



Australian Government

Office of Parliamentary Counsel

Instruments Handbook

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About this Handbook

The purpose of this Handbook is to provide information to help Commonwealth rule-makers and agencies make and manage legislative and notifiable instruments efficiently, effectively and in accordance with the relevant law. It should be read in conjunction with the following documents, as available on the Legislation Register <https://www.legislation.gov.au>:

- (a) the *Legislation Act 2003* (the LA)
- (b) the *Legislation (Exemptions and Other Matters) Regulation 2015* (LEOMR)
- (c) the *Legislation Rule 2016*
- (d) the *Legal Services Directions 2017*.

Questions and comments about the current Handbook are welcome at any time and should be emailed to lodge@legislation.gov.au.

Abbreviation key

Abbreviation	Meaning
AGD	Attorney-General's Department
ExCo	Federal Executive Council
LA	the <i>Legislation Act 2003</i> , previously known as the <i>Legislative Instruments Act 2003</i>
LIA	the <i>Legislative Instruments Act 2003</i>
LEOMR	the <i>Legislation (Exemptions and Other Matters) Regulation 2015</i>
OBPR	Office of Best Practice Regulation
OPC	Office of Parliamentary Counsel, an independent statutory authority accountable to the Attorney-General
Register	the Federal Register of Legislation
RIS	Regulation Impact Statement
Rule	the <i>Legislation Rule 2016</i>
s	section (or equivalent)
SDLC	Senate Standing Committee for the Scrutiny of Delegated Legislation

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Part 1—Matters relevant to all instruments

Chapter 1—Introduction

Main points

- The *Legislation Act 2003* is an Act of general application. It establishes a comprehensive regime for the making, publication and review of legislation and related material.

Background

1 The *Legislation Act 2003* (the *LA*) underpins open and transparent government by making a large body of legislation and related material subject to publication and review.

2 Under Australia’s Constitution, the Parliament can make laws in the form of Acts of the Parliament, or it can choose to delegate its power to make laws on particular matters to other persons and bodies¹.

3 For many years, related documents (*instruments*) had to be printed centrally under the *Statutory Rules Publication Act 1903*, or notified in the Commonwealth Gazette. Delegated laws including regulations and rules were also subject to disallowance by either House of the Parliament under the *Acts Interpretation Act 1901*.

4 Initially these arrangements worked well. However, as many new types of instruments began to emerge from the 1970s onwards, a significant body of law developed that was not published or subject to parliamentary scrutiny. Among other things, this meant that people could be held responsible for failure to comply with laws to which they did not have access.

5 These issues were highlighted by the Administrative Review Council in its 1992 report *Rule Making by Commonwealth Agencies*². In this report, the Council proposed that all delegated laws be:

- (a) subject to consultation before making; and
- (b) drafted to a certain standard; and
- (c) made public and accessible; and
- (d) tabled in the Parliament; and
- (e) subject to disallowance and sunseting.

6 The recommendations of the Administrative Review Council were largely adopted when the *Legislative Instruments Act 2003* (the *LIA*) was enacted.

¹ For guidance on which powers may be delegated, see the *Legislation Handbook*
<https://www.pmc.gov.au/resource-centre/government/legislation-handbook>

² See <https://www.ag.gov.au/legal-system/publications/report-35-rule-making-commonwealth-agencies-1992>

The Legislative Instruments Act 2003 (the LIA)

7 The *Legislative Instruments Act 2003* established a comprehensive regime for the management of Commonwealth legislative instruments, and what was then the Federal Register of Legislative Instruments (*FRLI*). The Act also:

- (a) created a concept of legislative instrument based on what an instrument did rather than what it was called; and
- (b) required the registration of all new legislative instruments made on or after 1 January 2005; and
- (c) repealed any older legislative instruments that were not lodged for registration before 1 January 2008, under what was known as backcapture.

8 As part of this, the Act required the online publication of every type of instrument that had previously been printed as a Statutory Rule, and of a much wider range of instruments that had not previously been required to be published systematically.

9 A formal review of the LIA conducted over 2008-09 found that it had “fundamentally changed the way in which Commonwealth legislative instruments are made, published and reviewed. It gives effect to important principles of access to the law and review of executive action which underpin open and accountable government”³.

10 The review also made a number of recommendations, including to amend the LIA to cover a wider range of instruments. Relevant legislation was enacted in stages, culminating in the commencement of the *Acts and Instruments (Framework Reform) Act 2015* and in the LIA becoming the *Legislation Act 2003* on 5 March 2016.

The Legislation Act 2003

11 The *Legislation Act 2003* establishes a comprehensive regime for the publication of all Commonwealth legislation and related notices. Of particular note is that:

- (a) it extends to Commonwealth Acts, the publication of which was previously governed by a separate Act; and
- (b) it also establishes a category of notifiable instruments, for notices of a legal nature that are not legislative but still of long-term public interest; and
- (c) it does not change existing requirements relating to the development and scrutiny of legislative instruments (e.g. disallowance and sunseting).

Sunseting Review

12 In 2017, the LA was subject to a review of sunseting and related matters specified by the Attorney-General under section 60 of the LA.

³ For more information about the review process and recommendations, see <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/LegislationAct2003.aspx>

13 The *Report on the Operation of the Sunsetting Provisions in the Legislation Act 2003*, published in September 2017⁴, made a number of recommendations. Overall, the review supported the sunsetting framework and recommended that the 10-year sunsetting period be maintained.

14 Some of the other recommendations include that:

- (a) the sunsetting framework not be extended to Acts; and
- (b) another review of sunsetting provisions be undertaken by 1 October 2027.

15 The *Legislation Amendment (Sunsetting Review and Other Measures) Act 2018* was assented to on 24 August 2018. The Act addresses a number of the Sunsetting Review recommendations including that:

- (a) the Attorney-General be allowed to grant deferrals of sunsetting for up to 24 months; and
- (b) Parliament be allowed to pass a resolution to roll over a legislative instrument at any time after that instrument is mentioned in the sunsetting list or a certificate of deferral; and
- (c) rules of court should be subject to the registration and publication requirements of the LA but not subject to sunsetting; and
- (d) automatic repeal of disallowable legislative instruments under Division 1 of Part 3 of Chapter 3 of the LA do not operate before the end of the disallowance period; and
- (e) the term *sitting day* be defined in the *Acts Interpretation Act 1901*.

Further statutory reviews

16 A review of the operation of Part 4 of Chapter 3 of the LA (sunsetting of legislative instruments) will be conducted in 2027 under section 60 of the LA.

17 A review of the operation of the LA is underway as required by section 59 of the Act.

⁴ See <https://www.ag.gov.au/legal-system/publications/report-operation-sunsetting-provisions-legislation-act-2003>

Chapter 2—Key concepts

Main points

- The **LA** imposes a number of obligations on rule-makers in respect of legislative instruments and notifiable instruments.
- For the purposes of the **LA**, the **rule-maker** generally refers to the person or body (or a delegate) authorised to make an instrument under its enabling legislation.
- Declarations about whether or not a class of instrument is a legislative instrument or a notifiable instrument can be found in the **LA**, **LEOMR** and some enabling legislation.
- In the absence of an express declaration, the definition of a **legislative instrument** in section 8 of the **LA** must be applied to an instrument.
- If it is unclear whether an instrument is a legislative instrument, it would be prudent to get legal advice and take action if necessary to put the issue beyond doubt.
- The Federal Register of Legislation is an authorised database of legislation and related material including instruments, their explanatory statements and compilations of instruments as amended.
- The Register is accessible online free of charge at <https://www.legislation.gov.au>.

Who is a rule-maker?

18 The **LA** imposes a number of obligations on rule-makers, including lodging instruments for registration, and notifying events that may affect the accuracy and completeness of the Register.

19 For the purposes of the **LA**, **rule-maker** generally means the person or body authorised to make an instrument under its enabling legislation, whether or not the person or body actually made the instrument concerned (**LA** s 6(1)(c)). There is one exception to this rule. For instruments made by the Governor-General, the rule-maker is taken to be:

- (a) the Minister responsible for the enabling legislation under which the instrument is made (**LA** s 6(1)(a)); or
- (b) if the instrument is made under executive power—the Prime Minister, or a Minister prescribed by regulation (**LA** s 6(1)(b)).

20 A rule-maker may be able to delegate the power to make an instrument to another person (see paragraphs 99 to 103). However, the delegation of power does not affect the obligations of the rule-maker under the **LA**.

21 Although rule-makers are responsible for ensuring that the requirements of the **LA** are met, agencies play an important role advising rule-makers on their powers and obligations, and taking care of administrative matters such as lodgement of instruments and other material for registration, preparation of compilations if required, and payment of associated fees.

What is an instrument?

22 An *instrument* means any writing or other document, and includes an instrument in electronic form (LA s 4). For the purposes of complying with the LA, there are three distinct types of instrument to consider:

- (a) *legislative instruments*, which are subject to additional requirements as outlined in Part 2; and
- (b) *notifiable instruments*; and
- (c) other instruments that are not required to be registered.

23 To identify the type of instrument, it is necessary to look at the text of an instrument and see whether it commences, amends or repeals a registered law (see paragraph 25). For instruments that are stand-alone or *principal instruments*, it is necessary to establish whether an instrument:

- (a) has been declared to be a legislative instrument (paragraph 28); or
- (b) has been declared to be a notifiable instrument (paragraph 33); or
- (c) is subject to other criteria including, in some cases, whether the instrument is of legislative character (paragraphs 36 to 38).

24 It cannot be assumed that a legislative instrument is of legislative character. The fact that an instrument is a legislative instrument does not imply that it is or must be of legislative character (LA s 9(1)). The reverse is also true: the fact that an instrument is not a legislative instrument does not imply that it is not or must not be of legislative character (LA s 9(2)).

Instruments that commence, amend or repeal registered laws

25 An instrument must be lodged for registration if it commences, amends or repeals a registered instrument, Act or provision of such an instrument or Act (a *registered law*).

26 An instrument that has the sole effect of commencing a registered law (a *commencement instrument*) must in all cases be lodged for registration as a notifiable instrument (LA s 4 and 11(2)(a)). This also applies to any instrument that announces the day that an international agreement enters into force for Australia, regardless of whether the treaty itself is ever registered (LEOMR s 8 item 1).

27 An instrument that amends or repeals a registered law must also be lodged for registration. If it only affects notifiable instruments, it must be lodged as a notifiable instrument (LA s 11(2)(d)). Otherwise, unless the instrument's enabling Act specifies otherwise, it must be lodged as a legislative instrument (LA s 10(1)(d)).

Instruments declared to be legislative instruments

28 An instrument's enabling legislation may declare it to be a legislative instrument. Examples of provisions that do this are as follows (LA s 8(2)):

- (a) "The Minister may, by legislative instrument, determine licence conditions...";
- (b) "An instrument made under ... is a legislative instrument".

29 The LA also declares the following to be a legislative instrument:

- (a) an instrument described as a regulation by its enabling legislation (LA s 10(1)(a));
- (b) an instrument described as a Proclamation by its enabling legislation, unless it is a commencement instrument (LA s 10(1)(a) and 11(2));
- (c) an ordinance that deals with certain aspects of the governance of Australian Territories (for details see LA s 10(1)(b) and 10(2));
- (d) an instrument prescribed by regulation (LA s 10(1)(c));
- (e) an instrument that includes a provision that amends or repeals another legislative instrument (LA s 10(1)(d));
- (f) any instrument that is registered as a legislative instrument, unless it is a notifiable instrument that meets certain criteria (LA s 8(8)).

30 Commonwealth rules of court are not legislative instruments (LA s 8(8)(d)). However, the enabling legislation for Commonwealth rules of court has the effect that the LA generally applies in relation to the rules of court as if a reference in the LA to a legislative instrument were a reference to a rule of court. This means that the rules of court are subject to most of the provisions of the LA, including the provisions about registration, publication and disallowance.

31 The exception is that sunseting does not apply to most rules of court.

32 If an instrument is declared to be a legislative instrument, no further action is required to establish its status under the LA.

Instruments declared to be notifiable instruments

33 An instrument's enabling legislation may declare it to be a notifiable instrument. Examples of provisions that do this are as follows (LA s 11(1)):

- (a) "The Minister may, by notifiable instrument, approve a form...";
- (b) "An instrument made under ... is a notifiable instrument".

34 The LA and LEOMR also declare the following to be a notifiable instrument:

- (a) a commencement instrument that commences a registered law ([LA](#) s 4 and 8(8)(b));
- (b) an instrument that announces the day an international agreement enters into force for Australia, regardless of whether the treaty itself has been registered ([LEOMR](#) s 8 item 1).

35 If an instrument is declared to be a notifiable instrument, no further action is required to establish its status under the [LA](#).

Other instruments

36 Sometimes an instrument's enabling legislation will include a different kind of declaration to the effect that an instrument is not a legislative instrument, or is not a notifiable instrument. The [LA](#) and [LEOMR](#) also contain declarations that certain instruments are not legislative instruments as follows:

- (a) specific declarations for instruments made under a particular Act or provision of an Act ([LA](#) s 8(8) and [LEOMR](#) s 7);
- (b) generic declarations that apply to instruments made under any Act unless the contrary intention appears ([LEOMR](#) s 6).

37 Please note, [LEOMR](#) does not apply if an Act (such as an instrument's enabling Act) declares that an instrument is a legislative instrument. An instrument's enabling Act should always be checked for declarations before [LEOMR](#), and lodging agencies are advised to take particular care when it comes to:

- (a) instruments of delegation and directions to delegates ([LEOMR](#) s 6(1) items 1 and 2); and
- (b) instruments of authorisation and approval ([LEOMR](#) s 6(1) items 4 and 5); and
- (c) instruments prescribing or approving forms ([LEOMR](#) s 6(1) item 6).

38 In the event that no declaration can be found in an Act or [LEOMR](#), the status of the instrument under the [LA](#) can only be established by looking closely at the individual instrument that has been or will be made and whether it is of legislative character. Subsection 8(4) of the [LA](#) specifies that an instrument is a legislative instrument if:

- (a) it is made under a power delegated by the Parliament; and
- (b) any provision of the instrument:
 - (i) determines the law or alters the content of the law, rather than whether or how it applies to particular cases or circumstances; and
 - (ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

39 Even if an instrument is not a legislative instrument, it may still be useful to lodge it for registration as a notifiable instrument, especially if it is required to be published in the Gazette or elsewhere. Registering such an instrument as a notifiable instrument:

- (a) will generally satisfy any statutory requirement for the instrument to be gazetted or published (see [LA s 11\(4\)](#)); and
- (b) is much cheaper than alternatives such as newspaper advertising; and
- (c) ensures long-term access to your instrument (unlike agency websites where there is often pressure to archive older content and to change URLs for agency name changes and website redevelopment).

40 Unlike legislative instruments, notifiable instruments are not subject to tabling, disallowance or sunseting. However, they can still be repealed in bulk by means of a regulation made under section 48E of the [LA](#) if appropriate (see paragraph 223).

If there is uncertainty about the status of an instrument

41 It is important to identify instruments correctly: a legislative instrument is not enforceable by or against any person including the Commonwealth unless and until it is registered as a legislative instrument ([LA s 15K\(1\)](#)).

42 Lodging agencies, not OPC, are responsible for establishing the status of an instrument under the [LA](#) and for choosing the appropriate lodgement type at the time of lodgement. Under section 15H of the [LA](#), if an instrument is lodged for registration:

- (a) as a legislative instrument, it must be registered as a legislative instrument ([LA s 15H\(1\)\(a\)](#)); or
- (b) as a notifiable instrument, it must be registered as a notifiable instrument ([LA s 15H\(1\)\(b\)](#)).

For new instruments

43 If it is unclear whether a particular instrument is a legislative instrument, it would be prudent to get legal advice and consider the potential risks to government policy if the instrument is, or is not, registered as a legislative instrument. If there is a need to put the issue beyond doubt, there are two options to consider as follows:

- (a) if the instrument does not need to be made urgently—there may be scope to include an express declaration in relevant legislation (generally [LEOMR](#)); or
- (b) if the instrument has already been made, or needs to be made urgently—it should be registered as a legislative instrument.

44 Registering an instrument as a legislative instrument generally results in it, and an instrument that amends or repeals it, becoming a legislative instrument ([LA s 10\(1\)\(d\)](#)). However, this principle, and associated disallowance and sunseting regimes, does not apply to a notifiable instrument that is:

- (a) a commencement instrument ([LA s 8\(8\)\(b\)](#) and [11\(2\)](#)); or
- (b) declared to be a notifiable instrument by its enabling legislation ([LA s 8\(8\)\(a\)](#) and [11\(1\)](#)).

Note: If an instrument is declared to be a notifiable instrument by section 8 of [LEOMR](#) but it is registered as a legislative instrument, it will become a legislative instrument under subsection 8(3) of the [LA](#). However, an instrument that is stated to be a notifiable instrument in its primary law cannot become a legislative instrument through registration as such (see subsection 8(8) of the [LA](#)).

45 An express declaration that an instrument is not a legislative instrument can be inserted into [LEOMR](#) or an instrument's enabling legislation, but exceptional policy reasons will be required for a type of instrument that is likely to be of legislative character (see paragraph 38). Before making or instructing OPC to draft an exemption, please consult AGD (adminlaw@ag.gov.au or (02) 6141 2736). The formal policy approval of the responsible Minister and the Attorney-General is required for such a declaration.

For older instruments

46 Instruments that would be notifiable instruments if they were made on or after 5 March 2016 are not required to be lodged for registration. However, they can be registered if the First Parliamentary Counsel agrees that this is likely to be useful to users of the Register, for example, because instruments of ongoing or historic interest would cease to be available online as a result of machinery of government changes.

47 Legislative instruments made before 1 January 2005 were, however, required to be lodged by certain deadlines that have now passed. Any legislative instruments not lodged by the relevant deadline were, in almost all cases, repealed by the operation of section 32 of the [LA](#) when it was known as the LIA. That section has since been repealed, but its repeal does not affect:

- (a) the operation of a handful of older legislative instruments lodged later and registered under subsections 32(3) and 32(4) of the LIA; and
- (b) the repeal of all other legislative instruments not lodged as required.

What is the Federal Register of Legislation?

48 The Federal Register of Legislation is the authorised whole-of-government website for Commonwealth legislation and related documents. The Register contains the full text of laws, as well as details of the lifecycle of individual laws and the relationships between them. It is managed by OPC in accordance with section 15A of the [LA](#), and it includes:

- (a) all Acts as made since 1901; and
- (b) all Statutory Rules as made from 1904 to 2004; and
- (c) all legislative instruments made on or from 1 January 2005, including all older instruments in force on 1 January 2005, and associated explanatory statements; and
- (d) all notifiable instruments as made from 5 March 2016; and

- (e) compilations showing the text of Acts and instruments as amended; and
- (f) related documents such as Gazette notices, Bills and explanatory memorandums.

49 The authorised version of a document that has been registered is always in a PDF format and is always stamped with the document’s unique identifier and a prescribed form of words such as “Authorised version” or “Authoritative” (for a complete list, see [Rule s 14](#)).

50 For information on how and when to lodge instruments and related documents for registration, see [Chapter 4](#). For information on how and when to lodge compilations, see [Chapter 5](#).

Chapter 3—Drafting and interpretation of instruments

Main points

- OPC is required to draft certain instruments, is available to assist with other drafting matters, and publishes detailed guidance on a range of drafting issues.
- In reading or drafting a legislative instrument, it is important to have regard to any special provisions in the enabling legislation that may apply in addition to, or instead of, the default rules provided by the LA on issues such as commencement, incorporation of documents by reference, and use of gender-specific language.
- Lack of attention to the default LA rules can have significant legal and other consequences.
- Attention to formatting issues is also important to ensure that registered documents meet government accessibility requirements and read as intended.

Drafting of legislative instruments

51 Under the *Legal Services Directions 2017*, certain drafting work is tied to OPC. Agencies must use OPC's drafting services to prepare new or amending regulations, Ordinances and regulations of certain Territories, and any other legislative instruments made or approved by the Governor-General.

52 To better target OPC's drafting services to government needs, OPC has a prioritisation system for legislative instruments made or approved by the Governor-General (ExCo instruments). General policy approval from the Minister (or the Cabinet) for ExCo instruments is also required to be in place at the time drafting instructions are issued to OPC unless other arrangements have been made with OPC. More information is available on the OPC website⁵ or by contacting [OPC's instrument client advisers](#).

53 Agencies that are developing legislative proposals for instruments required to be drafted by OPC but that lack the in-house expertise to answer key legal questions can also get quick, informal advice on drafting aspects of legislation proposals from OPC's instrument client advisers.

54 OPC is available to draft other instruments on a fee-for-service basis. OPC can also provide a range of support services for agencies drafting their own instruments including editorial, document design and compilation services on this basis. More information about OPC instrument drafting and support services is available on the OPC website <https://www.opc.gov.au/>.

⁵ See <https://www.opc.gov.au/>.

55 If an instrument is not to be drafted by OPC, the person drafting the instrument needs to be aware of the drafting and publishing standards set out in this Chapter. Compliance with these standards is important and will help ensure that new instruments are:

- (a) legally effective—there are a number of laws of general application to consider (see paragraphs 56 to 93); and
- (b) clear; and
- (c) intelligible to anticipated users, including people who may rely on assistive technology (see paragraph 112).

General principles for interpretation of instruments

56 Subject to a contrary intention in the enabling legislation, the [LA](#):

- (a) applies the *Acts Interpretation Act 1901* to a legislative instrument as if it were an Act and each provision were a section of an Act ([LA](#) s 13(1)(a)); and
- (b) gives expressions used in a legislative instrument the same meaning as in the enabling legislation as in force from time to time ([LA](#) s 13(1)(b)); and
- (c) requires a legislative instrument to be read subject to the enabling legislation as in force from time to time, and so as not to exceed the rule-maker's power ([LA](#) s 13(1)(c)); and
- (d) provides that, if the legislative instrument exceeds the rule-maker's power, the instrument is taken to be valid to the extent that it is within power ([LA](#) s 13(2)).

57 The [LA](#) also provides that a rule-maker, in exercising a power to make a legislative instrument in relation to a matter (including a thing, person or animal), may identify the matter by referring to a class or classes of matters ([LA](#) s 13(3)). A rule-maker may also:

- (a) specify when the instrument or a provision of the instrument commences (within the limits set out in [LA](#) s 12: see paragraph 69); and
- (b) prescribe matters by reference to another document (within the limits set out in [LA](#) s 14: see paragraph 95).

What should be included in an instrument

58 Appropriate Australian Government branding (e.g. the Commonwealth Coat of Arms or Australian Government logo) is important to ensure that an instrument is easily identifiable as an official document. The branding chosen should be consistent with relevant whole-of-government guidelines⁶.

⁶ See <https://www.pmc.gov.au/resource-centre/government/legislation-handbook>

Recommended approach

59 In addition to Australian Government branding, an instrument should include the following (see also Illustration 3A):

- (a) the words making the instrument—these should reflect the language of the enabling Act;
- (b) the date of making;
- (c) the name as signed, and title, of each maker of the instrument.

60 For a Minister or Assistant Minister, the title of the rule-maker should be the title by which the Minister or Assistant Minister was sworn in by the Governor-General.

61 So, for an Assistant Minister this will include the formal Parliamentary Secretary title, such as “Assistant Minister to the Attorney-General, Parliamentary Secretary to the Attorney-General”.

62 These titles can be verified with the ExCo and Government Division of PM&C.

Illustration 3A—generic official branding and making words⁷



[Title of instrument including year of making]

I, *[name of rule-maker]*, *[title of rule-maker]*, make the following instrument.

Dated *[date of making]*

[name of rule-maker]
[title of rule-maker]

⁷ This is an example only and may not be appropriate in all situations.

63 The making words are usually followed by a page break, a table of contents unless the instrument is very short, and the main body of the instrument. The main body of the instrument should start with certain standard provisions, and these provisions should not be combined with the making words or with any other provisions. These standard provisions, and the recommended order of provisions, is as follows (see also Illustration 3B):

- (a) **Name.** A naming provision should be included in all legislative instruments other than commencement instruments. The name given to an instrument should be convenient (not too long) and unique, so that the instrument can be identified with complete certainty from its name alone. For detailed guidance on the naming of instruments, please refer to [OPC Drafting Direction 1.1A](#). Note also that First Parliamentary Counsel may name or rename instruments if they do not have a name that is unique (see [LA s 15M\(b\)](#) and [Rule s 10](#)).
- (b) **Commencement.** A commencement provision is important to set out when the instrument will commence, even if the default commencement applying under the [LA](#) is to be used. For more information on commencement, see paragraphs 69 to 79.
- (c) **Authority.** An authority provision should be included in all legislative instruments other than commencement instruments, to identify the enabling legislation as defined in [LA s 4](#). The authority provision should cite the full name of each piece of enabling legislation, and also the enabling provision unless the instrument is made under a general instrument-making power.
- (d) **Definitions.** Any definitions should generally be presented together at the start of the instrument wherever possible. If an expression is already defined for the purposes of the whole of an instrument's enabling legislation, it is useful to note this but the definition should not be duplicated. An expression used in an instrument will generally have the same meaning as in its enabling legislation: see [LA s 13\(1\)\(b\)](#). However, this will generally apply only if the definition applies for the purposes of the entire enabling legislation, and not just a part of the enabling legislation.

64 Each provision in the main body of the instrument and in any Schedules should be referred to and numbered in an orderly way. This ensures that the provisions of an instrument can be referred to readily and amended with certainty, and compilations can be prepared of the instrument as amended (see [Chapter 5](#)). For consistency with the rest of the Commonwealth statute book, the person drafting the instrument should:

- (a) use Arabic numerals (e.g. 1, 2, 3) for all headings, sections and subsections; and
- (b) use letters (e.g. (a) and (b)) for paragraphs; and
- (c) if inserting a new section/s (e.g. after section 25), use capital letters after the numeral to indicate the sequence of sections (e.g. section 25A, 25B etc.); and
- (d) if many new sections have been/are to be inserted, skip the letters "I" and "O" after numerals to avoid confusion e.g. between 25I and 251, and 25O and 250; and

- (e) avoid using capitalised Roman numerals (e.g. I, II, III), unless inserting provisions into an existing instrument that already uses them; and
- (f) avoid “tidying up” legislation by renumbering it, without carefully considering the risks (especially if there are cross-references in related documents).

65 For detailed guidance on the numbering of provisions, and the risks involved in renumbering provisions, please refer to [OPC Drafting Direction 1.7](#).

Illustration 3B—standard order and format of provisions in main body of instrument

1 Name

→ This instrument is the [*name of instrument including year of making, formatted in italics*].

2 Commencement

→ (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	[<i>Date of commencement, spelt out in full, e.g. as 9 January or 1 September, not the potentially ambiguous 9/1, or other text describing when the provisions in column 1 commence</i>].	[<i>Date, spelt out in full, if known prior to registration</i>].

Note: → This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

→ (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

→ This instrument is made under [*enabling provision unless a general instrument making power is used*] of the [*full name of enabling legislation which should include the year of making (unless there is no year of making) and be formatted in italics*].

4 Definitions

Note: → A number of expressions used in this instrument are defined in the Act, including the following:

(a) → [*first expression defined in Act*];

(b) → [*second expression defined in Act*].

→ In this instrument:

Act means the [*full name of enabling legislation as in the authority provision. Note, this definition is only needed if there are repeated references to the Act*].

new expression means [*new expression defined in this instrument. Delete or insert definitions as appropriate*].

5 [Title of substantive section]

→ [Text of section. If subsections are required, number and format these and any paragraphs as follows].

→ (1) → [Detail of subsection 5(1)].

→ (2) → [Detail of subsection 5(2)].

→ (a) → [Detail of subsection 5(2)(a)]; and

→ (b) → [Detail of subsection 5(2)(b)].

→ (3) → [Detail of subsection 5(3). Insert additional sections and delete or renumber provisions as appropriate].

66 If different provisions of the instrument commence at different times, additional rows can be added to the commencement table (see Illustration 3C).

Illustration 3C—commencement table with multiple commencement dates

2 Commencement

(1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 4 and anything in this instrument not elsewhere covered by this table	<i>[Date of commencement, spelt out in full, e.g. as 9 January or 1 September, not the potentially ambiguous 9/1, or other text describing when the provisions in column 1 commence].</i>	<i>[Date, spelt out in full, if known prior to registration]</i>
2. Schedule 1	<i>[Date of commencement, spelt out in full, e.g. as 9 January or 1 September, not the potentially ambiguous 9/1, or other text describing when the provisions in column 1 commence].</i>	<i>[Date, spelt out in full, if known prior to registration]</i>
3. Schedule 2	<i>[Date of commencement, spelt out in full, e.g. as 9 January or 1 September, not the potentially ambiguous 9/1, or other text describing when the provisions in column 1 commence].</i>	<i>[Date, spelt out in full, if known prior to registration]</i>

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

(2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

Use of other approaches

67 The person drafting the instrument is sometimes asked to omit standard provisions or numbering, or to include images or other content that is not legally necessary. Although this approach may make an instrument “look nice”, it can also make it difficult to apply amendments and, in extreme cases, to enforce an instrument. Consequently, if a rule-maker wishes to proceed with a non-standard approach, agencies are advised to ensure that the rule-maker:

- (a) is aware of the associated risks; and
- (b) includes non-standard content as an attachment or Schedule to a short instrument that follows the recommended approach.

68 Even a very short instrument should include the enabling legislation and making words appropriate to that legislation in the text of the instrument. These details are important to establish whether the instrument has been validly made.

Default rules on commencement of instrument or provision

69 In exercising the power to make a legislative instrument, the rule-maker should always specify when the instrument, or each provision of the instrument, commences. In doing so, the rule-maker must have regard to any special provisions in the instrument's enabling legislation, and the default provisions of the [LA](#) (particularly s 12).

70 An instrument may provide for its commencement by enabling a commencement instrument to be made: see [LA](#) s 12(5). Alternatively, an instrument or provision of an instrument may be expressed as commencing as follows:

- (a) on a specified day—if no time is specified, the commencement will occur at the start of the specified day (see [Acts Interpretation Act 1901](#) s 3);
- (b) on a specified day and time—if a time is specified, it may be necessary to specify a time zone;
- (c) on or after a specified event such as:
 - (i) the instrument's registration; or
 - (ii) the commencement of a Commonwealth Act or provision of an Act; or
 - (iii) the commencement of a provision of a State law; or
 - (iv) the entering into force for Australia of a treaty—this would normally be notified through a notifiable instrument ([LEOMR](#) s 8 item 1).

71 As a general rule it is not safe to commence an instrument when it is signed by the rule-maker for the reasons set out in paragraph 73.

72 Special care is needed if an instrument is to be expressed to commence retrospectively, that is, before it is registered. Subject to any contrary provision in an Act, a provision of an instrument may commence retrospectively ([LA](#) s 12(1A) and (2)). However, a provision that commences before it is registered does not apply in relation to a person (other than the Commonwealth or an authority of the Commonwealth) to the extent that as a result ([LA](#) s 12(2)):

- (a) the person's rights as at the time the instrument is registered would be affected so as to disadvantage the person; or
- (b) liabilities would be imposed on the person in respect of anything done or omitted to be done before the instrument is registered.

73 It is for this reason that legislative instruments should generally not be expressed to commence when the instrument is signed because this will be before the instrument is registered, and so the rules in [LA](#) s 12(1A) and (2) will apply.

74 Care should also be taken to avoid having regulations made under a provision in a Bill if the regulations are to be made on the same day as the Bill is to be given Royal Assent. While this can be organised, it does require careful timing to ensure that the Royal Assent is given before the regulations are made. You should raise this with the ExCo Secretariat if this is required.

75 A legislative instrument is not enforceable unless and until it is registered as a legislative instrument (LA s 15K(1)).

76 Retrospectivity is an issue of concern to the Parliament, so if an instrument contains a retrospective provision, the instrument's explanatory statement (see Chapter 8) should explain why retrospective commencement is appropriate and include an assurance that it is not affected by subsection 12(2) of the LA. Additional assurances may be required for instruments to be made by the Governor-General—please refer to the Federal Executive Council Handbook for up-to-date information on current requirements⁸.

77 Special care is also needed if an instrument is being made under a provision of an Act that has received assent but that has not yet commenced. Such an instrument cannot commence before its enabling provision, and is usually expressed as commencing at the same time as the enabling provision commences (rather than on a particular date that might change). There are also limits on what such an instrument can do: see section 4 of the *Acts Interpretation Act 1901*.

78 If there is no commencement provision, an instrument commences on the start of the day after it is registered (LA s 12(1)(a)). However, OPC's practice when drafting is to always specify when an instrument commences in a separate provision to ensure this is clear.

79 For further guidance and advice on commencement issues, please contact OPC, preferably before an instrument is made.

Default rules on amendment or repeal

80 The general consequences of amending or repealing a legislative instrument, or a provision of a legislative instrument, are set out in section 7 of the *Acts Interpretation Act 1901* as applied by paragraph 13(1)(a) of the LA. Subject to a contrary intention in an instrument or Act, the amendment or repeal of an instrument does not, among other things:

- (a) revive an instrument or provision repealed by the first instrument or provision unless express provision is made for the revival; or
- (b) revive anything else not in force or existing when the repeal or amendment takes effect (unless express provision is and can be made for the revival); or
- (c) affect the previous operation of (including any amendment made by), or anything done under, the instrument or provision; or
- (d) affect any right, privilege, obligation or liability acquired, accrued or incurred under the instrument or provision; or

⁸ See <https://www.pmc.gov.au/resource-centre/government/federal-exec-council-handbook>

- (e) affect any penalty, forfeiture or punishment incurred in respect of an offence committed against the instrument or provision; or
- (f) affect any associated investigation, legal proceeding or remedy.

81 Under the [LA](#), amending an instrument generally triggers a requirement for one or more compilations to be prepared (see [Chapter 5](#)) but does not affect any sunset date that may apply to the instrument under Part 4 of Chapter 3 of the [LA](#) (see [Chapter 10](#)). Consequently, it may be better to repeal and replace an instrument if it is approaching its sunset date or if extensive changes are being made to the text of the instrument.

82 If an instrument is repealed, it is not removed from the Register. The instrument remains on permanent public record on the Register but is no longer displayed as in force. The [LA](#) makes no provision for registered instruments (or parts of registered instruments) to be removed from the Register for any reason.

Amending and repealing instruments

83 A rule-maker who is authorised to make a particular type of instrument may amend or repeal any instrument of the same type that is in force. However, the rule-maker must have regard to any special provisions in the instrument’s enabling legislation and the default provisions of the [Acts Interpretation Act 1901](#) and the [LA](#). The rule-maker should also:

- (a) ensure that each instrument to be amended or repealed is clearly identified; and
- (b) consider whether a saving, transitional, application or self-repealing provision is needed (see also paragraphs 92 and 93); and
- (c) consider whether separate instruments are needed e.g. because only some of the instruments to be dealt with would normally be subject to disallowance.

84 To ensure that an amendment or repeal is effective and does not have unintended consequences, it is essential to clearly identify each instrument that is to be amended or repealed. Under paragraph 40(1A)(b) of the [Acts Interpretation Act 1901](#) (as applied by paragraph 13(1)(a) of the [LA](#)), a legislative instrument may be identified by any of the following:

- (a) its name, if the instrument has a unique name equivalent to the short title of an Act;
- (b) a unique identifier given to the instrument in accordance with rules prescribed under the [LA](#); or
- (c) if the instrument was numbered under a Commonwealth law—the year it was made and its number, together with a reference (if necessary) to the kind of instrument; or
- (d) if the instrument was notified or published in the Gazette—the date and (if necessary) number and page of the Gazette in which it was notified or published; or

- (e) the date it was made, together with a reference to the Act or instrument, and (if necessary) provision, under which it was made.

85 In the case of amendments, it is important to ensure that the provisions to be amended are clearly identified to ensure the amendments have effect and a compilation can be prepared that clearly indicates the history of amendments (see [Chapter 5](#)). Unless a specific practice is required by the enabling legislation, it is also important:

- (a) to clearly indicate that the relevant instrument is being amended, preferably by using the word “amend” for consistency with the *Acts Interpretation Act 1901* and the [LA](#); and
- (b) to avoid a potentially ambiguous term that may have other meanings such as modify, supersede, replace or reverse; and
- (c) to ensure that any provisions that are inserted are numbered appropriately—for further guidance on numbering and renumbering issues, see paragraph 64; and
- (d) to include any application, saving or transitional provisions relating to an amendment into the principal instrument by amendment.

86 It is OPC’s drafting practice to present amendments and partial repeals in one or more Schedules, and to number the Schedules so that even if there is only one Schedule, it is called “Schedule 1”. Further guidance on such matters is available in the OPC [Amending forms manual](#).

87 Amending an instrument does not change when it sunsets, so the date of amendment provided by the rule-maker cannot be later than any sunset date that already applies to an instrument under Part 4 of Chapter 3 of the [LA](#). If the sunset date is soon, there may be workload and other benefits in making a single replacement instrument that incorporates amendments. More information on sunset issues is provided in [Chapter 10](#).

88 In repealing an instrument in its entirety, the date of repeal provided by the rule-maker will have no effect if it is later than any sunset date that already applies under Part 4 of Chapter 3 of the [LA](#) (see [Chapter 10](#)). Unless a specific term is required by the enabling legislation, it is also important:

- (a) to clearly indicate that the relevant instrument is being repealed preferably by using the word “repeal” for consistency with section 7 of the *Acts Interpretation Act 1901* and the [LA](#); and
- (b) to avoid a potentially ambiguous term such as cease, end, finish, replace, sunset, supersede, terminate or expire as if repealed—these terms may cease the effect of a law without removing it from the statute book.

Certain instruments will be subject to automatic repeal

89 If an instrument is solely commencing, amending or repealing, it will be repealed automatically in full under section 48A or 48B of the [LA](#) on the day after the latest of:

- (a) for a disallowable legislative instrument—the end of the disallowance period for that instrument, when the instrument has fully commenced, or when the capacity for any further provisions to commence has been exhausted;
- (b) for a legislative instrument that is exempt from disallowance or for a notifiable instrument—when the instrument has fully commenced, the capacity for any further provisions to commence has been exhausted, or the instrument is registered.

90 There is no need to provide for its repeal.

91 Agencies do, however, need to assess whether an instrument meets the [LA](#) criteria for automatic repeal, and advise OPC of this (ideally at the time of lodgement). Note that the following do not affect whether an instrument is solely commencing, amending or repealing:

- (a) a preamble or recital (however described);
- (b) a naming provision;
- (c) a commencement provision;
- (d) an authority provision;
- (e) an objects provision, simplified outline or similar provision that sets out the purposes of, or explains, the instrument or any of its provisions;
- (f) any provision that is being inserted into another instrument by amendment.

92 An instrument cannot be considered solely commencing, amending or repealing if it contains any of the following provisions, unless the provision is inserted into another instrument by amendment:

- (a) a saving provision such as “Parts X and Y of the *Cat and Dog Regulation 2016* continue to apply in relation to ...”;
- (b) a transitional provision such as “If a person has lodged a claim before the commencement of the instrument ... the claim is taken to have been ...”;
- (c) an application provision such as “The amendments made by Schedule X apply / do not apply / only apply ...”;
- (d) a modification provision such as “The formula in section 99 is modified by ...” (this may need to be read in the context of an application provision);
- (e) any other substantive provision such as a requirement to notify or gazette certain information.

Use of self-repealing provisions

93 Unless an instrument is subject to automatic repeal, it will remain in force until it is repealed by some other means. If an instrument is only likely to be needed for a particular

event or a limited period such as a financial or calendar year, a self-repealing provision may be considered. In drafting such a provision, OPC's current practice is generally:

- (a) to include a separate self-repealing provision under a heading such as "Repeal"; and
- (b) to provide that the instrument is repealed; and
- (c) to specify that the instrument is repealed at the start of a specified day, with the day chosen taking into account not only any sunset date that may apply, but also the need for the instrument:
 - (i) to be registered and to commence in full before it is repealed; and
 - (ii) to remain in force until the event or period to which it relates has passed.

Default rules on incorporating documents by reference

94 In exercising the power to make a legislative instrument in relation to a matter, a rule-maker may prescribe matters by reference to another document, such as model legislation enacted by another jurisdiction. In doing so, the rule-maker must comply with the default provisions of the [LA](#) (particularly section 14), and any special provisions of the instrument's enabling legislation.

95 Under section 14 of the [LA](#), if authorised or required by the enabling legislation, a legislative instrument or notifiable instrument may make provision in relation to any matter by applying, adopting or incorporating some or all of another document, with or without modification. A document may be:

- (a) the provisions of an Act, disallowable legislative instrument or rule of court as in force at a particular time or as in force from time to time; or
- (b) any other instrument or writing as in force or existing at the time the instrument commences or a time before the instrument commences (and not from time to time, unless the contrary intention appears).

96 To ensure that an incorporation by reference is effective, does not have unintended consequences, and is clear on the face of the instrument, it is essential to clearly identify the document that is incorporated.

97 As it is usually necessary to refer to the document to understand or apply the law made by the instrument, the [LA](#) requires the rule-maker:

- (a) to describe the document, and indicate how it may be obtained, in the explanatory statement (see [LA](#) s 15J(2)(c) and [Chapter 8](#)); and
- (b) to make the document available for inspection, if and as required by either House of the Parliament, while the instrument is open to disallowance (see [LA](#) s 41 and [Chapter 9](#)).

98 Although agencies are not required to make documents incorporated by reference available elsewhere, the practice of incorporating documents that are not readily available “may increase the cost of compliance for the community and the risk of non-compliance”⁹. If it is necessary to incorporate such material, it may be possible to reduce the costs and risks e.g. by purchasing print copies for distribution to major regional libraries through the Commonwealth Library Deposit and Free Issue Schemes¹⁰.

Scope to delegate power

Delegating a power to make a legislative instrument

99 A rule-maker may, in some circumstances, be able to delegate to a third party the power to make instruments or exercise other powers. It is important to note, however, that delegation is usually only possible if an Act makes explicit provision for it to occur. Examples of provisions that do this include the following:

“The Minister may, in writing, delegate his or her powers under this Act to an SES employee or an APS employee performing duties in the Department.”

“The First Parliamentary Counsel may, by signed instrument, delegate to ... an SES employee in the Office of Parliamentary Counsel or in the Department any of the powers or functions of the First Parliamentary Counsel under this Act.”

100 It is also important to note that delegating a power does not expand the statutory limits of that power, affect any obligations that may apply under Acts of general application including the [LA](#), or mean that the delegate can sub-delegate the power further (see [Acts Interpretation Act 1901](#) s 34AB(1)(b)). In addition, the delegator:

- (a) will need to make a formal instrument of delegation specifying who can exercise the power being delegated; and
- (b) may identify delegates by job title, by management level, by position number or by name (noting that doing so by name may necessitate regular updates); and
- (c) may wish to issue directions to delegates that apply in addition to the general obligations imposed by legislation including the [LA](#); and
- (d) should review the instrument of delegation and any directions to delegates on a regular basis, to ensure that they remain appropriate and up-to-date.

101 Instruments of delegation and any instructions issued to delegates are not normally required to be registered ([LEOMR](#) s 6(1) item 1) but are crucial to the legitimacy of any action taken in reliance on them. Consequently:

- (a) agencies should maintain detailed records of their documents, including those that have been superseded; and

⁹ See [2008 Review of the Legislation Act 2003](#), chapter 4.4.

¹⁰ See <https://www.dta.gov.au/help-and-advice/guides-and-tools/commonwealth-library-deposit-and-free-issue-schemes>

- (b) delegates should review their documents on a regular basis to ensure that they are acting lawfully.

Legislative instruments that delegate power

102 Special care is needed when a legislative instrument contains a delegation of power. The delegation must be within the scope permitted by the legislative framework and related case law. Specialist drafting assistance is recommended if the proposed delegation involves:

- (a) a delegate who is outside the agency; or
- (b) sub-delegation of the power to make an instrument that is, or is likely to be, a legislative instrument (see paragraph 38).

103 Sub-delegation of power has also been identified as an issue of concern to the Parliament (see [Chapter 9](#)) and is only acceptable if an instrument's enabling legislation provides for this. Accordingly, if a legislative instrument provides for sub-delegation of power:

- (a) the instrument's explanatory statement should provide the authority for the sub-delegation, and describe the training, monitoring or other strategies being put in place to ensure that the sub-delegation is exercised with appropriate skill and care; and
- (b) if a legislative instrument is made by a delegate, the instrument's explanatory statement should describe how and when the power to make it was delegated to the rule-maker, and include an assurance and details of compliance with any directions to delegates that may apply.

Offences, infringement notices and enforcement powers

104 If the Parliament has delegated the power to make an instrument prescribing criminal offences or infringement and enforcement provisions, care needs to be taken to ensure that the provisions are legally enforceable and consistent with Australian Government policy.

105 Before seeking policy approval for such a provision, agencies should assess whether the proposal is consistent with the AGD *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*¹¹. Agencies should contact AGD's Criminal Law Section via email at CriminalLaw@ag.gov.au if the proposal:

- (a) contains novel or complex issues that the Guide does not address; or
- (b) departs significantly from the principles in the Guide.

106 Further guidance on related matters can be found in [OPC Drafting Direction 3.5](#).

¹¹See <http://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx>

Gender-specific and gender-neutral language

107 In exercising the power to make a legislative instrument in relation to a matter, it is generally important to use gender-neutral language. Language that might be reasonably seen to imply a single gender should be avoided, unless:

- (a) the instrument is intended to apply only to people of one sex; or
- (b) it is important to use a particular term for consistency with the enabling legislation.

108 Inappropriate use of gender-specific language is clearly identified in the [LA](#) as undesirable. Under section 16 of the [LA](#), the First Parliamentary Counsel is required to take steps to prevent the inappropriate use of gender-specific language in legislative instruments, and to notify both the rule-maker and the Parliament of any instances that may be identified.

109 Further guidance on what constitutes gender-specific and gender-neutral language can be found in [OPC Drafting Direction 2.1](#).

Other content issues

110 When it comes to the content of an instrument and related documents, rule-makers need to exercise care and judgement in deciding what level of detail to include. For example, it may not be necessary or appropriate to disclose:

- (a) information that would be assessed as requiring protection and assigned a security classification or an Official: Sensitive dissemination limiting marker¹²; or
- (b) information such as a person's home address—this may breach the [Privacy Act 1988](#) and raise safety issues, although it may still be desirable to find some other way to identify a person unambiguously so as to minimise unintended consequences for other people with the same name.

111 A copyright notice should only be included in an instrument or related document if this is essential to acknowledge the intellectual property (IP) rights of a third party, and if the legal and other implications of reusing this IP has been carefully considered. For more information on copyright of registered content, see paragraph 216.

Technical considerations

112 Given their legal nature, it is essential that all registered documents are accessible to the widest range of users, including people who may rely on assistive technology such as screen readers. This is a requirement of the [Disability Discrimination Act 1992](#)—see section 29 of that Act in particular on the administration of Commonwealth laws and programs.

113 The Register website is generally compliant with the international standard for accessibility, namely the Web Content Accessibility Guidelines (WCAG) 2.0¹³. However,

¹² See [PSPF policy: Sensitive and classified information](#)

¹³ See <http://www.w3.org/WAI/>

agency software and other choices can have a major impact on the accessibility of individual documents.

114 To ensure that documents are searchable and can be read by a wide range of devices, all documents must be supplied to OPC in Microsoft Word or rich text format, unless the First Parliamentary Counsel has agreed otherwise ([Rule s 5\(3\)](#)). This ensures documents can be indexed and offered to users in a choice of file formats. For more information on current formats, see <https://www.legislation.gov.au/Content/Disclaimer>.

115 To meet accessibility requirements, alt text (short for “alternative text”) should be applied to any images contained in the document, including formulas. Alt text is a short textual description of the image that is not visible on the face of the relevant document but, instead, sits in the properties of the image.

116 It is important to include alt text because screen readers (mentioned in paragraph 112 above) rely on the alt text description. More information on alt text, including examples and guidance on what alt text to include, can be found in [OPC Drafting Direction 1.9](#).

117 An additional service fee will apply if OPC is required to add alt text to any images or objects. See paragraph 149 for further information on OPC’s special requirement and additional services fees.

118 Meeting these requirements is important but may not, on its own, ensure that text and other content is fully machine and people-readable. Agencies should, therefore:

- (a) format the text of documents using styles or equivalent; and
- (b) choose an easily readable font and font size for normal text—OPC’s current practice is to use 11 point Times New Roman for most text; and
- (c) present mathematical formulas as images; and
- (d) ensure all images are legible, and are tagged with an “alt text” description for people who use screen-readers; and
- (e) preview what the document is likely to look like when converted into PDF or HTML format (for example, by using the “Save As” feature in Word); and
- (f) consider splitting very large files that exceed 10MB or 600 pages into multiple volumes to avoid excessive download times; and
- (g) finalise the document only after checking for hidden issues—in Word 2010, for example, this can be done using the File | Info | Check for Issues toolset.

119 Things that are likely to cause problems, and that should be avoided if practicable, include the following:

- (a) hidden content such as revisions and comments that may not be intended or suitable for publication;

- (b) field codes and macros—these may no longer work, or may not work in the way intended, when the document is published by OPC;
- (c) special symbols—the Greek letter “Mu” (μ) in particular is at risk of being misread by some devices/software so μg may be misread as mg;
- (d) highlighting, watermarks or background images that may obscure the text.

120 Finally, agencies should also ensure that at least 1 cm is left blank at the bottom of each page. This is so that no content is obscured when the document is stamped with its unique identifier and, if applicable, the words that indicate that it is an authorised version (see [Rule s 11 and 14\(2\)](#)).

121 If significant technical issues are identified during or after the registration process, OPC will generally contact the lodging agency to discuss the situation and suggest what can be done to resolve it.

Improving drafting standards

122 Section 16 of the [LA](#) requires the First Parliamentary Counsel to cause steps to be taken to promote the legal effectiveness, clarity, and intelligibility to anticipated users, of legislative instruments and notifiable instruments. The steps may include, but are not limited to, the following:

- (a) undertaking or supervising the drafting of instruments;
- (b) scrutinising preliminary drafts of instruments;
- (c) providing advice about the drafting of instruments;
- (d) providing training in drafting and drafting-related matters to agencies;
- (e) arranging the temporary secondment of OPC staff to agencies;
- (f) providing drafting precedents to agencies.

123 This Handbook, issued by the First Parliamentary Counsel, includes important information to assist agencies to improve drafting standards. OPC’s [Drafting Directions](#) deal comprehensively with the drafting of instruments as well as Bills. OPC is also available on a fee-for-service basis to provide training to agency staff who prepare legislative instruments. For further information, please contact OPC’s [instrument client advisers](#).

Chapter 4—Lodgement and registration of instruments

Main points

- An instrument must be lodged for registration as soon as practicable after making, preferably with its explanatory statement if required.
- Registration is not the end of the process—both agencies and OPC are required to take action to ensure that the Register remains complete and accurate.

Requirement to lodge instruments with OPC

124 All instruments must be lodged for registration as soon as practicable after making (LA s 15G). However, it is possible to create a draft lodgement before an instrument is made. This is particularly useful if you require urgent registration.

125 The steps involved in lodging an instrument for registration are as follows:

- (a) create an online lodgement;
- (b) attach the electronic version of the instrument;
- (c) for legislative instruments—attach the explanatory statement;
- (d) if required—attach other documents;
- (e) certify the online lodgement—this is the final step before OPC can register an instrument, and should only be taken once an instrument has been made.

126 Agencies do not need to lodge original instruments in hard copy, as electronic copies of registered laws and explanatory statements are authorised and taken to be a reliable source of information for the purpose of legal proceedings (LA s 15ZB). Agencies are, however, expected to manage hard copies in accordance with the *Archives Act 1983* and related guidance on the destruction of original records after digitisation (see the National Archives of Australia General Records Authority 31(GRA31)).

127 Failure to lodge instruments promptly can have significant legal and other consequences, particularly if this results in the instrument commencing retrospectively (see paragraphs 71 to 76).

Step 1: Create online lodgement

128 A separate online lodgement must be created for each instrument. This can only be done through the secure lodgement facility at <https://lodge.legislation.gov.au> unless the First Parliamentary Counsel has agreed otherwise (Rule s 5(2)).

129 Many agencies have a central lodging area for lodgement purposes. If not, please contact OPC (lodge@legislation.gov.au or (02) 6120 1350) to arrange a log-on and for assistance. The lodgement facility also provides additional guidance within lodgement forms to make the process as easy as possible.

130 As part of the lodgement process, the lodging agency will need to choose the appropriate lodgement type (that is, legislative instrument or notifiable instrument as discussed in [Chapter 2](#)) and supply information including:

- (a) the name and relevant provision of the instrument’s enabling legislation; and
- (b) a brief description of the subject matter of the instrument; and
- (c) a reference identifying any document incorporated by reference in the instrument; and
- (d) the name of the instrument and of any instrument that it affects; and
- (e) the number of pages in the instrument; and
- (f) the name and contact details of a person who can answer questions about the instrument; and
- (g) details of any special requirement e.g. for registration on or before a specified date, or for express or peak period service as discussed in paragraph 149.

131 Please ensure that the person nominated to answer questions about the instrument is familiar with the instrument in question, and provides their mobile or after-hours phone number if express registration is required. Otherwise, if statutory requirements have not been met, it may not be possible for OPC to meet the requirement for express registration.

132 In addition, to ensure that the instrument is processed appropriately after registration, information must also be provided about:

- (a) whether the instrument is subject to automatic repeal as discussed in paragraphs 89 to 93; and
- (b) if it is a legislative instrument—whether it is subject to:
 - (i) disallowance as discussed in [Chapter 9](#); and
 - (ii) sunseting as discussed in [Chapter 10](#).

Step 2: Attach electronic version of instrument

133 If the instrument has been drafted by OPC, please attach the instrument and ensure you include the making date, and any other changes made by the rule-maker before the instrument was made.

134 For all instruments, attach (upload) an electronic copy of the instrument as made to the online lodgement form. The electronic file:

- (a) must be in .rtf, .doc or .docx format, unless the First Parliamentary Counsel has agreed to some other format (see [Rule s 5\(3\)](#)); and

Note: Our preferred format is .docx.

- (b) must not contain macros, fields or other dynamic content that may interfere with the content of the document (see [Rule s 5\(4\)](#)).

Step 3: If required—attach explanatory statement or other documents

135 The explanatory statement and any supporting material for the instrument should also be attached (uploaded) to the online lodgement form. As with instruments, these documents:

- (a) must be in .rtf, .doc or .docx format, unless the First Parliamentary Counsel has agreed to some other format (see [Rule s 5\(3\)](#)); and

Note: Our preferred format is .docx.

- (b) must not contain macros, fields or other dynamic content that may interfere with the content of the document (see [Rule s 5\(4\)](#)).

136 The Register may contain additional documents if First Parliamentary Counsel considers that the documents are likely to be useful to users of the Register (see [LA s 15A \(3\)](#)). Any supporting material should be appropriate to publish and likely to be useful to users of the Register. Administrative documents such as briefs to Ministers are not appropriate to be included as supporting material.

137 If the explanatory statement is not yet available, details of when the explanatory statement is likely to be available should be noted in the special requirements field.

Step 4: Certify the online lodgement

138 All lodgements must be certified as complete and accurate by the lodging agency (not OPC) in order for any processing of the lodgement to start.

139 As part of certifying a lodgement, the agency should check the lodgement and all attachments carefully against the original documents. It is particularly important to check the electronic form of the instrument against the instrument as made—they must be identical in all respects. As part of this:

- (a) any editing notations including change tracking and “DRAFT” or “COPY” marks must have been removed unless they appear in the signed original; and
- (b) the following must be included in the electronic copy:
 - (i) anything written by the rule-maker on the original instrument;
 - (ii) anything written on the original instrument by someone else before the rule-maker signed the instrument;
 - (iii) any date given in the signed instrument as the date of making;
 - (iv) the name as signed of each maker of the instrument and each other person who signed the instrument as made (e.g. a person who witnessed the rule-maker’s signature).

140 It is generally not necessary for the electronic form of the instrument to include a scan of the rule-maker’s signature or the notation “signed”. However, it should be clear from the text that the instrument has in fact been signed, so the presumption of regularity can apply.

141 To deal with instruments that have been made by applying an electronic signature, the person lodging the instrument for registration must certify that the rule-maker applied their signature personally. At a minimum, there should be evidence that the signature was applied personally by the rule-maker, such as:

- (a) documentary evidence from a person who witnessed (or virtually witnessed) the signature being personally applied to the instrument by the rule-maker; or
- (b) evidence that the rule-maker’s electronic signature is locked in such a way that only the rule-maker can access and apply it.

142 It is important to take the certification requirement seriously, and to check each document attached to a submission. Submitting incorrect information may be a breach of the APS Code of Conduct¹⁴, and can have serious consequences for an agency and for government policy (see paragraphs 207 to 213).

143 If it emerges that a lodgement is incomplete or inaccurate, it must be withdrawn as soon as practicable ([Rule s 6\(3\)](#)). If that is no longer possible, then the error must be notified to OPC without delay ([LA s 15L\(1\)\(e\)](#)). For further guidance on how to report events affecting the accuracy and completeness of the Register, see [Chapter 6](#).

144 A lodgement is complete once an accurate lodgement form is certified and submitted to OPC. If the lodgement form including any attached documents is required to be resubmitted and recertified, the lodgement date and time for the purpose of any relevant additional fees is the date and time of the last lodgement form certified before registration.

Standard timeframes for registration

145 Two full working days after certification should generally be allowed for standard pre-registration processes and another three working days for OPC to lodge documents for tabling during sitting periods. A longer lead time is recommended if documents:

- (a) are lodged in a non-standard format—please note this requires the prior approval of the First Parliamentary Counsel ([Rule s 5\(3\)](#)); or
- (b) do not have a name or a unique name—First Parliamentary Counsel may name or rename instruments if they do not have a name that is unique (see [LA s 15M\(b\)](#) and [Rule s 10](#)); or
- (c) are large, or contain a mathematical formula, a long table or other complex formatting; or
- (d) need special handling—requirements such as colour printing should be clearly flagged no later than the time of lodgement; or

¹⁴ See section 13 of the [Public Service Act 1999](#).

- (e) need to be registered during peak periods notified in advance—additional fees may also apply (see paragraph 149).

146 As soon as an instrument is registered and available on the Register website, an email notification will be sent to the address nominated in the lodgement. If registration is likely to be delayed significantly, OPC will ring the lodging agency to discuss the matter. Please note, it may not be possible to register an instrument:

- (a) because statutory requirements have not been met; or
- (b) because of technical difficulties.

147 If technical difficulties prevent OPC from registering a document on the approved website <https://www.legislation.gov.au>, and as permitted by section 12 of the [Rule](#), OPC:

- (a) may register the document by publishing it on the OPC website <https://www.opc.gov.au/> or (if that website is not publicly available) by publicly displaying the document at 28 Sydney Avenue, Forrest ACT; and
- (b) will make the document available on the approved website once the technical difficulties have been resolved.

Fees for standard and additional services

148 Clients receive a single annual Federal Register of Legislation Fee invoice for each financial year, which covers all routine registration services. This fee model enables OPC to provide certainty to clients and, because it is simple to administer, to keep Register costs down.

149 OPC only charges additional fees if the client requires a special requirement and additional service, such as registration at a specific time, express, after-hours or peak period service, when lodging instruments or gazettes. If your agency is likely to require such service, please let OPC know by calling (02) 6120 1350 during business hours. This is particularly important if you think your agency may require something to be registered:

- (a) on the day of or day after lodgement; or
- (b) on the same-day between 5.00 pm and 11.59 pm without prior notice; or
- (c) at a specified time during business hours; or
- (d) outside of normal business hours, including on a weekend or public holiday;
or
- (e) during the notified peak periods at the end of the calendar and financial year;
or
- (f) with the addition of a unique name; or
- (g) with the addition of alt text to an image or object before registration.

150 It also important for an agency to contact OPC if:

- (a) a registration requires express delivery for tabling; or
- (b) a rectification of an instrument or compilation needs to be issued due to an agency error.

151 The services OPC provides in connection with documents do not end with their registration. For example, OPC routinely tracks and alerts agencies to disallowance, sunseting and other legislative processes that may affect the lifecycle of an instrument and, even if an instrument is repealed, it remains available on the Register.

152 Detailed information on special requirement and additional service fees can be obtained from the home page of the [lodgement facility](#) or the Register Help Desk on (02) 6120 1350.

Requirement for gazettal or notification in addition to registration

153 A legislative instrument's enabling legislation may require the instrument to be published or notified in the Gazette. Under subsection 56(1) of the [LA](#), registering an instrument on the Federal Register of Legislation as a legislative instrument on or after 5 March 2016 meets the legislation's requirement for gazettal. Generally, any requirements for publication of the instrument other than in the Gazette or generally on a website (such as in a newspaper or elsewhere) are additional to the requirement for registration on the Register (see [LA](#) subsections 56(2) and (3)). (A requirement for an instrument to be published on a website would be met by registering an instrument as a legislative instrument on the Federal Register of Legislation as the Register is a website.)

154 Similarly, a requirement may exist in the enabling legislation for an instrument other than a legislative instrument to be notified or published in the Gazette. Generally, under subsection 11(4) of the [LA](#), registering an instrument on the Federal Register of Legislation as a notifiable instrument on or after 5 March 2016 meets the legislation's requirement for gazettal (whether or not the enabling legislation refers to the instrument as a notifiable instrument). In addition, any other requirements for publication of the instrument are also met by the requirement for registration on the Register (see [LA](#) subsection 11(4)) unless the legislation provides a contrary intention.

155 Agencies should update their legislation to align with the [LA](#)¹⁵, and should avoid putting in place additional requirements for publication as well as registration, unless there are compelling reasons for these. Adopting the [LA](#) standard does not prevent an instrument being notified or published elsewhere if desired.

If an instrument is to be notified/published in addition to registration

156 If an instrument that has been or will be registered is to be notified or published elsewhere, care needs to be taken to ensure that:

¹⁵ The 2008 Review of the LIA explicitly recommended that agencies consider aligning all additional publication requirements with the LIA (now the LA) unless there are compelling reasons why that should not be done (see [2008 Review of the Legislation Act 2003](#), recommendation 19).

- (a) what is published elsewhere is identical to what is lodged for registration (see also paragraphs 217 and 218); and
- (b) unless an instrument is made by the act of gazettal—the instrument is registered before it is published elsewhere, consistent with Parliamentary expectations about the prompt lodgement and registration of instruments.

157 If an instrument is to be notified or published in the Gazette, it may be appropriate to do so in one of the specialist gazettes published by individual Australian Government agencies. Otherwise, details should be lodged with OPC for gazettal in the general Government Notices Gazette. As part of lodging a notice with OPC, agencies will need to:

- (a) submit two different lodgements (an instrument and a gazette notice); and
- (b) ensure that the requirement for gazettal in addition to registration is explicitly flagged on both lodgement forms; and
- (c) if applicable, flag any special requirement for gazettal and registration to take place on the same day (and again, this should be noted on both forms).

Chapter 5—Compilations

Main points

- A compilation shows the text of an Act, legislative instrument or notifiable instrument as amended (if at all) and in force on the compilation date stated in the Act or instrument.
- Compilations are an important resource for agency staff and other users of legislation.
- As a general rule, a new compilation must be registered within 28 days of amendments to the text commencing or of other required compilation events.
- A compilation may also need to be prepared and lodged for other discretionary compilation events as notified by OPC.
- Agencies are responsible for preparing compilations of some instruments, but can make arrangements for OPC to prepare them on a fee-for-service basis.
- Care and skill is required to ensure that compilations are complete, accurate, and meet the requirements of the [LA](#).
- Future law compilations can be published on the Register if required.

General

158 Compilations showing the full text of a law as in force from time to time are an important resource for agency staff and everyone else wanting to understand and comply with the law. If a compilation is not available, people needing to know what the law says and how it has changed have to work this out for themselves—a time-consuming and complex process, particularly if the law has been amended many times.

When to prepare compilations

159 A compilation is required to be prepared and lodged whenever a required compilation event occurs. A **required compilation event** (that is, an event that requires a new compilation) occurs whenever:

- (a) an instrument is expressly amended, unless this is by the automatic repeal provisions of section 48C or 48D of the [LA](#) ([LA](#) s 15Q(1)(a)); or
- (b) disallowance results in the repeal of a provision of the principal legislative instrument, of an amending instrument or amending provision ([LA](#) s 15Q(1)(b)); or
- (c) a provision of the instrument is repealed under another Act or instrument ([LA](#) s 15Q(1)(c)); or
- (d) something else happens that is prescribed by the rules ([LA](#) s 15Q(1)(d)).

160 If a required compilation event occurs, the rule-maker must prepare and lodge a compilation within 28 days of the event, unless the First Parliamentary Counsel has agreed to a longer period (LA s 15R(3)) or has made a rule waiving this requirement (e.g. because the compilation will be prepared by OPC rather than the rule-maker, see Rule s 8).

161 The First Parliamentary Counsel may also prepare, or issue a notice requiring a rule-maker to prepare, compilations to reflect the impact of other events known as discretionary compilation events. A *discretionary compilation event* occurs when:

- (a) a provision of an instrument commences (LA s 15Q(2)(a)); or
- (b) solely commencing, amending or repealing provisions are repealed under section 48C or 48D of the LA (LA s 15Q(2)(b)); or
- (c) an instrument is modified (LA s 15Q(2)(c)); or
- (d) an instrument is impliedly amended (for example, by a provision stating that a reference to a law by its old name should be construed as a reference to its new name without details of where the reference is to be found) (LA s 15Q(2)(d)); or
- (e) a provision of an instrument is repealed under another provision of that instrument (LA s 15Q(2)(e)); or
- (f) the text of the instrument as made or of the latest registered compilation ceases to show the text of the instrument as in force (LA s 15Q(2)(f) and (g)); or
- (g) something else happens that is prescribed by the rules (LA s 15Q(2)(h)).

162 Compilations are required to be prepared on a “point-in-time” basis. A compilation of an instrument should be available for each date at which the text of the instrument is different. This enables a reader to readily work out the state of the law represented by the instrument at every point-in-time that the instrument is in force.

163 Thus, multiple compilations will normally be required if amendments commence on different dates. To illustrate, if amendments of an instrument commence on two different dates, two compilations will be required and it does not matter whether the amendments were made by one amending instrument or 20 amending instruments. Similarly, if an amendment of an instrument has commenced but is then disallowed:

- (a) a compilation showing the effect of the amendment before disallowance will be required; and
- (b) another compilation will be required to show the effect of disallowance on the text of the instrument.

If amendments to an instrument have not taken effect

164 A ***future law compilation*** is a compilation that incorporates expected amendments to the text of the law in force. Future law compilations can be a useful tool for agency staff and external stakeholders, particularly if major amendments have been made but have not yet commenced.

165 As the law may change before the expected amendments commence, and to avoid any confusion in the future, these compilations should always be clearly identified as future law compilations.

166 Although a future law compilation will not be authorised, OPC can prepare a future law compilation for the relevant agency and can make it available on the Register website until relevant amendments commence. For more information on the options and associated fees, please contact OPC (lodge@legislation.gov.au or (02) 6120 1350).

Who can prepare compilations

167 OPC prepares compilations for all Acts and for instruments that must be drafted by OPC. For more information on OPC's tied work, see paragraph 51. OPC is also available to prepare compilations of other instruments for agencies on a fee-for-service basis. For more information about OPC's compilation services and fees, please contact OPC (lodge@legislation.gov.au or (02) 6120 1350).

168 Agencies that choose to prepare their own compilations of instruments that are not required to be drafted by OPC should note that they, and not OPC, are responsible for ensuring that their compilations are complete and accurate. This requires attention to the following things:

- (a) the minimum content requirements of the **LA**—OPC does basic checks and will reject compilations that clearly do not meet the **LA** requirements; and
- (b) the text of the instrument as amended and in force from time to time—this is not routinely checked by OPC.

169 An agency should act promptly if it is notified that a compilation is required for a discretionary compilation event, or has become overdue for a required compilation event. Please contact OPC (lodge@legislation.gov.au or (02) 6120 1350) if your agency is experiencing difficulties meeting associated deadlines. Otherwise, OPC may prepare the compilation on the agency's behalf and charge the agency for this service.

What must be included in compilations

170 Preparing a compilation requires attention to detail, technical skill with word processing tools and a good understanding of legislative practices. Compilations:

- (a) must be in .rtf, .doc or .docx format, unless the First Parliamentary Counsel has agreed to another format (see **Rule s 5(3)**); and

Note: Our preferred format is .docx.

- (b) must not contain dynamic content that may interfere with the content of the document, such as macros and many fields (see [Rule s 5\(4\)](#)).

Note: An automatically generated table of contents is acceptable and desirable unless a document is very short.

171 To meet accessibility requirements, alt text (short for “alternative text”) should be applied to any images contained in the document, including formulas. Alt text is a short textual description of the image that is not visible on the face of the relevant document but, instead, sits in the properties of the image.

172 It is important to include alt text because screen readers (mentioned in paragraph 112) rely on the alt text description. More information on alt text, including examples and guidance on what alt text to include, can be found in [OPC Drafting Direction 1.9](#).

173 An additional service fee will apply if OPC is required to add alt text to any images or objects. See paragraph 149 for further information on OPC’s special requirement and additional services fees.

174 A compilation must also contain certain minimum information as prescribed in section 15P of the [LA](#) and section 7 of the [Rule](#). This information includes:

- (a) the **compilation date**, that is, the date from which the text of the instrument shown in the compilation applies ([LA s 15P\(1\)\(a\)](#));
- (b) if the compilation was prepared by OPC and incorporates editorial changes—a statement and brief outline of the editorial changes that have been made ([LA s 15P\(1\)\(b\)](#));
- (c) commencement and other details of any Act or instrument that amends the principal instrument ([LA s 15P\(1\)\(c\)](#));
- (d) the amendment history of each provision of the principal instrument as amended ([LA s 15P\(1\)\(d\)](#));
- (e) the name of the principal instrument ([Rule s 7\(a\)](#));
- (f) the **compilation number**—this is essentially a version number and is generally based on how many compilations have already been registered ([Rule s 7\(b\)](#));
- (g) the name of the department or agency that prepared the compilation ([Rule s 7\(c\)](#));
- (h) a key setting out any abbreviations used in notes to the compilation ([Rule s 7\(d\)](#));
- (i) the **enabling legislation** for an instrument, that is, the Act or instrument under which it was made ([Rule s 7\(e\)](#));
- (j) any further information prescribed by the rules ([LA s 15P\(1\)\(e\)](#)).

175 Agencies should not include a **registered date**, that is the date on which the compilation is registered, as this information will be displayed as part of the metadata on the Register and cannot be known at the time of preparation.

176 Agencies wishing to prepare their own compilations may find the following guidance useful. It takes into account not only the minimum requirements of the [LA](#) but also current best practice and the needs of users (including the courts). A template for preparing compilations is also available for download from the secure [lodgement facility](#).

177 Starting with the front matter, the compilation cover page or *title page* should clearly identify the principal instrument by its name and series number (if applicable). OPC's current practice is to provide the following information on the title page as shown in Illustration 5A:

- (a) Australian Government branding to ensure that the compilation is easily identifiable as an official document;
- (b) the name (or title) that the instrument gives to itself ([Rule s 7\(a\)](#)), followed by any series number that may apply;
- (c) the enabling legislation (and if appropriate, provision) for the principal instrument ([Rule s 7\(e\)](#));
- (d) the compilation number ([Rule s 7\(b\)](#));
- (e) the compilation date ([LA s 15P\(1\)\(a\)](#));
- (f) summary of any other significant event that may have triggered the compilation e.g. the disallowance of a provision or amendment;
- (g) the name and location of the agency that prepared the compilation e.g. "Prepared by the Office of Parliamentary Counsel, Canberra" ([Rule s 7\(c\)](#)).

Illustration 5A—sample title page for compilation



Example Instrument 2016
made under the
Example Act 2013

Compilation No. 16

Compilation date: 6 March 2016
Includes amendments up to: F2016L00010

{This compilation takes account of the disallowance of amendments made
by the Senate/House of Representatives on.....at.....}

Prepared by {Insert agency name, city in which agency is based}

178 Other reference information can be included in the front matter, including a table of contents even if there is no such table in the principal instrument. OPC's current practice is to reserve the reverse of the title page (the verso title page) for a short user guide to explain what the compilation incorporates (for details, see Illustration 5B).

Illustration 5B—sample reverse of title page showing user guide

About this compilation

This compilation

This is a compilation of the *Example Instrument 2016* that shows the text of the law as amended and in force on 6 March 2016 (the *compilation date*).

The notes at the end of this compilation (the *endnotes*) include information about amending laws and the amendment history of provisions of the compiled law.

Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on the Legislation Register (www.legislation.gov.au). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on the Legislation Register for the compiled law.

Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on the Legislation Register for the compiled law.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

179 The compilation number and compilation date should also be recorded in the footer of each page (see Illustration 5C).

Illustration 5C—sample page footer

Example Instrument 2016 5

Compilation No. 16 Compilation date: 06/03/2016

180 The *body* of the compilation shows the text of the principal instrument as in force as at the compilation date. Before updating the text, it is important to identify which amendments to incorporate. As the sample user guide above suggests, only those amendments that have commenced at the compilation date can be incorporated into the text. The following should be noted in the endnotes, but not incorporated into the text:

- (a) any amendment that has not commenced at the compilation date (see also paragraph 186(b));
- (b) any application, saving or transitional provision that is not incorporated into the principal instrument by an amendment (see also paragraph 185(d));

- (c) any amendment that cannot be incorporated because it is misdescribed and the rule-maker’s intention is unclear (see also paragraphs 188 and 189);
- (d) the expiry or cessation of a provision—a provision should only be removed from the text if it has been repealed by using the word “repeal”, “revoke” or “rescind”.

181 It is not necessary to note or incorporate modifications, that is, an alteration to the text of the principal instrument that is not permanent or that only applies to particular locations or cases. Links to and from the modifying legislation will normally be created when that legislation is registered but, if this is not the case, please let OPC know by using the [feedback form](#) on the Register (public) website or email lodge@legislation.gov.au.

182 It is important to take a systematic approach to incorporating amendments into the text of the principal instrument. In particular:

- (a) any automatic numbering that may have been used must be turned off—otherwise any insertions or omissions may not be shown with the correct provision numbers; and
- (b) styles or equivalent formatting devices should be used to format text wherever practicable—this will deliver a consistent look and feel, and make it easy to update any table of contents; and
- (c) any solely commencing, amending or repealing provisions in the instrument should be checked to establish whether they should be removed in accordance with the automatic repeal provisions in Part 3 of Chapter 3 of the [LA](#).

183 After the amendments have been incorporated into the text, it is important to document the changes made to the text, the authority for making the changes and other matters. This information should be set out in *endnotes*, that is, notes after the body of a compilation. OPC’s current practice is to include at least 4 endnotes, and to explain the purpose and structure of the endnotes in the first endnote (see Illustration 5D).

Illustration 5D—sample Endnote 1—About the endnotes

<p>Endnotes</p> <p>Endnote 1—About the endnotes</p> <p>The endnotes provide information about this compilation and the compiled law.</p> <p>The following endnotes are included in every compilation:</p> <p>Endnote 1—About the endnotes Endnote 2—Abbreviation key Endnote 3—Legislation history Endnote 4—Amendment history</p> <p>Abbreviation key—Endnote 2</p> <p>The abbreviation key sets out abbreviations that may be used in the endnotes.</p> <p>Legislation history and amendment history—Endnotes 3 and 4</p> <p>Amending laws are annotated in the legislation history and amendment history.</p> <p>The legislation history in endnote 3 provides information about each law that has amended (or will amend) the compiled law. The information includes commencement details for amending laws and details of any application, saving or transitional provisions that are not included in this compilation.</p> <p>The amendment history in endnote 4 provides information about amendments at the provision (generally section or equivalent) level. It also includes information about any provision of the compiled law that has been repealed in accordance with a provision of the law.</p> <p>Misdescribed amendments</p> <p>A misdescribed amendment is an amendment that does not accurately describe how an amendment is to be made. If, despite the misdescription, the amendment can be given effect as intended, then the misdescribed amendment can be incorporated through an editorial change made under section 15V of the <i>Legislation Act 2003</i>.</p> <p>If a misdescribed amendment cannot be given effect as intended, the amendment is not incorporated and “(md not incorp)” is added to the amendment history.</p>

184 Endnote 2, the abbreviation key, meets the requirement of paragraph 7(d) of the [Rule](#) and sets out abbreviations that may be used in the endnotes. The most complex compilations prepared by OPC may use over 30 abbreviations. Agencies should use the same abbreviations as OPC to avoid confusing readers (see Illustration 5E), but may wish to specify additional abbreviations for matters not covered by the standard OPC abbreviations. OPC can provide advice on the use of abbreviations on request.

Illustration 5E—sample Endnote 2—Abbreviation key

Endnote 2—Abbreviation key

ad = added or inserted	orig = original
am = amended	par = paragraph(s)/subparagraph(s) /sub-subparagraph(s)
amdt = amendment	pres = present
c = clause(s)	prev = previous
C[x] = Compilation No. x	(prev...) = previously
Ch = Chapter(s)	Pt = Part(s)
def = definition(s)	r = regulation(s)/rule(s)
Dict = Dictionary	reloc = relocated
disallowed = disallowed by Parliament	renum = renumbered
Div = Division(s)	rep = repealed
exp = expires/expired or ceases/ceased to have effect	rs = repealed and substituted
F = Federal Register of Legislation	s = section(s)/subsection(s)
gaz = gazette	Sch = Schedule(s)
LA = <i>Legislation Act 2003</i>	Sdiv = Subdivision(s)
LIA = <i>Legislative Instruments Act 2003</i>	SLI = Select Legislative Instrument
(md not incorp) = misdescribed amendment cannot be given effect	SR = Statutory Rules
mod = modified/modification	Sub-Ch = Sub-Chapter(s)
No. = Number(s)	SubPt = Subpart(s)
o = order(s)	<u>underlining</u> = whole or part not commenced or to be commenced
Ord = Ordinance	

185 Endnote 3, the legislation history, meets the requirement of paragraph 15P(1)(c) of the [LA](#) for compilations to include commencement and other details for any Act or instrument that amends the principal instrument. It is usual to list this material starting with the principal instrument and to refer to each amending Act or instrument in chronological order of making. The endnote should contain at least the following information for the principal instrument and each amending Act or instrument (see Illustration 5F):

- (a) its full name, and any series number and year that may apply, unless some other method of citation is identified in an earlier endnote;
- (b) for an instrument—the instrument’s date of registration and registration ID (or, if it was made before 2005, the date of gazettal and Gazette number);
- (c) details of when it commenced—if, for example, some provisions commenced on one date and the remainder on another date, this should be spelt out, or if

the provisions commence in the future, clearly indicating this (see use of underlining in Illustration 5F below);

- (d) the location of any application, saving or transitional provisions that are relevant to, but not included in, the principal instrument;
- (e) details of any event that has affected the text of the principal instrument—in the case of disallowance of a provision or amendment, the House, date and time of disallowance should be noted.

Illustration 5F—sample Endnote 3—Legislation history

Endnote 3—Legislation history			
Name	Registration	Commencement	Application, saving and transitional provisions
Example Directions 2012	11 Nov 2012 (F2012L02395)	1 Jan 2013 (s 2)	
Example Amendment Directions 2012	11 Dec 2012 (F2012L02412)	Sch 1: 11 Oct 2013 (s 2)	—
Example Amendment Directions 2013	11 Apr 2013 (F2013L00649)	Sch 1 (items 52–57): 12 Apr 2013 (s 2 item 2)	—
Example Amendment Directions 2013 (No. 1)	28 June 2013 (F2013L01243)	1 July 2013 (s 2)	—
Example Amendment Directions 2015	2 June 2015 (F2015L00780)	Sch 2: 1 July 2015 (s 2(1) item 1) Note: Sch 2 was disallowed by the Senate at 1.42 pm on 25 June 2015	—
Example Amendment Directions 2015 (No. 1)	12 July 2015 (F2015L01138)	13 July 2015 (s 2(1) item 1) Note: disallowed by the Senate at 5.02 pm on 11 Aug 2015	—
Example Amendment Directions 2021	1 June 2021 (F2021L00670)	Sch 2–11 and Sch 12 (item 2): <u>1 July 2021 (s 2(1) items 3, 5)</u> Remainder: 2 June 2021 (s 2(1) items 1, 2, 4)	—

186 Endnote 4, the amendment history, meets the requirement of paragraph 15P(1)(d) of the LA for compilations to include the amendment history of each amended provision. OPC generally annotates amendments to the section level or higher as appropriate. As illustrated in Illustration 5G, the endnote should note the nature of, and authority for, any change and in particular:

- (a) identify the authority for a change by its full name unless a suitable acronym or a series number and year is identified in an earlier endnote; and

- (b) use underlining to indicate changes that have not commenced such as:
 - (i) uncommenced amendments; and
 - (ii) self-repealing provisions that have not yet operated; and
- (c) if a provision of the instrument as made or an amendment to the instrument has been disallowed in part or in full, an annotation to this effect.

Illustration 5G—sample Endnote 4—Amendment history

Endnote 4—Amendment history	
Provision affected	How affected
Part 1	
§ 1.02.....	rep LA § 48D
§ 1.03.....	am No 284, 2012; No 51, 2013; No 114, 2015 (disallowed)
§ 1.04.....	am No 284, 2012; No 51, 2013; No 114, 2015 (disallowed)
Part 2	
Division 2.1	
§ 2.01.....	am No 51, 2013
Division 2.2	
§ 2.03.....	am No 51, 2013
Division 2.3	
§ 2.04.....	am No 284, 2012 (Sch 1 item 2 md not incorp)
§ 2.05.....	am No 284, 2012
§ 2.05A.....	ad No 136, 2013
Division 2.5	
§ 2.11.....	am No 51, 2013
Division 2.6	
§ 2.13.....	am No 114, 2015 (disallowed)
§ 2.14.....	rep <u>end of 1 Dec 2040 (§ 2.14(3))</u>
Part 3	
Part 3.....	ad No 114, 2015 (disallowed)
§ 3.01.....	ad No 114, 2015 (disallowed)
Schedule 1	
Schedule 1.....	am No 284, 2012; No 51, 2013
	rs No 114, 2015 (disallowed)

187 The amendment history captured against section 2.14 in the example endnote 4 above indicates that subsection (3) of that section contains a future self repeal for the section as follows:

- (3) This section is repealed at the end of 1 December 2040.

188 Special care is needed if an amendment does not accurately describe the amendments to be made, and it may be necessary or desirable to get legal advice on whether and how to apply the amendment. For example, it may be that an amendment:

- (a) cites an incorrect provision (e.g. subsection 296T(1) instead of 269T(1)); or
- (b) cites the text of a provision incorrectly (e.g. it may provide for the omission of text ending in “a child” when the existing provision uses the term “the child”); or
- (c) repeals and substitutes a provision that has already been repealed by some other means (such as automatic repeal).

189 If the amendment cannot be incorporated as a result of the misdescription, the abbreviation “(md not incorp)” should be noted in the amendment history. Formal amendments may then be required to resolve the misdescription. Please contact OPC (lodge@legislation.gov.au or (02) 6120 1350) to discuss the options when dealing with misdescribed amendments.

190 Section 15V of the [LA](#) authorises First Parliamentary Counsel to make editorial and presentational changes to a compiled law in preparing a compilation of the law for registration, including giving effect to misdescribed amendments as intended. The changes must not change the effect of the law. Approval for an editorial change can only be sought when OPC is preparing the compilation on behalf of an agency.

191 If OPC is preparing the compilation on behalf of an agency and an editorial change is required, OPC will contact the agency regarding the issue and seek approval for the cost of each editorial change. Depending on the complexity of the editorial change(s) required and any other issues identified in the quality assurance process, additional compilation preparation time may also be required.

192 An additional Endnote 5, miscellaneous, is not mandatory but may be used if there are other matters that may be relevant to the compilation. For example, if the principal instrument applies, adopts or incorporates another document by reference, it may be appropriate to include a note about any changes in:

- (a) the availability or location of the other document; or
- (b) the content or currency of the document—for example, a new version may have been issued but the old version continues to apply to the principal instrument consistent with section 14 of the [LA](#).

193 For information and assistance on compilations, please contact OPC (lodge@legislation.gov.au or (02) 6120 1350).

Scope to correct errors and make other changes

194 It is possible to make editorial changes and other changes to an instrument as part of preparing a compilation (and for examples, see sections 15V and 15X of the [LA](#)). However, this power:

- (a) can only be used by the First Parliamentary Counsel—there is no scope for agencies to make editorial changes in an agency-prepared compilation of a legislative instrument or a notifiable instrument; and
- (b) cannot be used to change the effect of an instrument; and
- (c) may not be appropriate if, for example, a law requires consultation with or approval from another jurisdiction such as New Zealand, or involves a referral of power from States and Territories.

195 If your agency would like to nominate an instrument for editorial changes, please email OPC (lodge@legislation.gov.au) with more information about what changes are sought and why the changes are desirable. Fees may apply for the preparation of associated compilations, if the First Parliamentary Counsel agrees that changes can and should be made.

How to lodge compilations for registration

196 The processes for, and fees associated with, lodging a compilation for registration are very similar to those for lodging a legislative instrument. For current guidance and help on these matters, see the home page of the [lodgement facility](#) or contact the Register Help Desk on (02) 6120 1350.

197 Please note an agency's responsibility for a compilation does not end with its lodgement. If it emerges that a compilation is incomplete or inaccurate, it must be withdrawn as soon as practicable ([Rule s 6\(3\)](#)). If that is no longer possible, then the error must be notified to OPC without delay ([LA s 15L\(1\)\(e\)](#)). Further guidance on how to report events affecting the accuracy and completeness of the Register is provided in [Chapter 6](#).

Chapter 6—Keeping the Register up-to-date

Main points

- An agency’s responsibility for an instrument does not end when the instrument is lodged for registration.
- Agencies need to take action if a lodgement is found to contain errors or if an event affects the accuracy and completeness of the Register.

General

198 The Register is an important resource for courts and other users and section 15B of the [LA](#) provides that it is “for all purposes, taken to be a complete and accurate record of all registered Acts, legislative instruments and notifiable instruments”.

199 Users of the Register are also subject to special legal protections. Subsection 15D(3) of the [LA](#) provides that, if the Register is erroneous because of a mistake or omission and the Register is rectified to correct the error, the rectification does not:

- (a) affect any right or privilege that was acquired, or that accrued, because of reliance on the content of the Register before the rectification was made; or
- (b) impose or increase any obligation or liability incurred before the rectification was made.

200 In other words, there is a clear expectation that agencies and OPC will work together to keep the Register up-to-date.

Agencies must act on lodgements found to contain errors

201 Although OPC performs basic checks on every document that is registered, agencies are responsible for ensuring that the documents they lodge for registration are complete and accurate. Consequently, if it emerges that a lodgement is incomplete or inaccurate, the person who lodged it must withdraw it as soon as practicable (see [Rule s 6\(3\)](#)). This can be done:

- (a) by using the online lodgement facility at <https://lodge.legislation.gov.au>; or
- (b) by emailing lodge@legislation.gov.au.

202 It may be that it is not possible to withdraw a lodgement e.g. because it has already been registered. If so, this must be notified to OPC without delay in accordance with paragraph 15L(1)(e) of the [LA](#). This does not require a log-on, and can be done by any member of the public by using the [Feedback form](#) on the Register website or emailing lodge@legislation.gov.au.

Agencies must notify other events affecting the Register

203 As part of its registration services, OPC routinely monitors a range of ‘downstream’ processes that may affect the accuracy and completeness of registered laws. OPC does not need to be notified of, and will update the Register for, the following events:

- (a) the occurrence of a specified day or time;
- (b) the commencement of, or changes in the commencement, of a registered law where the commencement is linked to either:
 - (i) the commencement of another registered law; or
 - (ii) a commencement instrument that has been lodged for registration (LA s 15L(2)(a));
- (c) required compilation events as described in paragraph 159 (LA s 15L(2)(b));
- (d) the disallowance of legislative instruments (LA s 15L(2)(c));
- (e) the automatic repeal of a registered law that is solely commencing, amending or repealing under Part 3 of Chapter 3 of the LA (LA s 15L(2)(d)(i));
- (f) the sunseting of legislative instruments (LA s 15L(2)(d)(ii));
- (g) any other event prescribed by the rules (LA s 15L(2)(e)).

204 OPC is not, however, able to monitor all of the events that could affect instruments and other registered laws. OPC relies on agencies to monitor and notify OPC of other events that may affect registered laws in accordance with subsection 15L(1) of the LA. Agencies are required to notify OPC of any other event that has the effect of:

- (a) commencing a registered law (LA s 15L(1)(a)); or
- (b) amending the text of a registered law as in force as a result of the automatic repeal provisions under section 48C or 48D of the LA, or modifying the text of a registered law as in force (see also paragraph 161 on discretionary compilation events) (LA s 15L(1)(b)); or
- (c) repealing a registered law or a provision of a registered law, or otherwise causing a registered law or provision to cease to be in force (LA s 15L(1)(c)); or
- (d) rendering a registered law invalid or unenforceable (LA s 15L(1)(d)) (e.g. as a result of a Court or Tribunal decision).

205 Examples of events that agencies must notify OPC of are as follows:

- (a) the commencement of State or Territory laws or of an international treaty, where this triggers the commencement of a registered law;

- (b) the implied amendment of a registered law, for example, by an amendment that is broadly framed and that does not specify each law that is amended;
- (c) the implied repeal of a law, for example, by the repeal of an instrument's enabling legislation or provision;
- (d) the preservation of an instrument by a saving, application or transitional provision despite the repeal of its enabling legislation or provision.

206 Agencies are asked to notify OPC of events by emailing lodge@legislation.gov.au and to attach or provide links to documentary evidence of the relevant event, such as a court judgement or a written statement from an SES employee (see [Rule s 13](#)). This evidence may be registered and as such, must not contain classified or sensitive information.

If an error is found in the Register

207 If an agency or another user of the Register notifies OPC of an error in the Register that arises because the text of the document in the Register is not the same as the text as made or assented to or the document was not compiled correctly, the matter will be investigated consistent with the First Parliamentary Counsel's obligation to rectify errors under subsection 15D(1) of the [LA](#). A rectification may be appropriate if, for example:

- (a) a symbol or mathematical formula is not displaying correctly in the authorised version of an instrument; or
- (b) an amendment has not been incorporated into a compilation correctly or in a timely manner (for example, because commencement was tied to an event that was not notified promptly); or
- (c) an electronic version of a disallowable legislative instrument registered on the Register does not accurately reflect the text of the original document as made by the rule-maker.

208 If a rectification is made, both the rectified and the original document remain on the Register to enable users to assess the legal effect of changes. The Register is also annotated to show that a rectification has been made and to outline the rectification in general terms ([LA s 15D\(2\)](#)).

209 A rectification may not be appropriate in every instance. For example, if the text of an instrument contains a typographical error but the text is consistent with the text made by the rule-maker, the error cannot be corrected under section 15D of the [LA](#). However, in this example, it may be possible for OPC to prepare a compilation that incorporates an editorial change that fixes the error. For more information on OPC's editorial powers, see paragraphs 194 and 195.

Rectification of disallowable legislative instruments

210 If a disallowable legislative instrument is rectified after the original version was tabled then the rectified instrument must be re-tabled in each House of the Parliament within 6 sitting days after the rectification ([LA s 15DA\(2\)](#)).

211 If the disallowable legislative instrument has already been disallowed in full by a House of the Parliament then the re-tabled instrument is not subject to a new disallowance period (LA s 15DA(4)). In all other cases, a rectified disallowable legislative instrument extends or starts a new disallowance period (LA s 15DA(3)).

212 The following table summarises the impact of rectification on parliamentary processes for disallowable legislative instruments.

Time of rectification	Action
The instrument is rectified before the original instrument has been tabled	The rectified instrument is tabled and normal parliamentary processes occur
The instrument is rectified after the original instrument has been tabled and the disallowance period has begun but no motion to disallow is on foot	The rectified instrument is re-tabled and the disallowance period restarts (thereby extending) the disallowance period
The instrument is rectified after the original instrument has been tabled, the disallowance period has begun and notice of a motion to disallow is on foot	The rectified instrument is re-tabled and the disallowance period restarts (thereby extending) the disallowance period. The notice of motion is taken to have been given on the sitting day after the rectified instrument is tabled
The instrument is rectified after the original instrument has been tabled and the instrument has been disallowed in full	The rectified instrument is re-tabled but the disallowance period does not restart as the instrument has already been disallowed in full
The instrument is rectified after the original instrument has been tabled, the disallowance period has begun and a motion to disallow the instrument in part has been passed	The rectified instrument is re-tabled and the disallowance period restarts for the provisions of the instrument that have not already been disallowed
The instrument is rectified after the original instrument has been tabled, the original disallowance period has ended and for solely amending or repealing instruments or provisions, section 48A or 48C of the LA has operated and automatically repealed the instrument or provisions of the instrument	The rectified instrument is re-tabled, the automatic repeal of the instrument or provisions of the instrument under sections 48A or 48C of the LA is taken not to have occurred and a new disallowance period begins

Scope for redaction or removal of registered documents

213 It is not possible to remove a registered document from the Register because of privacy or other concerns once the document has been registered. The LA makes no provision for the redaction (blacking out) or the removal of any document that is required to be registered, even if a court has declared an instrument to be void.

214 If your agency has serious concerns about the content of a registered document, please contact OPC (lodge@legislation.gov.au) to discuss the issues and options. It may be possible, for example, to clarify the status of an instrument by adding information or documents such as a court judgement.

Scope for republication of registered content

215 It is possible to make authorised versions of registered documents from the PDF files published on the Register (Rule s 14(1)). The electronic version, and any print version that is

made from it, must also contain a specific phrase, such as “Authorised version” as used from March 2016. For a complete list of specified phrases, see subsection 14(2) of the [Rule](#).

216 Wholesale or commercial reproduction of registered content is subject to the [Copyright Act 1968](#), other relevant laws and the relevant Creative Commons licence. However, there are still some restrictions on the use of some content (such as the Commonwealth coat of arms). Please refer to the [copyright notice on the Register website](#) for details.

217 Agencies wishing to reproduce registered content should also be aware that this has inherent risks as the law is subject to change. Failure to keep agency websites in particular up-to-date may raise questions of legal liability. It may, therefore, be better to provide simple links to relevant content on the Register. This can be done as follows, with the relevant document ID substituted for FyyyyLnnnnn:

Use this link format	To link users to
www.legislation.gov.au/Details/FyyyyLnnnnn	a particular version of a law—not recommended unless the intent is to link to a historic version
www.legislation.gov.au/Latest/FyyyyLnnnnn	the latest version of a law
www.legislation.gov.au/Series/FyyyyLnnnnn	the series page, which shows all available versions of a law and any instruments/notices enabled by it

218 If an agency still wants or needs to reproduce registered content, it would be prudent to do so using the authorised version as described in paragraph 215, and also to include an [appropriate attribution](#) so that users can easily check the Register for up-to-date information.

219 Agencies can also order bound print copies of registered documents online, by locating the relevant document on the Register and using the “Buy Print Copy” facility. Please email OPC (lodge@legislation.gov.au) if your agency would like to enquire about purchasing copies of legislation that cannot be ordered online or has not commenced.

220 If your agency receives a request about copyright of content that it has contributed to the Register, please review the [copyright permissions for the Register website](#). It may be that no additional permission is required. Alternatively, if the request involves the issues identified in paragraph 216, the request may need to be referred to other bodies.

If an instrument is no longer required

221 Parts 3 and 4 of Chapter 3 of the [LA](#) encourage the timely repeal of instruments that are no longer required. An instrument that is repealed remains on permanent public record on the Register, but no longer displays as in force. An instrument may be repealed:

- (a) by the automatic and bulk repeal provisions of Part 3 of Chapter 3 of the [LA](#); or
- (b) by the rule-maker; or
- (c) if it is a legislative instrument—by sunseting under Part 4 of Chapter 3 of the [LA](#).

Automatic and bulk repeal under Part 3 of Chapter 3 of the LA

222 All new instruments that are solely commencing, amending or repealing are subject to automatic repeal as soon as they have been registered, operated in full and, for disallowable legislative instruments, their disallowance period has ended (see paragraph 89).

223 In addition, existing instruments and provisions can be repealed in bulk by means of a regulation made under section 48E of the [LA](#). However, no bulk repeal regulations have been made by the Attorney-General since 2015.

224 Automatic and bulk repeal does not undo the effect of the instrument. Bulk repeal may also be used to repeal instruments that:

- (a) are spent but currently exempt from sunseting; or
- (b) may not have been validly made; or
- (c) are no longer required for whatever reason.

225 Agencies, not OPC, are responsible for assessing whether there are any statutory or other impediments to the repeal of an instrument and, if appropriate, seeking legal advice about this matter in accordance with the [Legal Services Directions](#) as in force from time to time. It may not be appropriate to list an instrument for bulk repeal if, for example, it:

- (a) is described in its enabling legislation as irrevocable; or
- (b) amends or modifies something that is not available on the Register (such as an aircraft maintenance manual, or a law enacted by a State government); or
- (c) is referenced in the laws of another jurisdiction and changes to that law are required to ensure that there are no unintended consequences.

226 For more information about any aspect of automatic or bulk repeal, please contact OPC (sunsetting@opc.gov.au or (02) 6120 1350).

Direct repeal by rule-maker

227 A rule-maker who is authorised to make a particular instrument can repeal any instrument of the same kind, even if a different individual in the position of the rule-maker, or a delegate of the rule-maker, made the instrument. If a rule-maker is required or wishes to use OPC's drafting services, please contact OPC with the details. Otherwise, please note that:

- (a) any date specified for repeal must not be later than any sunset date that may apply under Part 4 of Chapter 3 of the [LA](#); and
- (b) it is important to use the word "repeal" to link clearly back to section 7 of the [Acts Interpretation Act 1901](#), unless another term is required by the enabling legislation; and

- (c) if the instrument of repeal includes a transitional, saving or application provision that is not to be inserted into the principal instrument by amendment, a self-repealing provision should also be considered.

228 For further guidance on how to repeal instruments, including the drafting of self-repealing provisions, see [Chapter 3](#).

Sunseting under Part 4 of Chapter 3 of the LA

229 If a legislative instrument is no longer required, it is preferable to repeal the instrument explicitly. Doing nothing does not guarantee that an instrument will, in fact, sunset because the instrument may be exempt from sunseting. Even if an instrument is subject to sunseting, any Senator or Member may move for a resolution to defer (“roll over”) its sunset date by 10 years.

230 For further guidance on sunseting processes, see [Chapter 10](#).

Part 2—Matters specific to legislative instruments

Chapter 7—Before making a legislative instrument

Main points

- Before making a legislative instrument, a rule-maker is required to do a range of things (or to arrange for these to be done).
- In particular, the rule-maker must be satisfied that consultation has been undertaken to the extent that is appropriate and practicable.
- The rule-maker must also assess the regulatory impact of a proposal, and consider a range of other matters.

What is making?

231 For the purposes of the LA, the *making* of a legislative instrument is the signing, sealing or other endorsement of the instrument by the person or body empowered to make it, by which it becomes a legislative instrument (LA s 4).

232 AGS have published the Legal briefing - Execution solutions for remote working arrangements¹⁶ to assist agencies.

233 In this, AGS advise:

Making legislative instruments

Under the *Legislation Act 2003* (Cth), a legislative instrument is ‘made’ by the signing, sealing or other endorsement of the instrument by the person or body empowered to make it. A Minister or other rule-maker could probably ‘make’ such an instrument by personally applying an electronic signature, on the basis that this would constitute their endorsement (approval) of the instrument.

Where this is done, it would be advisable that a person witness the application by the Minister of their electronic signature and make a contemporaneous file note to that effect, to ensure that evidence can be provided should there be a question raised in future as to whether it was the Minister who endorsed the document. Alternatively, it may be that the electronic signature could be locked to the Minister personally and evidence provided, if required, that only the Minister could access and apply it.

234 Before applying an electronic signature, agencies should satisfy themselves first that the instrument can be validly made using the application of an electronic signature.

235 For instruments for Exco, agencies should also have regard to other relevant guidance, including for example the Federal Executive Council Handbook¹⁷ and Executive Council Circulars.

¹⁶ See <https://www.ags.gov.au/publications/legal-briefing/lb-20220321>

¹⁷ See <https://www.pmc.gov.au/resource-centre/government/federal-exec-council-handbook>

236 When an instrument is lodged for registration, an additional certification requirement is included in relation to electronic signatures that have been applied to a legislative instrument (see paragraph 141).

Requirement to consult before making

237 The LA requires a rule-maker, before making a legislative instrument, to be satisfied that any consultation the rule-maker considers to be appropriate and reasonably practicable has been undertaken (LA s 17(1)). This requirement applies to all legislative instruments.

238 The LA provides that, in deciding whether consultation is appropriate, the rule-maker may have regard to the extent to which consultation drew on the knowledge of relevant subject matter experts and ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content (LA s 17(2)). Consultation could involve (LA s 17(3)):

- (a) notifying representative bodies or organisations (either directly or by advertisement); and
- (b) inviting submissions or participation in public hearings.

239 Although the LA is not prescriptive about consultation, agencies should note that the Parliament takes the obligation to consult seriously. Inadequate consultation is one of the most frequent grounds of criticism by the Senate Standing Committee for the Scrutiny of Delegated Legislation (SDLC). Consequently, agencies should:

- (a) establish what the rule-maker considers to be the most appropriate form of consultation at an early stage of the process; and
- (b) satisfy the rule-maker that consultation has been undertaken to the required standard before the instrument is made; and
- (c) ensure that the explanatory statement for an instrument provides an adequate description of either:
 - (i) the consultation process and outcomes; or
 - (ii) if no consultation was undertaken, the reasons for not consulting (see paragraphs 241 to 243).

240 An explanatory statement that does not mention consultation, or that contains only a superficial description, is likely to result in the relevant Minister being asked by the SDLC to provide additional information or take other action. Further guidance on how to meet the requirements of the LA and the Parliament is provided on the SDLC website¹⁸.

When consultation may be unnecessary or inappropriate

241 The LA does not require consultation if the rule-maker considers it inappropriate or impractical. It may be, for example, that a legislative instrument:

¹⁸ See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances

- (a) is of a minor or machinery nature or does not substantially alter existing arrangements; or
- (b) is required urgently; or
- (c) implements a decision announced in the Budget; or
- (d) is required because of a national security issue; or
- (e) is an instrument for which appropriate consultation has already been undertaken by somebody else; or
- (f) relates to employment; or
- (g) relates to the management of, or to the service of members of, the Australian Defence Force.

242 Even if an instrument falls into one of these examples, a case-by-case assessment is still important and necessary to satisfy the requirements of section 17 of the [LA](#) and of scrutiny bodies.

Consequences of failure to consult

243 Failure to consult in relation to a legislative instrument does not affect the validity or enforceability of the instrument ([LA](#) s 19). However, the rule-maker must explain why consultation was unnecessary or inappropriate in the explanatory statement that is registered and tabled with the instrument in the Parliament (see also [Chapter 8](#)).

Requirement to assess regulatory impacts before making

244 Before the decision is taken to make an instrument, a regulatory impact assessment must be undertaken consistent with the Government’s deregulation policies. A formal Regulation Impact Statement (RIS) may also need to be prepared.

245 Alternatively, you may be able to use the Office of Best Practice Regulation’s (OBPR) “streamlined” process of senior-level officer correspondence in lieu of preparing a RIS. Information about this process and the circumstances in which it may be used is available in OBPR’s [Sunsetting Legislative Instruments Guidance Note](#)¹⁹.

246 Failure to comply with the RIS requirements does not invalidate an instrument, but is a breach of Government policy and will be publicly reported by the OBPR. More information on the current requirements is available from the OBPR website²⁰ and on request (helpdesk-obpr@pmc.gov.au or (02) 6271 6270).

247 Note also that, if a RIS that relates to an instrument has been completed, the entire RIS must be included in, or attached to, the instrument’s explanatory statement.

¹⁹ See <https://obpr.pmc.gov.au/resources/guidance-obpr-procedures/sunsetting-legislative-instruments>

²⁰ See <https://obpr.pmc.gov.au/>

Other requirements to consider before making

248 There are a range of other requirements a rule-maker may need to consider before making a legislative instrument or approving an explanatory statement. For example, as a matter of process, before making an instrument:

- (a) during the caretaker (election) period—it may be necessary to consider the caretaker conventions, even if the rule-maker is a statutory authority or officeholder rather than a Minister or department²¹; or
- (b) that is the same in substance as an instrument that has been registered or disallowed recently—it may be necessary to consider the restrictions on remaking that apply before and after tabling (see [Chapter 9](#)); or
- (c) that is intended to amend or replace an instrument that has already sunsetted or will sunset soon—it is necessary to consider a range of other issues (see [Chapter 10](#)).

²¹ See <https://www.pmc.gov.au/resource-centre/government/guidance-caretaker-conventions>

Chapter 8—Explanatory statements

Main points

- Each new legislative instrument must have an explanatory statement approved by the rule-maker, but a single statement may relate to one or more legislative instruments.
- An explanatory statement must contain certain information and should also take into account the requirements of the Federal Executive Council (ExCo) Secretariat and of parliamentary committees if applicable.
- The explanatory statement must be lodged with OPC for registration with, or as soon as practicable after, the legislative instrument to which it relates.
- The explanatory statement is likely to attract question and comment if it is not able to be tabled with the instrument or does not meet parliamentary requirements.
- If the initial explanatory statement provided by a rule-maker is incomplete or inaccurate, it may be possible to lodge a supplementary or replacement statement with OPC for registration on the Register.

General

249 Explanatory statements are an important resource for readers of legislative instruments and, under section 15AB of the *Acts Interpretation Act 1901*, may be used by a court to help interpret an instrument. A well-prepared explanatory statement is also desirable to facilitate:

- (a) parliamentary scrutiny of the legislative instrument; and
- (b) compliance with the instrument by agencies and external stakeholders.

250 Although each legislative instrument must be accompanied by an explanatory statement, a single explanatory statement may relate to one or more legislative instruments (LA s 15J(4)). This may be appropriate if, for example, several instruments are made under the same enabling legislation at the same time. However, careful consideration should be given to the content and timing requirements outlined in paragraphs 254 and 281.

Responsibility for approving explanatory statements

251 Agencies must ensure that any explanatory statement that they lodge in relation to an instrument has been approved by the relevant rule-maker as required by section 15J of the LA. It is usual to submit explanatory statements to rule-makers at the same time as the legislative instruments that they explain so that all related documents can be lodged, registered and tabled together.

252 In the case of a legislative instrument made by the Governor-General, the explanatory statement can be approved by the relevant Minister (see [LA s 6\(1\)\(a\)](#)). The explanatory statement does not generally need to be submitted to ExCo, and should not be confused with the explanatory memorandum that is required for ExCo purposes. For further information on ExCo requirements and processes, see the Federal Executive Council Handbook²².

Content of explanatory statements

253 The explanatory statement for an instrument should be as clear and helpful as possible. The more complex the instrument, the more extensive the explanatory statement needs to be to achieve this.

254 To make it easy to identify an explanatory statement and the instrument that it explains, it is usual to present the following information at the top of the first page:

- (a) the name of the document e.g. “Explanatory Statement” (if necessary prefaced by the words “Replacement” or “Supplementary”); and
- (b) the complete name of the instrument to which the statement relates, as specified in the instrument.

255 When it comes to the content of the statement, section 15J of the [LA](#) sets out the minimum standards in some detail. An initial or replacement explanatory statement must:

- (a) be approved by the rule-maker; and
- (b) explain the purpose and operation of the instrument; and
- (c) if any documents are incorporated in the instrument by reference—contain a description of the incorporated documents and indicate how they may be obtained; and
- (d) if consultation was undertaken under section 17 of the [LA](#) before the instrument was made—contain a description of the nature of the consultation; and
- (e) if no such consultation was undertaken—explain why no such consultation was undertaken; and
- (f) if the instrument is disallowable—contain a statement of compatibility prepared under subsection 9(1) of the [Human Rights \(Parliamentary Scrutiny\) Act 2011](#); and
- (g) contain any other information prescribed by regulation.

256 An Act may prescribe certain information that must be included in an explanatory statement, for example [LA s 51\(5\)](#) and [51A\(4\)](#).

²² See <https://www.pmc.gov.au/resource-centre/government/federal-exec-council-handbook>

257 A supplementary explanatory statement must also be approved by the rule-maker and must contain any other information prescribed by regulation.

258 It may be necessary or desirable to include other content to provide assurance that key legal requirements or issues have been considered, and to facilitate parliamentary scrutiny. Other content considerations are discussed in paragraphs 266 to 280.

Purpose and operation of instrument

259 The explanatory statement should contain sufficient information to enable readers to understand the need for the instrument, its objectives and its intended operation. As a guide, it is desirable for the statement to include the following information:

- (a) the issues giving rise to the need for the legislative instrument;
- (b) why legislation is necessary to address the issues;
- (c) an explanation of how the instrument is intended to operate, and its likely impact.

260 Although the [LA](#) does not insist on a provision-by-provision explanation, this is often useful and may be necessary to meet the needs of users, particularly scrutiny bodies such as the SDLC (see paragraphs 269 to 273).

Documents incorporated by reference

261 If an instrument incorporates a document by reference and the document is not a Commonwealth Act or legislative instrument, the explanatory statement must describe each document that has been incorporated and indicate how the document may be obtained ([LA](#) s 15J(2)(c)). In describing such documents, the explanatory statement should:

- (a) state whether the document is incorporated as in force from time to time or as at a particular time; and
- (b) if the document is incorporated as in force at a particular time—state the time; and
- (c) if the document is incorporated as in force from time to time—comment on the application of subsection 14(2) of the [LA](#) and mention any contrary provision in the enabling legislation that displaces it; and
- (d) indicate where the document may be freely accessed and used by members of the public.

262 If an instrument does not incorporate a document by reference, a statement in the explanatory statement indicating this can assist in expediting parliamentary scrutiny.

263 Please refer to paragraphs 94 to 98, 271, 300 and 301 for further information on documents incorporated by reference.

Consultation

264 The explanatory statement must contain a description of any consultation undertaken under section 17 of the [LA](#) before the instrument was made or, if no such consultation was undertaken, an explanation as to why no such consultation was undertaken. The requirement for consultation before making a legislative instrument is discussed in more detail in [Chapter 7](#).

Human rights compatibility

265 Under paragraph 15J(2)(f) of the [LA](#), if a legislative instrument is disallowable, its explanatory statement must include a statement of compatibility prepared under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* that assesses the instrument's compatibility with the rights and freedoms contained in seven core human rights treaties to which Australia is a party. More information on human rights and how to assess compatibility is available on the AGD website²³.

Other content considerations

266 In considering what to include in an explanatory statement, it is useful to take into account the needs of users. The following guidance takes into account issues of particular interest to the Parliament. For general guidance on formatting matters, including use of images and hidden content, see paragraphs 112 to 121.

Best Practice Regulation requirements

267 If a Regulation Impact Statement (RIS) has been completed, the entire RIS must be included in or attached to the instrument's explanatory statement for tabling purposes. If the streamlined process of senior-level officer correspondence with OBPR has been adopted, then that correspondence should be included in or attached to the explanatory statement.

268 Even if a RIS has not been completed, it is desirable to describe the regulatory impact assessment process and outcomes and include any OBPR reference number. This provides assurance that the Australian Government's best practice regulation requirements have been met. For more information about these requirements, please contact OBPR (helpdesk-obpr@pmc.gov.au or (02) 6271 6270).

Senate Standing Committee for the Scrutiny of Delegated Legislation (SDLC) requirements

269 The SDLC reviews each disallowable legislative instrument, or legislative instrument that is subject to disapproval, affirmative resolution or exempt from disallowance, that is tabled in the Parliament. The instruments are reviewed against a set of technical scrutiny principles that focus on individual rights and liberties and standards of parliamentary propriety. The SDLC publishes a consolidated set of guidelines setting out these scrutiny principles. Each of the scrutiny principles contains information to assist agencies to prepare an explanatory statement which meets the requirements of the SDLC. One of the scrutiny principles deals specifically with the adequacy of explanatory materials.

²³ See <http://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/default.aspx>

270 The SDLC has long emphasised the importance of explanatory statements as a point of access to understanding the law, and, if needed, as extrinsic materials to assist with interpretation. The SDLC assesses whether the explanatory materials for a legislative instrument provide sufficient information to gain a clear understanding of the instrument. The guideline for the scrutiny principle dealing with the adequacy of explanatory materials says that an explanatory statement should typically:

- (a) describe the purpose and operation of the instrument (see also [LA s 15J\(2\)\(b\)](#));
- (b) provide a detailed provision-by-provision explanation of the instrument, with sufficient detail to understand how each section will function and which does so not by simply repeating the text of the provisions;
- (c) state the specific provisions that provide the legal authority for making the instrument;
- (d) where the instrument has been made in contemplation of commencement of its enabling provision, state that the instrument relies on section 4 of the [Acts Interpretation Act 1901](#);
- (e) where the instrument repeals or amends another instrument, and there is no express power in the enabling legislation to do so, state that the instrument relies on subsection 33(3) of the [Acts Interpretation Act 1901](#) for the power to amend, modify or repeal the instrument. The SDLC has provided the following example of a form of words that may be included in an explanatory statement where relevant:

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.
- (f) state whether there are any statutory preconditions which must be satisfied for the instrument to be lawfully made and, if so, whether they have been satisfied;
- (g) where the instrument is one that specifies grants and programs on which expenditure is authorised (usually made under the [Financial Framework \(Supplementary Powers\) Act 1997](#) or the [Industry Research and Development Act 1986](#)), or engages an express or implied constitutional principle or guarantee, explain why the instrument is constitutionally valid;
- (h) where the instrument is likely to engage an express or implied constitutional principle or guarantee, explain why the instrument does not breach the principle or guarantee;
- (i) state whether any consultation occurred in relation to the specific instrument (and, if so, whether persons likely to be affected by the instrument and persons with expertise in relevant fields were consulted) or, if no consultation occurred, why no consultation occurred (see also [LA s 15J\(2\)\(d\)](#) and (e) and s 17);

- (j) contain a statement of compatibility with human rights prepared under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (see also [LA s 15J\(2\)\(f\)](#)).

271 The checklist for the scrutiny principle covering adequacy of explanatory materials also identifies the following instrument-specific matters which should be covered by the explanatory statement where relevant:

- (a) where the instrument provides for the collection, use or disclosure of personal information, an explanation of the nature and scope of the provisions, why they are necessary and appropriate, and the safeguards in place to protect the personal information;
- (b) the availability or otherwise of independent review of discretionary decisions made under the instrument, explained by reference to the Administrative Review Council's Guide *What decisions should be subject to merits review?*²⁴;
- (c) details about any delegation of administrative functions or powers in the instrument, including the purpose, scope and necessity of the delegation, who will be exercising the powers and functions (including whether they possess appropriate qualifications and skills), and the limitations and safeguards in place;
- (d) an explanation of any exemption from primary legislation or modification of the application of primary legislation made by the instrument, and additional details;
- (e) the basis for imposition of any fees or charges imposed by the instrument, and additional details;
- (f) a description of any document incorporated by reference, including the manner in which it is incorporated (that is, whether as in force at a particular time or as in force from time to time), the legislative authority for incorporation as in force from time to time (if applicable), how the document may be obtained and where it may be freely accessed and used by the public (see also [LA s 15J\(2\)\(c\)](#));
- (g) where the instrument includes an offence which reverses the legal or evidential burden of proof, a justification for this reversal by reference to the *AGD Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*²⁵;
- (h) if the instrument commences retrospectively, a statement whether any person may be disadvantaged by the retrospectivity and, if so, what steps have been or will be taken to avoid such disadvantage (see also [LA s 12\(2\)](#)).

²⁴ See <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/practice-guides/what-decisions-should-be-subject-to-merit-review-1999.aspx>

²⁵ See <https://www.ag.gov.au/legal-system/publications/guide-framing-commonwealth-offences-infringement-notices-and-enforcement-powers>

272 Agencies should respond quickly if the SDLC asks questions or expresses concern about a legislative instrument. Failure to do so may result in adverse parliamentary comment and possibly disallowance of the instrument. If the instrument was drafted by OPC, agencies should also contact their OPC drafter.

273 Further information on issues and instruments of concern to the SDLC is available on the SDLC website²⁶.

Parliamentary Joint Committee on Human Rights requirements

274 The Parliamentary Joint Committee on Human Rights reviews each legislative instrument that is tabled in the Parliament for human rights compatibility in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*.

275 The committee views statements of compatibility as essential to the consideration of human rights in the legislative process, and expects statements to set out the necessary information in a way that allows the committee to undertake its scrutiny task efficiently. The committee expects statements of compatibility to be able to be read as stand-alone documents.

276 If the rule-maker considers that no rights are engaged, the committee expects that reasons should be given, if possible, to support that conclusion. This is particularly important where such a conclusion may not be self-evident from the description of the instrument's objective.

277 If human rights are limited by a legislative instrument, the committee prefers statements of compatibility to follow the sequence of steps set out in the assessment tool and associated guidance developed by AGD²⁷. Statements should provide information on:

- (a) whether and how the limitation is aimed at achieving a legitimate objective; and
- (b) whether and how there is a rational connection between the limitation and the objective; and
- (c) whether and how the limitation is reasonable, necessary, and proportionate.

278 Further guidance on issues and instruments of concern to the committee is available on the committee's website²⁸.

Previous ministerial or parliamentary undertakings

279 A Minister or rule-maker may, on occasion, give an undertaking to the Parliament or a committee of the Parliament to review or change how an instrument operates, or to change drafting, consultation or other practices before making a similar instrument. If such an undertaking is relevant to a new instrument, the undertaking should be acknowledged and its implementation discussed in the explanatory statement for the new instrument.

²⁶ See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances

²⁷ See <http://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/default.aspx>

²⁸ See http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights

If an instrument or provision is very similar in substance to one made recently

280 The LA imposes significant restrictions on remaking an instrument or provision before, and for a period after, tabling. Consequently, if an instrument or provision is being remade while restrictions apply or shortly after they end, the explanatory statement should acknowledge the restrictions and explain why they do not apply (see paragraphs 319 to 327 for more detail).

Consequences of failure to provide explanatory statements on time

281 An explanatory statement for a legislative instrument must be lodged with OPC for registration at the same time as, or as soon as practicable after, the legislative instrument that it explains (LA s 15G(4)(a)). Although a failure to lodge the explanatory statement as required does not affect the validity or enforceability of the registered instrument (LA s 15K(2)), the rule-maker:

- (a) remains under a statutory obligation to lodge the explanatory statement with OPC for registration; and
- (b) must arrange for a written explanation to be tabled in the Parliament if the explanatory statement for an instrument is not lodged before the instrument is delivered by OPC for tabling (LA s 39(3)); and
- (c) should expect adverse comment from relevant parliamentary committees if this happens.

If there is a significant error or omission in an explanatory statement

282 If there is a significant error or omission in the initial explanatory statement provided for an instrument, there are things an agency or rule-maker can do to address this.

283 It may be appropriate for a supplementary or replacement explanatory statement to be lodged and delivered to the Parliament, even if the instrument is no longer open to disallowance. As part of this, the agency will need to:

- (a) consider which form of statement is most appropriate (a supplementary statement may suffice if the issue is a minor omission); and
- (b) get the rule-maker's approval for the supplementary or replacement statement; and
- (c) lodge the supplementary or replacement statement online with OPC, so that OPC can register and deliver it for tabling in accordance with section 39 of the LA.

284 If there are special requirements for a statement to be tabled by a particular date to ensure that an instrument is not disallowed, agencies are advised to contact OPC. Under no circumstances should agencies attempt to lodge statements directly with the Table Offices or scrutiny bodies.

Supporting material

285 Any supporting material that should be made available with an instrument should also be attached (uploaded) to the online lodgement form. As with instruments and explanatory statements, these documents:

- (a) must be in .rtf, .doc or .docx format, unless the First Parliamentary Counsel has agreed to some other format (see [Rule s 5\(3\)](#)); and

Note: Our preferred format is .docx.

- (b) must not contain macros, fields or other dynamic content that may interfere with the content of the document (see [Rule s 5\(4\)](#)).

Chapter 9—Parliamentary scrutiny (disallowance) processes

Main points

- All legislative instruments that are registered must be tabled in each House of the Parliament and, unless an exemption applies, they may be disallowed by either House.
- If a disallowable legislative instrument is rectified, it must be re-tabled in each House of the Parliament and may be subject to a new or extended disallowance period.
- OPC is responsible for delivering legislative instruments and their explanatory statements to the Parliament for tabling.
- The Parliamentary Table Offices are responsible for tabling legislative instruments and explanatory statements.
- The parliamentary sitting schedule determines when a legislative instrument can be tabled and how long it is open to disallowance (if applicable).
- If a notice of motion to disallow is given but is not dealt with within 15 sitting days of the giving of that notice, the legislative instrument is automatically disallowed.
- If a legislative instrument is disallowed, or is not tabled within 6 sitting days of registration, it is repealed immediately and any amendment or repeal made by it is undone.
- A legislative instrument that has been registered recently, that is open to disallowance, or that has been disallowed in the last 6 months, generally cannot be remade.

Background

287 Until 2005, the process for deciding which instruments should be subject to parliamentary scrutiny and disallowance was largely ad hoc. An instrument was disallowable only if its enabling legislation declared it to be a statutory rule or otherwise disallowable, and a variety of disallowance periods and regimes applied. Individual agencies were responsible for delivering instruments for tabling if and as required.

288 Part 2 of Chapter 3 of the [LA](#) establishes, with some exceptions, a single regime for parliamentary scrutiny and disallowance of legislative instruments. In particular:

- (a) all legislative instruments must be tabled in each House of the Parliament within 6 sitting days of registration to remain in effect ([LA s 38](#)); and
- (b) all legislative instruments are subject to disallowance by either House for a period of at least 15 sitting days ([LA s 42](#)), unless an exemption applies ([LA s 44](#)); and
- (c) a legislative instrument generally cannot be remade pending tabling or for a period after tabling ([LA s 46](#)), while open to disallowance ([LA s 47](#)) or, if the instrument is disallowed, for 6 months after disallowance ([LA s 48](#)).

289 The Parliament's sitting schedule is normally released at the start of each Parliament and each year, but extra sittings may be scheduled as needed. The Houses may sit on different days, and a **sitting day** does not necessarily correspond to a calendar day (see *Acts Interpretation Act 1901* s 2M). For example:

- (a) a sitting day may extend beyond a calendar day if a House sits late; and
- (b) a sitting without adjournment that is suspended and resumes on a later day only counts as one sitting day.

290 For the purposes of Part 2 of Chapter 3 of the **LA**, 15 sitting days of a House of the Parliament can equate to several months and is calculated from the first sitting day of a House after the sitting day on which the instrument is tabled. Similarly, the 6-sitting day deadline for the tabling of an instrument is calculated from the first sitting day of a House after the day of registration.

If an enabling Act has special requirements for tabling or disallowance

291 An instrument's enabling legislation sometimes includes provisions for the tabling or disallowance of instruments that duplicate or differ from the standard regime established by the **LA**. The **LA** will generally displace such special provisions, unless they:

- (a) are preserved by regulations made under subsection 57(5) of the **LA**; or
- (b) were made after the **LA** commenced on 1 January 2005.

292 If a special regime for tabling or disallowance applies, agencies should flag this as a special requirement when lodging the instrument for registration, and make their own calculations as to deadlines. Agencies should also consider adopting the **LA** standard to avoid making the scrutiny process more complex than it needs to be²⁹.

Responsibility for delivering instruments for tabling

293 OPC is responsible for delivering registered instruments for tabling (**LA** s 38(1)), and generally does so as soon as practicable after they are registered whether or not the Parliament is sitting. As part of this process, OPC:

- (a) delivers hard copies of each instrument and its explanatory statement, including any supplementary materials such as a Regulatory Impact Statement, to the Table Offices; and
- (b) works with the Table Offices to ensure that instruments are tabled before the relevant deadline.

294 OPC is also responsible for delivering rectified disallowable legislative instruments for re-tabling (see paragraph 210 and **LA** s 15DA(2)).

²⁹ See 2008 *Review of the Legislation Act 2003*, chapter 8.3.

295 If an agency wants registered documents tabled urgently, or has some other specific tabling requirement, the agency should go through its normal parliamentary liaison channels to make an arrangement with the Table Offices and relevant scrutiny bodies.

296 For urgent tabling, please note that:

- (a) OPC will work to prepare registered documents and reports for delivery to the table offices as soon as practicable but, particularly for larger documents, consideration for processing time should be taken into account; and
- (b) while agencies are required to negotiate any special arrangements with the Table Offices, OPC is still responsible for the delivery of registered documents for tabling.

297 There are strict deadlines for tabling instruments. If a registered instrument is not tabled in a House of the Parliament within 6 sitting days after the day of registration, it is repealed immediately after the 6th day (LA s 38(3)).

298 OPC monitors tabling processes and routinely records relevant dates in the Register for the information of agency staff and external stakeholders. Tabling information can also be obtained from the Journals of the Senate³⁰ and the Votes and Proceedings of the House of Representatives³¹.

If either House requires more information

299 If a House of the Parliament requires more information about an instrument, the matter would normally be raised directly with the responsible Minister. A prompt response is usually enough to resolve factual questions associated with vague or incomplete explanatory material, or access to material incorporated by reference.

300 If the matter is not dealt with to the satisfaction of a House, that House may escalate the matter, for example, by giving notice of motion to disallow the instrument. Less commonly, a House may also choose:

- (a) to formally require documents incorporated by reference in a disallowable legislative instrument to be made available for inspection (LA s 41); or
- (b) to refer a matter to a committee for investigation; or
- (c) to call witnesses to answer questions at hearings, which may be open or broadcast to the public.

If extra documents need to be tabled or made available

301 If a replacement or supplementary explanatory statement is issued, it needs to meet certain requirements and should be lodged promptly with OPC for registration and delivery for tabling (see paragraphs 282 to 284).

³⁰ See http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate

³¹ See http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/HoR/Votes_and_Proceedings

302 Other documents cannot be lodged for tabling through OPC. The relevant agency should prepare and lodge these for tabling in accordance with the current Guidelines for the Presentation of [non-Register] Documents to the Parliament³². It may also be appropriate to provide additional courtesy copies to relevant scrutiny bodies.

Disallowance

303 Under the LA, all new legislative instruments are subject to disallowance by either House of the Parliament for a set period, unless they are explicitly exempted from disallowance. Exemptions may be set out in section 44 of the LA, sections 9 and 10 of the LEOMR, or the enabling legislation.

304 Tabling and disallowance requirements that were in force before 1 January 2005 have been, in almost all cases, superseded by the operation of section 57 of the LA. However, earlier provisions continue to apply if those provisions:

- (a) are preserved by regulations made under subsection 57(5) of the LA; or
- (b) require things to be done before, or at the same time as, a legislative instrument is tabled (e.g. to prepare a report and table it with an instrument).

What instruments are exempt from disallowance

305 When an instrument is lodged for registration, the lodging agency is asked to certify a range of information including whether an exemption from disallowance applies and, if so, what legislation authorises the exemption.

306 Most exemptions are straightforward and nominate a specific enabling provision such as instruments made under section 123 of the *XYZ Act 2012*. However, other exemptions are more generic and some can be difficult to apply, particularly if they refer to the purpose of an instrument.

307 If there is any doubt about whether an instrument is exempt, the rule-making agency should get legal advice and consider the potential risks to government policy if an instrument is listed as not subject to disallowance. There could be significant consequences if, for example, an agency claims an instrument is exempt but the Parliament does not agree.

308 If a new exemption may be appropriate, for example, because a new class of instrument is being created, the proposal should be discussed in the first instance with AGD (adminlaw@ag.gov.au or (02) 6141 2736). The formal policy approval of the responsible Minister and the Attorney-General is required for new exemptions.

When instruments are open to disallowance

309 Unless exempt from disallowance or subject to a special disallowance regime, legislative instruments are open to disallowance in whole or in part for at least 15 sitting days. This timeframe needs to be calculated separately for each House from the first sitting day after the day the instrument is tabled.

³² See <https://www.pmc.gov.au/sites/default/files/publications/pmc-tabling-guidelines.pdf>

310 If an election is called, the disallowance “clock” for each House generally stops and then resumes once the House starts sitting again. However, the clock must be re-started if notice of motion to disallow an instrument has been given but not resolved. An affected instrument is again open to disallowance for the full disallowance period of 15 sitting days once sittings resume (LA s 42(3)).

311 If a disallowable legislative instrument is rectified, the instrument must be re-tabled which may extend an existing, or start a new, disallowance period (see paragraphs 210 to 212 and LA s 15DA).

How notice of motion to disallow may be resolved

312 If a Senator or Member gives notice of motion to disallow an instrument, or a provision of an instrument, the standing orders of both Houses do not allow the motion to be moved on the same day. However, if a matter is controversial, a House may grant leave or suspend standing orders so that the motion is moved, debated and voted on immediately.

313 A notice of motion may be withdrawn. Once the motion is moved, it may be withdrawn or put to a vote by the House on the day specified in the motion. In the Senate, standing orders require the Senator who initiated the motion to give notice of intention to withdraw it, and permit another Senator to take over the motion even if the initial period for giving notice has elapsed. The House of Representatives does not have a similar procedure.

314 If a disallowance motion is not withdrawn, put to a vote or otherwise disposed of within 15 sitting days after the sitting day that the notice of motion is given, the relevant instrument or provision is taken to have been disallowed at the end of that period (LA s 42(2)).

If notice of motion to disallow has been given

315 OPC monitors parliamentary proceedings and, if notice of motion to disallow is given, will update the Register and alert the lodging agency as necessary. Agencies can also track the progress of disallowance motions via the SDLC’s Disallowance Alert³³. It is important to take such matters seriously.

316 Consequently, if a House has not yet voted on a disallowance motion, the responsible Minister should be briefed quickly on the issues and options. It may be possible for the responsible Minister to resolve the situation by:

- (a) responding with and, if appropriate, tabling additional information such as a replacement or supplementary explanatory statement (see paragraph 301); or
- (b) giving an undertaking to review or change how an instrument operates, or to change drafting, consultation or other practices.

317 If an undertaking is given, agencies should ensure that it is implemented and provide feedback to this effect through, for example, subsequent explanatory statements if relevant. Prompt action should be taken because scrutiny bodies often include details of both new and outstanding undertakings in their periodic reports to the Parliament.

³³ See https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Disallowance_Alert

318 Agencies should also prepare for the possibility of disallowance as swift action may be required. For example, it may be necessary to do some or all of the following:

- (a) notify people who rely on the instrument for authority to act (particularly if it is a matter that could go to court or involves public money);
- (b) get legal advice on other legislation that may be revived or amended as a result of the disallowance;
- (c) prepare one or more compilations to reflect the revised text of the instrument and any other affected legislation (see [Chapter 5](#)).

If notice of motion to disallow has passed

319 If a notice of motion is passed, or taken to have passed, the effect of disallowance is:

- (a) to repeal the instrument or provision immediately, that is, from the day and time of disallowance ([LA s 42\(1\) and \(2\)](#)); and
- (b) to revive any instrument, law or provision repealed by the instrument or provision unless the repealed instrument or provision had sunsetted under Part 4 of Chapter 3 of the [LA](#) (s 45(2) and (3)); and
- (c) to undo the effects of a disallowed amending instrument or provision immediately, that is, from the day and time of disallowance. This will also require a compilation to be prepared to show the effect of the disallowance ([LA s 15Q\(1\)\(b\)](#)).
- (d) to extend the restrictions on remaking the disallowed instrument or provision for 6 months after the day of disallowance ([LA s 48](#)).

Restrictions on remaking instruments before and after tabling

320 Sometimes problems are identified with the text of an instrument soon after it has been lodged for registration. If so, the instrument may be amended or repealed, but a second instrument that is the same in substance as the first instrument cannot be made before the first instrument is tabled, and for a period after its tabling, without the Parliament's approval.

321 Irrespective of whether a legislative instrument is disallowable, once it has been registered a second instrument that is the same in substance as the first instrument cannot be made for a period of 7 calendar days from the following ([LA s 46](#)):

- (a) if it was tabled on the same day in both Houses—the day of tabling;
- (b) if it was tabled on different days in both Houses—the later of those days;
- (c) if it was not tabled in both Houses—the last day when the instrument could have been tabled under section 38 of the [LA](#).

322 If a legislative instrument is disallowable, longer timeframes may apply. If notice of a motion to disallow is given, an instrument, or a provision of the instrument, that is the same in substance as the original instrument or provision cannot be made while the original instrument or provision can be disallowed (LA s 47). If the original instrument or provision is disallowed, an instrument or provision the same in substance cannot be made for 6 months after the day of disallowance (LA s 48).

323 It is important to note that the restrictions on remaking are broadly expressed, and focus on whether an instrument or provision is “the same in substance” as an earlier instrument or provision. This usually requires an assessment of whether it has “in large measure, though not in all details, the same effect” as an earlier instrument or provision³⁴.

324 It is also important to comply with the restrictions on remaking. An instrument or provision that is remade in breach of these restrictions has no effect, and can never take effect even if it is registered and tabled (LA s 46(3), s 47(3) and s 48(4)).

325 Consequently, if there is a compelling need to remake an instrument or provision before these restrictions end, there are only two practical options for resolving the situation:

- (a) remake the instrument or provision with changes, so that it is not the same in substance as the earlier instrument or provision, or
- (b) seek a resolution by the Parliament approving the remaking of the instrument or provision (see LA s 46(1) and s 48(2)).

326 In either case, agencies are strongly advised to obtain legal advice on whether the proposed new instrument or provision is the same in substance as the earlier one. Also, agencies are advised to consider the possibility that the Parliament may disallow the new instrument or provision based on a broader view of the concept than that adopted by the courts to date.

327 If a Parliamentary resolution for remaking is obtained and an instrument or provision is remade, the resolution date and other details should be noted in the explanatory statement. This will ensure that the details are readily available if the validity of remaking is questioned at any point in the future.

328 Similarly, if a decision is taken to remake an instrument or provision shortly after the restrictions have ended, the relevant date calculations should be included in the explanatory statement. This is particularly important if the new instrument is disallowable or the earlier instrument was disallowed.

³⁴ See *Victorian Chamber of Manufactures v Commonwealth (Women’s Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347 (13 August 1943), and *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834

Chapter 10—Sunsetting

Main points

- Many legislative instruments are automatically repealed after 10 years—this process is known as sunsetting and is governed by Part 4 of Chapter 3 of the [LA](#).
- Early action on sunsetting is more likely to achieve a smooth process and a better outcome than leaving things until the last minute.
- Sunset dates can only be deferred or rolled over in limited circumstances, and this requires the consent of the Attorney-General, the Parliament or both.
- In many cases, a replacement instrument will need to be made and registered before an instrument sunsets to ensure continuity of the law.

Background

329 This chapter describes the framework for sunsetting established by the [LA](#), and highlights key considerations in the drafting and registration of instruments. It should be read in conjunction with:

- (a) the AGD Guide to Managing Sunsetting of Legislative Instruments³⁵; and
- (b) the Sunsetting Checklist in Appendix A of this Handbook; and
- (c) the Australian Government’s deregulation policies.

330 The automatic repeal or sunsetting of older legislative instruments presents a unique opportunity for the Australian Government to reduce red tape, deliver clearer laws, and align existing legislation with current government policy.

331 Sunsetting may, at first, require some agencies to change the way they manage their legislation but it is an important process. Its purpose is to “ensure that legislative instruments are kept up-to-date and only remain in force for as long as they are needed” ([LA](#) s 49).

332 As a general guide, agencies should plan ahead and, if appropriate, negotiate minor changes to sunset dates. If an instrument is no longer required, it should be repealed (see paragraph 221). Otherwise the instrument should be reviewed (see paragraph 349). If the review establishes that the instrument is still required, the instrument should be:

- (a) replaced and registered before the instrument’s scheduled sunsetting date to ensure continuity of the law (see paragraph 369); or
- (b) rolled over (if appropriate, see paragraph 360).

³⁵ See <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/LegislationAct2003.aspx>

333 Agencies should prepare for sunseting well in advance of an instrument's sunset date as the process of reviewing an instrument, and acting on review recommendations, can be lengthy. The process may also attract significant Parliamentary and public scrutiny, even if no changes are recommended.

334 For further guidance on preparation for sunseting and the risks of inaction, see the AGD Guide to Managing Sunseting of Legislative Instruments³⁶ or contact AGD (sunseting@ag.gov.au or (02) 6141 2736).

How sunseting works

335 Part 4 of Chapter 3 of the [LA](#) provides for:

- (a) regulations and other legislative instruments to sunset on predictable dates, either 1 April or 1 October each year; and
- (b) a list of sunseting instruments to be tabled 18 months before each sunset date.

336 Although there are mechanisms for postponing an instrument's scheduled sunseting date, or permanently exempting it from sunseting, these options are only available in limited circumstances. Further guidance on such matters is provided in paragraphs 337, 352 and 360.

337 Even if a legislative instrument is exempt from sunseting, it may still need to be reviewed periodically to comply with specific statutory obligations in the enabling legislation and with the Australian Government's best practice regulation requirements. For more information about these requirements, please contact OBPR (helpdesk-obpr@pmc.gov.au or (02) 6271 6270).

What instruments are exempt from sunseting

338 Under the [LA](#), all legislative instruments are subject to sunseting unless they are exempt from sunseting. Exemptions may be set out in section 54 of the [LA](#), sections 11 and 12 of the [LEOMR](#) or, in very limited cases, the enabling legislation.

339 When an instrument is lodged for registration, the lodging agency is asked to certify a range of information including whether an exemption from sunseting applies and, if so, what legislation authorises the exemption.

340 Most exemptions are straightforward and nominate a specific enabling provision such as instruments made under section 123 of the *XYZ Act 2013*. However, other exemptions are more generic and some can be difficult to apply, particularly if they refer to the purpose of an instrument.

341 If there is any doubt about whether an instrument is exempt from sunseting, the rule-making agency should seek legal advice and consider the potential risks to government policy if the instrument is not listed for sunseting. There will be significant legal and other consequences if, for example, an agency claims that an instrument is exempt but a court later finds that the instrument was not exempt and has sunsetted.

³⁶ See <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/LegislationAct2003.aspx>

342 The formal policy approval of both the responsible Minister and the Attorney-General is required to create a new exemption from sunseting. Proposals for a new exemption should be discussed in the first instance with AGD (adminlaw@ag.gov.au or (02) 6141 2736).

When instruments sunset

343 All legislative instruments sunset on the first 1 April or 1 October falling on or after the 10th anniversary of their registration (LA s 50(1)), unless their enabling legislation provides otherwise. To illustrate:

Date of registration	Default sunseting date
31 March 2015	1 April 2025
1 April 2015	1 April 2025
2 April 2015	1 October 2025

Advance notice of sunseting

344 The Attorney-General is required to table a list of all the instruments due to sunset on a given sunset date. The list must be tabled in each House of the Parliament on the first sitting day within 18 months before that date (LA s 52). The exact date of tabling will vary, but some of the key dates are as follows:

Sunseting date	List tabling date
1 October 2027	First sitting day on or after 1 April 2026
1 April 2028	First sitting day on or after 1 October 2026
1 October 2028	First sitting day on or after 1 April 2027

345 Tabled lists are available on the Register³⁷. Newly tabled lists are available on the website as soon as possible after tabling in accordance with the current Guidelines for the Presentation of Documents to the Parliament³⁸. In accordance with subsection 52(3) of the LA, OPC also provides the tabled list to each Departmental Secretary for distribution to each rule-maker within the portfolio as soon as practicable after the list is tabled.

346 OPC also provides a list of instruments due to sunset in 6 and 12 months to all agency Legislation Liaison Officers. This list is not tabled in each House of the Parliament but is provided for information only. This is so agencies can take into account any changes that have occurred since lists of instruments due to sunset in 18 months were tabled in each House of Parliament and to assist agencies in managing their sunseting instruments to ensure the timely remaking or repeal of sunseting instruments.

347 Up-to-date information on all the instruments due to sunset within 18 months³⁹ and details of a particular instrument's current sunset date can be obtained from the Register website. Agency-specific reports on instruments that are not yet repealed can also be accessed, customised and downloaded to Microsoft Excel through the secure lodgement facility <https://lodge.legislation.gov.au>.

³⁷ See <https://www.legislation.gov.au/Content/SunsettingLists>

³⁸ See <https://www.pmc.gov.au/sites/default/files/publications/pmc-tabling-guidelines.pdf>

³⁹ See <https://www.legislation.gov.au/Browse/BySunsetDate/LegislativeInstruments/SunsettingSoon>

What to do about sunseting

348 Agencies that take early action on sunseting are more likely to achieve a smooth process and better outcomes than agencies that leave things until the last minute. Early action is particularly desirable if:

- (a) a change in sunset date may be appropriate e.g. to facilitate a thematic review of multiple instruments; or
- (b) an instrument's inclusion in a tabled sunseting list is likely to cause significant parliamentary or public concern; or
- (c) a parliamentary rollover or significant policy change is likely to be sought; or
- (d) an agency is responsible for a large number of sunseting instruments.

349 Many instruments are “one-off” instruments that have been created for a particular event or period, or for the sole purpose of doing something to another instrument (e.g. commencing, amending or repealing the other instrument). These instruments are usually easy to identify and may be subject to automatic repeal. If not, they should be repealed once they have done their job. For further guidance on repeal processes, see paragraph 221.

350 If an instrument is still required, or if there is doubt about whether it is still required, the rule-making agency should undertake a more in-depth review of whether the instrument is “fit for purpose”. For further guidance on how to prepare for and review sunseting instruments, see the Sunseting Checklist in Appendix A of this Handbook, the AGD Guide to Managing Sunseting of Legislative Instruments⁴⁰ or contact AGD (sunseting@ag.gov.au or (02) 6141 2736).

351 Agencies planning reviews should also have regard to the Australian Government's best practice regulation requirements. For further guidance on these requirements, please contact OBPR (helpdesk-obpr@pmc.gov.au or (02) 6271 6270).

352 An instrument that is “fit for purpose” can be considered for a parliamentary rollover (see paragraphs 360 to 367). Otherwise, the instrument should be remade (see paragraphs 368 to 380).

Scope to negotiate minor changes in sunset date

353 The LA recognises that minor changes to default sunset dates may be appropriate in certain circumstances. It authorises the Attorney-General to:

- (a) align the sunset dates for related instruments to facilitate thematic review; and
- (b) defer sunseting by up to 24 months if statutory conditions are met.

⁴⁰ See <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/LegislationAct2003.aspx>

Declaration of thematic review under section 51A of the LA

354 It is possible to align the sunset dates for a group of instruments to facilitate a thematic review. This process may involve bringing forward some dates, and pushing others back by up to 5 years. It is not limited to instruments made under a single Act or administered by a single portfolio—instruments can be grouped on some other basis, such as a particular treaty or industry.

355 Safeguards have been enacted to ensure that this mechanism is used to support and not undermine the purpose of sunseting. Among other things, the LA requires:

- (a) the responsible rule-maker to apply to the Attorney-General (LA s 51A(1)); and
- (b) the Attorney-General to be satisfied that all the instruments to be reviewed are or will be subject to a single review (LA s 51A(1)(a)(ii)); and
- (c) the Attorney-General to be satisfied that the making of the declaration will facilitate the undertaking of the review or the implementation of the findings of a completed review (LA s 51A(1)(b)); and
- (d) the Attorney-General to make a declaration—this declaration is a legislative instrument that must be registered (LA s 51A(1)) and is subject to disallowance.

356 A declaration of thematic review cannot revive an instrument that has already sunsetted. Also, if a declaration is disallowed, any instrument named in the declaration that has passed its previous sunset date is repealed. Consequently, any application for a declaration should be made well in advance of the earliest sunset date.

357 For practical guidance on and assistance with section 51A applications, see the AGD Guide to Managing Sunsetting of Legislative Instruments⁴¹ or contact AGD (sunsetting@ag.gov.au or (02) 6141 2736).

Attorney-General's certificate under section 51 of the LA

358 If the Attorney-General is satisfied that the statutory conditions in section 51 of the LA are met, an instrument's sunset date can be deferred for either 6, 12, 18 or 24 months by means of a certificate made under that section. In terms of process, the LA requires:

- (a) the responsible rule-maker to apply to the Attorney-General in writing; and
- (b) the Attorney-General to be satisfied that the instrument meets the statutory conditions; and
- (c) the Attorney-General to make a certificate that must be registered (LA s 51(3))—a certificate of deferral for 6 or 12 months is exempt from disallowance (LA s 51(4)); and

⁴¹ See <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/LegislationAct2003.aspx>

- (d) the explanatory statement for the certificate must include a statement of reasons for the issue of the certificate.

359 A certificate cannot revive an instrument that has already sunsetted, so it must be prepared, signed, and registered before the relevant sunset date to be effective.

360 For practical guidance on and assistance with applications for section 51 certificates, see the AGD Guide to Managing Sunsetting Instruments⁴² or contact AGD (sunsetting@ag.gov.au or (02) 6141 2736).

Parliamentary “rollovers”

361 If an instrument is mentioned in a section 51 deferral certificate laid before a House of the Parliament in accordance with section 38 of the LA or in a sunsetting list laid before a House of the Parliament under section 52, either House of the Parliament may pass a resolution at any time before the repeal day that the instrument should continue in force (LA s 53(1)).

362 If a resolution is passed, the instrument’s sunset date is deferred for 10 years. There is no requirement to remake, register or table an instrument that has been rolled over and, having already been the subject of parliamentary scrutiny, the instrument is not subject to further scrutiny in the form of disallowance.

363 If the vote on the proposed roll over is in the negative, or if no vote is taken prior to the instrument’s scheduled sunsetting date, nothing changes and urgent action is required to prepare, make and register a replacement instrument before the existing instrument sunsets. As part of that process, changes to the substance of the instrument may be desirable or important (particularly if the replacement will be subject to disallowance).

If notice of private rollover motion is given

364 OPC monitors parliamentary proceedings and will notify agencies as soon as practicable if an instrument is subject to a motion for a rollover by a Private Member.

When government rollover motion may be appropriate

365 Only Senators and Members of Parliament can move for a rollover under section 53 of the LA. Consequently, unless the rule-maker is a Minister, it will be necessary for the rule-maker (for example, the Secretary of a Department or statutory body) to make the case for a rollover to the responsible Minister. This should be done well in advance of the deadline for rollover motions, because:

- (a) consultation with government and other stakeholders may be necessary or desirable (see paragraph 366); and
- (b) both the parliamentary sitting schedule and order of business can be subject to change without notice.

⁴² See <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/LegislationAct2003.aspx>

366 Agencies considering a rollover motion should consult AGD before proceeding to ensure that current policy and process requirements have been met. Agencies should also recognise that a rollover may not reduce overall workload compared with replacing an instrument. There could be significant workload and other consequences if, for example:

- (a) a motion is controversial and referred to committee; or
- (b) public uncertainty about the instrument generates campaign correspondence; or
- (c) a motion is unsuccessful and the instrument has to be replaced within short timeframes.

367 For further guidance on this matter, see the AGD Guide to Managing Sunsetting Instruments⁴³ or contact AGD (sunsetting@ag.gov.au or (02) 6141 2736).

Tabling of documents for rollover purposes

368 If a document needs to be tabled in anticipation or support of a rollover motion, it cannot be lodged for tabling through OPC. The relevant agency will need to prepare and lodge it in accordance with the current Guidelines for the Presentation of [non-Register] Documents to the Parliament⁴⁴. It may also be appropriate to provide additional courtesy copies to relevant scrutiny bodies.

Replacement of sunseting instruments (if required)

369 A rule-maker who is authorised to make a particular instrument can repeal and remake it, no matter who originally made it. Merely amending an instrument does not reset its sunseting “clock”.

370 To ensure continuity of the law, a new (replacement) instrument must be made and registered before any existing instrument sunsets. Failure to get a replacement instrument made and registered by the sunset date can have significant legal and other consequences (see paragraphs 71 to 76).

371 In the case of disallowable instruments, a much earlier date of registration is recommended to reduce the potential risks and consequences of disallowance. Disallowance of a replacement instrument or provision may temporarily revive a previous instrument, but cannot prevent that instrument sunseting or revive an instrument that has already sunseted.

372 It may be tempting for agencies to assume that the process of preparing a new instrument to replace a sunseting instrument will not take very long because necessary provisions already exist. However, it is OPC’s experience that significant time and care is needed to ensure that:

- (a) the new instrument is legally effective, clear and intelligible to anticipated users (see paragraphs 372 to 380); and

⁴³ See <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/LegislationAct2003.aspx>

⁴⁴ See <https://www.pmc.gov.au/sites/default/files/publications/pmc-tabling-guidelines.pdf>

- (b) consultation, regulatory impact and other process requirements are met (see [Chapter 7](#)); and
- (c) the explanatory statement for the instrument meets current legislative and Parliamentary standards (see [Chapter 8](#)).

Drafting of replacement instruments

373 If an agency intends to use OPC’s drafting services to draft a replacement for a particular instrument, OPC would appreciate early instructions that:

- (a) outline the preferred timing, including whether an exposure draft is required to assist consultation; and
- (b) deal with any policy or other changes that are needed (such as deletion of unwanted provisions); and
- (c) confirm that the rest of the instrument is to remain the same in substance—OPC will modernise it without detailed instructions, if and as needed, in consultation with the agency.

374 Irrespective of who drafts it, a new instrument intended to replace a sunseting instrument needs to contain the following to avoid confusion about what is intended and what is in force:

- (a) a new, unique name (e.g. the *Widgets Determination 2027* where 2027 is the year of making);
- (b) an express provision that states when the new instrument is to commence;
- (c) an express provision that clearly identifies and repeals the sunseting instrument or instruments (use of the word “repeal” is important);
- (d) transitional provisions, if and as needed to transition things from being done under the sunseting instrument to the new instrument.

375 Other changes may also be necessary to meet current drafting and publishing standards. The person drafting the instrument should check that each provision in the new instrument is supported by a head of power in current law, and should consider carefully any legal opinions that go to the effect or validity of existing provisions. Care is also needed if a sunseting instrument:

- (a) has enabled the making of another instrument that is still in force; or
- (b) incorporates documents other than Commonwealth Acts or disallowable legislative instruments by reference; or
- (c) is cited in other legislation that is in force; or
- (d) deals with a criminal offence, civil penalty or related enforcement issue; or
- (e) contains gender-specific language.

376 Further information on drafting issues is provided in [Chapter 3](#).

Scope to remake instruments in bulk by reference

377 It may be possible to remake instruments by reference, that is, without spelling out the full text of each replacement instrument. However, there is no known precedent for this and this approach has significant legal and practical limitations. It is only likely to be appropriate if the instruments to be remade:

- (a) are not likely to be of interest to the Parliament (e.g. because of their technical content); and
- (b) are available on the Register “as amended” without any misdescribed amendments; and
- (c) do not need to be amended substantially as part of the remaking processes.

378 It should be noted that it is generally not possible for a single rule-maker such as a Minister to make a single instrument that remakes every instrument in a portfolio. In the absence of statutory authority, a Minister cannot, for example:

- (a) amend, repeal, or repeal and replace, a regulation or other instrument made by the Governor-General or other rule-maker; or
- (b) repeal and replace one type of instrument (such as a guideline) using another type of instrument (such as a determination).

379 Even with instruments of the same type, separate replacement instruments may be required for disallowable and non-disallowable instruments to avoid making non-disallowable instruments subject to disallowance.

380 Although it may be possible to remake instruments by reference with very minor changes, expert drafting will be required to minimise the risk of unintended consequences if anything more substantial is proposed. This may be particularly important if, for example, the instrument to be remade:

- (a) contains saving or transitional provisions; or
- (b) has been amended but no up-to-date compilation has been registered showing the text as amended; or
- (c) needs to be amended retrospectively, with changes applied to the instrument before its date of remaking.

381 Each replacement instrument must be registered before the relevant sunset date with an explanatory statement that meets all of the requirements for explanatory statements. In addition, a compilation of any instrument that has been amended by the replacement instrument will also need to be prepared and registered as soon as practicable after the instrument is remade.

If an instrument cannot be replaced before it sunsets

382 If an instrument cannot be replaced before it sunsets, there are only three options for ensuring or restoring continuity of the law.

383 First, if an urgent and unavoidable issue emerges before the sunset date that prevents an instrument being remade, it may be possible to obtain a 6, 12, 18 or 24 month deferral of its sunset date by the issuing of an Attorney-General's certificate under section 51 of the [LA](#). For further guidance on section 51 certificates, see paragraph 357.

384 Second, if the original instrument has sunsetted, a replacement instrument should be made as soon as practicable. It might be possible to backdate the commencement to the relevant sunset date, but please seek legal advice before attempting to commence or apply an instrument retrospectively (see paragraph 72). Note also that retrospectivity may attract adverse comment from bodies such as the SDLC).

385 Finally, if a replacement instrument cannot be made retrospectively, an Act of the Parliament may be required to remedy the situation. However, this should only be considered if all other options have been exhausted. For more information on what is involved, see the *Legislation Handbook*⁴⁵.

386 For assistance with any of these options, please contact OPC by email at instrument.instructions@opc.gov.au or contact OPC's .

⁴⁵ See <https://www.pmc.gov.au/resource-centre/government/legislation-handbook>

Appendix A—Sunsetting Checklist

- Does the instrument pass the fit-for-purpose test (see the AGD Guide to Managing Sunsetting of Legislative Instruments)?
- Is the policy of each provision still necessary and appropriate?
- Is each provision of the instrument supported by an appropriate head of power in the enabling legislation?
The instrument might not explicitly refer to the head of power under which the provision is made. If so, you might need to speak to a drafter in OPC or seek legal advice.
- Are all references in the instrument to the following still appropriate and correct:
 - references to laws or other instruments;
 - references to persons, organisations or bodies.

This might require checking those references in the laws of the Commonwealth, a State or a Territory, or in instruments made by another person, organisation or body.
- Does each provision of the instrument meet OPC drafting and publishing standards?
- Are any application, transitional or savings issues raised by repealing the instrument?
- If the instrument is not to be replaced, has the instrument been repealed?
- If the instrument is to be replaced, have all prerequisites required by the enabling legislation before making the new instrument been complied with?
- If the instrument is to be replaced, does the new instrument have a unique name, and a commencement provision?
- Have you considered the power to make any instruments that are made under the legislative instrument, and the character of those instruments?
- Are any consequential amendments required to any other instruments because the instrument is to sunset or be replaced?

Further reading

Key legislation

Acts Interpretation Act 1901

Legislation Act 2003

Legislation (Exemptions and Other Matters) Regulation 2015

Legislation Rule 2016

Guidance material

AGD guidance on human rights scrutiny

<http://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/default.aspx>

AGD Guide to Framing Commonwealth Offences, Infringements Notices and Enforcement Powers

<http://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx>

AGD Guide to Managing Sunsetting of Legislative Instruments

<https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/LegislationAct2003.aspx>

The Australian Government Guide to Regulation

<https://www.policyhub.gov.au/resources/australian-government-guide-regulation>

Federal Executive Council Handbook

<https://www.pmc.gov.au/resource-centre/government/federal-exec-council-handbook>

Guidelines for the Presentation of Documents to the Parliament

<https://www.pmc.gov.au/sites/default/files/publications/pmc-tabling-guidelines.pdf>

Legislation Handbook

<https://www.pmc.gov.au/resource-centre/government/legislation-handbook>

Legislation Proposal Advice—OPC client advisers list

<https://www.opc.gov.au/drafting-resources/client-advisers>

OPC's drafting services: a guide for clients

<https://www.opc.gov.au/drafting-resources/drafting-manuals>

OPC Drafting Manuals

<https://www.opc.gov.au/drafting-resources/drafting-manuals>

OPC Drafting Directions

<https://www.opc.gov.au/drafting-resources/drafting-directions>

Parliamentary Joint Committee on Human Rights—Guidance Notes and Resources

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

Senate Standing Committee for the Scrutiny of Delegated Legislation—Committee guidelines

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines

Useful contacts

Office of Parliamentary Counsel

Instrument drafting services

instrument.instructions@opc.gov.au

or please contact OPC's instrument client advisers

(<https://www.opc.gov.au/drafting-resources/client-advisers>)

Compilations services

lodge@legislation.gov.au

(02) 6120 1350

Sunsetting and repeal of instruments

sunsetting@opc.gov.au

(02) 6120 1350

Registration services and corrections

To lodge documents online, go to:

<https://lodge.legislation.gov.au>

To arrange a log-on or get other help:

lodge@legislation.gov.au

(02) 6120 1350

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table.legislation.sen@aph.gov.au

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Attorney-General's Department

Exemptions from some or all of the LA

adminlaw@ag.gov.au

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Proposals to defer sunseting

sunsetting@ag.gov.au

(02) 6141 2736

Human rights compatibility

humanrights@ag.gov.au

(02) 6141 6666

Criminal Law Policy

CriminalLaw@ag.gov.au

Department of the Prime Minister and Cabinet

Office of Best Practice Regulation

helpdesk-obpr@pmc.gov.au

(02) 6271 6270

Office of Deregulation

officeofderegulation@pmc.gov.au

Federal Executive Council Secretariat

exco@pmc.gov.au

(02) 6271 5779

Tabling of non-Register documents

tabling@pmc.gov.au

(02) 6277 7212

Parliamentary committees

Parliamentary Joint Committee on Human Rights

human.rights@aph.gov.au

(02) 6277 3823

Senate Standing Committee for the Scrutiny of Delegated Legislation

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2.1	December 2015	M15JF133.V04.DOCX
3.0	July 2016	M16JF136.V02.DOCX
3.1	March 2017	M17JF142.V05.DOCX
3.2	March 2018	M17JF142.V11.DOCX
3.3	June 2018	M17JF142.V12.DOCX
3.4	November 2018	M17JF142.V20.DOCX
3.5	May 2019	M17JF142.V24.DOCX
3.6	August 2022	M17JF142.V36.DOCX
3.7	September 2022	M17JF142.V40.DOCX
