IS 'SUNSETTING' LIMPING OFF INTO THE SUNSET?: RECENT DEVELOPMENTS IN THE REGIME FOR SUNSETTING OF COMMONWEALTH DELEGATED LEGISLATION

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In 2003, with the passage of the *Legislative Instruments Act 2003* (LIA), the Commonwealth Parliament established, in the Commonwealth jurisdiction (among other significant reforms), a regime for the 'sunsetting' of Commonwealth 'legislative instruments' (in simple terms, delegated legislation). 'Sunsetting', a concept that had already been in operation in New South Wales, Queensland, South Australia and Victoria, dating back to the 1980s, refers to the automatic repeal of delegated legislation once it has been in operation for a certain number of years. Under the LIA, the number of years stipulated was 10, chosen in preference to shorter periods in the State jurisdictions. The explanatory memorandum that accompanied the relevant Bill stated:

> Ten years has been chosen as an appropriate period of time to prevent the persistence of antiquated or unnecessary legislative instruments, and enable ample time for review and re-making of legislative instruments that may still be required. A shorter time span would be more resource intensive.[1]

The sunsetting regime has now operated for over 15 years.

As required by s 60 of the LIA, a review of the sunsetting regime was conducted in 2017 after the regime had been in operation for 12 years. The sunsetting review[2] is discussed in more detail below. However, before the review was concluded, the (then) Minister for Immigration and Border Protection, the Hon Peter Dutton MP, took action to exempt the *Migration Regulations 1994* (Cth), in their entirety, from the sunsetting regime. The Migration Regulations are voluminous, and far-reaching in their effect, especially on individuals. They have also operated for over 25 years (more than double the period set for sunsetting). As a result, their exemption from sunsetting was a significant step, especially if effected *before* the statutory review of the sunsetting regime had been completed. While the Senate (through the Senate Standing Committee on Regulations and Ordinances (Senate Committee)) took steps to explore with the Minister the justification for the exemption, the Senate Committee, in effect, accepted the Minister's arguments in favour of exemption and the Senate, in turn, ultimately allowed the exemption to stand.

In my view, this was regrettable (and disappointing), as the exemption of the Migration Regulations from sunsetting seriously undermined the effectiveness of the sunsetting regime and also (arguably) created a 'precedent' that invited further exemptions to be sought and given. I set out the reasons for my view below.

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Legislative Instruments Bill 2003

The LIA established 'a consistent system for registering, tabling, scrutinising and sunsetting all Commonwealth legislative instruments'.[3] Sunsetting was, evidently, one of the four key elements of what was enacted as the LIA.

The explanatory memorandum for the Legislative Instruments Bill 2003 states:

> **Part 6 — Sunsetting of Legislative Instruments**
>
> This Part provides for the automatic repeal or sunsetting of each legislative instrument 10 years after the date that the instrument must be placed on the Register. Ten years has been chosen as an appropriate period of time to prevent the persistence of antiquated or unnecessary legislative instruments, and enable ample time for review and re-making of legislative instruments that may still be required. A shorter time span would be more resource intensive.[4]

In his second reading speech, the (then) Attorney-General, the Hon Daryl Williams QC MP, stated:

> The final feature of this bill which I wish to emphasise is the sunsetting mechanism.
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> The bill provides for the sunsetting or the automatic repeal of legislative instruments after a period lasting approximately 10 years from the time that the instrument is registered. Sunsetting will ensure that legislative instruments are regularly reviewed and only remain operative if they continue to be relevant.
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> This has clear benefits for business and the community.
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> The bill provides a number of targeted exemptions from the sunsetting provisions because the nature of the instrument would make sunsetting inappropriate — for example, where commercial certainty would be undermined by sunsetting or the instrument is clearly designed to be enduring.
>
> In addition, either house of parliament may, by resolution, exempt nominated legislative instruments from sunsetting.
>
> This addresses a concern previously expressed by the opposition.
>
> The bill provides for a review of the operation of the legislation to take place three years after commencement and for a further review of the general sunsetting provisions 12 years after commencement.
>
> The requirement for a review recognises the importance of ensuring that the bill is operating as intended, in particular that the requirement for rule makers to periodically review and remake legislative instruments is operating in an efficient and effective manner.[5]

The exemptions to which the Attorney-General alluded were set out in s 54 of the LIA. They included 50 types of legislative instruments that were specified in a table in s 54(2) of the LIA.[6] It is important to note, at the outset, that the exemption of a legislative instrument from sunsetting was originally considered to be significant enough to be included in primary legislation rather than delegated legislation.

Table item 51 provided for the exemption of '[l]egislative instruments that are prescribed by the regulations for the purposes of this table'. As originally promulgated, Sch 3 of the *Legislative Instruments Regulations 2004* (Cth) (LIRs) exempted a further six classes of instruments.[7] By the time that the LIRs were superseded (see below), Sch 3 listed 58 classes of legislative instruments that were exempt from sunsetting, demonstrating that the power contained in table item 51 of s 54(2) of the LIA had been much used.[8]

Acts and Instruments (Framework Reform) Act 2015

In 2015 (with effect from 2016), the LIA was significantly amended — and renamed the *Legislation Act 2003* (Cth) — by the *Acts and Instruments (Framework Reform) Act 2015* (Cth) (Framework Reform Act).[9] The content and breadth of the amendments is a matter for another article. However, an important element of the amendments, for this article, was that the content of s 54 was largely moved to Pt 5 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth) (LEOMR). That regulation currently exempts seven classes of legislative instrument and almost 100 particular instruments from sunsetting.[10] However, the important thing to note is that what was previously done (largely) by primary legislation is now done by delegated legislation. This is a key issue for the discussion below.

It is interesting to note, at the outset, that the Senate Standing Committee for the Scrutiny of Bills (Senate Scrutiny of Bills Committee) did not comment in any detail on this element of the Bill that became the Framework Reform Act.[11] The removal of legislative activity from primary legislation and its placing, instead, within delegated legislation might be expected to attract attention from the Senate Scrutiny of Bills Committee on the basis that it involved an inappropriate delegation of legislative power (for principle (iv) of the Committee's terms of reference) or involved insufficiently subjecting the exercise of legislative power to parliamentary scrutiny (for principle (v) of the Committee's terms of reference).[12] The removal of the sunsetting exemptions from the primary legislation was identified as a potential issue only obliquely — in a comment that was primarily directed at the removal of the exemption of legislative instruments from disallowance from the primary legislation. The Senate Scrutiny of Bills Committee stated:

> It is understood that it is intended that the categories of exempt instruments will be consolidated in the new regulations. *While a consolidated approach is desirable, the committee notes that in moving material from primary to delegated legislation a justification should be provided for each item or class of instrument to be exempted from disallowance or sunsetting (current and new categories) and for each item or class of instrument to be removed from the tables of those instruments exempt from disallowance or sunsetting.*[13]

This was identified as potentially involving legislation insufficiently subjecting the exercise of legislative power to parliamentary scrutiny. The Senate Scrutiny of Bills Committee stated:

> The committee draws this matter to the attention of the Regulations and Ordinances Committee for information.[14]

While the (then) Attorney-General, Senator the Hon George Brandis QC, responded to the Senate Scrutiny of Bills Committee's comments on the Framework Reform Bill,[15] the response did not directly address the sunsetting issue discussed above. The Senate Scrutiny of Bills Committee concluded its consideration of the Framework Reform Bill by stating:

> The committee draws its concern that, generally, instruments should be deemed to be legislative and subject to disallowance and sunsetting to the attention of Senators, and leaves the matter to the consideration of the Senate as a whole.
>
> The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.[16]

In other words, the Senate Scrutiny of Bills Committee left the matter to the Senate Regulations and Ordinances Committee (and to the Senate as a whole). The Senate Regulations and Ordinances Committee's dealing with the issue is discussed below.

Exemption of the *Migration Regulations 1994* from sunsetting

In 2016, under the authority of the (then) Minister for Immigration and Border Protection, the *Migration Amendment (Review of the Regulations) Regulation 2016* (Cth) (Amendment Regulation) was promulgated. The Amendment Regulation inserted into the Migration Regulations a new reg 5.44A that set out a new review regime for the Migration Regulations. In essence, the new regulation provided that the Migration Regulations be reviewed every 10 years.[17] As no requirements for the review were specified, it could be assumed that the review would be entirely within the control of the relevant department. Significantly, there was no requirement to make the outcome of any review public — even to the Parliament — and, similarly, no obligation to remake or amend the Migration Regulations in the light of the outcome of a review. The latter point was relevant, also, to the capacity of the Parliament to retain meaningful oversight over the (accumulated) content of such regulations.

Less than a month later, under the authority of the (then) Attorney-General, Senator the Hon George Brandis QC, the *Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016* (Cth) (Sunsetting Exemption Regulation) was promulgated. The Sunsetting Amendment Regulation amended the LEOMR to insert various new exemptions from sunsetting. Item 10 of the amendment schedule exempted the Migration Regulations from sunsetting[18] — in their entirety. Absent this amendment, the Migration Regulations would have sunsetted on 1 October 2018 (unless remade or otherwise continued in force[19]).

No justification was provided, in the explanatory statement for either the Sunsetting Exemption Regulation or the Amendment Regulation, for exempting the Migration Regulations from sunsetting. Given the importance of sunsetting to the legislative regime established by the LIA, and given the volume of the Migration Regulations, how long they had been in force and their potential effect (particularly on individuals), this seems quite extraordinary.

Concerns raised by the Senate Committee

The Senate Committee commented on both the Amendment Regulation and the Sunsetting Exemption Regulation, in a single entry, in Delegated Legislation Monitor 1 of 2017.[20] The Senate Committee stated:

> Neither the [explanatory statement] to the [Amendment Regulation] nor the [Sunsetting Exemption Regulation] provides information on the broader justification for the exemption of the Migration Regulations from sunsetting.
>
> The committee also notes that the process to review and action review recommendations for instruments can be lengthy, and the committee expects departments and agencies to plan for sunsetting well in advance of an instrument's sunset date.
>
> *The committee is concerned that neither the [explanatory statement] to the [Amendment Regulation] nor the [Sunsetting Exemption Regulation] provides information about whether a review of the Migration Regulations had commenced in light of the sunsetting date of 1 October 2018 and why, in effect, an additional year is required to conduct the initial review.*[21]

The Senate Committee sought a response from 'the Minister' (which was evidently intended to include the Attorney-General). The Attorney-General responded (including on behalf of the Minister for Immigration and Border Protection) in a letter dated 1 March 2017. The letter is discussed in Delegated Legislation Monitor 3 of 2017.[22] In essence, the Senate Committee was not satisfied with the further information provided and sought a further response.

In a letter dated 15 June 2017, the Minister for Immigration and Border Protection responded to the Senate Committee. The response is discussed in Delegated Legislation Monitor 7 of 2017.[23] Again, the Senate Committee was not satisfied with the further information provided and sought a further response.

At this point, it is not helpful to reproduce here the precise detail of the further correspondence. Suffice it to say that, over numerous responses (discussed in Delegated Legislation Monitors 8, 9, 13 and 15 of 2017[24]), from the Minister and from the Attorney-General, the Senate Committee seems to have remained less than happy with the information provided in response to its concerns. The Senate Committee's concerns are underlined by the fact that 'protective' notices of motion[25] to disallow were placed on the Amendment Regulation (on 28 March 2017) and the Sunsetting Exemption Regulation (on 31 March 2017).[26] This had the effect of preserving the Senate Committee's jurisdiction over the Migration Regulations pending receipt of a satisfactory response to its concerns.

However, the Senate Committee ultimately withdrew the notices of motion, despite apparently not being able to agree entirely with the arguments made in a series of responses by the Attorney-General and the Minister. In Delegated Legislation Monitor 15 of 2017, the Senate Committee concluded its scrutiny of the Amendment Regulation and the Sunsetting Exemption Regulation, stating:

> The committee is conscious that these instruments have been the subject of an extensive dialogue over a long period, and acknowledges the cooperation of both the Attorney-General and the Minister for Immigration and Border Protection in assisting the committee with its consideration of this matter. The committee recognises that there is a difference of view between the committee and the relevant ministers in relation to these issues, which is unlikely to be resolved through further correspondence.
>
> The committee nonetheless reiterates its concern that these instruments have effectively removed from comprehensive parliamentary scrutiny a significant body of delegated legislation, in an area of law which engages a large number of Australia's national and international legal obligations, and has significant ramifications for individuals as well as the national interest. The committee reiterates its considered view that it is essential that Parliament retain direct oversight of the outcomes of the review of significant pieces of delegated legislation, including the *Migration Regulations 1994*.
>
> The committee also reiterates its expectation that the review of the Migration Regulations, and the resulting report, would be thorough and, at a minimum, reflect the principles outlined in the Attorney-General's Department *Guide to Managing Sunsetting of Legislative Instruments*.
>
> The committee has concluded its examination of the instruments. However, the committee draws its concerns regarding the exemption of the Migration Regulations from sunsetting, and the absence of alternative arrangements for appropriate parliamentary oversight of those regulations, to the attention of the Senate.[27]

In other words, despite apparently finding a series of ministerial responses to its concerns less than compelling, the Senate Committee did not seek to have the regulations in question disallowed but, rather, merely restated its underlying concerns and reiterated its 'expectation'. But the bottom line was that the Migration Regulations had 'escaped' the sunsetting regime.

What is the problem?

There are two fundamental points that I would like to make about the interchange between the Senate Committee and the Attorney-General and the Minister, discussed above. The first is what I identify as the substantive justification that was (eventually) provided for exempting the Migration Regulations from sunsetting. The second is the fact that all of this was occurring while a major statutory review of the sunsetting regime was underway and the fact that what was proposed was that the Migration Regulations be exempted, without

such exemption being considered (and adjudged), in the context of the outcome of that review.

Justifications provided for the exemption

In my view, the most substantive justification provided[28] for the exemption of the Migration Regulations from sunsetting is set out in a letter to the Senate Committee from the Minister, dated 13 July 2017, which is discussed in Delegated Legislation Monitor 8 of 2017.[29] In the letter, the Minister stated:

> Remaking the Migration Regulations would incur significant costs, and place a high impost on Government resources, with limited effect on the reduction of red tape, the delivery of clearer law or the alignment of the existing legislation with current Government policy.
>
> In addition, a remake of the Migration Regulations would require complex and difficult to administer transitional provisions. It is likely that this would have a significant impact on any undecided visa and sponsorship applications, as well as causing significant uncertainty for:
>
> (a) the millions of visa holders whose visa conditions and the grounds on which their visa is held, including when that visa ceases, are determined by the Migration Regulations;
>
> (b) the millions of current or future visa applicants whose eligibility for an Australian visa is determined by the Migration Regulations;
>
> (c) sponsors and potential sponsors; and
>
> (d) industries where the conduct of business is reliant on migrants, either as employees or clients.
>
> The Migration Regulations were exempted from sunsetting on the basis that the new review process met the objectives of the sunsetting regime set out in Part 4 of Chapter 3 of the *Legislation Act 2003* (the Legislation Act), which are 'to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed' (see section 49).
>
> There is no question that the Migration Regulations are still needed — as described above, they are in constant use to support Australia's migration programme. There is also no question that the Migration Regulations are kept up to date and fit for purpose; the regulations are regularly reviewed and amended, often extensively, to reflect current Government priorities and to respond to economic and social developments. Amendments are also made several times each year to address changing policy and administrative requirements.
>
> In addition, as a deregulation measure, in 2012–2013 the Migration Regulations were comprehensively reviewed and were amended in 2014 to remove redundant provisions and regularise terminology (see the *Migration Amendment (Redundant and Other Provisions) Regulation 2014* for further details about these amendments).
>
> The process involved individual consideration of every provision of the Migration Regulations and categorisation as 'still required', 'possibly redundant', and 'redundant'. The relevant policy area was then consulted to provide instructions to repeal, or justification to keep the provisions. The process also involved updating cross references and terminology, and certain drafting practices.[30]

The Minister went on to state:

> In future, the Migration Regulations will continue to be reviewed and improved to ensure they are up to date and align with Government policy …
>
> In light of the above, I consider that the Migration Regulations currently meet the objectives of Part 4 of Chapter 3 of the Legislation Act, and that the review arrangements inserted by the *Migration Amendment (Review of the Regulations) Regulation 2016* formalise, and add to, what is effectively an ongoing review process. I note, moreover, that each time amendments are made to the Migration Regulations the changes are subject to Parliamentary scrutiny, including possible disallowance.[31]

I consider that much of the above justification could be said about *any* of the complicated Commonwealth legislative regimes that are subject to sunsetting. Many other agencies could (surely) argue that the review process that is involved with sunsetting 'would incur significant costs, and place a high impost on Government resources'. Similarly, many other agencies could (surely) argue that regular amendments mean that *their* legislation is 'kept up to date'. This was, surely, something that had been considered when the sunsetting regime was originally put in place by the LIA.

Unfortunately (relying on the published information), the Senate Committee did not pursue this issue with the Minister or the Attorney-General.

More worrying, however, is what I see as a logical inconsistency that is inherent in the Minister's response, extracted above. If regular amendment of the Migration Regulations means that they are 'kept up to date' (especially given the additional review processes to which the Minister refers) then how can it be that remaking the Migration Regulations (as part of sunsetting) would *necessarily* 'incur significant costs, and place a high impost on Government resources'? If regular amendment has, in fact, kept them 'up to date' then surely it should not take much to review and remake the Migration Regulations for the purposes of sunsetting.

Again, unfortunately (relying on the published information), the Senate Committee did not pursue this issue with the Minister or the Attorney-General.

Exemption of the Migration Regulations from sunsetting pre-empted the outcome of the Review of the Sunsetting Framework

Section 60 of the LIA provides for a review of the operation of the sunsetting provisions, by a 'body' of persons appointed to conduct such a review, after they had been in operation for 12 years.[32] The Sunsetting Review Committee was appointed in early 2017 and released a consultation paper for public comment on 30 May 2017,[33] with the report to be completed by 1 October 2017 (in accordance with the statutory requirements).

As mentioned above, the Amendment Regulation and the Sunsetting Exemption Regulation were promulgated at the end of 2016 prior to the commencement of the sunsetting review. However, for much of the time during which these regulations were the subject of discussions between the Senate Committee and the Minister and the Attorney-General, the sunsetting review was operating. Indeed, the Senate Committee did not conclude its consideration of the two regulations in question until 29 November 2017, *after* the Sunsetting Review Committee had reported.[34]

In my view, given their volume, how long they had been in force and their potential effect (particularly on individuals), the exemption of the Migration Regulations from sunsetting should have been considered in the context of the sunsetting review rather than taking place regardless of the outcome of the review. This seems both logical and not unreasonable.

Instead, all the report of the Sunsetting Review Committee did was report on the interchange between the Senate Committee and the Minister and the Attorney-General[35] and then make some (fairly obvious) recommendations about what agencies should do in the future if seeking to justify an exemption from sunsetting.

Meanwhile, a significant part of the body of Commonwealth legislation had 'escaped' the sunsetting regime. In my view, this was *a bad thing*, both in terms of the removal of a significant body of Commonwealth legislation from the sunsetting regime (and the scrutiny

that attaches to such a regime) and in terms of the message that (in effect) allowing this to happen sent to other agencies (discussed further below).

In making this comment, I note that the report of the Sunsetting Review Committee stated:

> Sunsetting is an important mechanism for the Australian Government to implement policies to reduce red tape, deliver clearer laws and align existing legislation with current government policy. The sunsetting framework commenced in 2003. Since then 2024 legislative instruments have appeared on sunsetting lists tabled by the Attorney-General under section 52 of the Legislation Act. Approximately 60% (1215) of those listed instruments were either allowed to sunset (413 instruments), were actively repealed (340 instruments), or have been replaced (462 instruments). The sunsetting framework has played a key role in keeping the statute book up to date.[36]

So sunsetting is 'an important mechanism for the Australian Government to implement policies to reduce red tape, deliver clearer laws and align existing legislation with current government policy' and its operation has apparently produced significant results. But it should not apply to the Migration Regulations.

Do the Migration Regulations actually need reviewing and rewriting?

Whether or not the Migration Regulations actually need reviewing and rewriting is an issue on which opinions would presumably differ. Clearly, the Minister thought not, having told the Senate Committee about the reviews to which the Migration Regulations had been (and will be) subject and also his view that, as a result, they are 'up to date'. As indicated above, I consider the Minister's arguments to be weak (and contradictory). As a result, in my view, they should have been scrutinised further by the Senate Committee. In addition, however, it seems unlikely that there is anything that makes the Migration Regulations different from other Commonwealth legislation, such that they would *not* be enhanced by the benefits identified by the report of the Sunsetting Review Committee as generally flowing from sunsetting — that is, the reduction of red tape, the delivery of clearer laws and the alignment of legislation with current government policy.

An example of an aspect of the Migration Regulations that would seem to be an obvious target for review and remaking is Sch 2 of the Migration Regulations. Schedule 2 sets out the criteria that apply to eligibility for specific subclasses of visas. It deals with primary and secondary criteria, with the main applicant having to satisfy the primary criteria and others involved in the application (for example, partners and children) being the subject of secondary criteria. In addition, Sch 2 also distinguishes between criteria that must be met at the time an application is made and criteria that must be met at the time that a decision is made.

It is difficult to explain, neatly and quickly, how the issues required to be dealt with in Sch 2 have resulted in a complexity of drafting architecture that renders Sch 2 difficult to amend, let alone to understand. However, a simple example is the fact that Sch 2 contains at least six instances where the drafting requires reference to sub-subparagraphs (see items 445.223(4); 676.611; 773.213(2), (3) and (4); and 801.321 of Sch 2). Use of sub-subparagraphs (in my experience) is relatively rare in Commonwealth legislation. Their use demonstrates an obvious level of complexity that, surely, would be addressed if the Migration Regulations were subject to the kind of comprehensive review that would be involved in a sunsetting exercise.

That said, it would be understandable if the (now) Department of Home Affairs was wary of the time, resources and expense that would be involved in a comprehensive review — and, probably, rewrite — of the Migration Regulations. The Department would, no doubt, be aware of what has happened in relation to the *Civil Aviation Safety Regulations 1998* (Cth).

It is my understanding that a substantial rewrite of those regulations commenced over 20 years ago and was expected to take two years to complete. It is *still* proceeding and must have already cost multiple millions of dollars in legislative drafting resources alone (including as a result of the formation of a drafting 'taskforce'). Over the years, this has been the subject of criticism.[37] Any Commonwealth agency would, presumably, be wary of potentially facing a similar experience with its legislation.

As a side issue, it is relevant to note that the *Civil Aviation Safety Regulations 1998* were exempted from sunsetting by the LIA from the outset.[38]

Subsequent exemptions from sunsetting

I suggested above that the fact that the exemption of the Migration Regulations from sunsetting was allowed to stand (despite what I regard as weak justifications) could set a 'precedent' that invited further exemptions to be sought and given. Sure enough, in August of 2017, the (then) Attorney-General, the Hon Senator George Brandis QC, was involved in promulgating the *Legislation (Exemptions and Other Matters) Amendment (Sunsetting Exemptions) Regulations 2017* (Cth) (Second Sunsetting Exemption Regulation).[39] That regulation exempted a further 17 regulations, plus some further legislative instruments, from sunsetting. The exempted regulations included the *Corporations Regulations 2001* (Cth) — another significant, voluminous piece of Commonwealth legislation that had been in force for a substantial number of years. The following justification was provided in the explanatory statement for the Second Sunsetting Exemption Regulation:

> The Corporations Regulations, made under the *Corporations Act 2001*, prescribe matters relating to corporations, securities, the futures industry, financial products and services, and other purposes. The Corporations Regulations are integral to the Corporations Agreement 2002, an intergovernmental scheme between the Commonwealth, States and Territories. They are reliant on a referral of power from the States. Ordinarily, amendments to the Corporations Regulations must be approved by the Legislative and Governance Forum for Corporations. The sunsetting of the Corporations Regulations would bypass this requirement, contrary to the Commonwealth's obligations under the Corporations Agreement.
>
> The Corporations Regulations are also integral to long-term decision making by the relevant stakeholders. Subjecting the regulations to the sunsetting regime would create significant commercial uncertainty and impose a heavy regulatory burden on stakeholders. Additionally, the Corporations Regulations are currently being reviewed as part of other reform processes (including implementation of the recommendations of the Financial System Inquiry). Due to the size of the Corporations Regulations, the current approach to updating the Regulations to ensure they remain fit for purpose is to review and reform discrete sections of the Regulations on a thematic basis. These amendments have been supported by extensive consultation and often follow a comprehensive public review. This ensures that there is strong stakeholder engagement in the review process that enables stakeholders to more easily adapt to any change, as the reforms are limited to a particular set of issues each time.
>
> Accordingly, it is appropriate to exempt the Corporations Regulations from sunsetting.[40]

Of the arguments set out above, I find the reference to the operation of the intergovernment scheme the most persuasive. However, I also note that legislative instruments made under the *Corporations Act 2001* (including the Corporations Regulations) have, since the enactment of the LIA, been expressly excluded from the general exemption from sunsetting that applies, under s 54(1) of the Legislation Act, to a legislative instrument that:

(a) facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States or Territories; and
(b) authorises the instrument to be made by the body or for the purposes of the body or scheme.

One wonders what had changed between the enactment of the LIA and the giving of this latest exemption so as to require (in effect) the removal of the exclusion of legislative instruments made under the Corporations Act from the general exemption from sunsetting applicable to legislative instruments relating to intergovernmental schemes. This issue is not addressed in the explanatory statement for the Second Sunsetting Exemption Regulation.

The Senate Committee considered issues raised by the Second Sunsetting Exemption Regulation in Delegated Legislation Monitor 13 of 2017, seeking further information from the Attorney-General.[41] The Attorney-General's response (which referenced the correspondence in relation to the Amendment Regulation and the Sunsetting Exemption Regulation, mentioned above) is discussed in Delegated Legislation Monitor 14 of 2017.[42] Readers can make their own judgment about the justifications provided by the Attorney-General. My view is that they are no more convincing than the earlier arguments made in relation to the Migration Regulations. The Senate Committee nevertheless concluded its scrutiny of the Second Sunsetting Amendment Regulation (thereby allowing it to stand, without a disallowance motion, et cetera), stating:

> The committee remains of the view that exemptions from the sunsetting requirements of the Legislation Act are significant matters, and that the circumstances in which an exemption will be appropriate are limited. The committee's focus where an exemption from sunsetting is proposed is to ensure that Parliament maintains effective and regular oversight of the legislative power it has delegated.
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> The committee acknowledges that the Corporations Regulations are regularly amended, and that those amendments are subject to parliamentary scrutiny and disallowance. However, the committee considers that removing the requirement to remake the Corporations Regulations every ten years, after a significant review, reduces Parliament's oversight of those regulations. The committee considers that Parliament's opportunity to consider amendments to an instrument on an ad hoc basis, as they arise, is not the same as comprehensive periodic oversight of an instrument in its entirety, as envisaged by the sunsetting regime.
>
> The committee notes that no other form of parliamentary oversight has been introduced to replace the Legislation Act sunsetting process in relation to the instruments being exempted, including the Corporations Regulations.
>
> *The committee has concluded its examination of the instrument. However, the committee draws the exemption of several additional and significant legislative instruments from sunsetting, including the Corporations Regulations, and the lack of alternative arrangements for appropriate parliamentary oversight of those instruments, to the attention of the Senate*.[43]

In other words, again, despite apparently finding the ministerial responses to its concerns less than compelling, the Senate Committee did not seek to have the regulations in question disallowed but, rather, merely restated its underlying concerns. Again, the bottom line was that a further swathe of significant delegated legislation had 'escaped' the sunsetting regime.

More recently, in April 2019, the (then) Attorney-General, the Hon Christian Porter MP, was involved in promulgating the *Legislation (Exemptions and Other Matters) Amendment (2019 Measures No 1) Regulations 2019* (Cth).[44] That regulation exempts from sunsetting several further sets of regulations and legislative instruments, including regulations made under the *Fair Work Act 2009* (Cth), the *Fair Work (Registered Organisations) Act 2009* (Cth) and the *Work Health and Safety Act 2011* (Cth). At the time of writing, the Senate Committee does not appear to have commented on the regulation.

On previous indications, however, it seems unlikely that the Senate Committee will move to have the regulation disallowed. As indicated above, my view is that a 'precedent' has been set and that, in effect, the floodgates have been opened.

Other problems with sunsetting

Based on my experience of working with Commonwealth delegated legislation, I am generally disappointed (to put it mildly) by the way that some Commonwealth agencies have dealt with their sunsetting obligations. I have seen too many examples of agencies apparently leaving the issue of sunsetting to the last minute then dealing with it badly. In my view, there is a suggestion in the Senate Committee's commentary on the Migration Regulations that that was the case in that instance too.[45]

In this context, I also note that over 50 instruments currently appear on the Federal Register of Legislation that defer or 'alter' sunsetting dates.[46]

I offer the following example — the worst of the examples that I could identify apart from the Migration Regulations — of sunsetting issues apparently being left until the last minute and, generally, being handled badly.

Seacare Authority Code of Practice Approval 2017

On 23 March 2017, the Minister for Employment (Employment Minister) made the Seacare Authority Code of Practice Approval 2017[47] (the Code) under s 109 of the *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth). The explanatory statement for the Code stated:

> The Code was first approved by the Minister for Employment, Workplace Relations and Small Business on 10 May 2000. The Code is due to sunset on 1 April 2017 [just over a week after the Code was made] under section 51 of the *Legislation Act 2003*. The Code has been under review by a working group formed by the Seacare Authority. The Chairperson of the Seacare Authority consulted and received the unanimous support of the working group members to request that the Code be remade to allow for that review to be completed. The working group is made up of representatives from the Australian Maritime Safety Authority and employee and employer representatives (Maritime Industry Australia Ltd, the Australian Maritime Officers Union, the Australian Institute of Marine and Power Engineers and the Maritime Union of Australia).
>
> The content of the Code is unchanged and the approval is limited to a two year period while updated guidance for industry participants is prepared, reflecting developments in work health and safety.[48]

While the Code was over 200 pages, the explanatory statement for the Code was only two pages. It contained little background information about the Code and *no* clause-by-clause explanation of the operation of the provisions of the Code.

The Senate Committee dealt with the Code in Delegated Legislation Monitor 5 of 2017.[49] The Senate Committee noted the absence of the clause-by-clause analysis in the explanatory statement but made a fairly benign comment on the issue. However, the Senate Committee raised an issue in relation to a matter that arose because of the absence of a clause-by-clause analysis. The Senate Committee noted that the Code incorporated two other codes by reference, but the explanatory statement did not address certain requirements of the Senate Committee in relation to incorporation of documents by reference.[50] As a result, the Senate Committee sought advice from the Minister for Employment.

The (then) Minister for Employment, Senator the Hon Michaelia Cash, responded to the Senate Committee's comments in a letter dated 30 May 2017. The response is considered

in the Senate Committee's Delegated Legislation Monitor 6 of 2017.[51] The response of the Minister for Employment was (in part):

> Your committee considers that the text of the Code should state the manner in which documents are incorporated. To now include in the text a new description of how matters referred to are incorporated would have been an amendment of the Code.
>
> Access to referenced documents is expressly dealt with in the *Occupational Health and Safety (Maritime Industry) Act 1993*. Subsection 109(7) of the OHS(MI) Act provides that the Australian Maritime Safety Authority (as the Inspectorate under the OHS(MI) Act) will ensure that all incorporated material is available for inspection at its offices, which are located in 19 major ports around Australia (see www.amsa.gov.au/about-amsa/organisational-structure/amsa-offices/index.asp).
>
> Industry participants have had 17 years to locate and become familiar with the relevant referenced material but, if required, the maritime industry is able to obtain referenced material directly from the AMSA.
>
> Failure to comply with any provision of a code approved by me cannot make a person liable for any civil or criminal proceedings (see subsection 109(8) of the OHS(MI) Act). The Code merely provides practical guidance to operators on how to meet their duties under the OHS(MI)Act (see subsection 109(1) of the OHS(MI) Act). The Code provides a benchmark against which maritime industry participants and the Inspectorate can assess compliance and operates alongside other guidance material.
>
> I have written to the Chair of the Seacare Authority requesting that the replacement code of practice be made as soon as reasonably practicable, and drawing his attention to the need for the replacement code to meet modern drafting standards.
>
> Having regard to the above, I do not propose to provide any further supplementary explanatory material in support of my approval.[52]

This response is, in my view, in all the circumstances, quite surprising. Fault had been found with a 'quick-fix' approach to a sunsetting obligation that had existed since the passage of the LIA in 2003, and the response of the Minister for Employment was to be (in my view) less than helpful.

To the Senate Committee's credit, it did not accept the response of the Minister for Employment and sought further advice from the Minister.[53]

The Minister for Employment provided a further response, dated 19 June 2017. In the response, the Minister provided some additional information but concluded by repeating that she did not propose to provide any further supplementary explanatory material. The Senate Committee dealt with this response in Delegated Legislation Monitor 7 of 2017.[54] Disappointingly, the Senate Committee merely reiterated its 'expectation' in relation to the relevant issues and concluded its examination of the Code.

Legal Services Directions 2017

A (perhaps) more concerning example — given that they were promulgated by the Attorney-General's portfolio, which has administrative responsibility for the sunsetting regime — is the *Legal Services Directions 2017*, made on 29 March 2017.[55] The explanatory statement for these directions states:

> Under the sunsetting regime provided by the Legislation Act, the 2005 Directions were due to sunset on 1 April 2016. On 11 February 2016, the Attorney-General issued a certificate under section 51 of the Legislation Act, to defer the sunsetting of the 2005 Directions by 12 months to 1 April 2017. The certificate explained that the Secretary of the Attorney-General's Department (AGD) was undertaking a review of Commonwealth legal work. The Review was examining how legal work can be delivered

> most effectively and efficiently to the Commonwealth, including consideration of changes to the 2005 Directions. The reasons for issuing the certificate of deferral remain valid, but the Legislation Act does not allow the making of a second certificate of deferral. Following consideration of the Review by government, further updates to the Directions are expected.[56]

This means that, even after a deferral of the sunsetting date, the agency responsible for the sunsetting regime could not be relied upon to deal with a sunsetting process in a timely and efficient manner.

The Senate Committee raised issues with the directions, including in relation to the approach to sunsetting, in Delegated Legislation Monitor 5 of 2017.[57] The Senate Committee pursued various issues (though not the sunsetting issue as such) with the Attorney-General over Delegated Legislation Monitors 6, 8 and 13 of 2017.[58] It is, in my view, disappointing that the Senate Committee did not make any substantive comments about the way that the Attorney-General's Department had dealt with the sunsetting of the directions. In my view, Australians are entitled to expect better from the agency responsible for sunsetting, and this point might have been made by the Senate Committee.

The Attorney-General's Department's approach to sunsetting (and that demonstrated by the Migration Regulations example) might be contrasted, for example, with the approach of the Department of Communications and the Arts to the sunsetting of the *Copyright Regulations 1969* (Cth) (old Copyright Regulations). The old Copyright Regulations were scheduled to sunset on 1 April 2017, but (as noted in the explanatory statement for the regulations that replaced them) this was deferred to 1 April 2018 by the *Legislation (Deferral of Sunsetting — Copyright Instruments) Certificate 2017*.[59] At the time of being superseded, the old Copyright Regulations were some 135 pages. So they were not insignificant or insubstantial.

The *Copyright Regulations 2017* (Cth) (new Copyright Regulations) were registered on 18 December 2017.[60] The explanatory statement indicates that an exposure draft was released for public consultation on 11 September 2017. It further indicates both that a large number of stakeholders were consulted but also that concerns raised by stakeholders were taken into consideration in the process of finalising the new Copyright Regulations.[61] So there is no suggestion of the remade regulations being a 'quick-fix' of the sunsetting issue.

There are numerous other examples that (in my view) demonstrate a 'quick-fix' approach to sunsetting, made necessary because sunsetting had not been properly prepared for in advance.[62] There are also, no doubt, better examples of a timely and efficient approach to sunsetting than the Corporations Regulations. It is not possible to canvass them all in this article.

In my view, this is (at best) disappointing. Sunsetting obligations did not arise for Commonwealth agencies by ambush. They have existed since the passage of the LIA in 2003 (and were foreshadowed as early as 1994[63]). In my view, the Senate Committee has not done enough to call agencies out for the deficiencies in their approach to sunsetting. If the Senate Committee has commented at all then its comments have been fairly benign, as demonstrated by the Senate Committee's approach to the Code. In essence, the Senate Committee's approach has largely been to note that 'the process to review and remake instruments can be lengthy' and to remind departments and agencies that they 'should plan for sunsetting well in advance of an instrument's sunset date'.[64]

The role of the Office of Parliamentary Counsel

In this context, it is important to consider the role of the Office of Parliamentary Counsel (OPC) in relation to sunsetting. Under s 16 of the Legislation Act (and, previously, under

s 16 of the LIA), OPC has an obligation to promote and encourage 'high standards in the drafting of legislative instruments'. This includes, under para 16(2)(d), an obligation to '[provide] training in drafting and matters related to drafting to officers and employees of Departments or other agencies'. One would have expected that these obligations would have included an obligation to provide, well in advance of the sunsetting obligations arising, training in relation to sunsetting obligations.

Based on information provided in OPC annual reports, it appears that it was not until 2016–17 that OPC provided such training on a public-service-wide basis. The 2016–17 annual report states:

> This year OPC presented a number of seminars on sunsetting to staff of many agencies that are responsible for instruments. The seminars were presented at OPC in conjunction with the Attorney-General's Department and with input from the Department of Defence.[65]

In my view, this training should have started much earlier. In saying this, I note that OPC's 2013–14 annual report stated:

> The first date for the sunsetting of instruments is now approaching and OPC is working with sunsetting coordinators in all portfolios to encourage early action on sunsetting.[66]

Similar sentiments were reflected in subsequent annual reports. OPC's 2015–16 annual report states:

> OPC worked closely with sunsetting coordinators in all portfolios to encourage early action on instruments due to sunset. Key legislative instruments that were reviewed by portfolios and redrafted by OPC before the instruments were due to sunset on 1 April 2015 included the *Customs Regulations 1926* and *Excise Regulations 1925* as well as the *Telecommunications Numbering Plan Declaration 2000* and *Telecommunications Numbering Plan Number Declaration* and related instruments. OPC greatly improved the quality and readability of these instruments through this process.[67]

But why did it take until 2016–17 for OPC to start providing general training to agencies on sunsetting? By that time it was (surely) too late. The poor standard of approach demonstrated by Commonwealth departments and agencies is reflective of the lack of timely and effective training.

I note that I have previously been critical, including in this journal, of OPC's approach to its s 16 obligations.[68]

Concluding comments — a sorry, disappointing tale

In conclusion, it is my view that the Senate Committee's failure to take an effective stand against the exemption of the Migration Regulations from sunsetting has contributed to the sunsetting regime being significantly undermined. Similarly, the Senate Committee's relatively benign approach to what I have identified as deficiencies in the way that many Commonwealth departments and agencies have dealt with their sunsetting obligations, in my view, has done little to discourage the poor standards that have developed.

The Senate Committee's failure has been magnified by deficiencies that I observe in OPC's management of the sunsetting obligations, despite its obligations under s 16 of the Legislation Act. If OPC is not doing its job as well as it might then there is no-one else (other than the Senate Committee) who can take action to ensure that the sunsetting of Commonwealth delegated legislation is undertaken in a timely and efficient fashion, effectively and *in accordance with the law*.

In making these comments, I acknowledge that the Senate Committee has always avoided 'policy' issues in its operation,[69] undertaking 'technical' legislative scrutiny, with a 'non-partisan' approach.[70] But the operation of the sunsetting regime should not have been a partisan issue. The LIA was passed with bipartisan support (the Australian Democrats moved amendments that were not supported and not passed[71]).

The Senate Committee's role in these matters has been particularly disappointing. I fear that the sunsetting regime has been left significantly weakened as a result.

Endnotes

1 Explanatory Statement, Legislative Instruments Bill 2003, <https://www.legislation.gov.au/Details/C2004B01468/Explanatory%20Memorandum/Text>.
2 See Attorney-General's Department, 'Review of the Sunsetting Framework under the Legislation Act 2003', <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/Review-of-the-sunsetting-framework-under-the-legislation-act-2003.aspx>.
3 Above n 1.
4 Ibid.
5 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17623 (Daryl Williams, Attorney-General), <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/2003-06-26/0025%22>.
6 For the LIA, as originally enacted, see <https://www.legislation.gov.au/Details/C2004A01224>.
7 For the LIRs, as originally promulgated, see <https://www.legislation.gov.au/Details/F2005B00003>.
8 See <https://www.legislation.gov.au/Details/F2015C00509>.
9 Available at <https://www.legislation.gov.au/Details/C2015A00010>.
10 See <https://www.legislation.gov.au/Details/F2018C00538>.
11 See Senate Standing Committee for the Scrutiny of Bills, Alert Digest No 15 of 2014, 19 November 2014, pp 1–4, <https://www.aph.gov.au/~/media/Committees/Senate/committee/scrutiny/alerts/2014/pdf/d15.pdf?la=en>.
12 See Australian Government, Senate, *Standing Orders and Other Orders of the Senate*, August 2018, Standing Order 24, <https://www.aph.gov.au/~/media/05%20About%20Parliament/52%20Sen/523%20PPP/Standing%20Orders%202015/StandingOrders.pdf?la=en>.
13 Senate Standing Committee for the Scrutiny of Bills, above n 11, p 4.
14 Ibid.
15 See Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, First Report of 2015 (11 February 2015), pp 7–22, <https://www.aph.gov.au/~/media/Committees/Senate/committee/scrutiny/bills/2015/pdf/b01.pdf?la=en>.
16 Ibid, p 11.
17 See <https://www.legislation.gov.au/Details/F2016L01809>.
18 See <https://www.legislation.gov.au/Details/F2016L01897>.
19 See, for example, *Legislation Act 2003* (Cth) s 53.
20 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 1 of 2017, pp 38–9, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no01.pdf?la=en>.
21 Ibid, p 38 (footnotes omitted).
22 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 3 of 2017, pp 32–6, 199–200, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no3.pdf?la=en>.
23 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 7 of 2017, pp 14–20, 49, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no7.pdf?la=en>.
24 Parliament of Australia, 'Delegated Legislation Monitor (2017)', <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor/mon2017/index>.
25 See R Laing (ed), *Odgers' Australian Senate Practice* (Department of the Senate, Canberra, 14th ed, 2016), ch 15, <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_15>.
26 See Parliament of Australia, 'Disallowance Alert 2017', <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts/alert2017>. Note that both motions were eventually withdrawn.
27 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 15 of 2017, p 38, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no15.pdf?la=en>.
28 Though readers should form their own views, having read the correspondence in its entirety, as other arguments were also made.

29 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 8 of 2017, pp 38–47, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no8.pdf?la=en>. The response was: Letter from the Hon Darren Chester MP, Minister for Infrastructure and Transport, to Senator John Williams, Chair, Senate Regulations and Ordinances Committee, 27 June 2017, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/Responses/Responses_no8.pdf?la=en>.

30 Ibid.

31 Ibid.

32 See above n 6 for LIA as originally enacted.

33 See Australian Government, Attorney-General's Department, *Review of the Operation of the Sunsetting Provisions in the Legislation Act 2003* (Consultation Paper, May 2017), <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/Consultation-paper-review-of-the-sunsetting-framework.pdf>.

34 The report was tabled in the House of Representatives on 23 October 2017 and in the Senate on 13 November 2017 (see Attorney-General's Department, *Review of the Sunsetting Framework under the Legislation Act 2003*, <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/Review-of-the-sunsetting-framework-under-the-legislation-act-2003.aspx#SunsettingReview>).

35 As did the submission by the Department of Immigration and Border Protection to the sunsetting review (see Department of Immigration and Border Protection to Attorney-General's Department, *Submission to the Review of the Operation of the Sunsetting Provisions of the Legislation Act 2003*, 30 June 2017, <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/sunsetting-review-submissions/DIBP-Submission.PDF>).

36 Attorney-General's Department, above n 2, p 5.

37 See, for example, ProAviation, *Submission to the Aviation Safety Regulation Review*, 21 February 2014, <http://proaviation.com.au/2014/02/22/proaviations-submission-to-the-asrr/#_Toc380758472>.

38 See item 9 of the table in s 54(2) of the LIA as originally enacted (above n 6). The exemption is maintained by item 15 in the table in s 12 of the LEOMRs.

39 Available at <https://www.legislation.gov.au/Details/F2017L01093>.

40 Explanatory Statement, *Legislation (Exemptions and Other Matters) Amendment (Sunsetting Exemptions) Regulations 2017* (Cth), <https://www.legislation.gov.au/Details/F2017L01093/Explanatory%20Statement/Text>.

41 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 13 of 2017, p 16, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no13.pdf?la=en>.

42 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 14 of 2017, pp 67–73, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no14.pdf?la=en>.

43 Ibid, p 73.

44 Available at <https://www.legislation.gov.au/Details/F2019L00550>.

45 See, for example, the Senate Committee on Regulations and Ordinances, Parliament of Australia, *Annual Report 2017* (Commonwealth of Australia, 2018), para 3.78, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/annual/Annual_2017.pdf?la=en>.

46 See Australian Government, Federal Register of Legislation, <https://www.legislation.gov.au/Browse/Results/ByTitle/LegislativeInstruments/Asmade/Le/0/0/all>.

47 Available at <https://www.legislation.gov.au/Details/F2017L00326/e91a7aa2-20ba-45da-8a42-32e35e3f27da>.

48 Explanatory Statement, *Seacare Authority Code of Practice*, <https://www.legislation.gov.au/Details/F2017L00326/4b608618-359b-4963-9ab5-89c9010e3cbb>.

49 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 5 of 2017, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no5.pdf?la=en>.

50 Ibid, p 19. See also Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, 'Guideline on Incorporation of documents', <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents>.

51 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 6 of 2017, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no6.pdf?la=en>.

52 Ibid, pp 29–30.

53 Ibid, pp 30–1.

54 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 7 of 2017, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no7.pdf?la=en>.

55 Available at <https://www.legislation.gov.au/Details/F2017L00369>.

56 Explanatory Statement, *Legal Services Directions 2017*, <https://www.legislation.gov.au/Details/F2017L00369/Explanatory%20Statement/Text>.

57 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 5 of 2017, especially pp 12–13, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no5.pdf?la=en>.

[58] The issues and the correspondence are summarised in Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 13 of 2017, pp 75–9, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2017/pdf/no13.pdf?la=en>.

[59] Explanatory Statement, *Copyright Regulations 2017*, <https://www.legislation.gov.au/Details/F2017L01649/Explanatory%20Statement/Text>.

[60] Available at <https://www.legislation.gov.au/Details/F2017L01649>.

[61] Senate Standing Committee on Regulations and Ordinances, above n 57.

[62] See, for example, the explanatory statements for the legislative instruments on the Federal Register of Legislation with these registration numbers: F2016L01455, F2017L00189, F2017L00202, F2017L00403, F2017L00701, F2017L01279, F2017L01311 and F2017L01515.

[63] See S Argument, 'The Legislative Instruments Bill — Lazarus With a Triple By-pass?' 2006 (39) *AIAL Forum* 44.

[64] See, for example, Senate Committee on Regulations and Ordinances, above n 45, para 3.78.

[65] Office of the Parliamentary Counsel, *Annual Report 2016–17* (2017), para 10 <https://www.opc.gov.au/sites/default/files/annual_report_2016_-_2017.pdf>.

[66] Office of the Parliamentary Counsel, *Annual Report 2013–14* (2014), para 20, <https://www.opc.gov.au/sites/default/files/annualreport2013_14.pdf>.

[67] Office of the Parliamentary Counsel, *Annual Report 2014–15* (2015), para 22, <https://www.opc.gov.au/sites/default/files/annualreport2014_15.pdf>.

[68] See S Argument, 'The Importance of Legislative Drafters — Challenges Presented by Recent Developments in the Commonwealth Jurisdiction', (2015) 81 *AIAL Forum* 40, <http://www.aial.org.au/aial-forum-articles/the-importance-of-legislative-drafters-challenges-presented-by-recent-developments-in-the-commonweal>. See also S Argument, 'The Use of Legislative Rules in Preference to Regulations: A "Novel" Approach?' (2015) 26 *Public Law Review* 4.

[69] See, for example, DC Pearce and S Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, Australia, 5th ed, 2017) pp 185–6.

[70] See, for example, Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor 2 of 2019, p ix, <https://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2019/Final%20Delegated%20Legislation%20Monitor%202%20of%202019.pdf?la=en>.

[71] See information available at Parliament of Australia, 'Legislative Instruments Bill 2003', <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r1850>.