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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

STATUTORY INSTRUMENTS (TABLING AND DISALLOWANCE)
LEGISLATION AMENDMENT BILL 1988

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Attorney-General, the Hon. Lionel Bowen)

STATUTORY INSTRUMENTS (TABLING AND DISALLOWANCE) LEGISLATION
AMENDMENT BILL 1988

GENERAL OUTLINE

The main purpose of this Bill is to amend the Acts Interpretation Act 1901. The amendments arise out of suggestions by the Senate Standing Committee on Regulations and Ordinances. The amendments do not extend the existing powers of the Parliament to disallow regulations. The purpose of the amendments is to prevent the possible circumvention of Parliamentary scrutiny of regulations and certain other statutory instruments.

2. Part XII of the Acts Interpretation Act 1901 deals with the tabling and possible disallowance of regulations. Section 48 of that Act requires regulations to be tabled in each House of the Parliament within 15 sitting days of the making of the regulations. If regulations are not tabled they cease to have effect. Either House may by resolution disallow regulations. The disallowance resolution must, by s.48(4), arise from a motion notice of which was given within 15 sitting days of the tabling of the regulations. Thus the tabling of regulations allows for their scrutiny by the Parliament and disallowance enables Parliamentary control over subordinate legislation.

3. The Bill amends the Acts Interpretation Act 1901 to prevent:

- (a) the avoidance of parliamentary scrutiny of regulations and other instruments by the repeated remaking of untabled regulations and instruments and the repeal and remaking of tabled regulations and instruments so soon after tabling as to have a similar practical effect; and
- (b) the repeated repeal and remaking of regulations and other instruments in respect of which a notice of motion for disallowance is in force.

4. The Acts relating to the external territories also make provision for the tabling and disallowance of Ordinances made under those Acts. The Bill also amends those Acts to bring them into line with the Acts Interpretation Act.

5. Many other Acts contain provisions applying the tabling and disallowance provisions of the Acts Interpretation Act to instruments made under those Acts. The Bill makes consequential amendments of those other Acts in order to keep their tabling and disallowance regimes in line with that of the Acts Interpretation Act 1901.

FINANCIAL IMPACT STATEMENT

6. The proposals put forward in the Bill will have no impact on Government expenditure.

ABBREVIATIONS

7. The following abbreviations are used in this Explanatory Memorandum

Act: Acts Interpretation Act 1901 as amended prior to any amendments effected by this Statutory Instruments (Tabling and Disallowance) Bill 1988.

Bill: Statutory Instruments (Tabling and Disallowance) Legislation Amendment Bill 1988.

NOTES ON INDIVIDUAL CLAUSES

PART I - PRELIMINARY

Clause 1: Short Title
Clause 2: Commencement

8. This clause provides for the Bill to commence on Royal Assent.

PART II - AMENDMENT OF ACTS INTERPRETATION ACT 1901

Clause 3: Principal Act

Clause 4: Disallowable instruments

9. This clause amends section 46A of the Act. Paragraph (a) inserts a reference to new sections 48A and 48B. This will have the effect of applying those sections to disallowable instruments. The remainder of the clause clarifies the operation of subsection 48(7) of the Act in relation to disallowable instruments.

Clause 5: Regulations

10. This clause amends section 48 of the Act to bring its language into line with the more modern language of proposed subsections 48A(3) and 48B(3). It does not alter the effect or operation of section 48.

Clause 6: Inserts new sections 48A and 48B

Section 48A: Regulations not to be re made while required to
be tabled

11. Subsection 48A(1) ensures that, where a regulation has been made, another regulation the same in substance as that regulation cannot be made during the period set out in subsection 48A(2) without prior agreement of both Houses of Parliament.

12. Subsection 48A(2) defines the period of prohibition for the purposes of subsection 48A(1) as the period starting on the date of making the original regulation and ending 7 days after either the day of tabling (or last tabling) or the expiration of the 15 sitting days during which, by virtue of section 48(1)(c) of the Act, the regulations are required to be tabled.

13. Subsection 48A(3) ensures that the prohibition will be observed by providing that a regulation made in contravention of section 48A has no effect.

14. The purpose of section 48A is to fill a possible gap in the system of parliamentary scrutiny of regulations set up by section 48 of the Act. The need for the amendment arose from deliberations of the Senate Standing Committee on Regulations and Ordinances. It would be theoretically possible to avoid the intended consequences of non-tabling by successively making a regulation, failing to table it and repealing and remaking it during or immediately upon the expiration of the period of 15 sitting days prescribed by section 48(1)(c) for the tabling of regulations. This cycle could be continued indefinitely, with each regulation being of full force and effect from the date of its making until the expiration of the 15 sitting days or sooner repeal and remaking. Although the cycle would be broken if either House, having gained knowledge of the making of the regulation, disallowed the regulation before its repeal and remaking, such action would be dependent on that House acquiring that knowledge in sufficient time to enable disallowance while the regulations are in force. Tabling is, of course, the principal means by which such knowledge is conveyed to the Parliament.

15. While it is recognised that a scenario such as is described above is unlikely, particularly in the case of regulations (which must, of course, be made by the Governor-General in Council), the possibility of its occurring could be regarded as being stronger in the case of Ministerial or other executive instruments to which section 48 is expressed to apply, since the likelihood of the making of such instruments going unnoticed is greater than with regulations.

Section 48B: Regulations not to be re-made while subject to disallowance

16. Subsection 48B(1) ensures that, where a regulation has been made and tabled and notice of a disallowance motion has been given, another regulation the same in substance as that regulation cannot be made unless one of the following 4 events occurs:

- (a) the notice is withdrawn;
- (b) the regulation is deemed to have been disallowed under subsection 48(5) - i.e. 15 sitting days have elapsed since the notice was given and it has neither been withdrawn nor dealt with;
- (c) the motion is withdrawn or otherwise disposed of; or
- (d) subsection 48(5A) has applied in respect of the regulation - in other words, by reason of the dissolution, expiry or prorogation of the Parliament within 15 sitting days of the giving of the notice of disallowance, and the motion not having been dealt with, the regulations are to be deemed to have been tabled on the first sitting day of the next Parliament and the time for parliamentary scrutiny will have begun to run again.

17. The effect of subsection 48B(2) is to apply a ban (of the same kind as is imposed by subsection 48B(1)) on the remaking of regulations where subsection 48(5A) has operated in respect of the regulations and notice of a disallowance motion has been moved within 15 sitting days of the deemed date of tabling.

18. Subsection 48B(3) ensures that the prohibitions imposed by subsections 48B(1) and (2) will be observed by providing that a regulation made in contravention of section 48B has no effect.

19. Subsection 48B(4) ensures that the prohibition on remaking expressed in section 48A, and the prohibition in s.49 on remaking a disallowed regulation within 6 months of the disallowance, are not affected by section 48B.

20. The purpose of section 48B, like that of section 48A, is to prevent the circumvention of parliamentary scrutiny of subordinate legislation. At the moment it would be possible for regulations to be repealed and remade as soon as notice of a disallowance motion is given. This would nullify the disallowance motion as there would no longer be any regulations upon which it could operate. The 15 sitting days period for tabling would start to run again once the second set of regulations were tabled and, should another notice of a disallowance motion be given, the second regulations could also be repealed and remade, thus preventing the disallowance of the regulations. While it is also recognised that such a scenario is unlikely in relation to regulations, again the possibility of its occurring could be regarded as stronger in the case of Ministerial and other executive instruments.

Clause 7: Disallowed regulations not to be remade unless resolution rescinded or House approves

21. This clause makes a consequential amendment to section 49 to bring its language into line with that used in new subsections 48A(3) and 48B(3). It does not alter the effect or operation of section 49.

PART III - AMENDMENTS OF OTHER ACTS

Clause 8: Schedule

22. This clause makes consequential amendments to the Acts set out in the Schedule. With the exception of the Acts relating to the external Territories, each of those Acts contains a provision that empowers the making of instruments of various kinds and applies the tabling and disallowance provisions of the Acts Interpretation Act to those instruments. The purpose of the amendments is to ensure that the provisions of the proposed new sections 48A and 48B will apply to those instruments in the same way as the existing tabling and disallowance provisions.

23. The clause also amends the Seat of Government (Administration) Act 1910 and each of the following Acts relating to the external Territories:

Ashmore and Cartier Islands Acceptance Act 1933
Australian Antarctic Territory Act 1954
Christmas Island Act 1958
Cocos (Keeling) Islands Act 1955
Coral Sea Islands Act 1969
Heard Island and McDonald Islands Act 1953
Norfolk Island Act 1979

Each of those Acts authorises the making of Ordinances for the particular Territory, and provides for the tabling, and possible disallowance, of those Ordinances. Each Act is being amended to bring the tabling and disallowance provisions into line with the Acts Interpretation Act by inserting provisions equivalent to proposed sections 48A and 48B and by modernising the language of the remaining provisions. Similar amendments are being made to the Environment Protection (Impact of Proposals) Act 1974 as it also contains its own tabling and disallowance provisions. With regard to the Acts relating to the External Territories, each section already contains 11 subsections so that the last 4 subsections have been broken up into 2 sections. The only changes of substance are those mentioned above.