

LEGISLATIVE INSTRUMENTS HANDBOOK

A practical guide for compliance with
the *Legislative Instruments Act 2003* and related matters

December 2004

Foreword

The purpose of this Handbook is to provide information to help Commonwealth rule-makers and agencies manage their legislative instruments and comply with their obligations under the *Legislative Instruments Act 2003* (the LIA). The Handbook is a practical guide to LIA matters and should be read in conjunction with the LIA and its regulations. The LIA is available in electronic form on ComLaw at:

<http://www.comlaw.gov.au>

The Handbook sets out the procedures with which rule-making agencies must comply to meet their obligations under the LIA and to ensure that their legislative instruments can be enforced. It also provides guidance on how to improve drafting standards in legislative instruments, prepare compilations of legislative instruments if required, and develop effective explanatory statements.

The Handbook has been prepared by the Office of Legislative Drafting and Publishing (OLDP) in the Attorney-General's Department (AGD) and is available in electronic form at:

<http://www.frli.gov.au/lodgment.nsf>

The Handbook will be reviewed and updated from time to time, to improve its presentation and information. Rule-making agencies are invited to comment on the Handbook and make suggestions for its improvement. Any queries should be directed to:

the Director, Federal Register of Legislative Instruments in the Office of Legislative Drafting and Publishing

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1 Introduction

Background

1.1 In its 1992 report *Rule Making by Commonwealth Agencies* (Report No. 35), the Administrative Review Council identified a number of significant problems relating to Commonwealth delegated legislation. They included:

- the lack of formal public consultation procedures
- the poor quality drafting of some legislative instruments
- the inaccessibility of many instruments
- the inconsistent application of parliamentary scrutiny for legislative instruments that are not statutory rules
- the existence of some instruments that are not treated as being either legislative or executive in character
- the lack of a mechanism to ensure periodic review of legislative instruments.

1.2 The Council proposed a new regime for Commonwealth delegated legislation to enhance public participation in the making of delegated legislative instruments, improve their quality and accessibility, and provide more effective parliamentary scrutiny and control.

Overview of the LIA regime

1.3 The *Legislative Instruments Act 2003* (LIA) introduces a new, comprehensive regime for the making, registration, publication, parliamentary scrutiny and sunseting of Commonwealth delegated legislation. In addition to new provisions, the LIA substantially re-enacts those parts of section 46A and Part XII of the *Acts Interpretation Act 1901* that deal with regulations and disallowable instruments and extends their operation to all legislative instruments.

1.4 The main features include:

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

1.5 The Federal Register of Legislative Instruments (FRLI) is the centrepiece of the new LIA regime. The FRLI will be the comprehensive and authoritative repository of Commonwealth legislative instruments in electronic form. It will also include compilations of legislative instruments and explanatory statements for instruments made on or after 1 January 2005.

1.6 The LIA applies to all non-exempt legislative instruments. Registration of legislative instruments replaces gazettal as the sole means of notifying or publishing delegated legislation.

1.7 The Act was assented to on 17 December 2003 and will take effect on 1 January 2005.

Review of the Act

1.8 The LIA will be reviewed after 3 years operation. The review will examine all aspects of the new regime. The review body, which will be appointed by the Attorney-General, must report to the Attorney-General and the report must be tabled in Parliament.

1.9 Part 6 of the LIA (sunsetting) will also be reviewed 12 years after the LIA has been in operation. The review body will also be appointed by the Attorney-General and its report must be tabled in Parliament.

1.10 For more information about these reviews, please contact:

Assistant Secretary
Civil Justice Division
Attorney-General's Department
Robert Garran Offices
Barton ACT 2600
Telephone: (02) 6250 6364

2 Interpretation, commencement and construction of instruments

Introduction

2.1 This chapter explains some points about the interpretation and construction of legislative instruments and when they take effect under the LIA.

Interpretation

2.2 Provisions of the *Acts Interpretation Act 1901* dealing with interpretation and construction of legislative instruments will be repealed on 1 January 2005, and substantially re-enacted in the LIA.

2.3 The meaning of the term *legislative instrument* is explained in sections 5 to 9 of the LIA. This is discussed further in Chapter 3 of this Handbook.

2.4 The following important terms used in the LIA are defined in section 4 of the LIA:

- ADJR Act
- certified true copy
- commencing day
- compilation
- enabling legislation
- explanatory statement
- inappropriate use of gender-specific language
- instrument
- legislative instrument
- lodge
- making
- original legislative instrument
- register
- Register
- responsible Minister
- rule-maker
- Secretary
- State
- working day.

Who is a rule-maker?

2.5 There are various references to the *rule-maker* in the LIA in relation to responsibilities such as consultation before making an instrument, and lodging an instrument and related material for registration. The term includes a person or body authorised to make the legislative instrument, even if the instrument is not yet made.

2.6 The meaning of *rule-maker* in relation to a legislative instrument is explained in subsection 4(3) of the LIA.

2.7 If the person authorised to make the instrument under enabling legislation is the Governor-General:

- the reference to the rule-maker in the LIA (except section 13) is to the Minister responsible for administering the enabling legislation under which the instrument has been or will be made; and
- the reference to the rule-maker in section 13 of the LIA (which deals with construction of instruments rather than the responsibilities of rule-makers) is a reference to the Governor-General.

2.8 If the person or body authorised to make the instrument is not the Governor-General, the reference to the rule-maker in the LIA is a reference to that person or body.

2.9 The rule-maker's powers and functions may be delegated to another person. While the rule-maker (responsible Minister, other person or body, or delegate) is responsible for meeting the requirements of the LIA, it will be the responsible agency that will deal with administrative matters and lodge the instrument for registration.

Commencement of an instrument

2.10 Subject to any contrary provision in the enabling legislation, a legislative instrument made on or after 1 January 2005, or a particular provision of such an instrument, takes effect from:

- the day or day and time specified in the instrument; or
- the day or day and time of commencement of an Act or provision of an Act, or the occurrence of an event, that is specified in the instrument; or
- in any other case, the first moment of the day following the day when the instrument is registered (the default commencement).

2.11 Certain instruments made before the commencing day are to be treated as having been made on the commencing day under subsection 55(2) of the LIA.

2.12 Under section 3 of the *Acts Interpretation Act 1901*, a provision that is expressed to commence on a day, with no time specified, commences on the first moment of the day.

2.13 The default commencement is changed by the LIA — previously an instrument commenced by default at the beginning of the day on which it was gazetted. Under the LIA, it commences at the beginning of the day **after** it is registered.

2.14 The LIA broadens the scope of events to which an instrument's commencement can be linked. These could be, for example, the registration of the instrument, the commencement of a Commonwealth Act or another instrument, the commencement of a State Act or instrument or the entering into force for Australia of a treaty.

2.15 Subsection 12(2) of the LIA provides that an instrument (or provision) that adversely affects the rights of a person or imposes liabilities on a person, (other than the Commonwealth or an authority of the Commonwealth) has no effect if it would take effect before the date of its registration. This rule is subject to any contrary provision in the enabling legislation.

2.16 Subsection 12(2) does not generally prevent retrospective commencement of an instrument. If an instrument has a beneficial effect only, it could be expressed to commence retrospectively.

2.17 Agencies should note that provisions that commence retrospectively will attract the attention of the Senate Standing Committee on Regulations and Ordinances when the instrument is tabled in Parliament. The related explanatory statement will need to provide clear advice on the reasons for the retrospectivity and an assurance that the rights of a person, other than the Commonwealth, are not affected so as to disadvantage that person. Any document that is intended to have a retrospective operation and is submitted to the Federal Executive Council must be accompanied by written certification from the Australian Government Solicitor or the Office of Legislative Drafting and Publishing to the effect that what is being proposed by the recommending Minister is appropriate and does not offend against subsection 12(2) of the LIA.

2.18 Regardless of its particular commencement details, a legislative instrument made on or after 1 January 2005 is not enforceable unless it is registered.

2.19 Rule-making agencies that require guidance with drafting commencement provisions or advice about when their legislative instrument takes effect should consult the Office of Legislative Drafting and Publishing before the instrument is made.

Construction

2.20 Subject to any contrary intention in the enabling legislation, section 13 of the LIA:

- applies the *Acts Interpretation Act 1901* to legislative instruments as if they were Acts and each provision were a section of an Act
- gives expressions used in a legislative instrument the same meaning as in the enabling legislation
- requires legislative instruments to be interpreted subject to the enabling legislation and within the rule-maker's power (if a legislative instrument exceeds the rule-maker's power, the instrument is taken to be valid to the extent that it is within power)
- provides that if a rule-maker has power to make a legislative instrument in relation to a matter or thing, the rule-maker may exercise that power in relation to a class or classes of matters or things.

Documents incorporated by reference

2.21 A legislative instrument may make provision for matters by applying, adopting or incorporating the provisions of any Commonwealth Act or disallowable legislative instrument as in force at a particular time or as in force from time to time (since changes to Acts and these instruments are scrutinised by Parliament) (section 14).

2.22 A legislative instrument may make provision for matters by applying, adopting or incorporating the provisions of any other written instrument as in force or existing at the time when the legislative instrument takes effect. Unless the enabling legislation allows instruments in this category to be applied, adopted or incorporated as in force from time to time, they may only be applied, adopted or incorporated in the form in which the instrument exists at the date when the legislative instrument takes effect.

2.23 A document is a *document incorporated by reference* in a legislative instrument if the document:

- is mentioned in the instrument; and
- is applied, adopted or incorporated by the instrument with the effect that the contents of the document become part of the law by the instrument.

2.24 As a general rule, a document mentioned in a legislative instrument is a *document incorporated by reference* in the instrument if it is necessary to refer to the document to understand or apply the law made by the instrument. Under section 41 of the LIA, either House of the Parliament may require the administering agency to provide any documents incorporated by reference for Parliament's inspection (see Chapter 11).

Effect of repeal

2.25 Section 15 of the LIA sets out the consequences of repealing a legislative instrument or provision of a legislative instrument. Subject to a contrary intention in the repealing instrument or Act, repeal does not:

- revive anything not in force at the time of repeal; or
- affect the previous operation of the instrument or provision, or any right, privilege, obligation or liability acquired, or any penalty, forfeiture or punishment incurred under it; or
- affect any investigation, legal proceeding or remedy instituted, continued or enforced under the repealed instrument or provision.

Main points

- The *rule-maker* is defined in the LIA (see also paragraphs 2.5 to 2.9) but generally refers to a person, delegate or body authorised to make the relevant legislative instrument under enabling legislation.
- A legislative instrument is to be read subject to its enabling legislation in a way that does not exceed the power of the rule-maker.
- A legislative instrument may adopt, apply or incorporate anything in an Act or another legislative instrument as in force from time to time.
- If an instrument is silent about commencement, it will commence at the beginning of the day following its registration on the FRLI.
- The repeal of a legislative instrument does not revive anything not in force at the time the repeal takes effect (unless there is a contrary intention in an Act or legislative instrument).

3 Legislative instruments

Introduction

3.1 An instrument that is legislative in character will generally be subject to the LIA. It is therefore important for a rule-making agency to determine whether or not an instrument for which it is responsible is a legislative instrument for the purposes of the LIA. This chapter provides information about Parliament's delegation of legislative power and guidance in determining whether an instrument is legislative, sets out categories of instruments declared to be legislative and deals with exemptions and exclusions from LIA requirements.

Parliament's delegation of legislative power

3.2 Historically, legislative instruments have been described as 'delegated legislation' or 'subordinate legislation' because Parliament delegates the power to make them and they are subordinate to primary legislation passed by Parliament. If a legislative instrument is inconsistent with any provision in the enabling legislation, the latter will prevail to the extent of any inconsistency.

3.3 Delegation of legislative power allows matters of a detailed technical nature to be dealt with more efficiently than is possible through the Parliamentary processes. Legislative instruments can be made and amended more quickly and easily than primary legislation. If Parliament did not delegate the power to make legislative instruments, the legislative process would become slower and more congested.

3.4 For the LIA, a power delegated by the Parliament includes a subsequent further delegation under Parliament's authority (section 8). This means that the definition of *legislative instrument* covers instruments that are made under enabling regulations or other legislative instruments.

3.5 Most delegations of power are easy to identify. A delegation of power may appear in an Act or a legislative instrument, such as a regulation. Some existing¹ formulations include:

- The Governor-General may make regulations ...
- The Minister may determine

3.6 Parliament retains control over delegated legislation through its power to disallow legislative instruments and scrutiny by Parliamentary Committees (see Chapter 11 Parliamentary scrutiny of legislative instruments).

¹ From 1 January 2005, provisions in new enabling legislation that deal with delegating the power to make an instrument may be more explicit for instruments that are legislative in character. For example, a possible formulation might be: 'The Minister may determine, by legislative instrument'. This will assist with the identification of legislative, as opposed to administrative, instruments.

Instruments declared to be legislative

3.7 Instruments that fall within the definition of *legislative instrument* in section 5 of the LIA, and those expressly mentioned in section 6, are subject to the LIA.

3.8 If an instrument is in a class of instruments listed in section 6, there is no need to consider the application of the general definition. The classes are:

- regulations
- statutory rules (other than regulations) made before 1 January 2005
- instruments (Ordinances, rules, regulations by-laws) of non-self-governing Territories
- disallowable instruments made under an empowering provision that commenced before 1 January 2005 and declares the instruments to be disallowable for the purpose of section 46A of the *Acts Interpretation Act 1901*
- Proclamations made under enabling legislation.

Further, an instrument made under an empowering provision that commenced or was amended after 1 January 2005 and declares the instrument to be a legislative instrument is also a legislative instrument.

3.9 If an instrument does not fall into one of the above classes, the definition in section 5 has to be considered.

3.10 Once an instrument is registered, it is taken to be a legislative instrument. If that happens, any amendments to the instrument will also have to be registered.

3.11 An instrument with legislative and administrative provisions is taken to be a legislative instrument and will also have to be registered to be enforceable.

Applying the definition of *legislative instrument*

3.12 Subsection 5(1) of the LIA defines a *legislative instrument* as an instrument in writing that is of a legislative character and made in the exercise of a power delegated by the Parliament. Note that this refers to the character of a particular instrument, and not to the provision under which it was made.

3.13 Subsection 5(2) of the LIA provides that, without limiting the generality of subsection (1), an instrument is taken to be of 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.

3.14 That an instrument is of a legislative character is fundamental to the definition of a legislative instrument in subsection 5(1). Subsection 5(2) contains factors generally accepted as indicative of legislative character. Other factors indicative of legislative character include:

- legislative instruments are binding in their application

- if an instrument applies an existing principle it is more likely to be administrative, but if it establishes a new legal regime it is legislative.

3.15 The determinative factor of legislative character is the effect of the instrument. If the instrument establishes a new rule of law or legal regime, or alters the content of the law, it is a legislative instrument. An instrument affecting a benefit, tax or charge or requiring a person to do something is likely to be a legislative instrument. Examples of instruments that determine the law or alter the content of the law include:

- instruments that impose a penalty
- instruments setting mandatory standards.

3.16 If an instrument merely applies criteria to a set of facts, it is likely to be administrative in character, for example an instrument that declares a place for a purpose stated in the enabling legislation.

Exemptions, exclusions and instruments that are not legislative

3.17 In addition to instruments that do not fall within the definition in section 5, the LIA provides that the following instruments are not legislative:

- rules of court (section 9). However, rules of court are treated as if they were legislative by express amendment of the legislation providing for them to be made
- instruments mentioned in the table in section 7
- instruments made under an Act or a disallowable legislative instrument that first authorised the making of the instrument on or after 1 January 2005, and declared the instrument not to be a legislative instrument (section 7).

Rules of court

3.18 Rules of court for the High Court, the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court will be treated as if they were legislative by express amendment of their respective enabling legislation. In practice, this means that they will be subject to most of the requirements affecting legislative instruments under the LIA (including the consultation, disallowance and sunseting regimes). New rules of court made on or after 1 January 2005 will have to be registered to be enforced. Existing rules of court made before 1 January 2005 will also have to be registered, in accordance with the backcapture deadlines in the LIA, to remain in force.

Exemptions and exclusions

3.19 Section 7 of the LIA includes a table of kinds of instruments that are declared not to be legislative instruments. Most of them are instruments under specific sections of Acts (see Appendix A for details). The inclusion of these instruments in the table does not imply that they would otherwise be legislative. However, their inclusion puts the question beyond doubt. These instruments are exempted from the requirements of the LIA and do not need to be registered.

3.20 The section 7 table also allows for regulations to prescribe additional exempt instruments. The Legislative Instruments Regulations are likely to be made towards the end of 2004. It is proposed to prescribe additional, individual exemptions from the LIA. It is also proposed to include specific categories of instruments that will be declared not to be legislative, to put these matters beyond doubt.

3.21 The proposal to declare specific categories of instruments not to be legislative includes:

- instruments of delegation
- instruments of authorisation
- evidentiary certificates
- instruments prescribing forms
- (spent) Proclamations that provided solely for the commencement of Acts that had effect before 1 January 2005
 - instruments whose effect was spent before 1 January 2005 — this would include instruments that solely revoked or repealed other instruments.

3.22 Future additional instruments will only be included in the exemption table if exceptional policy circumstances exist. A formal request from the responsible Minister to the Attorney-General will be required before the proposed exemption can be considered. Enquiries about exemptions should be initially directed to the Civil Justice Division of the Attorney-General's Department on telephone (02) 6250 6364.

Exclusions under enabling legislation

3.23 From 1 January 2005, enabling legislation may also declare an instrument made under it not to be a legislative instrument for the purposes of the LIA. In practice, however, this mechanism would be used infrequently. As a general rule, if an instrument is legislative it will be caught by the LIA unless it is specifically exempted.

3.24 A rule-making agency that proposes to draft enabling legislation that authorises making instruments must address the issue of whether the instruments should be declared to be, or not to be, legislative instruments. If it is proposed to make them non-legislative instruments, the agency should consult the Civil Justice Division about the new draft provisions before issuing instructions to the Office of Parliamentary Counsel.

In cases of uncertainty

3.25 It is important for rule-making agencies to ensure that instruments are correctly classified. If a legislative instrument is not registered according to LIA requirements, it will be unenforceable. If a rule-making agency is unclear about whether a particular instrument falls within the general definition in subsection 5(1) of the LIA, or the application of a particular criterion is uncertain, the agency should seek legal advice from the Attorney-General's Department (Office of Legislative Drafting and Publishing) or their legal service provider as soon as possible.

3.26 If uncertainty still exists following formal legal advice, the person or body with authority to make the instrument may apply to the Attorney-General for an Attorney-General's certificate to determine the matter. However, as the certificate is intended to be used as a last resort, the relevant rule-making agency must first obtain formal legal advice about the character of the instrument before applying for a certificate. (See Chapter 4 for options when dealing with an instrument of uncertain character.)

Main points

- Parliament delegates the power to make legislative instruments.
- Section 6 declares certain instruments to be legislative. Other instruments will be declared to be legislative by their empowering provision.
- Section 5 of the LIA defines a legislative instrument.
- Section 7 declares certain instruments not to be legislative and therefore exempt from the LIA.
- The Legislative Instruments Regulations will contain additional exemptions and exclusions from the LIA.
- Rule-making agencies should obtain legal advice if uncertain about whether an instrument is legislative.

4 Attorney-General's certificate

Introduction

4.1 This chapter is about the Attorney-General's certificate. It explains what to do if there is uncertainty about whether an instrument is, or is not, a legislative instrument, how to apply for a certificate if necessary, what happens when a certificate is issued and the effect if the certificate is judicially reviewed.

4.2 If a rule-making agency is unclear about whether a particular instrument is legislative, the agency should seek formal legal advice from OLDP or other legal advisers. Depending on the advice, the options for the rule-maker are:

- If the advice indicates that the instrument is legislative or is likely to be legislative, the instrument should be lodged for registration in accordance with the LIA. If the rule-making agency considers that there are good reasons to exempt the instrument from aspects of the LIA, the agency should contact the Civil Justice Division (CJD) of the Attorney-General's Department immediately to discuss the possibility of an exemption.
- If the advice indicates that the instrument is not legislative, the agency need do no more.
- If the advice indicates that the instrument is probably not legislative but there is some doubt, the agency should discuss options with OLDP. The options are:
 - register the instrument as a legislative instrument (only available if OLDP has advised that there is doubt about the status of the instrument);
 - seek an exemption from the LIA to put the matter beyond doubt;
 - seek an Attorney-General's certificate.

4.3 The Attorney-General's Department considers that the issue of an Attorney-General's certificate would be the last resort option, and would be pursued only if other, more suitable, options are not available. Desirably, an instrument about which there is any significant doubt should be either registered or legislatively exempted. Further, the LIA makes clear that the Attorney-General's certificate can be judicially reviewed, for example, under the *Administrative Decisions (Judicial Review) Act 1977*. This means that, if a certificate is challenged under that Act, the future status of that certificate may be unclear for a considerable period.

Applying for a certificate

4.4 An application for an Attorney-General's certificate must be in writing addressed to the Attorney-General and made through the Minister responsible for the enabling legislation under which the instrument is or will be made. An application may be made after 1 January 2005.

4.5 The application must set out the reasons for the uncertainty in relation to whether the instrument is, or is not, a legislative instrument. A copy of the legal advice obtained by the rule-making agency in relation to the nature of the instrument should be included with the application.

4.6 It is highly desirable that the rule-making agency discuss the proposed application with the Attorney-General's Department before any application is made, and provide a draft of the Minister's application for a certificate to ensure that sufficient information and reasoning is contained to facilitate the Attorney-General's early consideration of the matter.

Issuing a certificate

4.7 When a decision has been made, the Attorney-General will issue a written certificate determining whether the instrument, or an instrument of that kind, is or is not, or will be, or will not be, legislative, and setting out the reasons for that decision. The certificate is conclusive of whether the instrument is, or is not, legislative, subject to any future judicial review and an order quashing the decision. A copy of the certificate will be forwarded to the applicant.

4.8 If the certificate determines that an instrument, or instrument of that kind, is legislative, the rule-maker must register the instrument in accordance with the requirements of the LIA.

4.9 As the certificate is also a legislative instrument that must be registered, the Attorney-General's Department will arrange for the registration of the certificate and its explanatory statement. The original, hard copy of the certificate will also be given to OLDP. The certificate is exempt from the disallowance and sunset provisions of the LIA.

Judicial review and replacement certificate

4.10 If the Attorney-General's decision to issue a certificate is later reviewed by the Federal Court, the Federal Magistrates Court, or the High Court, and an order is made quashing or setting aside the decision, the Attorney-General must reconsider the matter and issue a replacement certificate.

4.11 A court order to quash or set aside a decision to issue a certificate takes effect from immediately before the issue of the replacement certificate. This provides certainty as to the operation of an instrument while a certificate is subject to judicial review. The procedures following judicial review depend on the outcome of that review and these are dealt with in section 11 of the LIA.

Main points

- If unclear about whether a particular instrument is legislative, the rule-making agency should seek formal legal advice from OLDP or other legal advisers.
- The issue of an Attorney-General's certificate is the last resort option, and would be pursued only if other, more suitable, options are not available. Options should be discussed with OLDP or CJD in the Attorney-General's Department.
- An application for the Attorney-General's certificate must be in writing addressed to the Attorney-General and made through the Minister responsible for the enabling legislation under which the instrument is or will be made.
- The certificate is conclusive of the character of the instrument, subject to any future judicial review and an order quashing the decision.

5 Drafting standards

Introduction

5.1 This chapter sets out the requirements relating to drafting standards under Part 2 of the LIA. It also provides additional guidance to help agencies to achieve high standards when drafting their own instruments.

Responsibilities

5.2 Part 2 of the LIA requires the Secretary of the Attorney-General's Department to cause steps to be taken to promote the legal effectiveness, clarity, and intelligibility to anticipated users, of legislative instruments. This responsibility will be taken on by OLDP.

5.3 The Act provides that these steps may include:

- 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
- providing drafting precedents to officers and employees of other Departments or agencies.

5.4 OLDP does not intend to take over drafting from agencies that draft their own legislative instruments. Agencies can continue to draft their own instruments or use other legal providers to do so. However, as the Register will make instruments more accessible to the public and highlight any inconsistent standards across agencies, it should encourage higher drafting standards over time.

5.5 OLDP already seeks to maintain high standards in its own drafting of legislative instruments. It will continue to draft legislative instruments that it is required to draft (ie regulations, Ordinances and Proclamations). It will also continue to be available to draft other instruments for a fee.

Gender-specific language

5.6 OLDP is also required to advise agencies about inappropriate use of gender-specific language in their instruments, and to notify Parliament when it does so. This follows from a

general requirement for the Secretary to cause steps to be taken to prevent the inappropriate use of gender-specific language in legislative instruments.

5.7 If someone other than OLDP has drafted an instrument, the person lodging the instrument for registration will be asked to state whether it contains any gender-specific language. OLDP will then assess whether the use of that language is inappropriate. If so, OLDP must arrange to notify Parliament.

5.8 Gender-specific language is inappropriate if it refers to only one sex when it could apply to both sexes. There is a useful discussion of the issues on the University of Southern Queensland website, at:

<http://www.usq.edu.au/faculty/educate/media/FacultyManual/Appendices.htm>
(accessed 22 September 2004).

Rules

5.9 Avoid gender-specific terms and masculine word forms, unless a term is specified in legislation or the individual concerned has expressed a preference for a gender-specific title.

Examples

chairman — use convenor or chair

policeman — use police officer (if gender is relevant, use male or female police officer)

murderess — use murderer

Do not qualify words or phrases by adding gender unless it is relevant.

Example

use judges, not women judges

Include both masculine and feminine pronouns or, if appropriate, use plural forms.

Examples

Lawyers must remember their duty to clients.

A lawyer must remember his or her duty to clients.

A sentence can often be rearranged so that there is no need for pronouns.

Drafting guidelines

5.10 OLDP is developing simple templates for principal and amending instruments, and for compilations. These are based on OLDP's styles and layouts and they will be available electronically at the FRLI electronic lodgment site at:

<http://www.frli.gov.au/lodgment.nsf>

5.11 The basic elements of an instrument are:

- title

- making words
- signature of rule-maker
- date of signing
- date of commencement (if any?)
- definitions
- substance of instrument
- schedules.

5.12 The Office of Parliamentary Counsel has produced a Plain English Manual, and some other documents dealing with plain language, available at:

<http://www.opc.gov.au/plain/docs.htm> (accessed 22 September 2004).

5.13 All drafting offices in Australia have a commitment to plain language. They have all developed their own forms of words and structures for principal and amending instruments. OLDP recommends that agencies use the same forms that OLDP uses for the instruments it drafts. These can be studied under the *Select Legislative Instruments (SLI) and Statutory Rules (SR)* titles on the ComLaw website at:

<http://www.comlaw.gov.au/>

Main points

- The Attorney-General's Department (AGD) has responsibility to take steps to promote the legal effectiveness, clarity, and intelligibility of legislative instruments.
- The AGD has responsibility to take steps to prevent the inappropriate use of gender-specific language in legislative instruments and report to Parliament about such use.
- Agencies that draft their own instruments may continue to do so. OLDP is developing simple templates and guidelines to assist agencies.
- Agencies may instruct OLDP to draft legislative instruments on a billable basis.

6 Consultation

Introduction

6.1 Part 3 of the LIA encourages appropriate consultation before making a legislative instrument on or after 1 January 2005. The new consultation regime complements existing Government policy and practice, particularly in relation to instruments affecting business or restricting competition. This chapter sets out the rule-maker's responsibility with regard to consultation, provides some guidance about the form that consultation might take and outlines some circumstances where consultation may be unnecessary or inappropriate, and the consequence of failing to consult.

Instruments made on or after 1 January 2005

6.2 Section 17 of the LIA requires an agency to consult before making a legislative instrument if it is appropriate and reasonably practical to do so. This applies to legislative instruments made on or after 1 January 2005 and, in particular, if an instrument is likely to have a direct or substantial indirect effect on business or to restrict competition. The aim is to send a message about the importance of consultation.

Is a Regulation Impact Statement required?

6.3 The LIA consultation regime does not change the existing requirements for Regulation Impact Statements (RIS). Nor does it require that a RIS be prepared. Enquiries about whether a RIS should be prepared for a regulatory proposal, and certainly before the making of a particular legislative instrument, should continue to be directed to the Office of Regulation Review (ORR).

6.4 If, however, a RIS is prepared before a legislative instrument is made, comment on consultation within the RIS will satisfy the consultation provisions of the LIA. Conversely, consultation that may satisfy the LIA provisions may not satisfy RIS requirements. If a RIS is required, the RIS should be prepared in accordance with *A Guide to Regulation*. The RIS should also be included in, or attached to, the explanatory statement that is lodged with the related legislative instrument in electronic form for registration. This will ensure that the RIS is tabled with the instrument in Parliament after the instrument and explanatory statement are registered. The RIS will be registered on the FRLI only if it forms part of the explanatory statement.

Some guidance about consultation

6.5 The responsibility is on the rule-maker to be satisfied that any appropriate consultation that is reasonably practicable to be undertaken, has been undertaken. The LIA does not

require a particular process of consultation to be followed, but provides some guidance for the rule-maker in determining whether any consultation undertaken was appropriate. For example, the rule-maker may have regard to the extent to which experts, stakeholders and affected persons were involved in any consultation.

6.6 Consultation might include notifying bodies or organisations representative of persons affected by the proposed instrument and inviting submissions or participation at public hearings. Ultimately, however, it will be a matter for the rule-making agency to decide the most appropriate form of consultation.

When consultation may be unnecessary

6.7 Section 18 of the LIA recognises that, in certain circumstances, the nature of the instrument may be such that consultation may be either unnecessary or inappropriate, and provides some examples of this. These examples include:

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

Effect of failing to consult

6.8 Section 19 of the LIA provides that failure to consult in relation to an instrument does not affect the validity or enforceability of the instrument. However, the explanatory statement that is tabled with the instrument in the Parliament must describe the nature of any consultation undertaken and, if no consultation occurred, explain why (see Chapter 7). Consequently, while failure to consult will not invalidate the instrument, it could attract criticism in the Parliament when the instrument and explanatory statement are tabled.

6.9 As the explanatory statement will also be registered with the instrument on the FRLI, failure to appropriately consult could also draw public criticism.

Main points

- The LIA encourages appropriate consultation to be undertaken before a legislative instrument is made and complements existing Government policy and practice.
- The rule-maker must be satisfied that any consultation that is appropriate and reasonably practicable has been undertaken.
- A description of any consultation must be included in the explanatory statement relating to the instrument. If no consultation is undertaken, that must also be explained.
- The explanatory statement will be placed on the FRLI and tabled in the Parliament.
- A failure to consult does not affect the validity of the instrument.

7 Explanatory statement

Introduction

7.1 An explanatory statement must be prepared by the rule-maker for each legislative instrument made on or after 1 January 2005. The explanatory statement should contain information about the purpose and operation of a legislative instrument, whether any documents have been incorporated by reference in the instrument, and a description of any consultation undertaken before the instrument was made. The explanatory statement must be lodged for registration with OLDP and will be tabled in the Parliament with the registered legislative instrument to which it relates.

This chapter sets out the requirements for explanatory statements under the LIA and provides some guidance in preparing an explanatory statement to meet the requirements of the Senate Standing Committee on Regulations and Ordinances (SSCRO) and, where applicable, the procedures of the Federal Executive Council Secretariat.

Requirements for an explanatory statement

7.2 Under the LIA, an explanatory statement must be prepared by the rule-maker for each legislative instrument made on or after 1 January 2005, lodged by the rule-maker with OLDP for registration with the instrument on the publicly accessible Federal Register of Legislative Instruments, and tabled in the Parliament when the registered instrument is tabled.

7.3 While the initial failure to lodge an explanatory statement with OLDP does not affect the validity or enforceability of the registered instrument, there is still a statutory obligation to lodge the explanatory statement for registration (section 26).

7.4 If the explanatory statement is lodged with OLDP for registration at the same time as the instrument, after registration OLDP will deliver copies of both to the Parliament for tabling. If it is not lodged with OLDP before the related instrument is delivered for tabling in the Parliament, the rule-making agency will be required to make the delivery and will need to provide a written statement to explain to the Parliament the reasons why it was late (section 39). The timely availability of the explanatory statement will facilitate Parliament's scrutiny of the related instrument, including through the work of the Senate Standing Committee on Regulations and Ordinances. Late delivery of the statement may delay that scrutiny and give rise to criticism of the rule-making agency.

7.5 Some legislative instruments may also require a Regulation Impact Statement (RIS) to be prepared. Where this occurs, the RIS must be included in the instrument's explanatory statement, or be an attachment to the statement (see paragraph 6.4 regarding the role of the RIS as the consultation statement).

7.6 When a legislative instrument is made by the Governor-General in Council (eg regulations, Proclamations, Ordinances), the related explanatory statement will be drafted in

parallel with the explanatory material prepared for the Executive Council. Since there are efficiencies in basing the explanatory statement on the Executive Council material, the explanatory statement will often reflect the requirements of the Federal Executive Council Handbook and any supplementary requirements of the Executive Council Secretariat, as well as the requirements of the LIA. The Executive Council procedures are discussed at paragraphs 7.16 to 7.19.

What is an explanatory statement?

7.7 An explanatory statement is a companion document to a legislative instrument. It helps members of Parliament, officials and the public to understand the objectives of the instrument and how it will operate. The more complex the instrument, the more extensive the explanatory statement will need to be to achieve this.

7.8 Section 4 of the LIA defines *explanatory statement* as a statement that:

- (a) is prepared by the rule-maker; and
- (b) explains the purpose and operation of the instrument; and
- (c) if any documents are incorporated in the instrument by reference—contains a description of the documents so incorporated and indicates how they may be obtained; and
- (d) if consultation was undertaken under section 17 before the instrument was made—contains a description of the nature of that consultation; and
- (e) if no such consultation was undertaken—explains why no such consultation was undertaken; and
- (f) contains such other information as is prescribed (no requirements are currently prescribed).

7.9 These elements of the explanatory statement are discussed below.

Elements of an explanatory statement

Rule-maker prepares explanatory statement

7.10 The LIA places responsibility for preparing the explanatory statement on the rule-maker. This means that an explanatory statement is the responsibility of the agency whose Minister or other official is empowered to make the legislative instrument.

7.11 It is never too early to start drafting an explanatory statement. An agency needs enough time to make sure that it can prepare a suitable explanatory statement, particularly if the legislative instrument is long or complex or raises issues likely to be of concern to parliamentarians. The explanatory statement should be ready in time to accompany the instrument to be made by the rule-maker.

Purpose and operation of instrument

7.12 An explanatory statement should be as clear and helpful as possible to facilitate Parliament's scrutiny of the legislative instrument concerned and public understanding of the instrument. The statement should contain sufficient information about the purpose and operation of the instrument to enable Parliament to understand the need for the instrument, its objective and its intended operation. As a guide, it is desirable for the statement to include the following information:

- the issues giving rise to the need for the legislative instrument
- why government action is necessary to address the problem
- the goals and objectives of the legislative instrument
- an explanation of how the instrument is intended to operate, and its likely impact.

7.13 When preparing an explanatory statement, the emphasis must be on explanation rather than merely paraphrasing what is in the instrument.

7.14 There are also some particular types of provisions about which the SSCRO has indicated that it may have concerns (see paragraph 7.23). If the legislative instrument contains any of these matters, the reasons why those matters are included in the instrument should be sufficiently explained.

Other matters to be considered

7.15 When considering the content of the explanatory statement, it is useful to take into account:

- any guidance in the Federal Executive Council Handbook — see also paragraphs 7.16 to 7.19
- points of key interest to the public or particular stakeholders gained from the agency's own consultations (stakeholders may have raised their concerns with parliamentarians)
- any relevant policy and legislative background so that the reason for, and the intent of, the instrument is clear
- any aspects previously raised by parliamentary committees as matters of particular concern to them. Be aware of past mistakes and any criticism by parliamentary committees² of instruments for which your agency has responsibility. See also paragraphs 7.20 to 7.23.

² Appendix B sets out the terms of reference of the Senate Standing Committee on Regulations and Ordinances. This Senate Committee reviews all regulations and other disallowable instruments that are tabled in the Parliament. If the explanatory statement accompanying the tabled documents does not provide sufficient information about the reasons for the regulations or instruments or fails to address those matters arising under them that are relevant to the Committee's charter, the Committee may write seeking further information from the relevant Minister. If you receive correspondence of this nature, it is important to respond quickly to avoid the possibility of disallowance of the regulations or disallowable instruments.

Requirements of the Federal Executive Council

7.16 The Federal Executive Council Secretariat is responsible for scrutinising documents that are to go to the Executive Council, including documents relating to the making of legislative instruments, such as regulations and Proclamations, where the legislation delegating the authority to make the instrument requires the instrument to be made by the Governor-General.

7.17 Agencies that prepare material for the Executive Council will be familiar with the draft clearance process required by the Executive Council Secretariat and the close scrutiny that the Secretariat gives to the documents and related explanatory material.³ The Executive Council requirements are outlined in the Federal Executive Council Handbook.

7.18 The Handbook advises that explanatory statements should:

- give a plain English explanation
- state the authority for making the instrument
- state the reason for making the instrument
- summarise the likely impact and effect
- discuss any unusual aspects of the matter calling for special comment
- give reasons for any imposition of, or change in, fees
- advise that all legal and other requirements have been met, eg if the enabling legislation provides for a mandatory duty to consult a particular authority before an instrument is made, this action should be confirmed in the explanatory statement
- for any legislative instrument that commences retrospectively, comment on the application of subsection 12(2) of the *Legislative Instruments Act 2003*.⁴

7.19 Both the explanatory memorandum and the explanatory statement should state whether the related instrument is a legislative instrument for the purposes of the LIA. This information will be helpful to the Executive Council Secretariat.

³ As explained by the Handbook, 2 types of explanatory documents are prepared for legislative instruments that are to be approved by the Governor-General in Council: an Explanatory Memorandum and an Explanatory Statement. In content, they will be very similar. The latter document — the Explanatory Statement — is not submitted to the Executive Council, but kept by the Secretariat for safekeeping until the instrument is made. At that time it is provided to OLDP with the instrument for registration and tabling in the Parliament. The explanatory statement is the document that is tabled in the Parliament and described in the LIA.

⁴ Section 48(2) of the *Acts Interpretation Act 1901* will be repealed by Act No. 140 of 2003, and replaced by provisions of the LIA, with effect from 1 January 2005. Any document that is intended to have a retrospective operation and is submitted to the Federal Executive Council must be accompanied by written certification from the Australian Government Solicitor or the Office of Legislative Drafting and publishing to the effect that what is being proposed by the recommending Minister is appropriate and does not offend against subsection 12(2) of the LIA. Discussions are continuing with the Executive Council Secretariat on changes to procedures necessitated by the commencement of the LIA. It is expected that the Federal Executive Council Handbook will be revised to take into account the new regime under the LIA.

Requirements of the SSCRO

7.20 The Senate Standing Committee on Regulations and Ordinances currently reviews all regulations and other disallowable instruments that are tabled in the Parliament. From the commencement of the LIA, all legislative instruments made on or after 1 January 2005 will be registered and tabled in the Parliament. The Committee will review only those legislative instruments subject to disallowance. The Legislative Instruments webpage⁵ has a link to the Committee's website which contains information about instruments that the Committee has considered.⁶

7.21 The Committee places considerable reliance on explanatory statements prepared by agencies to help parliamentarians to understand legislative instruments and to assess their purpose. The Committee considers that an explanatory statement should:

- give a plain English explanation
- state the authority for making the instrument
- state the reason for making the instrument
- summarise the likely impact and effect
- discuss any unusual aspects of the matter that call for special comment
- give reasons for any imposition of and the basis upon which charges or fees have been increased or decreased
- advise, where required, that consultation has taken place and the effect of that consultation
- provide a detailed provision-by-provision description of the instrument
- be precise and informative.⁷

7.22 Most of these requirements reflect those set out in the Federal Executive Council Handbook. From time to time, the Committee may comment on key areas of its concerns and what it wants to see addressed in explanatory statements. Past annual reports⁸ of the Committee have criticised explanatory statements that merely repeat, or paraphrase, the content of provisions in a legislative instrument.

7.23 Agencies should consider the Committee's terms of reference (see Appendix B) for the range of issues the Committee might raise. Some examples are:

- provisions with retrospective operation, where the explanatory statement does not provide clear advice on the reasons for the retrospectivity and an assurance that the rights of a person, other than the Commonwealth, are not affected so as to disadvantage that person
- decision-making powers that are formulated subjectively rather than objectively, eg 'in the Minister's opinion'

⁵ At http://www.aph.gov.au/leg_instruments/index.htm.

⁶ At http://www.aph.gov.au/senate/committee/regord_ctte/index.htm.

⁷ At http://www.aph.gov.au/senate/committee/regord_ctte/explanatory_statements.pdf, viewed on 16 August 2004.

⁸ At http://www.aph.gov.au/senate/committee/regord_ctte/index.htm.

- instruments that contain a wide delegation of powers
- failure to provide merits review of discretionary decisions
- strict liability offences
- discretions to record or pass on information and associated privacy considerations.

Documents incorporated by reference

7.24 The explanatory statement must describe any documents incorporated by reference in the legislative instrument and contain information on how they may be obtained. Specific reference to these documents in the explanatory statement ensures that the Parliament is made aware of the incorporation and can consider whether to exercise its power to request access to the incorporated documents under section 41 of the LIA. See Chapters 2 and 11 for further information about documents incorporated by reference.

Description of consultation

7.25 The explanatory statement must also contain a description of any consultation undertaken or, if not undertaken, an explanation for its absence. Sections 17 to 19 of the LIA deal with consultation, including the circumstances in which consultation may be unnecessary or inappropriate (see also Chapter 6). The LIA does not make consultation mandatory. However, all Commonwealth agencies are encouraged to undertake appropriate consultation before making a legislative instrument, particularly if the proposed instrument is likely to affect business or restrict competition.

7.26 Some instruments are subject to the regulatory impact statement process and this will not change under the LIA.⁹ It is expected that, if a regulatory impact statement has been prepared, it will be included in the explanatory statement and will satisfy any LIA consultation requirements.

7.27 The LIA provides some examples of the form that consultation might take but does not require any particular method of consultation. However, it requires the rule-maker of the instrument to be satisfied that appropriate consultation has occurred. As noted above, if no consultation is undertaken before making an instrument, this must be explained in the explanatory statement. Lack of appropriate consultation could give rise to criticism in the Parliament when the instrument and explanatory statement are tabled.

Risks with inadequate or defective explanatory statement

7.28 If the explanatory statement does not adequately explain the provisions of the legislative instrument, there is the risk of the instrument not being made or being disallowed or of an inability to interpret the instrument appropriately in the future.

⁹ Further information on the regulation impact statement process is available at the Office of Regulation Review website, see <http://www.pc.gov.au/orr/reports/guide/reguide2/index.html>.

Delays in implementation/risk of disallowance

7.29 If the explanatory statement is defective or deficient, the instrument or the explanation can be subject to criticism and the instrument may be at risk. This can happen in two ways.

7.30 First, if the explanatory statement accompanies an instrument to be made by the Governor-General, all explanatory material, including the explanatory statement will be scrutinised by the Federal Executive Council Secretariat, who may ask for further information if there are defects or there is insufficient information.

7.31 Second, when the instrument and its accompanying explanatory statement are tabled in the Parliament, they come to the attention of parliamentarians and, in particular, the Senate Standing Committee on Regulations and Ordinances. Legislative instruments are subject to disallowance in the Parliament, except for the few that are specifically exempt from disallowance. If the explanatory statement does not sufficiently explain the legislative instrument, or it contains insufficient information to convince the Parliament of the merits of the instrument or a provision of it, the instrument or provision may be disallowed.

7.32 If an instrument (or a provision of an instrument) is disallowed, it ceases to have effect from the time of disallowance (section 42 of the LIA). If it repeals another instrument (or law or provision) that instrument (or law or provision) is revived (section 45 of the LIA). An instrument that is disallowed cannot be remade for 6 months unless the Parliament allows this to happen (section 48 of the LIA).

Use as extrinsic aid to interpretation

7.33 The explanatory statement must be accurate as it is a major source of information to help interpret the meaning of the provisions of the legislative instrument, if the meaning is unclear. It is important to be aware of the basic principles of statutory interpretation and the circumstances in which an explanatory statement could be used as a guide to interpreting provisions. A key provision is section 15AB of the *Acts Interpretation Act 1901* which describes the material that can be used by a court to interpret legislation (see Appendix C).

7.34 If the meaning of a provision is ambiguous or obscure, the explanatory statement will be a key source to assist in the interpretation of the provision. However, it cannot be used to change the interpretation of a statutory provision if the meaning of that provision is clear. While every effort must be made to produce a legislative instrument that has no uncertainties, an instrument may need to apply to a variety of circumstances in the future. The explanatory statement acts as additional support if it becomes unclear how (or whether) the instrument applies in those future circumstances.

Lodging an explanatory statement

7.35 The explanatory statement and its related legislative instrument should be lodged for registration with OLDP as soon as practicable after the instrument is made. OLDP will arrange for the documents to be tabled in each House of the Parliament after they are registered. See Chapter 9 for further information about lodging instruments and related material, including special arrangements for early lodgment of explanatory statements for instruments made by the Governor-General in Council.

7.36 If the explanatory statement is not lodged with OLDP before the related legislative instrument is delivered for tabling in the Parliament, the rule-making agency will have to deliver copies of the explanatory statement to the Parliament together with a written statement explaining why it was not provided to OLDP before the instrument was delivered to the Parliament for tabling. This may result in adverse comment from the Senate Standing Committee on Regulations and Ordinances. See Chapter 11 for further information.

Main points

- An explanatory statement must be prepared by the rule-maker for each legislative instrument made on or after 1 January 2005.
- An explanatory statement must include a description of any documents incorporated by reference, and a description of any consultation undertaken.
- When preparing the explanatory statement, the rule-making agency must take into account, as appropriate, the requirements of the Senate Standing Committee on Regulations and Ordinances and any suggestions made by the Executive Council Secretariat.
- The explanatory statement and the related legislative instrument must be lodged for registration with OLDP, preferably together.
- The explanatory statement will be tabled in each House of the Parliament. If the explanatory statement relates to a disallowable instrument it will be reviewed by the Senate Standing Committee on Regulations and Ordinances together with the instrument.

8 The Federal Register of Legislative Instruments

Introduction

8.1 The Federal Register of Legislative Instruments (FRLI) will be established on commencement of the LIA on 1 January 2005. The FRLI will be administered by the Office of Legislative Drafting and Publishing (OLDP) which will be responsible for registering instruments, compilations and explanatory statements lodged under Part 4 of the LIA. This chapter provides information about the FRLI, its contents, its authoritative status, how to access it and the circumstances in which it may be rectified to correct errors in a registered instrument or compilation.

What is the FRLI?

8.2 The FRLI is an authoritative database established under section 20 of the LIA. The FRLI will contain legislative instruments, explanatory statements for legislative instruments made on or after 1 January 2005 and compilations of legislative instruments in electronic form. The contents of the FRLI will be accessible via the Internet. These instruments and documents are required to be lodged and registered under Part 4 of the LIA.

8.3 The FRLI serves an important legal function in relation to legislative instruments. A new legislative instrument made on or after 1 January 2005 is not enforceable unless it is registered (section 31 of the LIA). An existing in force legislative instrument must also be lodged for registration by the relevant statutory deadline under section 29 of the LIA, otherwise it will cease to be enforceable and will be taken to have been repealed (section 32 of the LIA).

8.4 The FRLI also serves an important function in notifying the public about new legislative instruments made on or after 1 January 2005. Registration replaces the need to publish legislative instruments in the *Gazette*, where that is a current requirement under the enabling legislation for those instruments, and extends the registration function to all non-exempt legislative instruments. Under subsection 56(1) of the LIA, the registration of a new instrument on the FRLI will satisfy any existing requirement in the instrument's enabling legislation in force before 1 January 2005 to publish the text of the instrument, or particulars of its making, in the *Gazette*.

8.5 If new enabling provisions enacted on or after 1 January 2005 require gazettal action for a legislative instrument, that requirement is **in addition to** the requirement to register the instrument (subsection 56(2) of the LIA).

8.6 The FRLI will be a complete repository of legislative instruments after all existing instruments required to be registered under Division 3 of Part 4 of the LIA are backcaptured. This will take approximately 3 years after the FRLI is established on 1 January 2005.

FRLI contents

8.7 As noted, the FRLI will contain legislative instruments, explanatory statements for instruments made on or after 1 January 2005 and compilations of legislative instruments in electronic form.

Legislative instruments

8.8 OLDP will register all non-exempt legislative instruments (principal, amending, and repealing) made on or after 1 January 2005 and lodged by rule-makers. Legislative instruments will be classified into categories, for example, regulations, determinations, Proclamations, orders, Ordinances.

8.9 OLDP will register all non-exempt, in force legislative instruments (principal and amending) made before 1 January 2005 and lodged by rule-makers by the lodging deadlines in section 29 of the LIA. Legislative instruments will be classified into categories as mentioned above.

Explanatory statements

8.10 OLDP will register explanatory statements relating to legislative instruments made on or after 1 January 2005 and lodged by rule-makers.

8.11 There is no requirement to lodge or register explanatory statements relating to legislative instruments made before 1 January 2005. However, earlier explanatory statements relating to Statutory Rules that are already available on ComLaw (or SCALEplus) will be accessible from the FRLI.

8.12 Details about the lodging requirements for legislative instruments and explanatory statements are set out in Chapter 9. See also Chapter 7 in relation to explanatory statements.

Compilations of legislative instruments

8.13 OLDP will register compilations of legislative instruments in accordance with section 33 of the LIA. A compilation of a legislative instrument is a representation of the instrument as amended and in force at a particular time. A compilation of an instrument makes it easier to see what the instrument says because it consolidates the full text in one document and saves having to look at the principal and each amending instrument in the title.

8.14 A compilation is required to be registered as soon as practicable after amendments to an instrument commence, but not before the relevant instruments in the title have been registered.

8.15 Details about compilations and lodging requirements are set out in Chapter 10.

Supporting information

8.16 The FRLI will be supported by other useful, searchable fields of information about a registered instrument or registered compilation. For example, the supporting information about an instrument will include:

- date of making
- enabling legislation
- enabling provision
- a brief description of the instrument
- tabling dates
- parliamentary scrutiny information
- sunseting information.

8.17 Some of this information will be provided by the rule-making agency when lodging instruments for registration. OLDP will update this information as events affecting the instrument happen (eg, when the instrument is tabled, if it is fully or partially disallowed).

Accessing the FRLI

8.18 The FRLI has authoritative status within a wider system known as ComLaw. The FRLI has its own home page and is publicly accessible on the Internet at:

www.frli.gov.au

8.19 Each registered principal instrument will have a home page, from which access will be available to related amending instruments and compilations of instruments in that title.

8.20 FRLI documents and material will be clearly identified and distinct from the wider ComLaw material.

Authoritative status of FRLI

8.21 Section 22 of the LIA gives the electronic FRLI authoritative status. The FRLI is taken to be a complete and accurate record of all registered legislative instruments (section 22). This means that the FRLI can be relied on, including in court proceedings, and proof is not required about commencement of an instrument as registered in electronic form. The authoritative version of a legislative instrument will be in PDF form.

8.22 A registered compilation is also taken to be a complete and accurate record of the instrument as amended and in force at the date specified in the compilation, unless the contrary is proved. The authoritative version of a compilation will be in PDF form.

8.23 Instruments, explanatory statements and compilations can be printed from the FRLI for information.

Rectification of the FRLI

8.24 The LIA allows for the FRLI to be rectified to correct an error in the electronic form of the instrument or compilation as registered. This can only happen in the following circumstances.

8.25 For an instrument, the FRLI can be rectified if the error is in the electronic document lodged for registration (and registered), not in the original instrument as made.

8.26 For a compilation, the FRLI can be rectified if the error is in the electronic document in that it does not represent the state of the law that it purports to represent.

8.27 When an instrument or compilation is rectified, the FRLI will be annotated to explain the nature of the rectification, the date and time the rectification was made and the reason for it.

8.28 Rectification does not affect any right or privilege acquired, or impose or increase an obligation or liability incurred before the alteration was made (section 23 of the LIA).

8.29 While OLDP will have in place quality assurance measures to support the reliability and accuracy of the FRLI, it will be the responsibility of rule-making agencies to ensure that the electronic versions of the instruments they lodge for registration match the paper originals of the instruments made by the relevant rule-maker. This will help to ensure that erroneous instruments and compilations are not registered on the authoritative site.

8.30 Responsible agencies should check new instruments and compilations on the FRLI after registration and report any errors to OLDP as soon as possible.

Main points

- From 1 January 2005 the FRLI will be publicly accessible on the Internet at:
www.frli.gov.au
- The FRLI will contain legislative instruments, explanatory statements for legislative instruments made on and after 1 January 2005 and compilations of legislative instruments in electronic form.
- Registration on the FRLI replaces gazettal for legislative instruments, where that is a current requirement for those instruments, and extends the registration requirement to all non-exempt legislative instruments.
- New legislative instruments must be registered on the FRLI to be enforceable. Existing legislative instruments must be lodged for registration by the statutory deadlines to remain in force.
- The FRLI is authoritative and can be relied on in court proceedings.
- Under certain circumstances, the FRLI can be rectified to correct an error in the electronic form of the instrument or compilation as registered. Responsible agencies should check their new instruments and compilations after registration and report any errors to OLDP.

9 Lodging instruments for registration

A Legislative instruments made on or after 1 January 2005 (new instruments)

Introduction

9.1 The lodging requirements for new legislative instruments are set out in Division 2 of Part 4 of the LIA. Instruments lodged under this Division will be lodged with OLDP and registered by OLDP on the FRLI. The lodging requirements relate to legislative instruments made on or after 1 January 2005 and their related explanatory statements. Part A of this chapter provides information about the requirements for lodging both electronic versions of instruments and related material and hard copy versions of instruments, the effect of failing to lodge instruments, and how to lodge them, both electronically and in hard copy. It also provides information about lodging arrangements for instruments made by the Governor-General, lodging arrangements for electronic versions of instruments drafted by OLDP and dealing with urgent instruments.

Lodging electronic material

9.2 A rule-maker who makes a new legislative instrument on or after 1 January 2005 has a statutory responsibility to lodge the instrument and a related explanatory statement in electronic form with OLDP for registration on the FRLI. A new legislative instrument is not enforceable unless it is registered (section 31 of the LIA). This means that if it remains unregistered it cannot come into operation and will not, therefore, have any effect. Note that this also applies to a legislative instrument treated, under subsection 55(2) of the LIA, as if it were made on 1 January 2005.¹⁰

Using the electronic lodgment facility

9.3 The rule-making agency responsible for lodging the electronic versions of the instrument and explanatory statement must lodge them via the electronic lodgment facility established by OLDP. The relevant rule-making agency will be responsible for lodging electronic versions of instruments that they have drafted or arranged for someone other than OLDP to draft. (See paragraph 9.7 below for dealing with electronic versions of instruments drafted by OLDP.) Rule-making agencies will need to contact OLDP to arrange access to the electronic lodgment facility before they can use it. The electronic lodgment facility is accessible at:

¹⁰ If a legislative instrument (statutory rule or disallowable instrument) made before 1 January 2005 is required to be notified or published in full in the *Gazette* but that has not happened before 1 January 2005, the instrument is to be treated, for all purposes of the LIA, as if it had been made on 1 January 2005. This means that the instrument must be registered and previous obligations under the *Acts Interpretation Act 1901* and the *Statutory Rules Publication Act 1903* cease to apply.

<http://www.frli.gov.au/lodgment.nsf>

9.4 Detailed procedures for lodging instruments, explanatory statements and compilations via the electronic lodgment facility are set out in the *Lodging Agency's Guide to 'Lodging a Legislative Instrument for Registration on the Federal Register of Legislative Instruments'*. A *Quick Reference Guide* is also available. Both Guides are provided with this Handbook.

9.5 Instruments and explanatory statements must be lodged in OLDP's preferred formats, namely either Word or RTF (Rich Text Format). These formats aid the publication of instruments on the FRLI. If a rule-making agency cannot lodge the instrument and explanatory statement in either Word or RTF format it should contact OLDP on telephone (02) 6282 7348 as soon as possible.

9.6 At the time of lodging the instrument and explanatory statement, the rule-making agency is also required to complete certain fields of information about the instrument and to certify that the electronic version of the instrument reflects the full text of the instrument (including any handwritten annotations) as made by the rule-maker. The completion of certain fields of information and the certification is mandatory. A rule-making agency will not be able to lodge an instrument for registration unless the mandatory fields and the certification are completed. If someone other than OLDP has drafted the instrument, the rule-making agency must complete information about whether the instrument contains inappropriate gender-specific language (GSL). See Appendix D for a full list of the required fields of information. OLDP will capture this information in electronic form and use it to support the FRLI. The purpose of this information is to improve the public use of the FRLI and to assist OLDP in administering the FRLI.

Instruments drafted by OLDP

9.7 If an instrument made on or after 1 January 2005 has been drafted by OLDP, the rule-making agency must indicate that when lodging the electronic version of the explanatory statement and related information about the instrument. (Instruments drafted by OLDP include regulations, Ordinances of the non-self-governing Territories and Proclamations made by the Governor-General.) In completing the fields of information about an instrument, the rule-making agency must answer 'yes' to the question 'Will OLDP attach the legislative instrument?'. The agency will be required to provide the matter number for the instrument. This number will assist OLDP to locate and then attach the correct electronic version of the instrument to the lodgment. Note that the matter number is located in the footer on the front page of the hard copy of the instrument (for example, 0409434A-040824Z).

9.8 When the lodgment is received by OLDP, OLDP will find the electronic version of the legislative instrument, insert the making details and attach it to the lodgment. OLDP will then return the lodgment to the lodging agency with the electronic version of the instrument attached. To complete the lodgment the agency needs to check that the electronic version is the same in all respects as the signed instrument and certify the lodgment. See the *Quick Reference Guide* for further information.

Instruments made by the Governor-General

9.9 As OLDP drafts most legislative instruments made by the Governor-General (regulations, Ordinances of the non-self-governing Territories and Proclamations), the

arrangement in paragraph 9.7 will apply to lodging the electronic versions of the instruments made from 1 January 2005. For these instruments, rule-making agencies should lodge the related explanatory statement in electronic form before the instrument is signed. If urgent registration is required shortly after an Executive Council meeting, lodging agencies should clearly state this in the Comments field for the lodgment. Following the Executive Council meeting a certified true copy of each instrument that was made at the meeting will be returned to OLDP and a copy will be provided to the responsible agency. OLDP will then attach the electronic version of the instrument to the lodgment and return the lodgment to the lodging agency for certification.

9.10 If OLDP did not draft the legislative instrument signed by the Governor-General, the relevant rule-making agency responsible for drafting the instrument must lodge the electronic version of the instrument and the related explanatory statement after the instrument has been made. If the instrument is required to come into operation urgently, the rule-making agency should clearly state this in the Comments field for the lodgment.

Lodging hard copy material

9.11 At the same time, or as soon as practicable after lodging the instrument in electronic form, the rule-maker must also lodge the original legislative instrument (hard copy) with OLDP. (See paragraphs 9.18 to 9.21 below for dealing with hard copies of instruments signed by the Governor-General.) The signed legislative instrument will provide OLDP with proof about the making of the legislative instrument.

9.12 The hard copy of the instrument can be hand-delivered on a normal business day between 9.00am – 12.30pm and 1.30pm – 4.30pm each business day to the Federal Register of Legislative Instruments, 63 Denison Street, Deakin ACT 2600. If urgent, the hard copy may be faxed to OLDP on (02) 6282 7349.

9.13 OLDP will not assess and register the electronic version of the legislative instrument until it has received the hard copy proof of making of the instrument.

9.14 Section 25 of the LIA allows rule-makers to lodge alternative hard copy proof of making **if the original instrument cannot be lodged**. In descending order of preference these are:

- a certified true copy of the original legislative instrument; or
- the full text of the original legislative instrument as published in the *Gazette* or elsewhere; or
- such other evidence of the text of the original legislative instrument as the Attorney-General's Department (OLDP) considers acceptable.

9.15 A **certified true copy** of a legislative instrument means a copy of the instrument certified to be a true copy of the full text of the instrument as it was made. If an agency has access to the original instrument but cannot lodge it, the agency should be able to provide a hard copy version and certify that it is a true copy in every respect. The certified true copy of the instrument must also match the electronic version of the instrument lodged for registration because it is the electronic version of the instrument registered on the FRLI that is the law. The person certifying the true copy would be a person with relevant authority in terms of the

instrument (for example, a branch head or equivalent in the area of the agency that is responsible for the instrument). The wording of the certification may be **‘I certify that this is a true copy of the instrument as made’** and be signed and dated by the relevant certifier.

9.16 OLDP will retain the original, signed instrument, or other hard copy proof of making once an instrument is registered. Eventually, the hard copy versions of instruments will be sent to National Archives.

9.17 When an agency lodges the hard copy of the instrument with OLDP it will need to complete a hardcopy lodgment form (available from the FRLI lodgment site) and lodge it together with the original instrument with OLDP. OLDP will date and time-stamp that form, to acknowledge receipt of the hard copy, and will allocate a Hardcopy Lodgment Number for the lodgment. The form will be returned to the agency either by fax or with the person who lodged the hard copy. Where the signed original instrument is faxed to OLDP, the receipt will be faxed to the agency. This arrangement is designed to allow OLDP to properly manage the lodgment process for hard copies of instruments and agencies should retain the receipt as proof of lodgment of the hard copy. If an instrument is lodged for registration after the hard copy of the instrument has been provided to OLDP, the agency will need to include the hard copy lodgment in the lodgment details. If lodgment of the electronic instrument occurs before lodgment of the hard copy, a hardcopy lodgment number will not be required for the lodgment. If the hard copy is sourced by OLDP direct from the Executive Council Secretariat, this arrangement does not apply.

Instruments made by the Governor-General

9.18 The original, signed legislative instruments made by the Governor-General are retained by the Federal Executive Council Secretariat as part of its records. The rule-making agency will not, therefore, be able to lodge the original instruments with OLDP. However, arrangements have been made for the Secretariat to provide direct to OLDP a certified true copy of the original instruments made by the Governor-General on or after 1 January 2005. To enable the Secretariat to provide certified true copies of instruments, responsible agencies will need to provide the Secretariat with an original instrument for signing purposes and a copy for certification purposes.

9.19 If OLDP has drafted the instrument, OLDP will provide the original and a copy of the instrument for certification to the responsible agency for lodging with the Secretariat. The certification copy will replace the triplicate copy which is currently provided by OLDP.

9.20 If the responsible agency has drafted the legislative instrument, it will be responsible for ensuring that a certification copy is prepared and lodged with the Secretariat before the Executive Council meeting.

9.21 After signature at the Executive Council meeting, the Secretariat will retain the original, certify the certification copy and provide it direct to OLDP, and return a departmental copy to the agency as currently occurs. This means that the responsible agency will not have to lodge a hard copy of the signed instrument with OLDP because the Secretariat will already have provided the certified true copy to OLDP.

What happens after lodgment?

9.22 If an instrument is assessed by OLDP as acceptable for registration purposes, the instrument will be registered. Generally, instruments will be registered in order of priority, with routine instruments expected to be registered within 2 days after lodgment. If urgent registration of an instrument is required, the lodging agency must indicate this in the Comments fields of the lodgment. Lodging agencies can monitor the progress of their lodgments via the FRLI lodgment facility. Full instructions on checking on the status of a lodgment can be found in the *Quick Reference Guide* as well as the *Lodging Agency's Guide to 'Lodging a Legislative Instrument for Registration on the Federal Register of Legislative Instruments'*. As soon as an instrument is registered on the FRLI, an e-mail will be sent to the person who lodged the instrument for registration informing them that it has been registered and providing a link to the registered instrument on the FRLI.

9.23 Lodging agencies can also monitor the 'What's New' feature of the FRLI which will list the latest registrations. Agencies should check their instruments as registered and report any inaccuracies to OLDP on (02) 6282 7348.

9.24 If an instrument is assessed as unacceptable, OLDP will always contact the lodging officer to discuss the matter before rejecting the lodgment.

Urgent instruments

9.25 Generally, OLDP will assess and register legislative instruments during normal business hours (Monday to Friday between 8.30 am and 5 pm). However, if an instrument is required to be registered urgently, or out-of-hours because of exceptional circumstances, the rule-making agency will need to notify OLDP on (02) 6282 7348 as early as possible to make prior arrangements. This number will be forwarded to a mobile service outside normal business hours.

Main points — legislative instruments made on or after 1 January 2005

- Legislative instruments made on or after 1 January 2005 must be lodged, in electronic form, with OLDP for registration on the FRLI, otherwise they cannot be enforced.
- OLDP's preferred formats for lodged instruments are either Word or RTF.
- OLDP will attach available electronic versions of instruments it has drafted to lodgment material, for certification by the lodging agency.
- The FRLI electronic lodgment facility is accessible at:
<http://www.frli.gov.au/lodgment.nsf>
- Legislative instruments will be registered in order of priority, with routine instruments generally being registered within 2 days of being lodged.
- Special arrangements can be made with OLDP to register instruments urgently, or out-of-hours (telephone (02) 6282 7348).
- Original, hard copies of instruments must be lodged with OLDP at the Attorney-General's Department, Robert Garran Offices, National Circuit, Barton between 8.30 am and 5 pm, Monday to Friday. Agencies can fax instruments to (02) 6282 7349.
- The Federal Executive Council Secretariat will lodge directly with OLDP certified true copies of legislative instruments made by the Governor-General from 1 January 2005.
- Lodging agencies should check their instruments on the FRLI after registration and report any inaccuracies to OLDP on telephone (02) 6282 7348.

B Legislative instruments made before 1 January 2005 (existing instruments)

Introduction

9.26 The lodging requirements for existing (in force) legislative instruments caught by the LIA are set out in Division 3 of Part 4 of the LIA. Instruments will be lodged with OLDP and registered by OLDP on the FRLI. The lodging requirements relate to in force legislative instruments made before 1 January 2005. Part B of this chapter provides information about the requirements for lodging both electronic versions of existing instruments and hard copy versions of instruments, the effect of failing to lodge existing instruments, and how to lodge them both electronically and in hard copy. It also provides information about lodging deadlines for existing instruments, lodging arrangements for existing instruments made by the Governor-General, lodging arrangements for electronic versions of existing instruments drafted by OLDP, the 28-day rule and the early backcapture of certain legislative instruments.

Lodging electronic material

9.27 A rule-making agency must lodge for registration, in electronic form, an existing legislative instrument made before 1 January 2005 (section 29 of the LIA). Only legislative instruments that are still in force are required to be lodged for registration (section 28 of the LIA).¹¹ Except in the limited circumstances involving instruments connected with the collection of revenue (subsection 32(3) of the LIA), an instrument not lodged by the relevant lodging deadline in section 29 of the LIA will cease to be enforceable after the last lodging day and will be taken to have been repealed by the LIA (section 38 of the LIA).

Lodging deadlines

9.28 If an instrument made in the relevant period amends another legislative instrument (the principal legislative instrument), the principal legislative instrument and any other legislative instrument that amends the principal legislative instrument, must also be lodged in electronic form (at the same time). The lodging deadlines for existing instruments are as follows:

- **31 December 2005** — For instruments made between 1 January 2000 and 31 December 2004
- **31 December 2007** — For instruments made before 1 January 2000.

The 28-day rule

9.29 Note, however, that under section 29 of the LIA the lodging deadline for existing instruments can be brought forward under certain circumstances. If an amending instrument

¹¹ Note that it is not proposed to register instruments whose effect is spent before 1 January 2005, namely (spent) Proclamations that provided solely for the commencement of Acts and that had effect before 1 January 2005, and (spent) instruments that solely revoked or repealed other instruments before 1 January 2005.

made after 1 January 2005 is lodged and registered, the rule-maker must lodge the principal instrument being amended and any other amending instruments within 28 days (after registration), or longer period as the regulations provide. **It is proposed that the Legislative Instruments Regulations will prescribe a longer period of 6 months.** This will allow more time for agencies to locate and lodge their instruments, particularly instruments that have been frequently amended.

9.30 For instruments that have been frequently amended, agencies may choose to repeal and remake them in consolidated form before the applicable lodging deadline to make the backcapturing process easier to manage.

Early backcapture of certain instruments

9.31 Note that rule-making agencies are not required to lodge existing regulations or rules of court for registration because they will be automatically backcaptured by OLDP by 1 January 2005 as part of the early backcapture program. OLDP will do this in consultation with relevant rule-making agencies. In addition, OLDP has backcaptured a small number of other instruments over the past few years in consultation with responsible agencies.

Using the electronic lodgment facility

9.32 The rule-making agency must lodge the instrument or instruments via the electronic lodgment facility at:

<http://www.frli.gov.au/lodgment.nsf>

An agency will be responsible for lodging electronic versions of instruments it has drafted or arranged for someone other than OLDP to draft. (See paragraphs 9.36 to 9.38 below for dealing with electronic versions of instruments drafted by OLDP.) The electronic lodgment facility can be used to lodge a single instrument or multiple instruments in a title. Where there is more than one instrument to be lodged in a title, lodging agencies can easily copy the details from one lodgment to another and then update the lodgment information as necessary. Rule-making agencies will need to contact OLDP to arrange access to the electronic lodgment facility before they can use it.

9.33 Detailed procedures for lodging existing instruments via the electronic lodgment facility are contained in the *Lodging Agency's Guide to 'Lodging a Legislative Instrument for Registration on the Federal Register of Legislative Instruments'*. A *Quick Reference Guide* is also available. Both Guides are available with this Handbook.

9.34 Instruments should be lodged in OLDP's preferred formats, namely either Word or RTF (Rich Text Format). These formats aid the publication of instruments on the FRLI. If an agency does not have an instrument in either Word or RTF, and it would take considerable effort to generate the text, OLDP may accept a PDF image of the instrument for registration. Agencies should contact OLDP on telephone (02) 6282 7348 to discuss any difficulties with lodging instruments in the preferred formats.

9.35 At the time of lodging the instrument, the rule-making agency is also required to complete certain fields of information about the instrument and to certify that the electronic version of the instrument reflects the full text of the instrument (including any handwritten annotations) as made by the rule-maker. The completion of certain fields of information and

the certification is mandatory. A rule-making agency will not be able to lodge an instrument for registration unless the mandatory fields and the certification are completed. There are additional fields that apply to existing instruments including gazettal date (if applicable) and dates of tabling in both Houses of the Parliament. If someone other than OLDP has drafted the instrument, the rule-making agency must complete information about whether the instrument contains inappropriate gender-specific language (GSL). See Appendix D for a full list of the required fields of information for existing instruments. OLDP will capture this information in electronic form and use it to support the FRLI. The purpose of this information is to improve the public use of the FRLI and to assist OLDP in administering the FRLI.

Instruments drafted by OLDP

9.36 If an existing legislative instrument has been drafted by OLDP, it is possible that OLDP will still have the electronic version of the instrument stored on its server. It is unlikely, however, that OLDP holds electronic versions of instruments drafted before 1993. Before lodgment action, rule-making agencies can make enquiries about whether OLDP still has the electronic version of an instrument by e-mailing:

xxxxxxx@ag.gov.au

9.37 When lodging information about the instrument, a rule-making agency must indicate whether OLDP drafted the instrument. This would apply to instruments such as existing Ordinances of the non-self-governing Territories and (unspent) Proclamations made by the Governor-General. In completing the fields of information about an instrument, the rule-making agency must answer ‘yes’ to the question ‘Will OLDP attach the legislative instrument?’. The agency will be required to provide the matter number for the instrument. This number will assist OLDP to locate and then attach the correct electronic version of the instrument to the lodgment. Note that the matter number is located in the footer on the front page of the hard copy of the instrument (for example, 0409434A-040824Z).

9.38 When the lodgment is received by OLDP, OLDP will find the electronic version of the legislative instrument, insert the making details and attach it to the lodgment. OLDP will then return the lodgment to the lodging agency with the electronic version of the instrument attached. To complete the lodgment the agency needs to check that the electronic version is the same in all respects as the signed instrument and certify the lodgment. See the *Quick Reference Guide* for further information.

Instruments made by the Governor-General

9.39 As OLDP drafts most legislative instruments made by the Governor-General (including Ordinances of the non-self-governing Territories and Proclamations), the arrangement in paragraph 9.37 will apply to lodging the electronic versions of the instruments, except regulations, made before 1 January 2005.

9.40 If OLDP did not draft a legislative instrument signed by the Governor-General, the relevant rule-making agency responsible for drafting the instrument must lodge the electronic version of the instrument before the relevant lodging deadline.

Lodging hard copy material

9.41 At the same time, or as soon as practicable after lodging the instrument in electronic form, the rule-maker must also lodge the original legislative instrument (hard copy) with OLDP. (See paragraphs 9.46 to 9.48 below for dealing with hard copies of instruments signed by the Governor-General.) The signed legislative instrument will provide OLDP with proof about the making of the legislative instrument. As a general rule, OLDP will not assess and register the electronic version of the legislative instrument until it has received the hard copy proof of making of the instrument.

9.42 Section 29 of the LIA allows rule-makers to lodge alternative hard copy proof of making **if the original instrument cannot be lodged**. In descending order of preference these are:

- a certified true copy of the original legislative instrument; or
- the full text of the original legislative instrument as published in the *Gazette* or elsewhere; or
- such other evidence of the text of the original legislative instrument as the Attorney-General's Department (OLDP) considers acceptable.

9.43 See paragraph 9.15 above for information about providing a **certified true copy** of a legislative instrument. If an agency does not have the original or certified true copy, but the instrument was required to be published in full in the *Gazette* or otherwise, the agency should provide the *Gazette* or other published version (paragraph 29(3)(c) of the LIA). If an agency cannot provide acceptable hard copy evidence of the instrument as made, it may have to consider remaking the instrument.

9.44 Once an instrument has been registered, OLDP will retain the original, signed instrument, or other hard copy proof of making. Eventually, the hard copy versions of instruments will be sent to National Archives.

9.45 An agency that lodges the hard copy of the instrument before the electronic version is lodged will be given a Hardcopy Lodgment Number by OLDP. This hardcopy number must be noted when lodging the instrument electronically so that the 2 versions can be linked. See paragraph 9.17 above for further details.

Instruments made by the Governor-General

9.46 As noted previously, the original, signed legislative instruments made by the Governor-General are retained by the Federal Executive Council Secretariat as part of its records. The rule-making agency will not, therefore be able to lodge the original instruments with OLDP. However, the Secretariat may provide a certified true copy of an instrument if it receives a request directly from the relevant rule-making agency. This would allow the rule-making agency to lodge the certified true copy of the instrument with OLDP at the appropriate time.

9.47 Rule-making agencies will not be required to lodge certified true copies of existing regulations because OLDP already has triplicate copies of the regulations.

9.48 As noted previously, it is not proposed to backcapture Proclamations (including commencement Proclamations) made before 1 January 2005 if they are already spent. If an existing Proclamation is not spent, the responsible agency will need to lodge a hard copy with OLDP. However, as Proclamations are published in full in the *Gazette*, a copy of the instrument as published will be acceptable for lodging purposes.

What happens after lodgment?

9.49 If an instrument is assessed by OLDP as acceptable for registration purposes, the instrument will be registered. Generally, existing instruments will be registered in order of priority. Lodging agencies can monitor the progress of their lodgments via the FRLI lodgment facility. Full instructions on checking on the status of a lodgment can be found in the *Quick Reference Guide* as well as the *Lodging Agency's Guide to 'Lodging a Legislative Instrument for Registration on the Federal Register of Legislative Instruments'*. As soon as an instrument is registered on the FRLI, an e-mail will be sent to the person who lodged the instrument for registration informing them that it has been registered and providing a link to the registered instrument on the FRLI.

9.50 Lodging agencies can also monitor the 'What's New' feature of the FRLI which will list the latest registrations. Agencies should check their instruments as registered and report any inaccuracies to OLDP on telephone (02) 6282 7348.

9.51 If an instrument is assessed as unacceptable, OLDP will always contact the lodging officer to discuss the matter before rejecting the lodgment.

Main points — legislative instruments made before 1 January 2005

- OLDP will migrate existing regulations and court rules as part of the early backcapture program. Agencies will not have to lodge these.
- Existing legislative instruments made before 1 January 2005 must be lodged, in electronic form, with OLDP for registration by the statutory deadlines in section 29 of the LIA to remain in force.
- OLDP's preferred formats for lodged instruments are either Word or RTF.
- OLDP will attach available electronic versions of instruments it has drafted to lodgment material, for certification by the lodging agency.
- The FRLI electronic lodgment facility is accessible at:
<http://www.frli.gov.au/lodgment.nsf>
- Legislative instruments will be registered in order of priority.
- Original, hard copies of instruments must be lodged with OLDP at the Attorney-General's Department, Robert Garran Offices, National Circuit, Barton between 8.30 am and 5 pm, Monday to Friday. Agencies can fax instruments to (02) 6282 7349.
- Lodging agencies should check their instruments on the FRLI after registration and report any inaccuracies to OLDP on telephone (02) 6282 7348.

10 Compilations of legislative instruments

Introduction

10.1 The LIA gives new standing to compilations of legislative instruments. It requires that a new compilation be registered on the FRLI in electronic form as soon as practicable after amendments to an instrument have commenced. The LIA also provides that the Attorney-General's Department may require the rule-maker responsible for the instrument to lodge a compilation in the required form. This chapter contains information about the requirements for compilations under Division 5 of Part 4 of the LIA, sets out who is responsible for preparing compilations, provides guidance to agencies who want to prepare their own compilations, and provides information about how to lodge a compilation for registration.

What is a compilation?

10.2 A compilation of a legislative instrument is a representation of the instrument, as amended and in force at a particular time. A principal instrument may be amended by another instrument or by an Act. Having an up-to-date compilation of a legislative instrument means that a person does not have to look at the principal instrument and each amending instrument or amending Act to work out the full text of the instrument, because it is available in one compiled document. OLDP will register compilations of legislative instruments in accordance with section 33 of the LIA.

10.3 When an instrument is further amended by an Act or another legislative instrument, a new compilation must be created and registered in electronic form. This new compilation will represent the instrument as amended and in force at that time and any earlier compilation will become superseded. If an amending instrument is fully or partially disallowed, this will also be reflected in a new compilation of the instrument.

10.4 A registered compilation is taken to be a complete and accurate record of the instrument as amended and in force, unless the contrary is proved. The authoritative version of a compilation on the FRLI will be in PDF form.

Who is responsible for preparing compilations?

10.5 OLDP will continue to prepare compilations of legislative instrument it currently prepares on a budget-funded basis, namely, regulations, court rules, and Ordinances of the non-self-governing Territories. Where OLDP prepares the compilation, it will arrange for it to be registered on the FRLI, as soon as practicable after amendments commence. OLDP will automatically migrate compilations of the latest, in force regulations and court rules to the new FRLI on its establishment from 1 January 2005. (Compilations of the latest, in force Ordinances of the non-self-governing Territories will not be migrated to the FRLI until after the Ordinances have been backcaptured onto the FRLI.) This means that agencies responsible

for these particular instruments will not have to prepare and lodge compilations of these instruments for registration.

10.6 For other instruments, compilations will generally be the responsibility of the relevant rule-making agency. Section 34 of the LIA provides that the Attorney-General's Department may, by notice, require the rule-maker responsible for the instrument to lodge a compilation in the required form. Rule-making agencies can either prepare their own compilations in the appropriate form and arrange for their lodgment for registration as required, or arrange for OLDP to prepare and lodge these compilations on their behalf, on a billable basis. It is important for agencies to make an early decision about the approach they will take regarding the preparation of compilations of legislative instruments and inform OLDP accordingly to avoid receiving a formal notice under section 34.

10.7 If an agency chooses to prepare its own compilations, it will be responsible for checking both the accuracy and currency of the compilation as well as lodging it for registration with OLDP through the electronic lodgment facility (see below for lodging information). If a rule-making agency proposes to prepare and lodge its own compilations it should notify the Compilations and Printed Publication area of OLDP (telephone (02) 6203 9059) or send an e-mail to the following address in advance to discuss requirements and timing of lodgment of the compilations:

xxxxxxx@ag.gov.au

10.8 If an agency arranges for OLDP to prepare its compilations on a billable basis, OLDP will also arrange for the compilations to be registered on the FRLI at the appropriate time. OLDP already prepares compilations of some legislative instruments on behalf of agencies on a billable basis, and will continue to do this under the LIA regime as required. If a rule-making agency does not already have an arrangement in place, and wishes to arrange for OLDP to prepare and lodge its compilations, it should contact the Compilations and Printed Publication area in OLDP (details above) to discuss requirements and the cost of the compilations service.

10.9 If an agency gives OLDP instructions to draft an amending legislative instrument on a billable basis, OLDP will also prepare a compilation, unless the agency requests it not to. This will help to streamline the process of preparing, lodging and registering these compilations.

When must a compilation be lodged for registration?

10.10 The LIA requires that a compilation be registered as soon as practicable after amendments to an instrument commence, but not before the relevant principal instrument in the title has been registered. The practical effect of this is that, while a new amending instrument may be registered after 1 January 2005, a compilation incorporating that amendment is not required to be lodged for registration until the principal instrument has been backcaptured (see sections 33 and 34 of the LIA). If an agency wishes to have a new compilation registered as soon as possible after amendments commence, it should arrange with the Registration and Electronic Publication section in OLDP (telephone (02) 6282 7348) to have the relevant principal and amending instruments in the title backcaptured at an earlier time.

10.11 OLDP proposes to migrate the latest, in force, compilations of regulations and court rules to the FRLI on its establishment on 1 January 2005. This can be arranged because existing regulations and court rules will be part of the early backcapture program.

Contents of a compilation

10.12 The preparation of an accurate and reliable compilation takes some skill and understanding of legislative practice and editing. The form of a compilation required under the LIA follows the traditional form used by OLDP in preparing its compilations (see section 35 of the LIA). A compilation must include:

- the text of any amendments to ensure that it reflects the instrument as amended and in force (including any revisions as a result of disallowance of amendments, if any)
- a table of Acts or instruments by which each amendment was made to the principal instrument
- an amending history of each provision of the instrument, as amended
- the date the compilation was prepared
- such further information as is specified in the Legislative Instruments Regulations (if any).

10.13 As noted above, responsible agencies will have a choice of preparing and lodging their own compilations in the required form, or arranging for OLDP to prepare the compilation on a billable basis.

Guidance in preparing compilations

10.14 OLDP is developing a simple compilation template which agencies can use if they want to prepare their own compilations. The use of the template is not mandatory. When completed, the compilations template will be posted on the electronic lodgment facility and may be downloaded at:

<http://www.frli.gov.au/lodgment.nsf>

10.15 OLDP has also developed some general guidelines and a glossary of common terms used in compilations preparation to help agencies to prepare their own compilations if they wish to do that. The guidelines are at Appendix E and can be downloaded from the electronic lodgment facility.

What happens if the registered compilation is wrong?

10.16 If a registered compilation is found to be erroneous because the electronic text does not represent the state of the law it purports to represent, a new and corrected compilation will have to be prepared and registered under section 23 of the LIA. If a rule-making agency has been responsible for the erroneous compilation, it will have to prepare a correct version and lodge it with OLDP for registration. If a registered compilation is rectified, OLDP will

annotate the FRLI to explain the nature of the rectification, the time it was made and the reason for it.

10.17 The alteration of a compilation under these circumstances does not affect any right or privilege acquired or accrued, or any obligation or liability incurred before the alteration was made. This reinforces the importance of preparing and registering accurate and reliable compilations from the start.

Lodging compilations for registration

10.18 If an agency chooses to prepare a compilation of a legislative instrument, it will be responsible for the accuracy and currency of the compilation as well as for lodging the electronic version of the compilation for registration with OLDP via the electronic lodging facility at:

<http://www.frli.gov.au/lodgment.nsf>

The lodging facility is used for lodging electronic versions of legislative instruments and other documents for registration on the FRLI as required. Refer to the *Lodging Agency's Guide* and the *Quick Reference Guide* for further information about lodging compilations and using the lodging facility. Both Guides are available with this Handbook.

10.19 The agency will be required to complete brief details in the compilations lodgment screen and certify the accuracy of the compilation as prepared and lodged. These details include inserting:

- name of compilation
- date prepared
- incorporating amendments to (latest instrument number)
- name of agency that prepared the compilation
- Act under which the principal instrument is made
- number of pages in compilation
- contact details of lodging agency.

Refer to the *Lodging Agency's Guide* for further information.

10.20 As noted, before an agency prepares and lodges its own compilations it should notify the Compilations and Printed Publication area in OLDP to discuss requirements and timing of the lodgment:

telephone: (02) 6203 9059

e-mail:xxxxxxxx@ag.gov.au

Main points

- A new compilation must be registered on the FRLI as soon as practicable after amendments to an instrument have commenced.
- A registered compilation is taken to be a complete and accurate record of the instrument as amended and in force, unless the contrary is proved.
- The Attorney-General's Department may require the rule-maker responsible for the instrument to lodge a compilation in the required form. Compilations will generally be the responsibility of the relevant rule-makers (except for compilations of regulations, court rules and Ordinances of the non-self-governing Territories).
- OLDP can prepare and arrange for lodgment of compilations of legislative instruments on a billable basis. Make enquiries by phoning the Compilation and Printed Publication area on (02) 6203 9059 or by e-mail to:

xxxxxxx@ag.gov.au
- Agencies that propose to prepare their own compilation must meet the compilations requirements of the LIA (see paragraph 10.12) and should notify OLDP in advance.
- Agencies that prepare their own compilations must lodge them via the electronic lodgment facility at:

<http://www.frli.gov.au/lodgment.nsf>
- Agencies should check their compilations on the FRLI after they are registered and report any inaccuracies to OLDP on telephone (02) 6203 9059.

11 Parliamentary scrutiny of legislative instruments

Introduction

11.1 The purpose of this chapter is to set out the new arrangements under Part 5 of the LIA for tabling, scrutiny and disallowance of registered legislative instruments made on or after 1 January 2005. The chapter deals with how existing tabling and disallowance provisions are affected by the LIA, the new, shorter tabling period within which copies of registered instruments must be tabled, who will arrange tabling, what happens if a legislative instrument is not tabled, the arrangements for Parliamentary scrutiny of explanatory material and documents incorporated by reference, the scrutiny principles, the disallowance process, the effect of disallowance, exemptions from disallowance and the restrictions on remaking certain legislative instruments.

Standardising inconsistent tabling and disallowance provisions

11.2 The LIA provides a consistent tabling and disallowance regime to facilitate Parliamentary scrutiny of registered legislative instruments. The LIA substantially repeals and re-enacts those provisions of the *Acts Interpretation Act 1901* that relate to tabling and disallowance of regulations and disallowable instruments and extends their operation to all legislative instruments.

11.3 Copies of all registered legislative instruments made on or after the LIA comes into effect on 1 January 2005 must be tabled in each House of the Parliament within the period of 6 sitting days after registration. This is different from the existing requirement that disallowable instruments be tabled within 15 sitting days after they are made (not after they are gazetted). The LIA also gives the responsibility of arranging tabling of registered legislative instruments to the Attorney-General's Department (in practice, the Office of Legislative Drafting and Publishing).

11.4 The LIA also exempts some instruments from disallowance, although they are still required to be registered and tabled if they are legislative instruments.

11.5 From 1 January 2005, amended provisions in the *Acts Interpretation Act* will apply a new notification, tabling and disallowance regime to **disallowable non-legislative** instruments. Disallowable non-legislative instruments will be required to be tabled within the period of 6 sitting days after making (see paragraphs 11.18 to 11.20 below). See Appendix F for these new provisions for non-legislative instruments.

Effect on tabling and disallowance requirements before 1 January 2005

11.6 Section 57 of the LIA deals with the relationship between the new tabling and disallowance provisions for legislative instruments and the provisions that governed the tabling and disallowance of instruments before 1 January 2005. From 1 January 2005, complying with the new tabling requirements for a legislative instrument under the LIA constitutes full compliance with those requirements under provisions existing before 1 January 2005.

11.7 Similarly, the new disallowance regime in the LIA applies in relation to a legislative instrument rather than the disallowance regime existing in the *Acts Interpretation Act 1901* (AIA) before 1 January 2005

11.8 Before 1 January 2005 there were a number of enabling Acts that prescribed a different disallowance regime to that found in the AIA. Subsection 57(5) of the LIA allows the Legislative Instruments Regulations to prescribe particular disallowance provisions of that kind to continue to apply to different effect to the disallowance provisions in the LIA. Any special disallowance regimes will be prescribed in the Regulations late in 2004.

11.9 The LIA also provides that any additional tabling requirements in existing legislation for a legislative instrument continue to apply under the LIA. For example, if the enabling legislation requires that a report about the instrument be prepared and tabled in the Parliament at the same time as the instrument, that additional tabling requirement will apply under the LIA. If this is the case, the rule-making agency will need to tell OLDP of any additional tabling requirements for a legislative instrument lodged for registration, at the time of lodging, and make advance arrangements for the provision of additional material.

11.10 Section 57(3) of the LIA also provides that any particular consequences that follow tabling, non-tabling, disallowance or non-disallowance in existing provisions, will follow similarly under the LIA. If the enabling Act has specific consequences in these circumstances, the consequences remain in similar circumstances under the LIA.

11.11 If a legislative instrument was made and notified or published in the *Gazette* before 1 January 2005, the tabling requirements previously set out in Part XII of the *Acts Interpretation Act 1901* continue to apply (section 55 of the LIA).

11.12 If, however, the same legislative instrument was made before 1 January 2005, but has not been notified or published in the *Gazette* by that date, the instrument is treated for all purposes as if it had been made on 1 January 2005 and the LIA requirements in relation to tabling and disallowance will apply (section 55 of the LIA).

Arranging tabling of instruments and other material

11.13 The new tabling provisions will apply to all registered legislative instruments made on or after 1 January 2005. This includes legislative instruments required to be registered but exempt from disallowance under the LIA. Under section 38 of the LIA, the Attorney-General's Department is responsible for arranging the delivery of copies of registered legislative instruments and accompanying explanatory statements to each House of the Parliament for tabling **within 6 sitting days after the instrument is registered**. This is

intended to improve the administrative processes involved, and to avoid inadvertent failure to deliver documents for tabling.

11.14 In practice, the Office of Legislative Drafting and Publishing (OLDP) expects to arrange delivery of legislative instruments and related explanatory statements for tabling within **2 working days** after registration. OLDP will also deliver copies of both to the Senate Standing Committee on Regulations and Ordinances at the same time. In most cases, it is expected that tabling of the instrument will happen on the same or next sitting day after the instrument is lodged for tabling in that House.

11.15 Rule-making agencies must ensure that they simultaneously lodge the explanatory statement and the instrument with OLDP for registration so that, after registration, OLDP can deliver both to the Parliament for tabling together. If the agency does not do this, or cannot comply in time, OLDP may have to deliver the instrument for tabling without the explanatory statement. The agency will then have to deliver the required number of copies of the explanatory statement to the Parliament, together with a written statement explaining why the explanatory statement was not delivered to OLDP in time. If an explanatory statement is not prepared, it will not invalidate the instrument. However, it is possible that a notice of motion to disallow the instrument may be given. The explanatory statement will still need to be provided to OLDP for registration on the FRLI.

11.16 Rule-making agencies will also be required to provide OLDP with information about whether the instrument lodged for registration has special or additional tabling requirements (see paragraph 11.9).

11.17 After the instrument is lodged by OLDP with the Tabling Offices, the nominated contact officer in the rule-making agency will be able to monitor tabling details of their legislative instrument through the publicly accessible FRLI or through the authoritative records of the Parliament, the *Votes and Proceedings* (House of Representatives) or the *Journals of the Senate*.¹²

Arranging tabling of disallowable non-legislative instruments

11.18 As noted in paragraph 11.5 above, from 1 January 2005, notification, tabling and disallowance arrangements for disallowable non-legislative instruments will be covered by the new section 46B of the Acts Interpretation Act. These are essentially the same as the new requirements in the LIA for legislative instruments. The administering agency will be responsible for arranging notification or publication in the *Gazette* and tabling of the instrument.

11.19 The administering agency will continue to be responsible for delivering the relevant number of copies of a disallowable non-legislative instrument to the Parliament for tabling within 6 sitting days after the instrument is made. See Appendix G for details. If the disallowable non-legislative instrument is not tabled in both Houses of the Parliament in time, it ceases to have effect.

11.20 The administering agency can arrange for OLDP to gazette the instrument and deliver copies of a disallowable non-legislative instrument to the Parliament for tabling on the

¹² <http://www.aph.gov.au/house/info/votes/index.htm> and <http://www.aph.gov.au/Senate/work/journals/index.htm> respectively.

agency's behalf. OLDP will charge for these services. Further enquiries about arranging notification or publication in the *Gazette* and tabling of a disallowable non-legislative instrument should be directed to the Tabling and Parliamentary Scrutiny Officer on telephone (02) 6203 9008.

Scrutiny of documents incorporated by reference

11.21 As noted in Chapter 2, the LIA provides that legislative instruments may incorporate documents by reference in accordance with section 14. The benefit of incorporation by reference is that the incorporated document, which could be lengthy, is taken to be a part of the legislative instrument even though it is not required to be registered or tabled. However, an agency will be asked to provide information about any document incorporated by reference in the instrument when lodging the instrument for registration and OLDP will arrange for this information to be available on the FRLI. The explanatory statement tabled in Parliament will also describe any documents incorporated by reference, so this will draw the attention of Parliament to use of this mechanism.

11.22 If an agency gives OLDP an electronic copy of the document incorporated by reference, OLDP will arrange a link to the incorporated document from the instrument home page on the FRLI, if the size of the document and resources permit. Documents incorporated by reference will not be part of the FRLI itself.

11.23 While a legislative instrument is subject to disallowance, a House of the Parliament may require any document incorporated by reference into the instrument to be made available for inspection by that House at a particular place and time.

11.24 If a House of Parliament wants to inspect an incorporated document, it will contact the administering agency, not OLDP. The administering agency responsible for the legislative instrument must arrange for Parliament to inspect any document incorporated by reference if such a request is made.

What happens if a registered instrument is not tabled?

11.25 If a legislative instrument is not tabled in both Houses of the Parliament within 6 sitting days after registration, **it ceases to have effect**. The result is the same as if the instrument had been repealed with effect immediately after the sixth sitting day. In the unlikely event that this happens, the instrument will have to be remade (see also paragraph 11.48 below).

11.26 If a legislative instrument that repeals another legislative instrument or provision ceases to have effect because it was not tabled in accordance with subsection 38(1) of the LIA, the other legislative instrument or provision is revived from the time the repealing instrument ceases to have effect.

Parliamentary scrutiny of legislative instruments

11.27 Legislative instruments that are not exempt from disallowance, once tabled in the Senate, stand referred to the Senate Standing Committee on Regulations and Ordinances for

scrutiny and recommendation as to any further parliamentary action including disallowance. In this regard, Senate Standing Order 23(2) provides:

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

The Committee scrutinises each instrument to ensure that:

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

11.28 Non-legislative instruments that are declared to be subject to disallowance in their own enabling legislation are also referred to the Committee for scrutiny.

The disallowance process

11.29 Section 42 of the LIA sets out the circumstances in which either House of the Parliament may disallow a non-exempt registered legislative instrument that has been tabled in that House. The House and Senate Disallowable Instruments Lists on the Legislative Instruments webpage¹³ are informal lists of instruments for which disallowance motions can be moved. The circumstances are as follows.

Active disallowance

11.30 If a notice of motion to disallow a legislative instrument or provision of an instrument is given in either House within 15 sitting days after tabling of the instrument in that House, and the House passes the disallowance motion within 15 sitting days after giving the notice, the instrument or provision the subject of the notice of motion ceases to have effect immediately.

Passive disallowance

11.31 If, at the end of 15 sitting days of the House in which the notice was given, the notice has not been withdrawn, or the motion has been called, moved and seconded but not otherwise disposed of, the legislative instrument or provision is taken to have been disallowed and ceases to have effect.

¹³ http://www.aph.gov.au/leg_instruments/index.htm.

If an election intervenes in disallowance period

11.32 Section 42 also sets out what happens if an election intervenes in the disallowance period, after a notice of motion to disallow has been given but before the notice has been dealt with. If an election is called before a disallowance motion is passed or otherwise finalised, action on the disallowance motion is cancelled and the legislative instrument is taken to have been tabled in that House on the first sitting day of that House in the new Parliament. The 15 sitting days period in which a notice of motion to disallow must be given commences again from that time. This enables the House in which the original notice was given to decide whether the legislative instrument should continue to operate or should be disallowed.

11.33 A list of the notices of motion to disallow legislative instruments can be found through the Disallowance Alert on the Parliament's Legislative Instruments webpage.¹⁴

What happens if an instrument or provision is disallowed?

11.34 Section 45 of the LIA provides that if a legislative instrument or provision of an instrument ceases to operate at a particular time because it has been disallowed, the effect is the same as if the instrument or provision had been repealed with effect from that time.

11.35 If a legislative instrument or provision which ceases to have effect under Part 5 of the LIA had the effect of repealing a legislative instrument or law or provision of a legislative instrument or law, the previous legislative instrument, law or provision is revived from the time the repealing instrument ceases to have effect.

11.36 Rule-making agencies will be able to monitor any disallowance of their legislative instrument through the publicly accessible FRLI or through the authoritative records of the Parliament, the *Votes and Proceedings* (House of Representatives) or *Journals of the Senate*.

Exemptions from disallowance

11.37 Section 44 of the LIA provides that certain legislative instruments are exempt from disallowance under the LIA. A legislative instrument that is exempt from disallowance under the LIA, but is required to be registered, will still have to be tabled in the Parliament. As noted above, OLDP will arrange for this to happen after the instrument is registered.

11.38 Instruments made on or after 1 January 2005 under enabling legislation that facilitates an intergovernmental body or scheme involving the Commonwealth and one or more States, and authorises the instrument to be made by or for the body or scheme, are not subject to disallowance under the LIA unless the instrument is a regulation or the enabling (or other) legislation has the effect that the instrument is disallowable.

11.39 Section 44 includes a table of instruments that are exempt from disallowance under the LIA (see Appendix H). However, it does not exempt an instrument (or a provision of an instrument) that is already subject to disallowance under its enabling legislation or under some other Act. The table provides for further exemptions from disallowance to be prescribed by the Legislative Instruments Regulations.

¹⁴ http://www.aph.gov.au/leg_instruments/index.htm.

11.40 The LIA overrides special disallowance regimes unless these are preserved by Legislative Instruments Regulations made under section 57 of the LIA.

11.41 Rule-making agencies will be required to provide OLDP with lodging information about a legislative instrument, including whether it is exempt from disallowance or is a special disallowance regime preserved under the Legislative Instruments Regulations. See also paragraph 11.8.

11.42 Future additional instruments will be included in the disallowance exemption table only if exceptional policy circumstances exist. A formal request from the responsible Minister to the Attorney-General will be required before the proposed exemption can be considered. Enquiries about exemptions should be initially directed to the Civil Justice Division of the Attorney-General's Department on telephone (02) 6250 6364.

Prohibition on remaking legislative instruments the same in substance

11.43 The LIA prohibits the remaking of a legislative instrument, the same in substance as the original instrument, within certain periods unless certain conditions exist (see below). Legislative instruments made in contravention of the prohibition have no effect.

Not to be remade while required to be tabled

11.44 Section 46 of the LIA prohibits the making of a legislative instrument, the same in substance as the original registered instrument, within a period from registration until **7 days** after:

- the day the original legislative instrument was tabled in both Houses; or
- if the original instrument was tabled in both Houses on different days, the later of those days; or
- the last day on which the tabling requirement could have been satisfied

unless both Houses of the Parliament approve by resolution the making of an instrument the same in substance.

Not to be remade while subject to disallowance

11.45 If a notice of motion to disallow a legislative instrument or provision of an instrument has been given within 15 sitting days after tabling, section 47 of the LIA prohibits the making of a legislative instrument, the same in substance as the original instrument unless:

- the notice has been withdrawn; or
- the instrument or provision is taken to have been disallowed because of the passage of time under subsection 42(2)); or
- the motion has been withdrawn or otherwise disposed of; or

- an election has intervened in the disallowance period causing the instrument to be taken to be tabled in the House in which the notice of motion for disallowance was originally given on the first sitting day of that House in the new Parliament.

11.46 If an election has intervened in the disallowance period causing the instrument to be taken to be tabled on the first sitting day of the new Parliament, and a notice of motion to disallow the legislative instrument or provision has been given within 15 sitting days of that day, a legislative instrument, the same in substance, must not be remade unless:

- the notice has been withdrawn; or
- the instrument or provision is taken to have been disallowed because of the passage of time under subsection 42(2)); or
- the motion has been withdrawn or otherwise disposed of; or
- another election has intervened in the disallowance period causing the instrument to be deemed to be tabled on the first sitting day of the new Parliament.

11.47 Section 47 does not limit the operation of:

- section 46 (legislative instruments not to be remade while required to be tabled); or
- section 48 (disallowed legislative instruments not to be remade unless disallowance resolution rescinded or House approves).

Disallowed legislative instruments not to be remade unless disallowance resolution rescinded or House approves

11.48 Under section 48 of the LIA, a disallowed legislative instrument or provision of an instrument cannot be remade in substantially the same form within 6 months after the day the instrument, or provision of an instrument, was disallowed unless:

- if the disallowance was by resolution, the resolution has been rescinded by the House of Parliament which passed it; or
- if the disallowance was taken to have occurred, the House in which the notice of motion to disallow was given by resolution approves remaking in substantially the same form.

Main points

- OLDP will arrange the lodging for tabling of registered legislative instruments and accompanying explanatory statements, generally 2 working days after registration.
- The rule-making agency will be responsible for arranging tabling of the explanatory statement and providing reasons to the Parliament if it is not delivered to OLDP in time for it to be lodged for tabling with the legislative instrument.
- A registered legislative instrument that is not tabled within time will cease to have effect and this may cause the revival of any instrument or provision repealed by the ceased legislative instrument.
- The rule-making agency is responsible for tabling **non-legislative instruments** within 6 sitting days after the instrument is made, but OLDP can arrange this service for a charge.
- The rule-making agency is responsible for arranging for Parliament to inspect any document incorporated by reference in a legislative instrument if Parliament requests such inspection.
- Following tabling of an instrument, a House of Parliament may disallow a non-exempt registered legislative instrument within 15 sitting days after giving a notice of motion to disallow.
- An instrument (or provision) that is disallowed will cease to have effect and this may cause the revival of any instrument (or provision) repealed by the disallowed legislative instrument (or provision).
- There is a prohibition on remaking a legislative instrument, the same in substance as the original instrument, within certain periods unless certain conditions exist.
- Relevant contact numbers for further information about tabling and disallowance are:
 - OLDP Tabling and Parliamentary Scrutiny Officer: (02) 6203 9008
 - Papers Officer, House of Representatives Table Office: (02) 6277 4800
 - Publications Officer, Senate Table Office: (02) 6277 3037
 - Senate Standing Committee on Regulations and Ordinances: (02) 6277 3066

12 Sunsetting of legislative instruments

Introduction

12.1 Part 6 of the LIA provides for a comprehensive sunsetting regime (or automatic ceasing after 10 years) for all non-exempt legislative instruments. The aim of sunsetting is to ensure that legislative instruments are reviewed regularly, retained only if needed, and kept up-to-date. This chapter provides information about how the sunsetting regime will work, exemptions from sunsetting, the circumstances in which sunsetting may be deferred for a short term, the circumstances in which an instrument may be continued in force for another 10 years by Parliamentary resolution, and how to prepare for sunsetting.

How will sunsetting work?

12.2 The sunsetting regime is based on sunsetting (or automatic ceasing) of a principal legislative instrument, together with any amendments made to it, after 10 years on either a 1 April or 1 October. The default position is that a non-exempt legislative instrument will sunset on its sunsetting date. The instrument will be treated as though it has been repealed from then. The LIA also provides for limited exemptions from sunsetting, for the short-term deferral of sunsetting of an instrument in limited circumstances and for the continuation of an instrument for a further 10 years subject to Parliamentary resolution (see paragraph 12.17).

12.3 The calculation of sunsetting dates applying to particular legislative instruments can be complex and requires careful consideration. OLDP can provide written advice about sunsetting of particular instruments to responsible agencies on request (billable basis). In general, however, the sunsetting date for a legislative instrument will depend on whether the instrument was made before or after 1 January 2005 (the commencement date of the LIA).

In force instruments made before 1 January 2005

12.4 The sunsetting day is the first 1 April or 1 October that falls on or after the tenth anniversary of the day before which the instrument must be lodged for registration (see section 29 of the LIA for lodging deadlines). Any amendments to a principal instrument will sunset on the same day as the principal instrument (subsection 50(1) of the LIA).

Example A

Principal instrument made (and never amended):	1990
Lodging deadline:	31 December 2007
Proposed sunset date:	1 April 2018

Example B

Principal instrument made:	1990
Amended by instrument made:	2004
Lodging deadline for both:	31 December 2005
Proposed sunset date for both:	1 April 2016

12.5 The lodging deadline for an instrument depends on when the instrument was made, and whether it has been amended by an instrument or amending provisions made before or after 1 January 2005. OLDP can provide advice about lodging deadlines of particular instruments to responsible agencies on request.

In force instruments made on or after 1 January 2005

12.6 The sunset day is the first 1 April or 1 October that falls on or after the tenth anniversary of the commencement day of the principal legislative instrument. Any amendments to the principal instrument will sunset on the same day as the principal instrument (subsection 50(2) of the LIA).

Example C

Principal instrument made (and never amended):	2005 (commences 1 June 2005)
Proposed sunset date:	1 October 2015

Example D

Principal instrument made:	2008 (commences 1 February 2008)
Amended by instrument made:	2010
Proposed sunset date for both:	1 April 2018

Remade instruments

12.7 If an instrument is remade (and not just amended or added to by another instrument), it sunsets in the normal way for instruments made on or after 1 January 2005. Therefore, it is due to sunset on the first 1 April or 1 October after the tenth anniversary of its commencement.

12.8 A principal instrument and its amending provisions that are caught by the sunset provisions of the LIA can be repealed at any time before the proposed sunset day.

Exemptions from sunset

12.9 Section 54 of the LIA lists instruments that are exempt from the sunset provisions of the LIA (see Appendix I). The inclusion of an instrument in the table does not imply that every instrument of that kind is a legislative instrument. The exemptions include legislative instruments made under enabling legislation (not being the *Corporations Act 2001*) that facilitate 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 or for the body or scheme (subsection 54(1) of the LIA).

12.10 The Legislative Instruments Regulations may also prescribe additional instruments that are exempt from sunsetting under the LIA.

12.11 Future additional instruments will only be included in the sunsetting exemption table if exceptional policy circumstances exist. A formal request from the responsible Minister to the Attorney-General will be required before the proposed exemption can be considered. Enquiries about exemptions should be initially directed to the Civil Justice Division of the Attorney-General's Department on telephone (02) 6250 6364.

Deferral of sunsetting

12.12 Under section 51 of the LIA, the Attorney-General may issue a certificate deferring sunsetting of an instrument in limited circumstances. These circumstances include if the Attorney-General is satisfied, on written application by the rule-maker, that it is likely that the instrument will cease to have effect within 12 months after the proposed sunsetting date, or a substituted instrument will not be completed in time because of unforeseen or unavoidable reasons or because of prorogation of the Parliament.

12.13 Any such deferral of sunsetting would be until the 1 April or 1 October (whichever the Attorney-General specifies is more appropriate) following the proposed sunsetting day. Reasons for the certificate must also be included.

12.14 The certificate is a legislative instrument that must be registered on the FRLI and a copy must be tabled in each House of Parliament within 6 sitting days after issue.

Parliamentary resolution to continue instrument in force

12.15 The Attorney-General must arrange to table in each House of Parliament a list of instruments and provisions of instruments that are due to sunset 18 months before the proposed sunsetting day.

12.16 OLDPA will send a copy of the sunsetting list to the rule-making agencies responsible for each of the instruments as soon as practicable after the list is tabled in the Parliament.

12.17 Either House of Parliament may pass a resolution within 6 months after tabling of the list indicating which instruments and provisions of instruments should continue in force. Instruments and provisions of instruments the subject of the resolution continue in force for a further 10 years as if they were remade from the sunsetting date.

How to prepare for sunsetting

12.18 Since the first sunsetting dates will not happen for more than 10 years, there is plenty of time for rule-making agencies to prepare for the automatic repeal of their instruments. This preparation should include reviewing their existing instruments and making decisions about which instruments should automatically be sunsetted because they no longer serve a continuing purpose and which instruments should be repealed before their sunsetting date and remade in an updated form.

12.19 If agencies decide to allow their instruments to sunset automatically, they need take no further action. However, agencies should not wait until the last 18 months before they review their instruments and decide whether some should be repealed, remade in updated form and continued in force. Agencies who propose to repeal existing instruments and remake them in updated form will need sufficient time to seek the necessary approvals and draft replacement instruments. Agencies who leave these matters until the last 18 months risk having their instruments sunset by default.

12.20 OLDP will monitor changes in the Administrative Arrangements Order from the time a legislative instrument is registered under the LIA and update the information supporting the FRLI as required to assist in preparing and tabling sunseting lists and distributing the lists to the correct rule-making agencies. More advice about preparing for sunseting will be provided to rule-making agencies before the sunseting lists are tabled.

12.21 Rule-making agencies should ensure that they monitor their registered instruments and the supporting information about those instruments (including responsible agency) and notify OLDP immediately if they become aware that the information is out of date.

Main points

- The aim of sunseting is to ensure that legislative instruments are reviewed regularly, retained only if needed, and kept up-to-date.
- The default position is that a non-exempt legislative instrument will sunset after 10 years on either a 1 April or 1 October. The instrument will be treated as though it is repealed from then.
- Amendments to a principal instrument will sunset on the same day as the principal instrument.
- The sunseting date for a legislative instrument will depend on whether the instrument is made before or after 1 January 2005. If in doubt, contact OLDP for written advice.
- The Attorney-General may issue a certificate deferring the sunseting date of an instrument for a short period, in limited circumstances.
- A list of instruments and provisions of instruments due to sunset will be tabled in the Parliament 18 months before the sunseting date. The list will be copied to responsible rule-making agencies.
- Either House of Parliament may, by resolution passed within 6 months after tabling of the sunseting list, indicate which instruments and provisions should continue in force (for a further 10 years).
- Rule-making agencies should monitor their registered instruments and review them well before sunseting.

Appendix A

Legislative Instruments Act 2003, section 7

7 Instruments declared not to be legislative instruments

- (1) An instrument is not a legislative instrument for the purposes of this Act if:
- (a) it is included in the table below; or
 - (b) it is made under an Act or a disallowable legislative instrument:
 - (i) that first authorised the making of the first-mentioned instrument on or after the commencing day; and
 - (ii) that declared the first-mentioned instrument not to be a legislative instrument for the purposes of this Act.

Instruments that are not legislative instruments for the purposes of the Act

Item	Particulars of instrument
1	Instruments (other than regulations and other instruments that, immediately before the commencing day, are disallowable) made under the <i>Air Navigation Act 1920</i> , or under the regulations made under that Act, relating to aviation security
2	Commissioner's orders under section 38 of the <i>Australian Federal Police Act 1979</i>
4	Guidelines under section 8A of the <i>Australian Security Intelligence Organisation Act 1979</i>
5	Ministerial directions to: <ul style="list-style-type: none">(a) a Commonwealth company within the meaning of section 34 of the <i>Commonwealth Authorities and Companies Act 1997</i>; or(b) a Commonwealth authority within the meaning of section 7 of that Act; other than any such direction: <ul style="list-style-type: none">(c) that comprises a notification under section 28 or 43 of that Act; or(d) that is required to be laid before the Houses of the Parliament under the legislation that authorises the giving of the directions; or(e) the full text of which is required to be published in the <i>Gazette</i> or elsewhere under that legislation

Instruments that are not legislative instruments for the purposes of the Act

Item	Particulars of instrument
6	<p>Instruments (other than regulations and other instruments that, immediately before the commencing day, are disallowable) that are made under the <i>Corporations Act 2001</i> and that, in relation to:</p> <p>(a) a specified person (other than a person specified by membership of a class) or to persons associated with that specified person; or</p> <p>(b) a specified facility (other than a facility specified by membership of a class); or</p> <p>(c) a specified financial product (other than a product specified by membership of a class);</p> <p>have the effect of:</p> <p>(d) exempting the person, facility or product from the rules under the Act; or</p> <p>(e) modifying the operation of the rules under the Act in their application to the person, facility or product</p>
7	Determinations made under section 273 of the <i>Customs Act 1901</i>
8	Instructions under section 9A of the <i>Defence Act 1903</i>
9	Determinations made under section 58B or 58H of the <i>Defence Act 1903</i>
10	Legal Services Directions issued under paragraph 55ZF(1)(b) of the <i>Judiciary Act 1903</i>
11	Schedules to the Murray-Darling Basin Agreement made under clause 50 or 134 of that Agreement (being the Agreement approved under section 5 of the <i>Murray-Darling Basin Act 1993</i>)
12	Designations, or revocations of designations, made under section 11 of the <i>Payment Systems (Regulation) Act 1998</i>
13	Instruments made under section 72 of the <i>Public Service Act 1999</i>
14	<p>Laws of a self-governing Territory, other than:</p> <p>(a) Ordinances made under subsection 12(1) of the <i>Seat of Government (Administration) Act 1910</i> that have not become enactments (as defined in the <i>Australian Capital Territory (Self-Government) Act 1988</i>); or</p> <p>(b) Ordinances made under section 27 of the <i>Norfolk Island Act 1979</i>; or</p> <p>(c) rules, regulations and by-laws made under Ordinances described in paragraph (a) or (b)</p>

Instruments that are not legislative instruments for the purposes of the Act

Item	Particulars of instrument
15	Instruments (other than regulations and other instruments that, immediately before the commencing day, are disallowable) that are made under the <i>Superannuation Industry (Supervision) Act 1993</i> and that, in relation to: <ul style="list-style-type: none"> (a) a specified person (other than a person specified by membership of a class) or to persons associated with that specified person; or (b) a specified financial product (other than a product specified by membership of a class); have the effect of: <ul style="list-style-type: none"> (c) exempting the person or product from the rules under the Act; or (d) modifying the operation of the rules under the Act in their application to the person or product
16	Private rulings given under the <i>Taxation Administration Act 1953</i>
17	Public rulings made under the <i>Taxation Administration Act 1953</i>
18	Awards and agreements under the <i>Workplace Relations Act 1996</i>
19	Orders made by the Australian Industrial Relations Commission in proceedings under the <i>Workplace Relations Act 1996</i>
20	Instruments that relate to terms and conditions of employment of persons, or to the terms and conditions of service of persons as members or special members of the Australian Federal Police, other than: <ul style="list-style-type: none"> (a) regulations; or (b) instruments that are declared to be disallowable instruments under the enabling legislation; or (c) instruments that are made under section 23 or subsection 24(3) of the <i>Public Service Act 1999</i>; or (d) instruments that are made under section 23 or subsection 24(3) of the <i>Parliamentary Service Act 1999</i>; or (e) instruments that are required to be laid before the Parliament under subsection 7(7) of the <i>Remuneration Tribunal Act 1973</i>
21	Instruments that comprise, in their entirety, directions to delegates
22	Laws of a State or self-governing Territory that apply in a non-self-governing Territory and instruments made under those laws
23	Ordinances of the former Colony of Singapore that apply in a non-self-governing Territory and instruments made under those Ordinances
24	Instruments that are prescribed by the regulations for the purposes of this table

- (2) The inclusion of a kind of instrument in the table in subsection (1) does not imply that an instrument of that kind would be a legislative instrument if it were not included in the table.

- (3) If:
- (a) the making of an instrument is authorised before the commencing day; and
 - (b) the instrument is of a kind included in the table in subsection (1) or is not otherwise a legislative instrument; and
 - (c) the instrument is required:
 - (i) to have its text, or particulars of its making, published in the *Gazette*; or
 - (ii) to be laid before either or both of the Houses of the Parliament without provision for its disallowance;
- that requirement is unaffected by this Act whether the instrument is made before, on or after the commencing day.

Appendix B

Senate Standing Committee on Regulations and Ordinances — Terms of Reference

The functions of the Senate Standing Committee on Regulations and Ordinances, set out in Senate Standing Order 23, are to scrutinise all disallowable instruments of delegated legislation to ensure their compliance with non-partisan principles of personal rights and parliamentary propriety. The Committee engages in technical legislative scrutiny. It does not examine the policy merits of delegated legislation. Rather, it applies parliamentary standards to ensure the highest possible quality of delegated legislation, supported by its power to recommend to the Senate that a particular instrument, or a discrete provision in an instrument, be disallowed.¹⁵

The general requirements of personal rights and parliamentary propriety under which the Committee operates are refined by the Standing Orders into 4 principles. The following is a general guide to the manner in which the Committee interprets the principles.

Principle A — Is delegated legislation in accordance with the statute?

- Must be in accordance with the parent Act
- Must not be contrary to the ‘spirit’ of the authorising legislation
- Subdelegated legislation must be subject to tabling/disallowance
- Must have certainty of meaning and operation
- Must not be *ultra vires* or beyond the authority delegated.

Principle B — Does delegated legislation trespass unduly on personal rights and liberties?

- Must not lessen the operation of provisions protecting human rights
- Sensitivity must be shown in relation to personal matters
- Privacy must be protected
- Property rights, if interfered with, must be adequately protected
- Excessive fees or penalties should be avoided

¹⁵ The Committee is advised by an independent legal adviser, who examines and reports on every instrument of delegated legislation, comments on all correspondence received from Ministers, writes special reports and attends meetings of the Committee when required.

The Committee makes special statements to the Senate on matters arising out of its scrutiny of delegated legislation and tables an Annual Report on the work of the Committee during a financial year. The secretariat also produces the Procedure Office publication, the *Delegated Legislation Monitor*, which is the only reference source for all disallowable instruments of delegated legislation tabled in the Parliament. The *Monitor* is produced at the end of each sitting week and includes a brief description and details of each instrument.

- Criminal offences should normally provide a defence of reasonable excuse
- Onus of proof should normally be on the Prosecutor
- Retrospectivity should not disadvantage any one except the Commonwealth.

Principle C — Does delegated legislation make rights unduly dependent on administrative decisions which are not subject to independent review of their merits?

- Concern about delegated legislation affecting the right to practice a trade or profession or to carry on a business or otherwise affecting livelihood
- Decision making criteria should be objectively formulated
- Express statement required that power must be exercised reasonably
- Review on merits by independent body should be provided
- Decision should be notified within 28 days
- Notice of appeal rights and availability of statement of reasons for decision should be given to affected person.

Principle D — Does the delegated legislation contain matters more appropriate for parliamentary enactment?

- Legislation which fundamentally changes the law
- Legislation which is lengthy and complex
- Legislation which intended to bring about radical changes in relationships or community attitudes
- Legislation which is part of a uniform laws scheme.

Further information, including information on the disallowance process, can be found at:

http://www.aph.gov.au/senate/committee/regord_ctte/index.htm

Appendix C

Acts Interpretation Act 1901, section 15AB

15AB Use of extrinsic material in the interpretation of an Act

- (1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
 - (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
 - (b) to determine the meaning of the provision when:
 - (i) the provision is ambiguous or obscure; or
 - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.
- (2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:
 - (a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;
 - (b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;
 - (c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;
 - (d) any treaty or other international agreement that is referred to in the Act;
 - (e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;
 - (f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;
 - (g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and
 - (h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.

- (3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:
 - (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and
 - (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

Appendix D

Lodgment — Description of meta data fields

Lodgment type: Legislative Instrument — New and Backcapture

Section 1 — Details (ie. Instrument Details)

Purpose: enables the lodging agency to record details about the instrument being lodged.

Field name	Description
Name (mandatory)	Name of the Instrument being lodged. Name must be entered in full (eg. ABC Regulations 2005; ABC Amendment Determination No. 1 (2005)).
Brief description (mandatory)	A brief description of the instrument being lodged.
Date of making (mandatory)	The date the instrument was made ie. signed, sealed or otherwise endorsed by the person or body empowered to make it. Required format: dd/mm/yyyy
Optional series no.	Some instruments are known by their own unique numbering system. For example: Statutory Rules, SR 2004 No. 123.

Section 2 — Enabling (ie. Enabling Information/Effect of Instrument)

Purpose: enables the lodging agency to record details of the legislation that enabled the making of the instrument as well as the legislation that is affected by the instrument.

Field name	Description
Enabling legislation (may be multiple) (mandatory)	The name(s) of the legislation that contain(s) the power that allows the instrument to be made.
Enabling provision/s (may be multiple)	The specific provision or provisions of the enabling legislation under which the instrument is made. Required format: s 2; ss 2(3) and (4); r 6; rr 6(2) and (4)
Legislation type	Tick this box if the instrument being lodged is a principal instrument.
Effect of Instrument (mandatory if either amending or repealing box ticked)	What is the effect of the instrument (eg. amending and/or repealing)? Note: An instrument can be a principal instrument but it can also be amending and repealing in its effect. All effects of the instrument need to be recorded — this includes any citation change, or any saving or transitional provisions as a result of the repeal of an instrument.

Section 3 — Tabling* (ie. Tabling/Disallowance/Sunsetting)

Purpose: Enables lodging agency to record special tabling, disallowance, and sunseting requirements in relation to the instrument being lodged.

Field name	Description
<p>Tabling Is there a special tabling period for the instrument?</p>	<p>All new instruments that are registered must be tabled in both Houses of the Parliament. Under the <i>Legislative Instruments Act 2003</i> (LIA) this is required to be done within 6 sitting days of the instrument being registered. There are, however, a few instruments for which a special tabling period applies.</p> <p>If you answer Yes, to this question you will also need to indicate the No. of sitting days and the source of provision(s) which provides for the different tabling arrangement.</p>
<p>Disallowance Is the instrument exempt from disallowance?</p>	<p>Most instruments that are tabled are also able to be disallowed by either House of the Parliament. A few, however, are exempt from disallowance.</p> <p>Note: All commencement proclamations are exempt from disallowance.</p>
<p>Is there a special disallowance period for the instrument?</p>	<p>Under the LIA each House of the Parliament has 15 sitting days from the date of tabling of an instrument in which to move a motion to disallow the instrument either in full or in part and that House then has 15 sitting days after the date of the motion to deal with the motion.</p> <p>There are some instruments that have a special disallowance period which is different to this.</p> <p>If you answer Yes to this question, you will also need to indicate the No. of sitting days and the source of provision(s) which provide(s) for the different disallowance arrangement.</p>
<p>Sunsetting Is the instrument exempt from sunseting?</p>	<p>The LIA provides for the sunseting (after a specified period) of most instruments that are registered on the FRLI. Some instruments, however, are exempt from sunseting.</p> <p>Note: All commencement proclamations are exempt from disallowance.</p>

* Only applies to the lodgment type 'New Legislative Instrument' ie. a lodgment for a legislative instrument made on or after 1 January 2005.

Section 3 — Backcapture* (ie. Backcapture/lodgment deadline)

Purpose: Enables lodging agency to provide information about the instrument being lodged including gazettal, tabling and partial disallowance details if relevant.

Field name	Description
Gazettal date	The date the instrument was published (or notified) in the <i>Gazette</i> (if relevant).
Tabled HR	The date the instrument was tabled in the House of Representatives.
Tabled Sen	The date the instrument was tabled in the Senate.
Has this instrument been partially disallowed?	<p>Either House of the Parliament has the power to disallow an instrument in full or in part. Where part of the instrument being lodged has previously been disallowed by either House of the Parliament, that part of the instrument is no longer in force.</p> <p>If the answer is Yes, you will also need to list the disallowed provision(s), the date of disallowance and the House of Parliament in which the partial disallowance occurred.</p>
Deadline lodgment date	<p>S 29 of the LIA sets out the date by which a legislative instrument which was made before 1/1/2005 needs to be lodged for registration if it is to remain in force. This is the deadline lodgment date.</p> <p>If an amending instrument that is made on or after 1/1/2005 is lodged for registration and the instrument or instruments which it amends have not been previously been registered, then the lodging agency will have 28 days (or such other time as the regulations prescribe) from the date of registration of that new amending instrument to find and lodge all the other related instruments.</p> <p>On registration of a new amending instrument after 1/1/2005 OLDP will check to see whether the affected legislation has already been registered. If it has not, once the amending instrument has been registered the lodging agency will receive an e-mail advising the agency of the deadline lodgment date for the affected legislation.</p>
Multiple backcapture Is this lodgment part of a multiple backcapture lodgment?	Where a number of related instruments (eg. the principal instrument and amending instruments) are being lodged for backcapture at the same time, the answer to this question is Yes . If the answer is Yes, you will need to also indicate the no. of related instruments being lodged. This will enable OLDP to ensure that all the related instruments are assessed for registration and registered at the same time.

* Only applies to the lodgment type 'Legislative Instrument Backcapture' ie. a lodgment for a legislative instrument made before 1 January 2005

Section 4 — Other Information

Purpose: Enables lodging agency to record a range of information about the legislative instrument being lodged, including any documents incorporated by reference, the hardcopy lodgment number, who will attach the e-version of the instrument and details about the use of any gender specific language.

Field name	Description
Documents incorporated by Reference	<p>A document is taken to be incorporated by reference in an instrument when the instrument makes provision for, or in relation to a matter, by applying, adopting or incorporating any matter contained in a document (including an instrument or other writing) as in force or existing from time to time.</p> <p>Both the name of the document(s) incorporated by reference and the provision(s) in the legislative instrument being lodged where the document(s) is incorporated by reference need to be provided.</p>
Lodgment of hardcopy Has the original signed instrument (or certified true copy or other proof of making) been lodged with OLDP?	<p>Where a legislative instrument is lodged for registration the original signed instrument or other proof of making also need to be lodged with OLDP.</p> <p>To lodge a hardcopy of an instrument with OLDP the lodging agency will need to complete a hardcopy lodgment form and lodge it together with the hardcopy. OLDP will provide the agency with a receipt for the lodgment as well as a hardcopy lodgment number to acknowledge receipt of the instrument.</p> <p>Where the answer to this question is Yes, the hardcopy lodgment number will also need to be provided. OLDP will use this number to match the hardcopy with the electronic lodgment.</p> <p>This arrangement does not apply to regulations and other legislative instruments made by the Governor-General as OLDP will source a ‘certified true copy’ of all regulations and other legislative instruments direct from the ExCo Secretariat once they are made. This means that lodging agency will not need to provide proof of making for instruments made by the Governor-General.</p>
Attachment of LI Will OLDP attach the legislative instrument?	<p>The answer to this is Yes where OLDP has drafted the legislative instrument and will attach the e-version of it on behalf of the lodging agency. Where OLDP is to attach the e-version of the instrument the lodging agency will need to provide the matter number for the instrument.</p> <p>Note: the matter number is located in the footer on the front page of the instrument. For example, 0409434A-040824Z.</p>
Gender Specific Language (GSL)	<p>You will not have to answer this unless the answer to the above question was No ie OLDP will not attach the legislative instrument.</p> <p>If the answer to this question is Yes and the instrument does contain GSL, you will need to indicate Why and also list the</p>

	provision(s) of the instrument that contain GSL.
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Lodgment type: Legislative Instrument Compilation**Section 1 — Details** (ie. Compilation Details)

Purpose: Enables the lodging agency to record details about the compilation being lodged.

Field name	Description
Instrument Name (mandatory)	Name of the Compilation (ie the name of the instrument that has been compiled). Name must be entered in full (eg. ABC Determination 2003).
Optional series no.	Some instruments are known by their own unique numbering system. This is the unique number system of the instrument which is the subject of the compilation.
Date prepared (mandatory)	The date the compilation was prepared. Required format: dd/mm/yyyy
Incorporating amendments to	The amendment(s) incorporated by the compilation being lodged.
Prepared by	The name of the department or agency that prepared the compilation — this field will auto fill from the contact details of the lodging officer.

Section 2 — Enabling (ie. Enabling Information/Comments)

Purpose: Enables the lodging agency to record details of the legislation that enabled the making of the instrument that is the subject of the compilation and to provide comments to OLDP about the compilation.

Field name	Description
Comments	Insert any comments you wish to make in relation to the compilation being lodged.
Enabling legislation (may be multiple) (mandatory)	The name(s) of the legislation that contain(s) the power that allowed the instrument, the subject of the compilation, to be made.
Enabling provision/s (may be multiple)	The specific provision or provisions of the enabling legislation under which the instrument was made. Required format: s 2; ss 2(3) and (4); r 6; rr 6(2) and (4)

Appendix E

Guidelines for preparing compilations of legislative instruments and glossary of common terms used

The following guidelines and glossary of common terms used may assist rule-making agencies in preparing compilations of legislative instruments required to be registered under the *Legislative Instruments Act 2003*. They have been developed taking into account procedures used by the Compilation and Printed Publication area in the Office of Legislative Drafting and Publishing when preparing compilations of regulations and other legislative instruments.

General points

- If automatic numbering is used, turn it off in both the principal instrument and any amending instruments before preparing the compilation. Automatic numbering makes the incorporation of amendments with specific chapter, part or regulation numbers (which need to remain static) difficult.
- Take the principal instrument as it was made and insert amendments in **commencement date order** (as opposed to year or number of amending instrument) from earliest to latest amendments **strictly as stipulated**. This is important to ensure that the resulting compilation reflects the instrument in force at a particular time.

Note that commencements within an amending instrument can vary prompting an endnote 2/3 etc. containing pending amendments not yet in force. The endnote would be deleted after commencement and the incorporation of the amendments into the principal legislative instrument.

- Stylistically, placeholders and section breaks, and their placement, will also be crucial — they enable the generation of running headers, footers and Tables of Contents.
- Incorrect wording, eg a missing comma or a misspelling or an incorrect instruction, will make an amendment ‘**misdescribed**’ and therefore unable to be included. See glossary below.

An endnote 2/3 etc. at the end of your compilation will explain why an amendment was not incorporated.

- Be aware of **disallowances** (refer to glossary).
- Be aware of **as amended bys** (refer to glossary).
- Table of Instruments means the amendment history of the principal instrument (refer to example in glossary).

An explanatory Note 1 should precede the Table of Instruments.

- Table of Amendments is the amendment history of individual provisions in the principal legislative instrument. It explains the type of amendment made and by which instrument or Act it was made (refer to example in glossary).
- A Table A covers any application, saving or transitional provision which affects either the principal instrument being amended or on any of the amending instruments IF the amendments affected impact on the principal (refer to example in glossary).
- A Table B (rare) will be needed for anything that has a modifying effect on a principal instrument or any amending instrument IF the modifications impact on the principal (refer to example in glossary).

Glossary of terms

As amended by means an amendment of an amending instrument which, by extension, further amends or affects the principal instrument.

As made means any instrument as it appeared when it was signed/gazetted/registered.

Principal means the original instrument as made and gazetted (or registered if on or after 1 January 2005).

Compilation (previously known as *consolidation*) means the original instrument as amended and in force at a given point in time after all amending in force legislation relating to it has been incorporated. After 1 January 2005 registration on the FRLI will make a compilation authoritative, unless the contrary is proved, and able to be used in a court of law.

Disallowance/Disallowed means an entire instrument or part of it has been disallowed by the Senate. If an amending instrument or amending provisions are disallowed they cease to have effect, and any resulting compilation should reflect that (ie, disallowed amending provisions should be removed in the new version of the compilation). However, disallowance action should also be reflected in the Table of Instruments with an (a) Note. An (a) Note should look like the following example:

Year and number	Date of notification in Gazette or registration	Date of commencement	Application, saving or transitional provisions
1926 No. 203	23 Dec 1926	22 Dec 1926	
1927 No. 17(a)	15 Feb 1927	10 Feb 1927	—
1927 No. 95	25 Aug 1927	1 Jan 1928	—

(a) The *ABC Amendment Instrument 1927 (No. 2)* was disallowed by the Senate on 18 September 2003.

or this:

(a) Regulation 3.7 of the *ABC Amendment Instrument 1927 (No. 2)* was disallowed by the Senate on 18 September 2003.

The Notice of Disallowance will have been gazetted and a copy should be retained by the agency to verify the accuracy of the compilation. OLDP may also ask to see proof of disallowance action affecting the principal instrument. Notices of Disallowance will continue to be gazetted after 1 January 2005. Information about whether an legislative instrument has

been fully or partially disallowed will also be available on the instrument's home page on the FRLI.

FRLI means the Federal Register of Legislative Instruments.

Gazettal/Gazetted Before 1 January 2005 a disallowable instrument needed to be either published or notified in the *Commonwealth of Australia Government Gazette* to become law. After 1 January 2005 registration of a non-exempt legislative instrument on the FRLI will be a requirement to become law.

Misdescribed is probably best explained by illustration:

An amending instruction could read like this:

[4] Subparagraph 20 (1) (d)

Omit

- (d) in the best interests of a child:

Insert

- (d) in the best interests of a child or children;

and the subparagraph being amended could look like this:

- (d) in the best interests of the child:

The fact that the line being amended has the word 'a' rather than the word 'the' makes this amendment misdescribed and therefore incapable of being done.

An endnote will be needed to flag the missing amendment which would look like this:

Note 2

Subparagraph 20 (1) (d) — Regulation 3.8 of Statutory Rules 1998 No. 176 provides as follows:

[4] Subparagraph 20 (1) (d)

Omit

- (d) in the best interests of a child:

Insert

- (d) in the best interests of a child or children;

The proposed amendment was misdescribed and is not incorporated in this compilation.

Table of Instruments means the amendment history of the principal instrument. It should be preceded by an explanatory Note 1 and the entirety would look like this (the only change should be in the heading, where 'Date of notification in the Gazette' will become 'Date of Registration'):

Notes to the ABC Instrument 1926

Note 1

The *ABC Instrument 1926* (in force under the *ABC Act 1925*) as shown in this compilation comprise Instrument No. 203 of 1926 amended as indicated in the Tables below.

All relevant information pertaining to application, saving or transitional provisions prior to 1 July 2003 is not included in this compilation. For subsequent information *see* Table A.

Table of Instruments

Year and number	Date of notification in <i>Gazette</i> or registration	Date of commencement	Application, saving or transitional provisions
1926 No. 203	23 Dec 1926	22 Dec 1926	
1927 No. 17	15 Feb 1927	10 Feb 1927	—
1927 No. 95	25 Aug 1927	1 Jan 1928	—
1927 No. 121	20 Oct 1927	19 Oct 1927	—
1928 No. 47	9 June 1928	1 Jan 1928	—
1928 No. 57	28 June 1928	21 June 1928	—
1928 No. 74	2 Aug 1928	26 July 1928	—
1928 No. 95	13 Sept 1928	6 Sept 1928	—
2003 No. 25	1 July 2003	1 July 2003	R. 4 [see Table A]

Please see an example of a Table A note below.

Table of Amendments is the amendment history of individual provisions in the principal legislative instrument as amended by Acts or amending instruments, including headings, divisions, subdivisions, notes or schedules etc. and the details of the types of amendments made, ie. whether something has been added in, repealed and substituted, repealed or amended.

Please note, there are subtleties to the terms ‘amending’ and ‘adding in’. For example, a subregulation added into a regulation would be reflected in the table as an amendment to the given regulation rather than a subregulation being added in. If a new regulation was being put in it would be reflected as being added.

The Table would look like this:

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Heading preceding r. 1	rep. 1981 No. 162
R. 1.....	rs. 1998 No. 276
Heading preceding r. 1A.....	ad. 1955 No. 15 rep. 1981 No. 162
R. 1A	ad. 1955 No. 15 rs. 1965 No. 86 am. 1967 No. 9; 1978 No. 195; 1987 No. 297; 1988 No. 270; 1989 No. 160; 1990 Nos. 220 and 129; 1997 No. 70; 2000 No. 173; 2003 No. 16

Table A contains any application, saving or transitional provision contained in amending legislation which affects the principal or any amending instruments (if directly applicable to the principal instrument), and it would look like this:

Table A Application, saving or transitional provisions

Statutory Rules 1997 No. 342

5 Application

- 5.1 The amendments made by regulation 2 and subregulation 4.2 do not apply in relation to an application made to an RSA provider before the commencement of these Regulations.

Table B informs of any modifications which affects the principal or amending instruments (if directly applicable) and would look like this:

Schedule 3

(regulation 21)

Modifications of Schedule 2 to the Migration Regulations (as in force on 6 November 1996) in relation to certain applications made on or after 1 November 1996 and before 7 November 1996

1. Part 309 (Spouse (Provisional))

- 1.1 Clause 309.111 (definition of “**intended spouse**”):

Omit the definition, substitute:

“**intended spouse**” means the person referred to in subparagraph 309.211 (3) (a) (i), (ii), (iii) or (iv);”.

- 1.2 Subclauses 309.211 (2), (2A) and (3):

Omit the subclauses, substitute:

“(2) The applicant meets the requirements of this subclause if the applicant is the spouse of:

- (a) an Australian citizen; or
- (b) an Australian permanent resident; or
- (c) an eligible New Zealand citizen; or
- (d) a person who, on entry to Australia, will be the holder of a special category visa and intends to be usually resident in Australia.”

Appendix F

Acts Interpretation Act 1901, section 46B

46B Disallowable non-legislative instruments

- (1) This section applies to instruments:
 - (a) that are neither legislative instruments within the meaning of the *Legislative Instruments Act 2003* nor rules of court; and
 - (b) that are made under a provision of an Act or legislative instrument (the **enabling provision**); and
 - (c) that are expressly declared by the enabling provision or by another provision of the Act or instrument to be disallowable instruments for the purposes of this section.
- (2) An instrument to which this section applies that is made on or after the commencing day within the meaning of the *Legislative Instruments Act 2003*, or a particular provision of such an instrument, takes effect from:
 - (a) the day specified in the instrument for the purposes of the commencement of the instrument or provision; or
 - (b) the day and time specified in the instrument for the purposes of the commencement of the instrument or provision; or
 - (c) the day, or day and time, of the commencement of an Act, or of a provision of an Act, or of the occurrence of an event, that is specified in the instrument for the purposes of the commencement of the instrument or provision; or
 - (d) in any other case—the first moment of the day next following the day of notification under subsection (5).
- (3) If:
 - (a) an instrument to which this section applies is expressed to take effect before the day of its notification under subsection (5); but
 - (b) the instrument, or a provision of the instrument:
 - (i) would adversely affect the rights of a person (other than the Commonwealth or an authority of the Commonwealth) at a time before the instrument is notified; or
 - (ii) would result in the imposition of liabilities on a person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done, or omitted to be done, at a time before the instrument is notified;

the instrument or provision is taken to be of no effect in respect of the period before it is notified to the extent that it would have the effect described in subparagraph (b)(i) or (ii).
- (4) The effect of subsections (2) and (3) on an instrument is subject to any contrary provision for commencement of the instrument in the enabling legislation for the instrument if the enabling legislation is an Act or a provision of an Act.
- (5) An instrument to which this section applies must be notified in the *Gazette* and, if the instrument is not so notified by being published in full in the *Gazette*, a notice in the

Gazette of the instrument's having been made, and of the place or places where copies of it can be purchased, is sufficient compliance with that requirement.

- (6) If a notice of the making of an instrument is published in accordance with subsection (5), copies of the instrument must, at the time of publication of the notice or as soon as practicable thereafter, be made available for purchase at the place, or at each of the places, specified in the notice.
- (7) If, on the day of publication of a notice referred to in subsection (5), there are no copies of the instrument to which the notice relates available for purchase at the place, or at one or more of the places, specified in the notice, the Minister administering the enabling provision must cause to be laid before each House of the Parliament, within 15 sitting days of that House after that day, a statement that copies of the instrument were not so available and the reason why they were not so available.
- (8) Failure to comply with a requirement of subsection (6) or (7) in relation to any instrument does not constitute a failure to comply with subsection (5).
- (9) A copy of an instrument to which this section applies must be laid before each House of the Parliament not later than 6 sitting days of that House after the instrument is made and, for that purpose, must be delivered to the House by the person or body authorised to make the instrument.
- (10) If a copy of an instrument is not laid before each House of the Parliament in accordance with subsection (9), it thereupon ceases to have effect.
- (11) Unless the law otherwise provides, Part 5 of the *Legislative Instruments Act 2003*, other than sections 38, 39 and 40, applies in relation to an instrument to which this section applies as if:
 - (a) references to legislative instruments or to a legislative instrument were references to an instrument to which this section applies; and
 - (b) references to enabling legislation were references to the enabling provision; and
 - (c) references to repeal were references to revocation; and
 - (d) references in subsection 45(2) of the *Legislative Instruments Act 2003* to another legislative instrument included references to a provision of another non-legislative instrument made under the enabling provision.

Appendix G

Summary of Copy Requirements — Disallowable Non-Legislative Instruments

Distribution

Clerk of the House	2	Attention: Papers Officer House of Representatives Table Office (location: RG 89) Parliament House CANBERRA ACT 2600
Clerk of the Senate	2	Attention: Tabling Officer Senate Table Office (location: SG 25) Parliament House CANBERRA ACT 2600
Secretary Senate Standing Committee on Regulations and Ordinances	11	(location: SG 49) Parliament House CANBERRA ACT 2600

Any inquiries should be directed to:

- Papers Officer,
House of Representatives Table Office,
RG89
(02) 6277 4800
- Publications Officer,
Senate Table Office,
SG25
(02) 6277 3037
- Senate Standing Committee on Regulations and Ordinances
(02) 6277 3066 (regords.sen@aph.gov.au)

Appendix H

Legislative Instruments Act 2003, section 44

44 Legislative instruments that are not subject to disallowance

- (1) Section 42 does not apply in relation to a legislative instrument, or a provision of a legislative instrument, made on or after the commencing day, if the enabling legislation for the instrument (not being the *Corporations Act 2001*):
- (a) facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States; and
 - (b) authorises the instrument to be made by the body or for the purposes of the body or scheme;
- unless the instrument is a regulation, or the enabling legislation or some other Act has the effect that the instrument is disallowable.
- (2) Section 42 does not apply in relation to a legislative instrument, or a provision of a legislative instrument, that is included in the table below unless the instrument or provision is subject to disallowance under its enabling legislation or by means of some other Act:

Legislative instruments that are not subject to disallowance	
Item	Particulars of instrument
1	Declarations under paragraph 5A(2)(d) or (e) of the <i>Australian Citizenship Act 1948</i>
2	Determinations specifying drugs, made under section 4A of the <i>Australian Federal Police Act 1979</i>
3	Statutes made under the <i>Australian National University Act 1991</i> or rules or orders made under those statutes
4	Instruments made under section 32 of the <i>Australian Postal Corporation Act 1989</i>
5	Rules made under section 60 of the <i>Australian Research Council Act 2001</i>
6	Standards issued under section 122 of the <i>Broadcasting Services Act 1992</i>
7	Amendments under section 128 of the <i>Broadcasting Services Act 1992</i> to standards under Part 9 of that Act
8	Fee waiver principles made under subsection 91(1A) of the <i>Classification (Publications, Films and Computer Games) Act 1995</i>
9	Notifications under section 28 or 43 of the <i>Commonwealth Authorities and Companies Act 1997</i>
10	Determinations made under paragraph 153J(1)(c), 153L(1)(c), 153P(2)(c) or 153Q(1)(c) of the <i>Customs Act 1901</i>

Legislative instruments that are not subject to disallowance

Item	Particulars of instrument
11	Revocations made under subsection 153K(3) or 153LA(3) of the <i>Customs Act 1901</i>
12	Instruments made under subsection 161J(2) or (3) of the <i>Customs Act 1901</i>
13	Tariff Concession Orders made under section 269P or 269Q of the <i>Customs Act 1901</i>
14	Instruments made under section 269SC or 269SD of the <i>Customs Act 1901</i>
15	By-laws made under section 271 of the <i>Customs Act 1901</i> for the purposes of Schedule 4 to the <i>Customs Tariff Act 1995</i>
16	Revocations of Commercial Tariff Concession Orders to which section 20 of the <i>Customs Legislation (Tariff Concessions and Anti-Dumping) Amendment Act 1992</i> applies
17	Instruments made under section 303CA, 344 or 350 of the <i>Environment Protection and Biodiversity Conservation Act 1999</i>
18	By-laws made under section 165 of the <i>Excise Act 1901</i> for the purposes of the Excise Tariff within the meaning of section 4 of the <i>Excise Act 1901</i>
19	Determinations made under subsection 20(3), agreements made under section 31, directions given under section 32, or instructions given under section 52, of the <i>Financial Management and Accountability Act 1997</i>
20	Determinations made under Order 6.2.1 of the Financial Management and Accountability Orders 1997 made under section 63 of the <i>Financial Management and Accountability Act 1997</i>
21	Guidelines issued under regulations made pursuant to section 64 of the <i>Financial Management and Accountability Act 1997</i>
22	Proclamations made under section 5, warrants made under section 6 or rules made under section 7, of the <i>Flags Act 1953</i>
23	Proclamations made under subsection 31(1) or (3) of the <i>Great Barrier Reef Marine Park Act 1975</i>
24	Guidelines issued under section 13 of the <i>Higher Education Funding Act 1988</i>
25	Statutes made under the <i>Maritime College Act 1978</i> or rules made under those statutes
26	Legislative instruments (other than regulations) under Part 1, 2 or 9 of the <i>Migration Act 1958</i> , or legislative instruments under Part 1, 2 or 5, or Schedule 1, 2, 4, 5A, 6, 6A or 8, of the regulations made under that Act
27	Declarations made by Ministers under section 32 of the <i>Mutual Recognition Act 1992</i>
28	Instruments made under subsection 203AH(1) of the <i>Native Title Act 1993</i>

Legislative instruments that are not subject to disallowance	
Item	Particulars of instrument
29	Directions issued under section 20 of the <i>Parliamentary Service Act 1999</i>
30	Instruments made under section 23 or subsection 24(3) of the <i>Parliamentary Service Act 1999</i>
31	Access regimes made under section 12, variations of such access regimes under section 14, revocation of access regimes made under section 15, determinations and variations of standards under section 18, or instruments made under section 25, of the <i>Payment Systems (Regulation) Act 1998</i>
32	Directions issued under section 21 of the <i>Public Service Act 1999</i>
33	Instruments made under section 23 or subsection 24(3) of the <i>Public Service Act 1999</i>
34	Instruments made under section 2A, 2B, or 12, subsection 13(1), section 20B, subsection 26(2) or section 26A of the <i>Quarantine Act 1908</i>
35	Instruments made under subsection 60(1) or 106(1) of the <i>Radiocommunications Act 1992</i>
36	Instruments made under subsection 463(1) of the <i>Telecommunications Act 1997</i>
37	Declarations made by Ministers under section 31 of the <i>Trans-Tasman Mutual Recognition Act 1997</i>
38	Instruments made under Annual Appropriation Acts
39	Instruments (other than regulations) relating to superannuation
40	Legislative instruments that, in accordance with the provisions of the enabling legislation, do not commence unless they are approved by either or both of the Houses of the Parliament
41	Ministerial directions to any person or body
42	Proclamations that provide solely for the commencement of Acts or of provisions of Acts
43	Certificates issued by the Attorney-General under section 10 or 11, or under subsection 51(1), of this Act
44	Instruments that are prescribed by the regulations for the purposes of this table

- (3) The inclusion of a kind of instrument in the table in subsection (2) does not imply that every instrument of that kind is a legislative instrument.

Appendix I

Legislative Instruments Act 2003, section 54

54 Instruments to which this Part does not apply

- (1) This Part does not apply in relation to a legislative instrument made before, on or after the commencing day, if the enabling legislation for the instrument (not being the *Corporations Act 2001*):
 - (a) facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States; and
 - (b) authorises the instrument to be made by the body or for the purposes of the body or scheme.
- (2) This Part does not apply to any legislative instrument that is included in the table below:

Legislative instruments that are not subject to sunseting	
Item	Particulars of instrument
1	Instruments made under section 8 or 9 of the <i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986</i>
2	Instruments relating to aviation security made under the <i>Air Navigation Act 1920</i> or under the regulations made under that Act
3	Instruments relating to aviation safety made under the <i>Air Services Act 1995</i> or the <i>Air Services Regulations</i>
4	National Capital Plan made under the <i>Australian Capital Territory (Planning and Land Management) Act 1988</i>
5	Determinations specifying drugs, made under section 4A of the <i>Australian Federal Police Act 1979</i>
6	Statutes made under the <i>Australian National University Act 1991</i> or rules or orders made under those statutes
7	Instruments made under section 32 of the <i>Australian Postal Corporation Act 1989</i>
8	Instruments made under section 25 or 26 of the <i>Broadcasting Services Act 1992</i>
9	Instruments relating to aviation safety made under the <i>Civil Aviation Act 1988</i> , the <i>Civil Aviation Regulations 1988</i> or the <i>Civil Aviation Safety Regulations 1998</i>
10	Fee waiver principles made under subsection 91(1A) of the <i>Classification (Publications, Films and Computer Games) Act 1995</i>
11	Notifications under section 28 or 43 of the <i>Commonwealth Authorities and Companies Act 1997</i>
12	Determinations made under paragraph 153J(1)(c), 153L(1)(c), 153P(2)(c) or 153Q(1)(c) of the <i>Customs Act 1901</i>

Legislative instruments that are not subject to sunseting

Item Particulars of instrument

13	Revocations made under subsection 153K(3) or 153LA(3) of the <i>Customs Act 1901</i>
14	Instruments made under subsection 161J(2) or (3) of the <i>Customs Act 1901</i>
15	Instruments made under section 178, 181, 183, 184, 207A, 248, 249, 303CA, 303DB, 303DC, 303EB, 303EC, 303FG, 344 or 350 of the <i>Environment Protection and Biodiversity Conservation Act 1999</i>
16	Excise By-law No. 75, 114, 127, 129, 151 or 154 made under section 165 of the <i>Excise Act 1901</i>
17	Determinations made under subsection 20(1), (2) or (3), agreements made under section 31, directions given under section 32, or instructions given under section 52, of the <i>Financial Management and Accountability Act 1997</i>
18	Determinations made under Order 6.2.1 of the Financial Management and Accountability Orders 1997 made under section 63 of the <i>Financial Management and Accountability Act 1997</i>
19	Guidelines issued under regulations made pursuant to section 64 of the <i>Financial Management and Accountability Act 1997</i>
20	Plans of management made under section 17 of the <i>Fisheries Management Act 1991</i> and instruments amending such plans made under section 20 of that Act
21	Proclamations made under section 5, warrants made under section 6, or rules made under section 7, of the <i>Flags Act 1953</i>
22	Proclamations made under section 31 of the <i>Great Barrier Reef Marine Park Act 1975</i> , zoning plans prepared under section 32 of that Act, instruments made under section 37 of that Act amending or revoking such zoning plans, plans of management prepared in accordance with Part VB of that Act, instruments made under section 39ZG of that Act amending such plans of management, or instruments made under section 39ZH of that Act revoking such plans of management
23	Statutes made under the <i>Maritime College Act 1978</i> or rules made under those statutes
24	Instruments made under section 7 or 9 of the <i>Motor Vehicle Standards Act 1989</i>
25	Declarations made by Ministers under section 32 of the <i>Mutual Recognition Act 1992</i>
26	Instruments made under subparagraph 26(1)(c)(iv), subsection 26A(1), 26B(1) or 26C(2), paragraph 43(1)(b) or 43A(1)(b), section 203AD, 203AE, 203AF or 203AG, subsection 203AH(1) or (2), 207A(1), 207B(3), 245(4) or 251C(4) or (5), or paragraph (i) of the definition of infrastructure facility in section 253, of the <i>Native Title Act 1993</i>
27	Instruments made under section 421, or Marine Orders made under subsection 425(1AA), of the <i>Navigation Act 1912</i>
28	<i>Navigation (Collision) Regulations 1982</i> made pursuant to section 258, or <i>Navigation (Orders) Regulations 1980</i> made pursuant to subsection 425(1), of the <i>Navigation Act 1912</i>

Legislative instruments that are not subject to sunseting

Item	Particulars of instrument
29	Directions issued under section 20 of the <i>Parliamentary Service Act 1999</i>
30	Instruments made under section 23 or subsection 24(3) of the <i>Parliamentary Service Act 1999</i>
31	Approvals made under section 9 of the <i>Payment Systems and Netting Act 1998</i>
32	Access regimes imposed under section 12, variations of access regimes under section 14, revocation of access regimes under section 15, standards determined, or instruments varying or revoking such standards, under section 18, or instruments made under section 25, of the <i>Payment Systems (Regulation) Act 1998</i>
33	Marine Orders made under subsection 24(1) of the <i>Protection of the Sea (Powers of Intervention) Act 1981</i>
34	Protection of the Sea (Powers of Intervention) Regulations made under section 23 of the <i>Protection of the Sea (Powers of Intervention) Act 1981</i>
35	Marine Orders made under subsection 34(1) of the <i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i>
36	<i>Protection of the Sea (Prevention of Pollution from Ships) (Orders) Regulations 1994</i> made under subsection 33(1) of the <i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i>
37	Directions issued under section 21 of the <i>Public Service Act 1999</i>
38	Instruments made under section 23 or subsection 24(3) of the <i>Public Service Act 1999</i>
39	Instruments required to be laid before the Parliament under subsection 7(7) of the <i>Remuneration Tribunal Act 1973</i>
40	Declarations made by Ministers under section 31 of the <i>Trans-Tasman Mutual Recognition Act 1997</i>
41	Instruments made under Annual Appropriation Acts
42	Instruments (other than regulations) relating to superannuation
43	Legislative instruments the sole purpose of which, or a primary purpose of which, is to give effect to an international obligation of Australia
44	Legislative instruments the sole purpose of which, or a primary purpose of which, is to confer heads of power on a self-governing Territory
45	Legislative instruments that establish a body having power to enter into contracts for the purposes of the body's functions
46	Ministerial directions to any person or body
47	Ordinances of the non self-governing Territories
48	Proclamations that provide solely for the commencement of Acts or provision of Acts
49	Certificates issued by the Attorney-General under section 10 or 11 of this Act

Legislative instruments that are not subject to sunseting

Item Particulars of instrument

50 Regulations made for the purposes of item 24 of the table in subsection 7(1), item 44 of the table in subsection 44(2) or item 51 of this table

51 Legislative instruments that are prescribed by the regulations for the purposes of this table

- (3) The inclusion of a kind of instrument in the table in subsection (2) does not imply that every instrument of that kind is a legislative instrument.

Abbreviations and glossary

the Act	the <i>Legislative Instruments Act 2003</i>
AGD	the Commonwealth Attorney-General's Department
backcapturing	the registration of in force legislative instruments made before the commencement of the <i>Legislative Instruments Act 2003</i> according to the timetable in section 29
CJD	the Civil Justice Division in the Attorney-General's Department — responsible for policy of the Act
CPP	the Compilation and Printed Publication area of the Office of Legislative Drafting and Publishing — responsible for preparing and registering compilations of legislative instruments on the FRLI
enabling legislation	the legislative authority empowering a rule-maker to make an instrument
explanatory statement	the statement containing background information about the legislative instrument
FRLI	the Federal Register of Legislative Instruments
House (of Parliament)	the House of Representatives or the Senate of the Australian Parliament
making	the signing, sealing or other endorsement of a legislative instrument by the rule-maker which results in the instrument coming into existence
Office of Legislative Drafting and Publishing	(OLDP) the Office of Legislative Drafting and Publishing in the Attorney-Generals's Department — responsible for drafting delegated legislation and maintaining FRLI.
Office of Regulation Review (ORR)	the Office is part of the Productivity Commission and is responsible for overseeing regulation review issues
REP	the Registration and Electronic Publication area of the Office of Legislative Drafting and Publishing — responsible for registering

	legislative instruments and related material on the FRLI
RIS	Regulatory Impact Statement — a document analysing the impact of proposed new or amended regulation
SSCRO	the Senate Standing Committee on Regulations and Ordinances
sunsetting	the automatic repeal of a legislative instrument and its amendments after a certain period of operation
working day	a day that is not a Saturday, Sunday or public holiday in the Australian Capital Territory