. Given the high level of compliance for legislative instruments[53] there appears to be no compelling reason for amending the LIA to require rule-makers to consider the need for, or mandate the completion of, a full regulatory impact analysis.

For these reasons, the Committee does not consider the LIA to be a suitable vehicle to mandate compliance with the regulatory impact analysis requirements.

32. The Committee recommends that the reference to instruments affecting business or competition in subsection 17(1) of the LIA be repealed to avoid any perception that consultation is only required for those instruments.

[52] The preliminary assessment form is available at <http://www.finance.gov.au/obpr/proposal/ria-guidance.html#form>.

[53] Office of Best Practice Regulation, *Submission*, 23 May 2008, pp. 2–3.

8 Parliamentary scrutiny of legislative instruments

Prior to the commencement of the LIA, instruments were subject to tabling and disallowance only if expressly required in their enabling legislation.[54] A variety of disallowance periods and regimes applied.[55]

In contrast, all legislative instruments are now subject to a single regime for tabling and disallowance. Some stakeholders consider this to be one of the LIA's key achievements.[56]

The Committee considers that the measures discussed below would further improve the LIA's operation and streamline the scrutiny of instruments.

8.1 Tabling legislative instruments not subject to disallowance

In the Committee's view, there is no reason to table registered instruments not subject to disallowance because they are available to the Parliament and the public on the Register.

33. The Committee recommends that the LIA be amended to remove the tabling requirement for registered instruments that are not subject to disallowance.

8.2 Information exchange between the Register and the Table Offices

Both Table Offices of the Parliament manually collect data on legislative instruments to assist in managing the tabling and disallowance process, preparing reports for the Parliament and archiving documents.

The work of the Table Offices could be streamlined if data entered into the Register about legislative instruments were transmitted to the Offices electronically. Greater sharing of data between the Register and the Table Offices could also ensure that the Register contains timely information about the tabling and disallowance of legislative instruments.

Efficiencies could also be made by moving to electronic lodgment of legislative instruments and explanatory statements with the Table Offices.[57] AGD currently delivers up to 10 hard copies of each instrument and explanatory statement to the Parliament and has delivered well over 1.5 million pages of material since the LIA commenced.

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[54] Section 46A of the *Acts Interpretation Act 1901* (now repealed) operated to make Regulations disallowable, as well as any other instrument declared to be subject to section 46A.

[55] Under section 46A of the *Acts Interpretation Act 1901*, Regulations were subject to a disallowance period of 15 sittings days and could be disallowed in whole or part but not amended. Other disallowable instruments had much shorter disallowance periods (some as short as five or six days), and some could be amended as well as disallowed.

[56] Department of the House of Representatives, *Submission*, 9 May 2008, p. 3; Department of the Senate, *Submission*, 9 May 2008, p. 1.

[57] Section 40 of the LIA provides that the Regulations may specify the manner by which documents are delivered to a House of the Parliament for tabling, including delivery by electronic means.

34. The Committee recommends that AGD and the Table Office of each House of the Parliament actively pursue the potential for efficiencies through the electronic sharing of information.

8.3 A single disallowance regime for all instruments

During consultations the Committee was informed of Acts containing provisions for the disallowance of legislative instruments that differed from or reproduced the LIA's disallowance regime.

In most cases, the LIA will override other disallowance regimes, unless they are preserved by Regulations made under section 57 of the LIA[58] or can operate alongside the LIA's provisions.[59]

In a few cases[60] some doubt exists about whether the regimes have been overridden by the LIA, leading to uncertainty about which disallowance regime should be followed.

Some disallowance regimes also use different terminology, referring to 'disapproval' of instruments rather than 'disallowance'.[61]

The Committee considers it would be desirable for the disallowance regime in the LIA to be adopted as the standard for all instruments, regardless of whether they are legislative.

This proposal received general support from stakeholders. It would also be consistent with the proposal for an expanded Register and existing arrangements whereby non-legislative instruments can be declared to be disallowable and subject to the LIA's disallowance regime.[62]

35. The Committee recommends that the LIA's disallowance regime be adopted as the standard for all instruments, regardless of whether they are legislative.

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[58] Two disallowance regimes were preserved by Regulations made under section 57 of the LIA. These affect instruments made under:

- section 22 of the *Financial Management and Accountability Act 1997*, and
- subsections 7(8) and (8A) of the *Remuneration Tribunal Act 1973*.

[59] For example, section 102.1A of the *Criminal Code Act 1995* provides for an extended disallowance period for Regulations proscribing terrorist organisations so as to accommodate reporting by a special parliamentary committee which comments and makes recommendations on such Regulations.

[60] Acts brought to the attention of the Committee include: *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (section 9); *Aboriginal Land Rights (Northern Territory) Act 1976* (section 48G); *Albury-Wodonga Development Act 1973* (section 5A); *Australian Capital Territory (Planning and Land Management) Act 1988* (section 22); *Family Law Act 1975* (section 33C); *Federal Magistrates Act 1999* (section 41); *Great Barrier Reef Marine Park Act 1975* (section 35E); *Interstate Road Transport Act 1985* (section 43A); *Lands Acquisition Act 1989* (section 46); *Superannuation Benefits (Supervisory Mechanisms) Act 1990* (section 7).

[61] Department of the Senate, *Submission*, p. 1.

[62] This is achieved by declaring in the enabling legislation that an instrument is a disallowable non-legislative instrument for the purposes of section 46B of the *Acts Interpretation Act 1901*.

36. The Committee recommends that other disallowance regimes for legislative instruments be reviewed and aligned with the LIA, unless there are compelling reasons for not doing so.

8.4 Restrictions on remaking legislative instruments

The Committee has been asked to consider sections 46 to 48 of the LIA which restrict rule-makers from making legislative instruments the same in substance as legislative instruments which have been tabled or disallowed.

Consultations conducted by the Committee did not indicate that the provisions were causing any issues or hardship. The Committee sees no reason for changing what is well accepted practice and a practice that applies as well to Regulations as to other legislative instruments.

9 Reviewing and sunsetting legislative instruments

The final element of the LIA's regime for the comprehensive management of legislative instruments is the provision that such instruments will cease to be in force (sunset) approximately 10 years after they commence or are required to be registered, at the latest, unless action is taken to continue their operation or exempt them from that process.

Section 49 of the LIA provides that the purpose of the LIA's sunsetting provisions is to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed.

The Committee consulted stakeholders on the LIA's sunsetting provisions, on agencies' levels of preparedness for sunsetting, and on the suggestion that the sunsetting period be reduced from 10 years to five.

9.1 The sunsetting provisions

The sunsetting provisions in Part 6 of the LIA provide that:

- 18 months before a given sunsetting date, the Attorney-General is to table in the Parliament a list of the legislative instruments due to sunset on that date (section 52)

- the Parliament then has six months in which to pass a resolution to allow a legislative instrument or provisions of a legislative instrument on that list to continue in force as if remade (section 53), and

- rule-makers may ask the Attorney-General to issue a certificate extending the life of a legislative instrument for six or 12 months (section 51).

Instruments have been grouped to sunset on either 1 April or 1 October of each year from 2015 onwards to avoid having a range of sunsetting days determined by the anniversary of the commencement of the instruments.[63] Most stakeholders expressed the view that they did not have any in-principle concerns with the sunsetting provisions.

9.2 Reviewing legislative instruments and preparing for sunsetting

Section 49 of the LIA envisages more than the review and repeal of instruments every 10 years. Agencies should be reviewing the body of legislative instruments administered

[63] The sunsetting timetable is worked out by reference to a formula described in section 50 of the LIA. The sunsetting dates of amending instruments are linked to the sunsetting dates of the legislative instruments which they amend. Section 50 also contains timetables applying to instruments that contain amendments of earlier legislative instruments and additional provisions that do not amend earlier legislative instruments. The LIA calls these 'partially amending legislative instruments'.

by them and be proactively culling instruments no longer required without waiting for their automatic repeal.

In the Committee's view, agencies are not sufficiently active in this respect.

Many agencies indicated varying states of preparedness for the commencement of sunsetting in 2015 or its ongoing operation. A number admitted informally to the Committee that no action had yet been taken to review, or to plan for the review, of the legislative instruments they administer.

Given that many agencies make several hundred legislative instruments each year, the task of reviewing each one to determine if it has ongoing operation will be significant.[64] The number of instruments to be reviewed in the lead-up to their sunsetting in 2016 or 2018 will be particularly high. The sunsetting date for instruments made in the five years before the LIA commenced is 1 October 2016. The sunsetting date for instruments made prior to that five-year period is 1 April 2018.

The review of legislative instruments will be ongoing after the initial sunsetting date and will need to be undertaken several years in advance of sunsetting dates. If agencies wait until the Attorney-General tables the list of instruments due to sunset (which occurs 18 months before the sunsetting date), they will have only six months to review the instruments before the Parliament must resolve which instruments should continue in force.

Sunsetting may place acute demands on drafting resources if agencies propose that legislative instruments due to sunset should be remade. This will have a flow-on effect for AGD's lodgment and registration workload.

In the Committee's view, agencies should commence action now to identify which legislative instruments will need to continue beyond their sunsetting date, and to propose the repeal of spent instruments to minimise the number of instruments that must be reviewed.

Leadership on this issue would be helpful, not only from AGD but also the Department of Finance and Deregulation, because removing redundant legislation is a key element of the Government's deregulation agenda. The review of pre-2008 Commonwealth subordinate legislation announced in February 2009 may be a useful vehicle to progress this issue.

[64] The size of the task may be ameliorated by the cessation of legislative instruments before they reach 10 years of operation, but is difficult to predict the extent to which this might occur.

37. The Committee recommends that the sunsetting provisions in the LIA be retained, but that the Attorney-General remind responsible Ministers:

a) of the principle that legislative instruments remain in force for only as long as they are needed

b) that all legislative instruments be subject to ongoing review and culling, and

c) of the need to put timely arrangements in place to manage the commencement and ongoing operation of the sunsetting provisions.

38. The Committee recommends that agencies take action to cull spent legislative instruments as soon as practicable and identify instruments that will need to be continued beyond their sunsetting date.

9.3 Reducing the sunsetting period to five years

The Committee has been asked to consider recommendation 7.26 of the *Rethinking Regulation* report to amend the LIA to provide for sunsetting after five years rather than 10 years as at present.[65]

The report cited several submissions that 'strongly endorsed the use of sunset clauses as a protection against excessive regulation' and stated that there was broad support for periods of no more than five years.[66]

Some industry stakeholders supported the proposal. Almost all agencies expressed concerns about the resource and other implications of a shorter sunsetting cycle.

The LIA's 10-year sunsetting period is consistent with comparable regimes for the management of delegated legislation in Victoria, Queensland, South Australia and Tasmania.[67] Only New South Wales has a shorter sunsetting period of five years, although sunsetting can be postponed.[68]

A report on regulatory impact assessment in New South Wales showed that, of the statutory rules that were due to sunset on 1 September 1998, 63 were repealed and 101 were retained in force.[69] For approximately 70% of those 101 rules, the sunsetting date had already been postponed by between three and six years.[70]

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[65] Regulation Taskforce, p. 174.

[66] Regulation Taskforce, p. 173.

[67] *Subordinate Legislation Act 1994* (Vic), *Statutory Instruments Act 1992* (Qld), *Subordinate Legislation Act 1978* (SA), *Subordinate Legislation Act 1992* (Tas).

[68] *Subordinate Legislation Act 1989* (NSW).

[69] Regulation Review Committee, *Regulatory Impact Assessment in New South Wales*, Report prepared by the Public Management Service of the OECD, Report No 18/51, Regulation Review Committee, Sydney, 1999, p. 39.

[70] Regulation Review Committee, p. 39.

On the evidence available, the present period of 10 years appears appropriate and is supported by the Committee. It will, in any event, be reviewed during the 2017 statutory review of the LIA's sunsetting provisions when the impact of sunsetting can be better appreciated.

39. The Committee recommends that the 10-year sunsetting period be maintained pending the statutory review of the sunsetting provisions.

9.4 Review of the sunsetting provisions

The Committee sought feedback from stakeholders on whether the current arrangements in section 51 of the LIA for extending the life of a legislative instrument were appropriate. Of the few stakeholders who commented on this issue, most agreed that the arrangements were appropriate. The Committee notes that the LIA does not prevent rule-makers from remaking legislative instruments that are sunsetted.

The Committee also sought feedback from stakeholders on the most appropriate time for conducting the statutory review of the LIA's sunsetting provisions.

Section 60 of the LIA provides that the review be undertaken by 1 October 2017. Some stakeholders considered that it would be preferable to undertake the review sooner to allow appropriate lead time for any changes. Others considered that it should be deferred to allow more evidence of the operation of the sunsetting provisions to be gathered.

The Committee does not consider there is a compelling argument for changing the timing of the review.

10 Streamlining the LIA and providing assistance to users

The Committee received a number of suggestions for clarifying the operation of exemptions from the LIA, improving the overall intelligibility of the LIA, and assisting rule-makers to understand and comply with their obligations.

10.1 Exemptions from all or part of the LIA

Legislative instruments may be exempt from all of the LIA's requirements or only some, such as disallowance or sunsetting.

10.1.1 The appropriateness and consistency of exemptions

The Committee was asked to consider the appropriateness of exemptions and whether exemptions are applied consistently to instruments of a similar nature. Some stakeholders expressed concerns that exemptions undermined the operation of the LIA because they permitted inconsistent treatment and scrutiny of legislative instruments.

The Committee considers that these concerns are unfounded since all exemptions must be scrutinised by the Parliament on a case-by-case basis.

10.1.2 Exemption of legislative instruments made under national schemes of legislation

Subsection 44(1) of the LIA provides that an instrument is not disallowable if it is made under enabling legislation that:

- facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States, and
- authorises the instrument to be made by the body or for the purposes of the body or scheme,

unless the instrument is a Regulation, is otherwise required to be disallowable or is made under the *Corporations Act 2001*.

In its report on the Legislative Instruments Bill 2003 the Senate Committee recommended that the explanatory memorandum accompanying a Bill that establishes or amends a national scheme of legislation should include a statement on whether the instruments under the scheme will or will not be disallowable.[71] It also recommended that the present review consider any Parliamentary amendments to declare such instruments to be disallowable.[72]

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[71] Senate Standing Committee on Regulations and Ordinances, *Legislative Instruments Bill 2003 – Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003*, 111th Report, Senate Standing Committee on Regulations and Ordinances, Canberra, 2003, p. 19.

[72] Senate Standing Committee on Regulations and Ordinances, *Legislative Instruments Bill 2003*, p. 19.

Since the LIA commenced, four Acts creating or amending a national scheme of legislation have declared that instruments made under them are not disallowable.[73] Information about the declarations was included in the explanatory memoranda to the Bills for these Acts or provided in response to follow-up questions from the Senate Standing Committee for the Scrutiny of Bills. One Act creating a national scheme of legislation provided that instruments under the scheme would be disallowable.[74]

In the Committee's view, the disallowance of legislative instruments made under national schemes of legislation should in future be dealt with by express declarations in the enabling legislation rather than by a general provision in the LIA. Such a process will ensure that the issue is drawn to the attention of the Parliament and would be consistent with the view expressed by the Senate Committee as referred to above and this Committee's recommended approach to exemptions from the LIA as outlined below.

10.1.3 Review of instruments exempt from sunsetting

A number of instruments have been exempted from the LIA's sunsetting provisions. Periodic review of these instruments might nonetheless be beneficial even if automatic sunsetting is not appropriate. In this context, the Committee notes the work of the Office of Best Practice Regulation in implementing the Government's decision to require five-yearly reviews of business regulation not subject to statutory review or sunsetting.[75]

40. The Committee recommends that legislative instruments exempt from sunsetting be periodically reviewed.

10.1.4 Determining the application of exemptions

While most exemptions from the LIA relate to a specific instrument, some exemptions specified in the LIA are expressed to apply to classes of instrument.

For example, exemptions apply to:

- certain classes of instrument made under the *Corporations Act 2001*[76]
- instruments that comprise, in their entirety, directions to delegates,[77] and
- instruments the sole or primary purpose of which is to give effect to an international obligation of Australia.[78]

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[73] *AusLink (National Land Transport) Act 2005* (subsection 5(4)); *Food Standards Australia New Zealand Act 1991* (sections 6, 23, 87, 97, 106, and Note 2, Schedule 3, item 5); *Therapeutic Goods Act 1989* (section 52D); *Water Act 2007* (sections 63, 64 and 65).

[74] *Water Efficiency Labelling and Standards Act 2005* (sections 18, 27 and 30).

[75] This is due to commence in 2012.

[76] See item 6 of the table in subsection 7(1) of the LIA.

[77] See item 21 of the table in subsection 7(1) of the LIA.

[78] See item 43 of the table in subsection 54(2) of the LIA.

Some stakeholders reported difficulties in determining whether a particular instrument fell within one of these classes and was exempt from all or part of the LIA.

Stakeholders also advised that locating information about exemptions can be confusing and time-consuming because exemptions can be recorded in the LIA,[79] the LI Regulations or the enabling legislation for an instrument.

Consistent with the practice of explicitly declaring whether or not an instrument is a legislative instrument in its enabling legislation, agencies should consider the desirability of including declarations about whether instruments are exempt from disallowance or sunsetting under the LIA.

41. The Committee recommends that exemptions in the LIA and the LI Regulations be removed where the issue can be dealt with by the use of declarations.

10.1.5 Information on exemptions and divergences from the LIA

In addition to exemptions, legislative instruments may be subject to publication, tabling, disallowance or review requirements in addition to, or instead of, the requirements in the LIA.

Having a central source of information on exemptions and additional statutory requirements for legislative instruments would benefit users of the LIA, particularly parliamentary bodies that must regularly determine how the LIA applies to various Commonwealth instruments.

42. The Committee recommends that AGD prepare and publish on ComLaw a list of exemptions under the LIA, and of any statutory requirements relating to the publication, tabling, disallowance or review of legislative instruments that apply in addition to, or instead of, the LIA.

10.1.6 Guidance on exemptions

The Committee has considered the circumstances in which the Parliament has exempted instruments from all or part of the LIA, as provided for in the explanatory materials accompanying the Legislative Instruments Bill 2003, the LI Regulations and provisions enacted since the LIA commenced (**Appendix D**). They are broadly consistent with the circumstances in which stakeholders considered that exemptions would be justified.

The Committee considers it would be useful for more advice on the application of the LIA, and the circumstances in which the Parliament has considered an exemption is or is not appropriate, to be available for the purposes of developing and reviewing new legislative proposals. It should also include advice on the need to explain any exemptions from the LIA in explanatory memoranda. Instructors are reminded to do this as part of the drafting

[79] See the tables in subsections 7(1), 44(2) and 54(2) of the LIA.

process,[80] but this reminder is not always observed and the information provided is sometimes inadequate.[81]

43. The Committee recommends that the Legislation Handbook provide better guidance on the application of the LIA and the need to explain any exemptions from the LIA in explanatory memoranda.

10.2 The clarity and intelligibility of the LIA

The clarity and intelligibility of the provisions of the LIA were raised with the Committee as matters affecting its effectiveness.

While the overall plan of the LIA is logical, its clarity and intelligibility could be enhanced. Some of the suggestions made to the Committee for achieving this are summarised in the following table.

Proposal	Example
Key concepts defined and used consistently throughout the LIA	The LIA does not explain what is meant by the term 'disallowable legislative instrument'. The LIA also refers to instruments being 'in force', taking, ceasing or having no 'effect', as well as instruments being 'repealed', but how these terms relate is not always clear.
More clearly locate legislative requirements and definitions	Requirements for the content of explanatory statements in subsection 4(1) of the LIA should be moved so that they follow other provisions on explanatory statements in Division 2 of Part 4.
Clarify the relationship between certain provisions	The LI Regulations made under section 7 of the LIA are expressed to be subject to section 6. Section 6, however, states that it is subject to section 7. Notes could also be used to demonstrate links between provisions of the LIA, or between provisions of the LIA and provisions of other Acts, such as the link between the definition of a legislative instrument in section 5 of the LIA and section 15AE of the *Acts Interpretation Act 1901*.
Clarify the meaning of some provisions	Subsection 22(4) of the LIA refers to 'those matters' but it is not clear whether this is a reference to matters in subsection 22(3) only, or to matters in subsections 22(2) and (3).
Remove redundant provisions and Regulations	Division 6 of Part 4 of the LIA provides for a database to be created in anticipation of the LIA coming into operation. The *Legislative Instruments (Transitional Provisions and Consequential Amendments) Regulations 2005* also appear to be redundant.

44. The Committee recommends that AGD give consideration to the detailed technical amendments suggested to the Committee in order to improve both the clarity and the intelligibility of the LIA.

[80] Office of Parliamentary Counsel, *Drafting Direction 3.8 Subordinate instruments*, Office of Parliamentary Counsel, Canberra, 2008, viewed 25 June 2008, <http://www.opc.gov.au/about/drafting_series/DD%203.8.rtf>.
[81] Department of the Senate, *Submission*, p. 2.

10.3 Better guidance for users of the LIA

While the LIA imposes key obligations on rule-makers (see **Appendix E**), in practice these obligations involve the agency and the agency officials responsible for administering the legislative instrument.

The Committee considers that greater guidance on the application of the LIA and the standards, practices and procedures to be followed would improve compliance with the LIA and ensure greater realisation of its object.

In particular, more guidance would be valuable on preparing legislative instruments and compilations, consultation practices (including consulting on the commencement of an instrument), preparing explanatory statements and registering and updating legislative instruments.

45. The Committee recommends that AGD expand the Legislative Instruments Handbook to provide better guidance on the application of the LIA and on the standards, practices and procedures applicable to legislative instruments and registrable documents.

11 Implementing the recommendations of this report

Some of the recommendations in this report require increased resources for AGD, for example, the expansion of the Register (recommendation 11), the new ComLaw system (recommendation 22) and the development of technical standards (recommendation 23). The others do not individually impose significant burdens; some offer efficiencies, for example, removing the tabling requirement for non-disallowable instruments (recommendation 33) and sharing information electronically between the Register and the Table Office of each House of the Parliament (recommendation 34). Collectively, however, it is probable that some supplementary resources will be required.

46. The Committee recommends that adequate funding be provided to improve the standards and the computer systems that underpin the Register and, if necessary, to give effect to other recommendations in this report.

Appendix A – Terms of Reference

The review is to consider and report on:

- the extent to which the objectives listed in section 3 of the LIA have been realised
- factors, if any, which have limited achievement of the LIA's objectives
- the extent to which the objectives of the LIA are still appropriate
- how performance against those objectives might be improved.

The review should consider the recommendations of the Senate Standing Committee on Regulations and Ordinances in its October 2003 report on the Legislative Instruments Bill 2003 being:

- whether Parliament should be able to disallow legislative instruments which give effect to or amend a national scheme of legislation
- the operation of the consultation provisions in the LIA and the regulatory impact process, and
- appropriate ways in which incorporated material might be made accessible.

The review should also consider recommendations 7.11 and 7.26 of the *Rethinking Regulation* (Banks) report of January 2006, proposing amendment of the LIA:

- to include requirements for good regulatory process, and
- to provide for a 5 year rather than 10 year sunset clause following implementation.

Having regard to the first three years of operation of the LIA, the Committee should consider:

- the appropriateness of the definition of a legislative instrument
- the relationship between the LIA and the *Administrative Decisions (Judicial Review) Act 1977*
- the use of non-legislative instruments to commence or amend legislative instruments
- the appropriateness of exemptions from registration, disallowance and sunsetting and whether those exemptions are applied consistently to instruments of a similar nature
- the appropriateness of provisions providing for retrospective commencement of instruments

- the requirements of the LIA relating to the compilation of legislative instruments, including the timeliness and quality of compilations provided by rule-makers

- the restrictions on remaking instruments or provisions within instruments until a certain amount of time has passed since tabling and disallowance

- means of managing and recording instruments found to be legally ineffective, including instruments that have been made incorrectly, found by a court or tribunal to be invalid in whole or part, or have been repealed.

Appendix B – Submissions and comments received by the Committee

1. Australasian Legal Information Institute (AustLII)
2. Australian Accounting Standards Board
3. Australian Communications and Media Authority
4. Australian Competition and Consumer Commission
5. Australian Council of Trade Unions
6. Australian Customs and Border Protection Service
7. Australian Federal Police
8. Australian Fisheries Management Authority
9. Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission)
10. Australian Industrial Relations Commission
11. Australian Law Librarians' Association
12. Australian National University
13. Australian Securities & Investments Commission
14. Australian Taxation Office
15. Australian Transaction Reports and Analysis Centre (AUSTRAC)
16. Civil Aviation Safety Authority
17. Comcare
18. Compliance Consulting Pty Ltd and Ocean Informatics Pty Ltd (joint submission)
19. CPA Australia, Institute of Chartered Accountants in Australia and National Institute of Accountants (joint submission)
20. Defence Force Welfare Association
21. Department of Defence
22. Department of Education, Employment and Workplace Relations
23. Department of Families, Housing, Community Services and Indigenous Affairs
24. Department of Finance and Deregulation
25. Department of Health and Ageing
26. Department of Human Services
27. Department of Immigration and Citizenship
28. Department of Innovation, Industry, Science and Research
29. Department of Parliamentary Services (Parliamentary Library)
30. Department of the Attorney General (Western Australia)
31. Department of the Environment, Water, Heritage and the Arts
32. Department of the House of Representatives
33. Department of the Senate
34. Department of Veterans' Affairs
35. Federal Court of Australia
36. Federal Magistrates Court of Australia
37. Food Standards Australia New Zealand
38. Group of 100 Incorporated
39. Henry Burmester AO QC
40. Insurance Council of Australia
41. IP Australia
42. Jeffrey Barnes, Director of Teaching and Learning, School of Law, La Trobe University
43. Law Council of Australia
44. Migration Institute of Australia

45. Migration Review Tribunal–Refugee Review Tribunal
46. National Association of Testing Authorities
47. National Environment Protection Council Service Corporation
48. National Legal Aid
49. National Native Title Tribunal
50. National Transport Commission
51. New South Wales Council for Civil Liberties
52. Office of Best Practice Regulation
53. Office of Parliamentary Counsel
54. Office of the Privacy Commissioner
55. PricewaterhouseCoopers
56. Repatriation Medical Authority
57. SAI Global
58. Senate Standing Committee on Regulations and Ordinances
59. Shipping Australia Limited
60. Social Security Appeals Tribunal
61. Telstra Corporation Limited
62. Therapeutic Goods Administration
63. Thomson Legal and Regulatory Ltd

Appendix C – Public forum and meeting attendees

1. Australasian Legal Information Institute (AustLII)
2. Australian Communications and Media Authority
3. Australian Competition and Consumer Commission
4. Australian Customs and Border Protection Service
5. Australian Government Solicitor
6. Australian Law Librarians' Association
7. Australian Law Reform Commission
8. Australian Securities & Investments Commission
9. Business Council of Australia
10. Centrelink
11. Civil Aviation Safety Authority
12. Classification Board
13. Compliance Consulting Pty Ltd
14. Cutler Hughes & Harris (now Thomson Playford Cutlers)
15. Department of Agriculture, Fisheries and Forestry
16. Department of Climate Change
17. Department of Defence
18. Department of Families, Housing, Community Services and Indigenous Affairs
19. Department of Finance and Deregulation
20. Department of Foreign Affairs and Trade
21. Department of Health and Ageing
22. Department of Human Services
23. Department of Immigration and Citizenship
24. Department of Innovation, Industry, Science and Research
25. Department of Parliamentary Services (Parliamentary Library)
26. Department of the Environment, Water, Heritage and the Arts
27. Department of the House of Representatives
28. Department of the Prime Minister and Cabinet
29. Department of the Senate
30. Department of the Treasury
31. Department of Veterans' Affairs
32. Family Court of Australia
33. High Court of Australia
34. Law Council of Australia
35. Law Courts Library
36. Migration Agents Registration Authority
37. Migration Review Tribunal–Refugee Review Tribunal
38. New South Wales Parliamentary Counsel's Office
39. Ocean Informatics Pty Ltd
40. Office of Best Practice Regulation
41. Office of Parliamentary Counsel
42. SBA Lawyers
43. Secretariat to the Administrative Review Council
44. Secretariat to the Senate Standing Committee for the Scrutiny of Bills
45. Secretariat to the Senate Standing Committee on Regulations and Ordinances
46. Standards Australia

47. Taxation Institute of Australia
48. Therapeutic Goods Administration

Appendix D – Exemptions from the LIA

Exemptions from the whole of the LIA

Exemptions from the whole of the LIA have generally been made to:

- confirm that an instrument is not legislative where there is some prospect of doubt and there is a good reason why the instrument should not be registered, and
- recognise countervailing policy considerations, such as national security or personal privacy concerns, to avoid fettering employment arrangements and to avoid applying the LIA to certain applied laws.

Exemptions from disallowance

The reasons for disallowance exemptions include the following:

Reason	Example
The Parliament has an alternate role	Disability standards made under section 31 of the *Disability Discrimination Act 1992* where the standard does not commence until approved by the Parliament or can be amended directly by the Parliament.
The rule-making process should or needs to be separated from the political process	Quarantine measures under the *Quarantine Act 1908*, which can only be justified internationally as being based on scientific assessment of threats rather than political concerns.
The instrument is required under a treaty	A list made under section 303CA of the *Environment Protection and Biodiversity Conversation Act 1999* containing only those species identified by the Convention on International Trade in Endangered Species which, if disallowed, would mean that Australia would be unable to prevent trade in those species and would be in breach of international obligations.
The instrument is part of an intergovernmental scheme	Instruments under section 7 of the *National Transport Commission Act 2003*, which provides for Regulations to be made containing model legislation that has been developed by the National Transport Commission to aid regulatory and operational reform in road, rail and intermodal transport. The model laws do not have the force of law, but may be incorporated into Commonwealth, State and Territory legislation by reference.
The instrument is central to machinery of government arrangements or electoral matters	Instruments under section 19B of the *Acts Interpretation Act 1901* regarding references in legislation to Ministers or Departments that are no longer current, Proclamations commencing Acts, or instruments determining polling places.
The instrument is intended to remain within Executive control	Ministerial directions to a person or body or instruments under Annual Appropriation Acts.
The instrument is an internal management tool for government and an integral part of the government's relationship with government agencies and employees	Instruments made under subsection 24(3) of the *Public Service Act 1999* regarding remuneration and terms and conditions.

Reason	Example
The exemption will provide certainty in meeting specific security needs	Instruments under subsections 3A and 3B of the *Control of Naval Waters Act 1918*, which allow Proclamations to be made in relation to certain vessels or naval waters so that directions about activities near those vessels or in those waters can be given for the protection of Defence facilities and land and naval vessels. The Proclamations allow for access control to be invoked at times of heightened security.
The exemption is in response to a parliamentary recommendation	Instruments under section 126DA of the *Customs Act 1901*, which provides for the CEO of Customs to determine certain information technology requirements and standards for persons who communicate with Customs electronically. The Senate Legal and Constitutional Committee expressed a view that as the requirements are highly technical there is no real benefit in disallowance.[82]
The instrument is to operate from the time it is made and commercial (business) certainty will be adversely affected if it can be disallowed at a later date	Instruments under section 16 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to provide certainty for the telecommunications providers about the size of their universal service subsidy obligations. An exemption from disallowance for this reason may also be appropriate where the instrument is intended to cover once-only transitional arrangements, such as when a public sector body is changing governance structures.

Exemptions from sunsetting

The reasons for sunsetting exemptions include the following:

Reason	Example
The rule-maker has been given a statutory role independent of government, or is operating in competition with the private sector	Statutes made under the *Australian National University Act 1991* or rules or orders made under those statutes by the Australian National University Council for the management, good government and discipline of the University.
The instrument is designed to be enduring and not subject to regular review	Proclamation of a Commonwealth reserve under sections 344 and 350 of the *Environment Protection and Biodiversity Conservation Act 1999*.
Commercial certainty would be undermined by sunsetting	Fisheries Plans of Management made under section 17 of the *Fisheries Management Act 1991* where people invest based on an understanding that the plan will remain in force for 30 years. Instruments made by the Reserve Bank under the *Payment Systems and Netting Act 1998* or the *Payment Systems (Regulation) Act 1998* regulating the financial system.
The instrument is part of an intergovernmental scheme	Declarations made by Ministers under section 32 of the *Mutual Recognition Act 1992*.

[82] Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001, Import Processing Charges Bill 2000, and the Customs Depot Licensing Charges Amendment Bill 2000*, Senate Standing Committee on Legal and Constitutional Affairs, Canberra, 2001, p. 46.

Appendix E – General requirements of rule-makers

Section of the LIA	Requirement
17	Consult before making a legislative instrument, to the extent that the rule-maker considers appropriate and practicable.
25	Lodge a legislative instrument for registration in electronic form and in the form that it was made 'as soon as practicable after making'.
26	Lodge an explanatory statement 'at the same time or as soon as practicable' after the instrument it relates to is lodged.
34	Lodge a compilation of a legislative instrument for registration following notification from AGD.
39	Deliver to the Parliament as soon as possible a copy of the explanatory statement and a written explanation (in the event that a rule-maker fails to lodge an explanatory statement in accordance with section 26).
41	Provide a copy of any document incorporated by reference to either House of the Parliament on request.