



Legislative Assembly for the ACT

STANDING COMMITTEE ON LEGAL AFFAIRS
(performing the duties of a Scrutiny of Bills and
Subordinate Legislation Committee)

Scrutiny Report
Ninth Australasian and Pacific
Conference on Delegated Legislation and
Sixth Australasian and Pacific
Conference on the Scrutiny of Bills

2 MAY 2005

Report 8

TERMS OF REFERENCE

The Standing Committee on Legal Affairs (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:

- (a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
 - (i) is in accord with the general objects of the Act under which it is made;
 - (ii) unduly trespasses on rights previously established by law;
 - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;
- (c) consider whether the clauses of bills introduced into the Assembly:
 - (i) unduly trespass on personal rights and liberties;
 - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (d) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

Human Rights Act 2004

Under section 38 of the Human Rights Act, this Committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.

MEMBERS OF THE COMMITTEE

Mr Bill Stefaniak, MLA (Chair)
Ms Karin MacDonald, MLA (Deputy Chair)
Dr Deb Foskey, MLA

Legal Adviser (Bills): Mr Peter Bayne
Legal Adviser (Subordinate Legislation): Mr Stephen Argument
Secretary: Mr Max Kiermaier
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Anne Shannon
(Scrutiny of Bills and Subordinate Legislation Committee)

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.

Introduction

This is a report on the Committee's attendance at the Ninth Australasian and Pacific Conference on Delegated Legislation and the Sixth Australasian and Pacific Conference on the Scrutiny of Bills. The Conference was held from Wednesday, 2 March to Friday, 4 March 2005 in Canberra and hosted by the ACT Legislative Assembly. The first two days of the Conference were held in the Chamber of the Legislative Assembly and the final day was held at Parliament House, and thanks are extended to the Senate for facilitating those arrangements.

The Conference was attended by representatives of legislative scrutiny committees from Australia, New Zealand, Canada, and Scotland, as well as retired senator Mr Barney Cooney. A list of the Conference attendees is at Attachment 1.

The ACT was represented by Mr Bill Stefaniak MLA (Chair), Ms Karin MacDonald MLA (Deputy Chair), Dr Deb Foskey MLA, Mr Max Kiermaier, Secretary, Mr Peter Bayne, Legal Adviser (Bills), Mr Stephen Argument, Legal Adviser (Subordinate legislation) and Ms Anne Shannon, Assistant Secretary.

Resolutions passed

The Conference agreed to the following resolution on 3 March 2005:

That this Conference expresses its thanks to the Speaker of the ACT Legislative Assembly, Mr Wayne Berry MLA, for permission to use the ACT Legislative Assembly Chamber for the purposes of this Conference.

The Conference agreed to the following resolutions on 4 March 2005:

That future conferences be styled and titled "The Australia-New Zealand Scrutiny of Legislation Conference".

That this conference empowers the Chairs and Deputy Chairs Group to appoint, as Associate Patrons to future conferences, academics and committee staff (retired or still working) who have rendered invaluable service to the work of parliamentary legislative and regulatory review committees.

The Conference proceedings

The Conference had a theme of *Legislative scrutiny in a time of rights awareness*, and detailed below is a short description of the conference proceedings. The full conference agenda can be found at Attachment 2. Copies of the conference papers may be inspected by contacting the Committee Secretary (Mr Max Kiermaier – Telephone 620 50171).

Official Opening of Conference by the Chief Justice of the Supreme Court of the Australian Capital Territory

The Chief Justice of the Supreme Court of the Australian Capital Territory, the Hon. Justice Terence Higgins, opened the Conference with a welcoming speech to all delegates.

Papers delivered to the Conference

The ACT Human Rights Act 2004 – a new scrutiny challenge

Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner presented a paper discussing the ACT's Human Rights Act 2004 which came into effect on 1 July 2004. Dr Watchirs outlined the development of the legislation and how it draws upon elements from the UK and NZ models. She then referred to the "proportionality test" offered by section 28, under which human rights may only be subject to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

Dr Watchirs also outlined the role provided for in the Act for the ACT's Scrutiny Committee, as well as her own role and related some of the experience gathered over the first 6 months or so of the Act's existence.

Orthodoxy or heresy – Can scrutiny committees maintain control of delegated legislation in the face of modern legislative practices?

Dr Richard Worth MP, Chair, NZ Regulations Review Committee briefly spoke about the NZ Bill of Rights Act and illustrated his talk with some contemporary issues in New Zealand. His comment that Scrutiny Committees "perform the parliamentary equivalent of God's work" drew a favorable response from the audience!. Dr Worth went on to detail how the Act operated in practice, in particular the role of the Attorney-General and the Regulations Review Committee. He also commented on the growth in the many forms of delegated legislation, the increased use of materials incorporated by reference, and the development of an affirmative resolution process.

Legislative scrutiny through an Ombudsman's lens

Professor John McMillan, Commonwealth and ACT Ombudsman proffered the view that the enactment of human rights legislation was not the only way of protecting rights, and that offices such as the Ombudsman have been dealing with these sorts of issues for many years. Prof McMillan remarked on a number of changes he had seen over the years, namely the sheer complexity of modern legislation, the overwhelming "financial transaction" orientation and rules based nature of contemporary legislation, and improved public administration. He also commented on Executive schemes which "escaped the net of legislative scrutiny" and the importance of such schemes to have review mechanisms in them. Finally, Prof McMillan noted that it should be borne in mind that all legislation will ultimately need to be administered and so manuals, factsheets, etc should be developed in tandem with the development of the legislation.

The Kable doctrine

Dr Fiona Wheeler, Lecturer in Law, Australian National University focused on the relationship between the State and Territory legislatures and State and Territory courts, and the emergence of the Kable doctrine which prevents State and Territory legislatures from giving powers to courts which would undermine the institutional integrity of those courts, including their independence from the political arms of government.

Discrimination in the Law: the Victorian Experience

Ms Dominique Saunders, Special Counsel, Russell Kennedy and Equal Opportunity Consultant to the Victorian Scrutiny of Acts and Regulations Committee spoke about the work of the Victorian Committee, and in particular, its inquiry under the Equal Opportunity Act 1995 (Vic) into discrimination in the law. Ms Saunders highlighted a number of issues which came to light during the course of the inquiry, including disability law discrimination, gender based discrimination in law and age discrimination. She also pointed out that in some cases the discrimination could be justified.

Scrutiny in aid of Parliamentary Authority: a Contemporary Perspective (see Attachment 4)

Mr Peter Bayne, Legal Adviser, ACT Scrutiny of Bills & Subordinate Legislation Committee spoke of the history and evolution of scrutiny committees and how the principles have impacted upon modern administrative law, particularly with respect to strong notions of natural justice, freedom of information, accessibility and statements of reasons for decisions. Mr Bayne cited examples from the work of the ACT committee to illustrate a number of the points made. Mr Bayne also made reference to the use of Henry VIII clauses and to the fact that they are not always bad.

Scrutiny of Bills in NSW – the first 18 months

Mr Russell Keith Committee Manager, on behalf of Hon Peter Primrose MLC, Chair, NSW Legislation Review Committee presented a paper which examined the experience of the committee during its first 18 months of having a “scrutiny of bills” role, the issues that had arisen (eg right to silence, presumption of innocence, onus of proof, retrospectivity, delegation of powers) and an assessment of the impact it had had.

The UK Committee on Human Rights – an Assessment

Professor Janet Hiebert, Visiting Professor, Dept of Political Studies, Queen's University, Kingston, Ontario presented a paper commenting on the gradual development of human rights legislation internationally, comparing and contrasting legislation in the UK, Canada and New Zealand, before detailing some of the aspects of the UK Act, in particular the role and functions of the Joint Committee on Human Rights.

The Legislative Instruments Act: Is it the cherry on the top of the legislative scrutiny cake? (see Attachment 5)

Mr Stephen Argument, Special Counsel, Phillips Fox and Legal Adviser (Subordinate Legislation), ACT Scrutiny of Bills and Subordinate Legislation Committee discussed some of the impacts of the Commonwealth’s Legislative Instruments Act. Of particular note was that the Act applies to instruments “of a legislative character” irrespective of what they may be called. However, determining whether an instrument is “legislative” (and hence requiring registering) is a question which some agencies are having difficulty grappling with.

Panel session

An interesting panel session involving Professor George Williams, Professor Janet Hiebert and Professor Stephen Bottomley was conducted along the theme of Contemporary challenges for scrutiny committees.

Prof. Williams wondered whether the scrutiny work undertaken by committees could be broadened, for instance by looking into the major impediments to effective scrutiny and to hold more general inquiries. He believed that they do not get the media attention they deserve and so stressed the need for committees to publicise their work. Prof Williams also questioned whether committees were overly reliant on their legal advisers.

Prof Heibert noted the difficulties faced by committees in getting governments and parliaments to take rights issues seriously. In particular, she noted that committee members have divided loyalties – to the parliament and to their parties. The question is how far to push the envelope.

Prof Bottomley, as adviser to the Senate Regulations and Ordinances Committee, bemoaned the large (1600-1800) volume of instruments it had to deal with each year, and the fact that explanatory statements appear to focus more on the “statement” rather than the “explanatory” aspect of the instrument. The challenge is to educate departments to produce good explanatory statements.

Reports from participating parliamentary committees

Each Committee in the Commonwealth, the States, Territories and New Zealand gave an account of their operations over the past 2 years since the last conference in Hobart. Dr Deb Foskey MLA, on behalf of the ACT Committee presented the Committee’s report. (see Attachment 3).

Bill Stefaniak MLA
Chair

May 2005

Delegates

Australia

Australian Capital Territory

Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

Mr Bill Stefaniak MLA, *Chair*

Ms Karin MacDonald MLA *Deputy Chair*

Dr Deb Foskey MLA

Mr Peter Bayne, *Legal Adviser*

Mr Stephen Argument, *Legal Adviser*

Mr Max Kiermaier, *Deputy Clerk and Secretary*

Ms Anne Shannon, *Assistant Secretary*

Ms Robina Jaffray, *Manager of Committees, Secretary to Standing Committee on Legal Affairs*

Senate

Regulations and Ordinances Committee

Senator Claire Moore (QLD)

Professor Stephen Bottomley

Mr James Warmenhoven, *Secretary*

Ms Janice Paull, *Senior Parliamentary Officer*

Scrutiny of Bills Committee

Senator Brett Mason (QLD), *Deputy Chair*

Mr Richard Pye, *Secretary*

New South Wales

Legislation Review Committee

Mr Russell Keith, *Committee Manager*

Mr Mel Keenan, *Senior Committee Officer*

Northern Territory

Subordinate Legislation and Publications Committee

Mr Terry Hanley, *Secretary*

Queensland

Scrutiny of Legislation Committee

The Hon Ken Hayward MP, *Chair*

Mr Vaughan Johnson MP

Mr Peter Lawlor MP

Mr Tim Mulherin MP

Mrs Carryn Sullivan MP

Mr Chris Garvey, *Research Director*

Ms Renee Easten, *Principal Research Officer*

Tasmania

Subordinate Legislation Committee

The Hon Doug Parkinson MLC, *Chair*
Ms Wendy Peddle, *Secretary*

Victoria

Scrutiny of Acts and Regulations Committee

Ms Lily D'Ambrosio MP, *Chairperson*
Mr Murray Thompson MP, *Deputy Chairperson*
The Hon Lidia Argondizzo MLC
Mr Ken Jasper MP
Mr Michael Leighton MP
Mr Peter Lockwood MP
Mr Jude Perera MP
Mr Andrew Homer, *Senior Legal Advisor*
Ms Sonya Caruana, *Office Manager*
Ms Dominique Saunders, *Equal Opportunity Consultant*

Western Australia

Joint Standing Committee on Delegated Legislation

The Hon Ray Halligan MLC, *Deputy Chairman*
The Hon Barbara Scott MLC
The Hon Robin Chapple MLC
Ms Denise Wong, *Advisory Officer (Legal)*
Ms Kerry-Jayne Braat, *Committee Clerk*

Standing Committee on Uniform Legislation and General Purposes

Ms Johanna Edwards, *Advisory Officer (Legal)*

Other

Dr Simon Evans, *Centre for Comparative Constitutional Studies, University of Melbourne*
Mr Peter Crawford

International

New Zealand

Regulations Review Select Committee

Dr Richard Worth MP, *Chairman*
Mr Michael Wilkinson, *Clerk of Committee*
Ms Debbie Angus, *Legislative Counsel*

Scotland

Subordinate Legislation Committee

Ms Ruth Cooper, *Clerk of Committee*

Ninth Australasian and Pacific Conference on Delegated Legislation &
Sixth Australasian and Pacific Conference on the Scrutiny of Bills

2-4 March 2005

Legislative Scrutiny in a Time of Rights Awareness

PROGRAM

DAY ONE

Wednesday 2 March 2005

[ACT Legislative Assembly Building]

Morning Session

9.15 am-10.15 am

Registration:

Venue: Legislative Assembly Reception Room

10.15 am-10.30 am

Welcome:

*Mr Bill Stefaniak MLA, Chair, ACT
Committee on Scrutiny of Bills &
Subordinate Legislation*

Venue: Legislative Assembly Chamber

10.30 am-11.00 am

Official Opening of Conference

*The Hon Chief Justice Terence Higgins,
Chief Justice of the Supreme Court of the
ACT*

Venue: Legislative Assembly Chamber

11.00 am-11.30 am

Morning Tea

Venue: Legislative Assembly Reception Room

11.30 am-12.30 pm

Day 1 - Session 1

Venue: ACT Legislative Assembly Chamber

Session Chair:

*Mr Bill Stefaniak MLA, Chair, ACT
Committee on Scrutiny of Bills &
Subordinate Legislation*

Resolutions from previous conference, Tas,
2003 [Presented by Mr Stefaniak]
Resolutions from Chairs and Deputy Chairs
Working Group meeting, 1 March 2005
[Chair/Acting Chair of the Working Group]

12.30 pm-1.00 pm

Official Photograph

Venue: Legislative Assembly Forecourt

1.00 pm-2.15 pm

Lunch

Afternoon Session

Session Chair [Sessions 2 & 3]

**Mr Tom Duncan, Clerk of the ACT
Legislative Assembly**

Venue: Legislative Assembly Chamber

2.15 pm-3.00 pm

Day 1 - Session 2

Dr Helen Watchirs, ACT Human Rights and
Discrimination Commissioner

*The ACT Human Rights Act 2004 - a new
scrutiny challenge*

3.00 pm-3.45 pm

Day 1 - Session 3

Dr Richard Worth MP, Chair, NZ
Regulations Review Committee

*Orthodoxy or heresy - Can scrutiny committees
maintain control of delegated legislation in the
face of modern legislative practices?*

3.45 pm-4.15 pm

Afternoon Tea

Venue: Legislative Assembly Chamber

Session Chair:

**Dr Deb Foskey MLA, Member, ACT
Committee on Scrutiny of Bills &
Subordinate Legislation**

4.15 pm-4.45 pm

Notices of Motion by Delegates

4.45 pm

Close of formal proceedings - Day 1

5.00 pm-6.30 pm

Welcome Reception

Hosted by Mr Jon Stanhope MLA, Chief
Minister of the ACT; introduced by Ms
Karin MacDonald, MLA

Venue: Canberra Museum and Art Gallery

Ninth Australasian and Pacific Conference on Delegated Legislation &
Sixth Australasian and Pacific Conference on the Scrutiny of Bills

PROGRAM

DAY TWO Thursday 3 March 2005 [ACT Legislative Assembly Building]

Session Chair [Sessions 4 & 5] Mr Harry Evans, Clerk of the Senate
Venue: Legislative Assembly Chamber

Morning Session

9.00 am-9.45 am

Day 2 - Session 4

Professor John McMillan, Commonwealth
and ACT Ombudsman

*Legislative Scrutiny through an Ombudsman's
Lens*

9.45 am-10.30 am

Day 2 – Session 5

Dr Fiona Wheeler, Lecturer in Law,
Australian National University

The Kable Doctrine

10.30 am-11.00 am

Morning Tea

Venue: Legislative Assembly Reception Room

*Session Chair [Sessions 6 & 7] Dr Helen Watchirs, ACT Human Rights and
Discrimination Commissioner*

11.00 am-11.45 am

Day 2 - Session 6

Ms Dominique Saunders, Special Counsel,
Russell Kennedy and Equal Opportunity
Consultant to the Victorian Scrutiny of Acts
and Regulations Committee

*Discrimination in the Law: the Victorian
Experience*

11.45 am-12.30 pm	<u>Day 2 - Session 7</u> Mr Peter Bayne, Legal Adviser, ACT Scrutiny of Bills & Subordinate Legislation Committee <i>Scrutiny in aid of Parliamentary Authority: a Contemporary Perspective</i>
12.30 pm-2.00 pm	Lunch <i>Venue: Legislative Assembly Reception Room</i>
<u>Afternoon Session</u>	
Session Chair [Sessions 8 & 9]	Mr Peter Bayne, Legal Adviser, ACT <i>Scrutiny of Bills & Subordinate Legislation Committee</i> <i>Venue: Legislative Assembly Chamber</i>
2.00 pm-3.00 pm	<u>Day 2 - Session 8</u> Hon Peter Primrose MLC, Chair, Legislation Review Committee [NSW] <i>Scrutiny of Bills in NSW – the first 18 months</i>
3.00 pm-4.00 pm	<u>Day 2 - Session 9</u> Professor Janet Hiebert, Visiting Professor, Dept of Political Studies, Queen's University, Kingston, Ontario <i>The UK Committee on Human Rights – an Assessment</i>
Session Chair:	Ms Karin MacDonald MLA, Deputy Chair, ACT Committee on Scrutiny of Bills & Subordinate Legislation
4.00 pm- 4.30 pm	Notices of Motion by Delegates
4.30 pm	Close of formal proceedings - Day 2
6.15 pm	<i>Bus departs Novotel for Old Parliament House</i>
6.30 pm-7.15 pm	<i>Pre-dinner drinks</i> <i>Venue: Old Parliament House Members' Bar</i> <i>Hosted by Mr Stefaniak MLA</i>

7.15 pm-11.00 pm

Conference Dinner

***Venue: Old Parliament House – Members’
Dining Room***

***Guest speaker – Mr Harry Evans, Clerk of
the Senate [to be introduced by the Speaker
of the ACT Legislative Assembly, Mr Wayne
Berry, MLA]***

Ninth Australasian and Pacific Conference on Delegated Legislation &
Sixth Australasian and Pacific Conference on the Scrutiny of Bills

PROGRAM

DAY THREE

Friday 4 March 2005

[Main Committee Room, Parliament House, Canberra]

- 8.15 am* Bus departs Novotel for Parliament House
- Morning Session*
Session Chair [Sessions 10 & 11] Professor John McMillan, Commonwealth Ombudsman
Venue: Main Committee Room
- 9.00 am-10.00 am* Day 3 - Session 10
Mr Stephen Argument, Special Counsel, Phillips Fox and Legal Adviser (Subordinate Legislation), ACT Scrutiny of Bills and Subordinate Legislation Committee
The Legislative Instruments Act: Is it the cherry on the top of the legislative scrutiny cake?
- 10.00 am-10.30 am* *Morning Tea*
- 10.30 am-12.00 noon* Day 3 - Session 11
Panel session – Professor George Williams, Professor Janet Hiebert and Professor Stephen Bottomley]
Contemporary challenges for scrutiny committees
- Pre-lunch Session*
Session Chair: *Mr Bill Stefaniak MLA, Chair, ACT Committee on Scrutiny of Bills & Subordinate Legislation*
- 12.00 noon-12.30 pm* Conference Resolutions

12.30 pm-2.00 pm

Lunch – Private Dining Room, 2nd Floor

Afternoon Session

Closing Session Chair

*Mr Bill Stefaniak MLA, Chair, ACT
Scrutiny of Bills & Subordinate Legislation
Committee*

2.00 pm-3.30 pm

Reports from participating Parliamentary
Committees

3.30 pm-3.45 pm

Closing of conference & invitation to host
next conference – 2007.

END OF CONFERENCE

4.00 pm

*Buses depart from Parliament House for
ACT Legislative Assembly*

4.15 pm – 5.30 pm

*Farewell drinks [hosted by the Speaker of
the ACT Assembly, Mr Wayne Berry MLA]*

**NINTH AUSTRALASIAN AND PACIFIC CONFERENCE
ON DELEGATED LEGISLATION AND SIXTH
AUSTRALASIAN AND PACIFIC CONFERENCE ON THE
SCRUTINY OF BILLS**

**REPORT FROM THE AUSTRALIAN CAPITAL TERRITORY
STANDING COMMITTEE ON LEGAL AFFAIRS (PERFORMING
THE DUTIES OF A SCRUTINY OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)**

Dr Deb Foskey MLA

FELLOW DELEGATES, LADIES AND GENTLEMEN

The first matter to report is that the composition of the ACT Scrutiny Committee has changed. We are now into our Sixth Assembly following elections held late last year. Mr Bill Stefaniak remains as Chair of the Committee. Ms Karin McDonald has been appointed Deputy Chair, and I am the other member.

As everyone will now be well aware, the commencement of the *Human Rights Act 2004* on July 1 2004 has added another terms of reference to the work of the Committee. We must now “report ... about human rights issues raised by bills”. The Committee had been taking a broad view about the concept of “personal rights and liberties” in our usual terms of reference, but now we have a list of human rights to which we must refer. On the other hand, the Committee does not regard itself as limited to the list in the *Human Rights Act 2004*. By reference to various international treaties dealing with rights and interests of the

community – in matters such as health, the workplace, housing and the environment – the Committee takes a broad view of what rights may be in focus in relation to a particular bill.

All this represents a challenge, and no doubt we will have more to report on in the future.

So far as workload is concerned, I should report that over the course of the Fifth Assembly, the Scrutiny Committee made 56 formal reports. Some comment – sometimes quite detailed – was made in respect of 138 Bills. Of course, a great many more Bills were reviewed. A large amount of subordinate law was also reviewed, and comments offered on a substantial number. The practice of government in the ACT may now be moving towards greater use of subordinate law, and the Assembly has decided to place more emphasis on review in this area. To this end, Mr Stephen Argument has been appointed as a legal adviser in relation to subordinate law. Mr Peter Bayne remains legal adviser in relation to Bills.

The Scrutiny Committee, and indeed the Legislative Assembly, had been pleased to host this Conference, and we look forward to what promises to be another phase in the work of Australian scrutiny Committees.

Ninth Australasian and Pacific Conference on Delegated Legislation &
Sixth Australasian and Pacific Conference on the Scrutiny of Bills

2-4 March 2005

Legislative Scrutiny in a Time of Rights Awareness

SESSION 7

Peter Bayne

**Legal Adviser
ACT Legislative Assembly Scrutiny of Bills and Subordinate Legislation
Committee**

Scrutiny in aid of parliamentary authority: A contemporary perspect

In this era of rights awareness, Scrutiny Committees need be as conscious as they ever have been of the concerns reflected in the orthodox statement of their terms of references. The relevant resolution of the Legislative Assembly of the ACT provides that the Scrutiny Committee¹ shall consider whether a clause in a bill:

- (i) unduly trespass on personal rights and liberties;
- (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny

Lord Hewart's polemic

Lord Hewart's *The New Despotism* (1929) crystallized and publicized concerns voiced by others with the growth of the power of administrative officials to regulate the life of citizens. It exercised a considerable influence in the deliberations of the Senate Select Committee on Standing Committees which reported in favour of the institution of what became the Committee on Regulations and Ordinances.² The terms of reference of that Committee were substantially in the form as those stated above³ (although limited to review of subordinate laws).

Running through Hewart's book is a concern that two constitutional fundamentals had been undermined by the growth of the administrative state. The first was that it was the function of parliament to make the law, and the second was that it was the task of the courts to apply that law. Implicit in his argument is a rejection of a theory that all is well under a system of responsible government.

True, it is indeed the task of the Executive to govern the country. But it is the task of Parliament to make the laws, and the real business of the Executive is to govern the country in accordance with the laws which Parliament has made. It is not precisely because it is the task of the Executive to govern the country that it is so dangerous to hand over to the Executive the power of making the laws as well, and of making them in ways which, while a kind of formal homage is paid to the Sovereignty of Parliament, have the effect of employing the Sovereignty of Parliament to oust the jurisdiction of the Courts?⁴

In the chapter "Administrative Lawlessness", Hewart pointed to problems arising from the conferral, by statute or subordinate law, of powers on the Minister – and in practice on some official – to administer or apply the law in a way that affected adversely the rights or interests of a citizen. His concerns were various:

¹ The full title of the Committee is the Standing Committee on Legal Affairs (performing its role as a Scrutiny of Bills and Subordinate Legislation Committee).

² Australian Parliamentary Paper. S 1 of 1929-30-31 at 16. References to Hewart's book recur in the evidence given by witnesses. Professor K H Bailey did refer to the more positive view of the use of powers of regulation in books such as Robson, *Justice and Administrative Law*, and Port, *Administrative Law*; see Minutes of Evidence para 216. Sir Robert Garran, the Commonwealth Attorney-General also presented a more positive view of the use of regulations; see Minutes of Evidence para 343ff.

³ Australian Parliamentary Paper. S 1 of 1929-30-31 at 23.

⁴ Lord Hewart, *The New Despotism* (1929) at 75; see too at 51-52.

- that the procedures followed by the decision-maker did not afford an opportunity to be heard;⁵
- and thus the evidence acted upon was not tested;⁶
- decision-making process was not public, (it was, he said, conducted in a “hole-and-corner” fashion), and there was an inveterate policy of departmental secrecy;⁷
- the internal law of the administrative agency (by which discretion was exercised) was unknown;⁸
- administrative power was commonly conferred by means of very widely expressed discretions;⁹
- the decision-maker did not give reasons for her or his decision – thus making challenge difficult if not impossible;¹⁰ and
- the decisions made were protected from judicial review by various forms of privative clause,¹¹ which undermined the role of the courts by removing from them their function of administering the law.¹²

In the chapter “Departmental Legislation”, (and indeed throughout the book), Hewart pointed to problems arising from the conferral, by statute, of powers on the executive to make subordinate law. This practice:

- diminished the authority of Parliament, and permitted the executive to use the statute as a means to implement policies of which Parliament would have been unaware;¹³
- had the consequence that it was hard for the citizen to find out just what was the law;¹⁴ and
- greatly restricted the capacity of the citizen to bring to bear any influence on the content of the law.

Particularly objectionable were:

- privative clauses in the authorizing statute which immunized the subordinate law from judicial review;¹⁵

⁵ At 44.

⁶ At 47.

⁷ At 48.

⁸ At 44.

⁹ At 63.

¹⁰ At 49.

¹¹ At 49.

¹² At 52.

¹³ At 99.

¹⁴ At 100, and thus gave greater point to the rule that ignorance of the law was no excuse – at 97.

¹⁵ A point forcefully made at 72 -- Parliament stultifies itself At 63, Hewart sketched out the various forms such clause took.

- the allied the practice of legislation by reference;¹⁶ and
- the use of the ‘Henry 8th clause’.¹⁷

His summation was that subordinate law was “made at such a stage, in such a form, and in such circumstances as to deprive, at one and the same time, both Parliament and the Law Courts of any real authority in relation to them”.¹⁸

The Senate adopts Lord Hewart’s remedy

Then, in the chapter perhaps provocatively entitled “What is to be done?”,¹⁹ Hewart suggested various remedies for the mischief he identified. He placed faith in the creation of a particular state of public opinion, which he acknowledged would be created only when the facts were made known to the public. The first method²⁰ he advanced to this end was

[the formation] in each House of Parliament a Committee, not too large, whose sole task it should be to examine every Bill, as it is introduced, for the purpose of observing whether and in what respects its provisions may have the effect of increasing the power of the bureaucracy, and whether and by what contrivance that power is to be made irresponsible. [The Committee] would ask themselves with reference to every measure: (1) Does it confer, expressly or by implication, fresh powers upon the bureaucracy, if so, (2) how does it seek to attain that end, and (3) is the method, or is the probable result, of such a kind that the fresh powers may evade either the control of Parliament or the jurisdiction of the Courts?²¹

In his evidence to the Senate Select Committee, Sir John Peden quoted this passage from Hewart’s book. Peden also made specific reference to the need to safeguard against intrusion on ‘rights’. He argued that:

¹⁶ At 77.

¹⁷ At 53-58. There is also an allusion in the quote at 58 to the conferral of dispensing powers.

¹⁸ At 154.

¹⁹ One imagines that Hewart was aware of V I Lenin’s polemic of this title.

²⁰ Hewart at 148.

²¹ Hewart also suggested that the newspapers might play their part; see at 149. He also favoured broadening the existing very limited scheme for public participation in subordinate law making; see at 150, noting his earlier comments at 82ff. The abandonment of a similar scheme at the Commonwealth level in Australia was noted in the Report of the Senate Select Committee on Standing Committees, Australian Parliamentary Paper. S 1 of 1929-30-31 at 17. In his evidence, Professor K H Bailey said that “during [the First World War] what was regarded as a great safeguard for the ordinary citizen was removed by the Commonwealth Parliament. The Rules Publication Act 1903 laid down that in the case of [certain rules], a notice of intention to make a regulation had to be published 60 days before the making. The notice had to specify where copies of the draft regulation could be procured, and any interested person had the right to make representations in writing to the rule-making authority concerned. It thereupon became the duty of the rule-making authorities to take those representations into consideration. That provision was subject to one exception, an emergency power ...”. The relevant provisions of the Act were repealed in 1916.

The power of altering substantive laws dealing with personal liberty, the rights of property, and generally with the rights of the individual, should not be delegated to statutory bodies.²²

It appears from the Senate debates on the Senate Select Committee Report that some Senators favoured charging the scrutiny Committee with responsibility of reporting on public bills, but that was “lost by the wayside”, as the Committee “reduced its recommendations to an almost irreducible minimum”.²³ What thus resulted was the creation of the Committee on Regulations and Ordinances.

Against this background, I will now turn to pertinent aspects of the work of the Scrutiny Committee of the Australian Capital Territory.

Administrative discretions

Few now rail against the mere existence of the administrative state. It is accepted that in the pursuit of social and economic objectives, law will underpin schemes of regulation of very many aspects of our daily lives, and will confer power on administrative officers and on Ministers to make decisions in accord with those laws. Laws conferring administrative power regulate and impinge upon many of the ways people wish to live. There are thus laws about how we can move about in vehicles; our obligations and rights in relation to the education of our children; how and what we can build; how we can sell or buy a house; about what we can do with trees on their land; about what charges and fees we are liable to pay to government; and so forth. There is a great body of law regulating the provision of income and other kinds of support to those in need.

For the great part, administrative action is fairly conducted and produces fair outcomes. Most people, most of the time, have no complaint. But if a citizen has a problem with the law, and feels that their ‘rights’ have been breached, it is likely to derive from a perception that some official has unfairly or unlawfully restricted their freedom make a choice about he or she wants to live, or has denied some benefit to which they think they are entitled. The ways that administrative power is conferred, and the means for a review of its exercise, are of great practical significance to the protection of the rights of the ordinary citizen.

Of course, many of the ills of the lawless administrative state identified by Hewart have been addressed in most Australian jurisdictions by the adoption of all or some of what in Australia is called the ‘administrative law package’. Thus, we now have:

- a much elaborated and encompassing common law requirement that decision-makers must accord natural justice to those who would be affected adversely by their decision;
- which is supported by rights of access to information under freedom of information and privacy regimes;

²² Report of the Senate Select Committee on Standing Committees, Australian Parliamentary Paper. S 1 of 1929-30-31, Minutes of Evidence, at para 301. Lawyer/politicians on the ALP side of politics were also concerned with the misuse of subordinate law; see Peter Bayne, ‘Mr Justice Evatt’s Theory of Administrative Law: Adjusting State Regulation to the Liberal Theory of the Individual and the State’, (1991) 9 *Law in Context* 1 at 13ff.

²³ Commonwealth of Australia, *Parliamentary Debates*, vol 124 at 1557, 8 May 1930, per Senator Lynch.

- the publication of agency internal law (in compliance with another dimension of freedom of information law);
- an obligation on decision-makers to give reasons;
- inexpensive and accessible review of administrative action by an Ombudsman;
- elaborate systems of review of decisions – through levels of internal and first and sometimes second tier review by tribunals; and
- a somewhat less complicated (by certainly still very expensive) for of judicial review.

But the role of a Scrutiny Committee in this much reformed system has not evaporated. The quality of administrative justice which the system can deliver is still very much dependent on the terms in which administrative power is conferred. A Committee may also take note of attempts to displace one or more elements of the ‘administrative law package’ in relation to a particular scheme of administrative power.

The terms in which power is conferred

A Committee may review the terms in which administrative power is conferred in discharge of its function to ascertain whether “rights, liberties and/or obligations” have been made “unduly dependent upon insufficiently defined administrative powers”. These extracts from *Report 43 of the Fifth Assembly*, concerning the Construction Occupations (Licensing) Bill 2003, indicate the matters that ACT Committee considers relevant.

By this Bill, a large number of administrative discretions would be conferred upon administrative decision-makers - and in particular in the registrar (the Australian Capital Territory Construction Occupation Registrar). From the viewpoint of reducing the extent to which rights, liberties and/or obligations might by the exercise of these powers be unduly dependent upon insufficiently defined administrative powers, the Committee makes the following comments.

It is first noted that there is great variety in the way the provisions of the Bill states the limits to the discretions conferred.

- The power may be expressed in very wide terms - such as that the decision-maker simply "may" do something:
- The power may be qualified by the need for the decision-maker to take the action only where they have (or think they have) "reasonable grounds":
- The decision-maker may be required to take into account various matters, but then allowed a residual and wide discretion to act where "appropriate":
- The decision-maker may be required to take into account specific various matters:²⁴

Limiting and structuring administrative discretion

²⁴ These comments might be read as an invitation to the drafters to think whether variety of expression is intended. The problem is that a courts might attach significance to variety of expression where the drafter had not intended there be any significance.

The Committee considers that where an administrative discretion is conferred, then

- As far as practicable having regard to the nature of the power, the decision-maker be required to address specific matters;
- If a generally worded residual discretion to act is desirable, that completely subjective language be avoided (and instead, for example, a power to act on "reasonable grounds" be conferred);
- That care be taken to structure the exercise of the discretion: a good example of this in the Bill is found in subclauses 93(3) and (4); and
- That some person or body, (preferably including the decision-maker, but perhaps some other superior authority too), be empowered to issue guidelines which state how in general the discretion will be exercised.

Vesting a power in a decision-maker or in another to issue guidelines

In relation to guidelines, it may be desirable to empower the person or body issuing them to make them prescriptive as to the range of matters the decision-maker may consider. On the other hand, there will be circumstances where the guidelines should be stated in a non-prescriptive way - that is, so as to leave a residual discretion to the decision-maker.

In this Bill, there is one example of an express conferral of power to make prescriptive guidelines. By subclause 44(3), a court "may order the payment of reasonable compensation for the loss or expense only if it is satisfied it is just to make the order in the circumstances of the particular case". Subclause 44(4) then states: (4) The regulations may prescribe matters that may, must or must not be taken into account by the court in considering whether it is just to make the order. It is the Executive of the Territory that is empowered to make regulations (subclause 127(1)).

The effect of subclause 44(4) is that the Executive may, by making a regulation, state in a prescriptive way the factors that the court must or must not take into account when exercising the power vested in the court by subclause 44(3). The regulations would in this way be prescriptive guidelines.

This kind of model could be employed to govern any administrative discretion conferred by the Bill or by the proposed regulations. In general, it might be better to provide that a person or body vested with an administrative power may issue guidelines to indicate how that power will be exercised.²⁵

Provision for review of an exercise of administrative power

A Committee may also review to ascertain whether "rights, liberties and/or obligations" have been made "unduly dependent upon non-reviewable decisions".

This invites an examination of the bill to determine just what provision is made for review. The ACT Scrutiny Committee has had little occasion in the recent past to draw attention to problems arising out of this examination. It is now very commonly the case that the exercise of any power of significance – in the sense that its exercise could affect adversely a person – is subject to review by the Administrative Appeals Tribunal, or by some other similar body.

²⁵ On guidelines, see too *Report 50 of the Fifth Assembly*, concerning the Gaming Machine Bill.

Even where there is no such provision, the Committee has not necessarily identified a problem. It has pointed out that AAT review is expensive, in terms both of money and time. The adversarial and lawyer-dominated procedure of the AAT is not friendly to the citizen seeking review. The Committee has thus sometimes pointed out that Ombudsman review of a particular power may satisfy the policy stated in the term of reference set out above. It has also pointed out that the degree to which the application of policy is involved in an exercise of power may militate against review by a tribunal independent of the administrative structure in which the decision was taken.

The exclusion of judicial review: the privative clause and its allies

A privative clause seeks to restrict the ordinary jurisdiction of a court to review the legality of an exercise of administrative power (including of a power to make subordinate law). Lord Hewart zeroed in on the way in which a privative clause diminishes parliamentary authority:

In passing such a clause Parliament, it may be thought, was really stultifying itself, because, having inserted express provisions in the Act for the protection of persons liable to have their property taken without consent, and having enacted that the council in making, and the Board in confirming, an order must have regard to certain provisions, it then, by means of this “conclusive evidence clause”, rendered such provisions nugatory, and, so far as victims are concerned, a mockery.²⁶

An older form of the privative clause was the absolute discretion. This is still occasionally to be found in bills. In *Report 49 of the Fifth Assembly*, concerning the Gungahlin Drive Extension Authorisation Bill 2004, the Committee dealt with the matter this way:

The Committee notes that both subclauses 9(2) and (3) speak of the Minister being vested with an “absolute discretion”. It is unlikely that this wording does much to restrict judicial review of an exercise of the relevant power. A court would still fix limits to the scope of the discretion by reference to the objects of the statute. Given the high ‘policy’ content of the discretion, those limits may be very broad. The Committee raises the issue of whether it is ever desirable to provide for an “absolute discretion”. Such a provision does raise the question of whether there has been an insufficient definition of administrative power.

A more recent phenomenon is a clause which appears to negate the very notion that administrative powers must be exercised in accordance with the empowering law. There have been a couple of instances where the bill provided that the validity of some administrative action is not affected by reason of non-compliance with some provision of the authorising law.

In *Report 53 of the Fifth Assembly*, concerning the Electricity (Greenhouse Gas Emissions) Bill 2004, the Committee addressed a clause designed (in the words of the Explanatory Statement), to “make it clear that an assessment of liability to pay greenhouse penalty is not affected because a provision of the Principal Act, the regulations or the greenhouse gas benchmark rules has not been complied with”. The Committee commented:

²⁶ *The New Despotism* (1929) at 72.

Critical to the rule of law is the principle that bodies invested with statutory power should stay within the boundaries of their power; (in legal terms, the body should not act *ultra vires* - "beyond power"). Legislative qualification of this principle raises a concern. Proposed section 20 appears to be a major qualification of the *ultra vires* principle; indeed, it appears to set it aside completely.

Given the critical significance of the rule of law in our constitutional system, any qualification of it should be justified. None appears in the Explanatory Statement.

There was extensive discussion of the rights dimensions of a privative clause in *Report No 49*, concerning the Gungahlin Drive Extension Authorisation Bill 2004. This was a Bill to provide the Territory and its agents with the necessary powers to enable completion of the construction of the Gungahlin Drive Extension (GDE). The bill contained several privative clauses.

- Clause 7 provided that certain regulations “have effect, and are taken to have had effect from the day after their notification day, as if they had been enacted by an Act”.²⁷
- Clause 9 empowered the Minister to make any necessary authorisations required by relevant Acts in relation to the construction of the GDE. By clauses 10(3) and (5), decisions in relation to authorisations by the Minister made under section 9 were to be “final and conclusive”.²⁸
- Clause 15 provided that the *Administrative Decisions (Judicial Review) Act 1998* was not to apply to decisions that would be made under the *Gungahlin Drive Extension Authorisation Act 2004*. The Committee noted that displacement of the ADJR Act could not affect the jurisdiction of the Supreme Court to issue other forms of relief, whether by way of the prerogative orders, or the equitable remedies of injunction and declaration.

The Committee approached the rights issue in two ways. The first was to note that the courts commonly spoke of statutory provisions that restrict or remove the ability of a citizen to have access to the courts to challenge the acts of a state official as involving a derogation from "the ordinary rights of individuals": *Australian National Airlines Commission v Newman*.²⁹ It noted that in *Puntoriero v Water Administration Ministerial Corporation*, Kirby J advanced a more functional rationale for the policy of the courts. He said:

Obviously, to deny legal rights to a person which that person would otherwise enjoy, ostensibly because of some wider social purpose which appeals to the legislature, in effect obliges that person to underwrite (at its economic cost) the achievement of such objectives deemed beneficial to many. In particular circumstances, such deprivation of rights may constitute an effective acquisition of property from the person affected [case citations omitted]. Even where such a course is constitutionally unimpeachable, it does not seem unreasonable to insist

²⁷ The Committee noted that there was room for debate as the effect of such a clause, citing relevant case-law.

²⁸ The Committee noted that this probably had no effect on the availability of judicial review, or of statutory non-judicial review (such as by the Administrative Appeals Tribunal). In the latter case, the specific grant of jurisdiction would probably not be affected by a generally worded ‘final and conclusive’ clause.

²⁹ (1987) 162 CLR 466 at 417.

that Parliament should be clear as to its purpose in enacting legislation having such potentially drastic and unjust consequences.³⁰

The Committee then commented:

Applied to the parliamentary context where the desirability of a provision restricting access to the courts is in question, this suggests that those who sponsor the Bill should articulate clearly just what "wider social purpose" justifies a restriction on the right of a person to seek a remedy against a state official from the ordinary courts.

In the second place, the Committee evaluated the privative clauses in terms of section 21(1) of the *Human Rights Act 2004*:

21 Fair trial

(1) Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

The words "rights and obligations recognised by law" gives this provision an extensive application. It is manifestly not limited to the conduct of a criminal proceeding.

After reference to European and English case-law, the Committee noted that review by a Minister of an exercise of administrative power could not satisfy section 21. On the other hand, section 21 was not necessarily breached where the only avenue for review lay by way of judicial review by the Supreme Court, employing the standard common law and equitable remedies, (or a statutory remedy to the same effect). Whether there might be a breach of section 21(1) would turn on the extent to which a provision modified the administrative review jurisdiction of the Supreme Court.

In this respect, the Committee considered that "the scope of review available from the Supreme Court of the ACT on a challenge to a decision of the Minister under the Gungahlin Drive Extension Authorisation Bill 2004" was substantially that available at common law. It also, however, drew attention to clause 11(1), which stipulated a period of 21 days within which a court proceeding could be instituted to challenge an authorisation by the Minister under clause 9. In addition, by clause 12(2), a person could not bring a proceeding unless he or she had notified the Minister of this intention at least 14 days before commencing proceeding. The Committee noted that these provisions modified the normal rules for invoking the jurisdiction of the courts. There may well be a point where modification of the ordinary incidents of judicial review is incompatible with *HRA* section 21(1).

Subordinate laws

Where a delegation of legislative power is not appropriate

Whenever the Bill would confer on the executive a power to make a subordinate law there of course arises the question of whether this is an inappropriate delegation of legislative power. A Scrutiny Committee can probably do little more than point to such a power as appears to go 'too far', and leave it to the legislature to decide if it wishes to go that far. While it has not been adopted in Australian constitutional law,

³⁰ (1999) 199 CLR 575 at 594.

an appropriate yardstick may be the notion that the legislation should lay down an intelligible principle to which the person or body authorized to [make the subordinate law] is directed to conform”.³¹

A concern of this kind was raised by the Committee in *Report 34 of the Fifth Assembly*, concerning the Firearms (Prohibited Pistols) Amendment Bill 2003. This was a Bill to amend the Firearms Act 1996 and the Firearms Regulations to give effect to resolutions of the Australasian Police Ministers’ Council (APMC), endorsed by the Council of Australian Governments (COAG), to place greater restrictions on access to certain types of pistols. The Committee said:

The Committee draws attention to two respects in which fundamental elements of the scheme are to be provided for by regulation rather than by provision in the Act. First, in respect of licences for a collector, hunting or shooting club, both the matters relevant to the grant of a licence (proposed new para 15(4)(c)), and the nature of the conditions that attach to an approval (proposed new subsection 15(5)), are to be prescribed by regulation.

Secondly, it appears that all elements of the scheme for compensation, (except the entitlement thereto) are to be prescribed by regulation; see proposed new sections 136 and 137.

One situation where the Committee’s comment may be more pointed arises where the bill contains a privative clause designed to immunize an exercise of the power to make a subordinate law from judicial review. The Gene Technology (GM Crop Moratorium) Bill 2004 permitted the relevant Minister to make written orders to prohibit the cultivation of certain genetically modified food plants. Clause 10 of the Bill provided that

“a moratorium order or exemption in force under this Act - (a) may not be challenged or called into question in any court; and (b) is not subject to prohibition, mandamus or injunction in any court”.

The Committee commented that “Scrutiny Committees have long regarded provisions such as clause 10 as amounting to an inappropriate delegation of legislative power”.³²

Henry 8th clauses

³¹ *Touby v United States* (1991) 501 US 160 at 164, per O’Connor J. The High Court of Australia has not adopted this doctrine as a dimension of the separation of powers inherent in the Constitution, at least not in the American form. This was noted by R G Menzies in his evidence to the Senate Select Committee on Standing Committees; see Report of the Senate Select Committee on Standing Committees, Australian Parliamentary Paper. S 1 of 1929-30-31, Minutes of Evidence, at para 179. Menzies suggested that the relevant distinction was between a matter of substance – which was for a statute – and a detail of administrative – which might be the subject of a subordinate law: *ibid*. He also considered that “[m]oney ought not to be raised except by a direct Act of Parliament”: *ibid*. In contrast, Sir Robert Garran took a more sanguine view about the scope for subordinate law; see *ibid* at para 328ff.

³² Report 47 of the Fifth Assembly, concerning the Gene Technology (GM Crop Moratorium) Bill 2004. See too *Report 49 of the Fifth Assembly*, concerning the Gungahlin Drive Extension Authorisation Bill 2004. This Bill contained an “as if enacted in this Act” privative clause.

A Henry 8th clause “authorises the amendment of either the empowering legislation, or any other legislation, by means of delegated legislation ..”.³³ Such clauses have long been the concern of scrutiny committees. As Pearce and Argument observe, “the basis for objection to such clauses is that they vest “an enormous amount of power in the executive government” and that “the power is capable of abuse”.³⁴ But they also note that “the use of Henry VIIIth clauses in the Australian jurisdictions has become more, rather than less common” in the past 20 years.³⁵

Their common use in the face of constant criticism suggests that they are indeed useful. In any particular case, the relevant questions are: (1) just what is the extent of the power conferred?; and (2) what measure of parliamentary control is retained?

Careful attention must be paid to the extent of the power. It may be – and indeed commonly is – the case that the power may be used only to facilitate transition from an old statutory regime to a new regime.³⁶ In *Report No 10 of 2000*, concerning the Goods and Services Tax (Temporary Transitional Provisions) Bill 2000, the Committee noted the care taken to confine what on its face was a wide Henry 8th clause.

This is a Bill for an Act to make temporary transitional provisions in consequence of the introduction of the Goods and Services Tax (GST) by the Commonwealth. Clause 4 would have the effect that any price set by an Act or subordinate law will be increased by an amount that reflects the impact of the GST. Under subclause 5(1), the Executive may make regulations that may modify the operation of the proposed Act (except proposed subsection 5(1)), or of any other Act (other than certain specified laws) “with respect to any matter arising from, connected with or consequential on the introduction of the GST”.

Paragraph 2(c)(iv) – inappropriate delegation of legislative power

Subclause 5(1) is a wide power to modify by regulation almost the whole body of existing (and possibly future) legislation of the Territory.

It is also to be noted that under subclause 5(3), regulations may be expressed to take effect on a day earlier than the date they are notified in the Gazette, “but not earlier than the day this Act comes into operation”. In any such case, the effect of subclause 5(4) is to preclude the regulation from (i) having a prejudicial effect on the then existing rights of anyone (other than the Territory or a Territory

³³ Senate Standing Committee for Scrutiny of Bills, *The Work of the Committee during the 38th Parliament May 1996 – August 1998*, (June 1999), at 61. The use of the term might have been popularized by Lord Hewart; see *The New Despotism* (1929) at 58. They are called Henry 8th clauses “on the basis of that particular king’s extensive use of such provisions during his reign”: D Pearce and S Argument, *Delegated Legislation in Australia* (2nd ed, 1999) at 15. Historians do debate, however, just how widespread was the use by Henry 8th of a power to amend the statute law by proclamation. There was much criticism of this clause in the evidence given to the Senate Select Committee on Standing Committees, Australian Parliamentary Paper. S 1 of 1929-30-31. See Minutes of Evidence, at para 100 (Frederic Eggleston); para 206 (Professor K H Bailey); and at para 440 (Sir Daniel Levy).

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ See for example, *Report No 15 of 1998*, concerning the Taxation Administration (Consequential and Transitional Provisions) Bill 1998.

authority); and (ii) from imposing liabilities on anyone (other than the Territory or a Territory authority) in relation to any act or omission before the date of the notification in the Gazette.

(The Committee notes that subclause 5(4) repeats what is provided for in section 7 of the *Subordinate Laws Act 1989*.)

This is therefore a wide “Henry 8th” clause, and it is for the Legislative Assembly to judge whether it is appropriate. The Presentation Speech points out that the Assembly will not sit between 29 June and 29 August, and will not, in that period, be able to consider any legislation necessary to deal with unexpected effects of the introduction of the GST. The power in subclause 5(1) is also limited in a number of ways:

- Before making any regulations, the Executive must consult with, and have regard to any recommendations of those Members of the Legislative Assembly who are available to be consulted;
- The Executive may only exercise this power prior the end of the 6th sitting day of the Legislative Assembly after the Act commences, or, if it is earlier, prior to 31 October 2000; and
- Proposed new section 5 will expire on 31 October 2000.

On the other hand, the Committee does express concern where a broad power is unexplained.³⁷

The GST Bill carefully addressed the role of the Legislative Assembly. In every case, there is an argument that a subordinate law that would amend a statute should be subject to disallowance. In some cases, it might be argued that an affirmative resolution was necessary to preserve an appropriate role.³⁸

Incorporation by reference

This problem has been addressed in section 46 the *Legislation Act 2001* (ACT),³⁹ which operates where a law incorporates into its text the text of some document as it exists from time to time. The effect of section 47(6) is that the text of the incorporated document, as it is from time to time, must be published in the legislation register. The policy objective here is the public can thus ascertain just what the law of the Territory is as it stands at a particular time. A member of the public need only consult the legislation register. This is an important safeguard of the basic right to ascertain the law. Displacement of subsection 47(6) thus raises a rights issue, and

³⁷ See *Report No 14 of 1999*, concerning the Road Transport (General) Bill 1999. A rather intractable problem arises where the bill would permit legislation of another jurisdiction to amend the law as enacted by the ACT legislature; see *Report No 3 of 1998*, concerning the Gas Pipelines Access Bill 1998.

³⁸ See the example discussed in Lord Hewart; *The New Despotism* (1929) at 56-57. The Committee has occasionally raised the question of when a subordinate law should commence, see *Report 49 of the Fifth Assembly*, concerning the Gungahlin Drive Extension Authorisation Bill 2004; or pointed approvingly to clause which protected parliamentary authority; see *Report 50 of the Fifth Assembly*, concerning the Gaming Machine Bill.

³⁹ The full text of s 46 is appended.

where it is proposed by a bill, the Committee looks for a justification in the Explanatory Statement.⁴⁰

Dispensing clauses

The kind of provision which has concerned the ACT Scrutiny Committee⁴¹ was noted in *Report 47 of the Fifth Assembly*, concerning the Health Professionals Bill 2003:

Clause 130 of the Bill provides in substance that a Minister may exempt a health professional from a provision of this Act if satisfied that the public interest is served by doing so. An exemption is a notifiable (but not disallowable) instrument.

Apart from the reference to the public interest, there is no statement of the circumstances in which the Minister may grant a dispensation for the operation of the law in favour of a particular person.

The Committee has long expressed concern with provisions that empower a member of the executive branch of government to dispense with the operation of the law. It is fundamental that the law apply equally to all citizens. Any dispensation should be justified.

Dispensing clauses are also objectionable on the ground of their being an inappropriate delegation of legislative power. In essence, they empower the Minister to set aside the statutory scheme as it would normally apply. For example, often the effect of such a clause is to permit the executive to (in effect) re-write the Act by taking out of its purview classes of persons who would otherwise be within its scope, and who, it may be presumed, the Assembly, when it passes the Act, intend should be within its scope. The problem is compounded when the power to dispense is cast in the form of a discretion that is completely unconfined.

As a general principle, a law should state a principle according to which persons might apply for an exemption, rather than simply empower a Minister or an executive officer to grant a dispensation. There is some indication in the text of clause 130 of the basis for the exercise of this significant administrative power. The issue is whether this goes far enough.

Consideration should also be given to empowering the Minister to issue guidelines as to how this power might be exercised.

There is less concern where the instrument of dispensation is disallowable,⁴² and/or where the bill provides a statement of considerations relevant to the exercise of the power.⁴³

⁴⁰ *Report 43 of the Fifth Assembly* concerning the Building Bill 2003 (no justification offered), and concerning the Construction Occupations (Licensing) Bill 2003 (justification offered).

⁴¹ A lengthy statement of principle, with citation to long-standing legal policy, is in *Report No 15 of 1997*. A short statement of the history is in D M Walker, *The Oxford Companion to Law* (Dispensing Power). There was again criticism of this clause in the evidence given to the Senate Select Committee on Standing Committees, Australian Parliamentary Paper. S 1 of 1929-30-31. See Minutes of Evidence, at para 206 (Professor K H Bailey); and at para 439 (Sir Daniel Levy).

⁴² See *Report 43 of the Fifth Assembly*, concerning the Dangerous Substances Bill 2003; and compare *Report 44 of the Fifth Assembly*, concerning the Bail Amendment Bill 2003.

The power to tax by subordinate law

So far as concerns the conferral by subordinate law of a power on Minister to fix the rate of a tax, the Committee has followed the policy of the Senate Scrutiny of Bills Committee. In *Report 50 of the Fifth Assembly*, concerning the Gaming Machine Bill, the Committee said:

The empowerment of the Minister to fix the rate of tax raises an issue that has been addressed in past Reports. In Scrutiny Report No 14 of 1999 (and in Report No 5 of 2000), the Committee noted that many scrutiny committees operate according to the principle that “[i]t is for Parliament to set a tax rate and not for the makers of subordinate legislation to do so”: Senate Standing Committee for Scrutiny of Bills, *The Work of the Committee during the 37th Parliament May 1993 – March 1996*, (June 1997), at 62.

In its report, *The Work of the Committee during the 39th Parliament November 1998 – October 2001*, (June 2002), at 82 (para 5.31) the Senate Committee has accepted that

[w]here the rate of a levy needs to be changed frequently and expeditiously, this may be better done through amending regulations than by enabling statute. If a compelling case can be made for the rate to be set by subordinate legislation, the Committee seeks to impose some limit on the exercise of this power. For example, the Committee will seek to have the enabling Act prescribe either a maximum figure above which the relevant regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated.

The Standing Committee on Legal Affairs of this Assembly, acting in its scrutiny role, accepts this general approach as appropriate. In that light, it notes:

- (i) that the Explanatory Statement states only that “The approach to allow the Minister to determine the rate of tax is consistent with other gaming laws and allows scrutiny and disallowance by the Legislative Assembly”. This does not indicate why it is not desirable that the Assembly fix the rate; and
- (ii) the Bill does not prescribe either a maximum figure above which the Minister cannot determine a rate, or, alternatively, a formula by which the rate can be calculated. It also makes no provision for the kinds of matters that the Minister may or must take into account in fixing the rate of tax.

The Committee draws this matter to the attention of the Assembly.

⁴³ See *Report No 53 of the Fifth Assembly*, concerning the Electricity (Greenhouse Gas Emissions) Bill 2004. See too *Report No 3 of 1998*, concerning the Interactive Gambling Bill 1998, where the exemption proceed on the making of an agreement between a Minister and body which would benefit from the exemption. In this case, the Committee invited the Legislative Assembly to consider whether there should be inserted a provision which would require any application for an exemption to be notified to the public, and for the making of objections by a member of the public. Alternatively, or in addition, any exemption might be an instrument disallowable by the Assembly.

Of much more concern to the ACT Scrutiny Committee has been the conferment of power on a Minister to fix a fee that may amount to a tax. In *Report 52 of the Fifth Assembly*, concerning the Court Procedures Bill 2004, the Committee said:

Has there been an inappropriate delegation of legislative powers? - Para 2(c)(iv)

By subclause 13(1), the Minister “may, in writing, determine fees for any of the following purposes: ...”. Those purposes include “(c) the general purposes of the legislation”.

This provision is common, and in itself does not raise a problem in terms of whether there has been an inappropriate delegation of legislative power. The problem arises because by clause 12, “fee includes a charge and a tax”.

In ordinary and legal parlance, a fee is not a tax. A fee is a charge for a service rendered, and to be validly imposed there must be a proportionate relationship between what has been (or is to be) rendered and the fee charged. A tax is an impost that need bear no relationship at all to any service.

...

The empowerment of the Minister to impose a tax raises an issue that has been addressed in past Reports. In Scrutiny Report No 14 of 1999 (and in Report No 5 of 2000), the Committee noted that many scrutiny committees operate according to the principle that “[i]t is for Parliament to set a tax rate and not for the makers of subordinate legislation to do so”: Senate Standing Committee for Scrutiny of Bills, *The Work of the Committee during the 37th Parliament May 1993 – March 1996*, (June 1997), at 62. This Committee said: “[t]he vice to be avoided is taxation by non-primary legislation”. This approach reflects the long-standing constitutional position that “the raising and expenditure of public revenue have long been under the control of Parliament”: *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 579 per Brennan J.

In the past, in response to such comments, the relevant Bill, to the extent that it conferred on a Minister a power to levy a tax, has not been further advanced.

The Committee considers that it is inappropriate that a tax be levied by non-primary legislation.

APPENDIX

LEGISLATION ACT 2001 (ACT)

47 Statutory instrument may make provision by applying law or instrument

- (1) This section applies if an Act, subordinate law or disallowable instrument (the **authorising law**) authorises or requires the making of a statutory instrument (the **relevant instrument**) about a matter.
- (2) The relevant instrument may make provision about the matter by applying an ACT law—
 - (a) as in force at a particular time; or
 - (b) as in force from time to time.
- (3) The relevant instrument may make provision about the matter by applying a law of another jurisdiction, or an instrument, as in force only at a particular time.

Note For information on the operation of s (3), see the examples to s (9).

- (4) If the relevant instrument makes provision about the matter by applying a law of another jurisdiction or an instrument, the following provisions apply:
 - (a) if subsection (3) is displaced by, or under authority given by, an Act or the authorising law—the law of the other jurisdiction or instrument is applied as in force from time to time;

Note For the displacement of s (3), see s 6, examples 1 and 2.

- (b) if subsection (3) is not so displaced and the relevant instrument does not provide that the law of the other jurisdiction or instrument is applied as in force at a particular time—the law or instrument is taken to be applied as in force when the relevant instrument is made.

Examples for s (4) (b)

- 1 The *Locust Damage Compensation Determination 2003* (a hypothetical disallowable instrument) provides for the making of claims against a compensation fund. Section 43 states that disputes about claims must be decided in accordance with the *Commercial Arbitration Act 1984* (NSW) (the **NSW Act**) as in force from time to time. The determination is made on 1 August 2003. The Act under which the determination is made does not displace subsection (3). Therefore, even though section 43 purports to apply the NSW Act as in force from time to time, the NSW Act as in force on 1 August 2003 is applied by the determination.

- 2 The *Locust Damage Compensation Determination 2003* (mentioned in example 1), section 43 states that disputes about claims must be decided in accordance with the *Commercial Arbitration Act 1984* (NSW) (the **NSW Act**), but does not state that the NSW Act is to be applied as in force from time to time or at a particular time. The determination is made on 1 August 2003. The Act under which the determination is made does not displace subsection (3). Therefore, the NSW Act as in force on 1 August 2003 is applied by the determination.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see s 126 and s 132).

- (5) If a law of another jurisdiction or an instrument is applied as in force at a particular time, the text of the law or instrument (as in force at that time) is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument.
- (6) If subsection (3) is displaced and a law of another jurisdiction or an instrument is applied as in force from time to time, the text of each of the following is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument:
- (a) the law or instrument as in force at the time the relevant instrument is made;
 - (b) each subsequent amendment of the law or instrument;
 - (c) if the law or instrument is repealed and remade (with or without changes)—the law or instrument as remade and each subsequent amendment of the law or instrument;
 - (d) if a provision of the law or instrument is omitted and remade (with or without changes) in another law or instrument—the provision as remade and each subsequent amendment of the provision.
- (7) The authorising law or, if the relevant instrument is a subordinate law or disallowable instrument, the relevant instrument may provide that—
- (a) subsection (5) or (6) does not apply to the relevant instrument; or
 - (b) subsection (5) or (6) applies with the modifications stated in the authorising law or relevant instrument.
- (8) If a provision of an Act, subordinate law or disallowable instrument authorises or requires the application of a law or instrument, the provision authorises the making of changes or modifications to the law or instrument for that application.
- (9) This section is a determinative provision.

Examples for s (3) and s (9)

Here are 2 examples about the operation of subsections (3) and (9): the first illustrates how subsection (3) might be displaced and the second illustrates how a law of another jurisdiction that applies as in force from time to time would operate—

- 1 The effect of subsections (3) and (9), and subsection (10), definition of **applying**, is that if it is intended to apply, adopt or incorporate a law or instrument as in force from time to time, the authorising law would need

to expressly displace subsection (3) (as illustrated in s 6, examples of different kinds of displacement, example 1) *or* indicate a manifest contrary intention (as illustrated in example 2 in those examples).

- 2 The *ABC Regulation 2001* (made under a provision like those illustrated in section 6, examples of different kinds of displacement, examples 1 and 2) provides that noise measurements are to be taken in accordance with the NSW noise control manual as in force from time to time. The effect of the *ABC Regulation 2001* is that whenever the NSW noise control manual is amended in future, the noise measurements must be taken in accordance with the manual as last amended.

Note See s 5 for the meaning of determinative provisions, and s 6 for their displacement.

- (10) In this section:

ACT law means an Act, subordinate law or disallowable instrument, and includes a provision of an Act, subordinate law or disallowable instrument.

applying includes adopting or incorporating.

Note See also s 157 (Defined terms—other parts of speech and grammatical forms).

disallowable instrument, for a Commonwealth Act, means a disallowable instrument under the *Acts Interpretation Act 1901* (Cwlth), section 46A.

instrument includes a provision of an instrument, but does not include an ACT law or a law of another jurisdiction.

law of another jurisdiction means—

- (a) a Commonwealth Act, or any regulations, rules, ordinance or disallowable instrument under a Commonwealth Act; or
- (b) a State Act, or any regulations or rules under a State Act; or
- (c) a New Zealand or Norfolk Island Act, or any regulations or rules under a New Zealand or Norfolk Island Act; or
- (d) a provision of a law mentioned in paragraphs (a) to (c).

Ninth Australasian and Pacific Conference on Delegated Legislation &
Sixth Australasian and Pacific Conference on the Scrutiny of Bills

2-4 March 2005

Legislative Scrutiny in a Time of Rights Awareness

SESSION 10

Mr Stephen Argument, Special Counsel, Phillips Fox and Legal Adviser (Subordinate Legislation), ACT Scrutiny of Bills and Subordinate Legislation Committee

The *Legislative Instruments Act 2004*

Is it the cherry on the top of the legislative scrutiny cake?

Introduction

In the (soon to be superseded) 2nd edition of *Delegated Legislation in Australia*, Professor Dennis Pearce and I stated:

[T]he Commonwealth is no longer leading the way for the other jurisdictions. Particularly as a result of the failure of successive Commonwealth Government(s) to secure the passage of the Legislative Instruments Bill, the Commonwealth can no longer be said to be leading the way on scrutiny of delegated legislation, as it was 20 years ago.

The fact is that the Commonwealth is now very much behind several other jurisdictions, particularly in relation to regulatory impact assessment and staged repeal of delegated legislation. Experience with the Legislative Instruments Bill does not promote optimism that this slide will be arrested in the near future. This is not to suggest, however, that the quality of the work of the two Senate committees has fallen away. Rather, it is a reflection of the fact that, at present, the Commonwealth jurisdiction probably has more to learn from some of its State counterparts than they have to learn from it. It also means that, until such time as the Commonwealth passes the kinds of amendments contained in the Legislative Instruments Bill, jurisdictions such as Victoria (in particular) will be setting the example that had previously been set by the Commonwealth.¹

At around the same time, I suggested that the Commonwealth was 'leading from behind'.²

Almost six years on (and having written the Legislative Instruments Bill off on several occasions³), I find myself not only speaking about the Legislative Instruments **Act** but also in the peculiar position of extolling the virtues of the scrutiny of subordinate legislation regime that now operates in the Commonwealth jurisdiction.

For one very important reason, it is now without peer.

¹ 1999, Butterworths, Sydney, at [11.9].

² Argument, S, 'The Sad and Sorry Tale of the (Commonwealth) Legislative Instruments Bill', in Kneebone, S (ed), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (1999, Australian Institute of Administrative Law, Canberra), at p 260.

³ See, eg, Argument, S, 'Legislative Instruments Bill—R.I.P.?', 1998 (17) *AIAL Forum* 37; 'The Legislative Instruments Bill: Lazarus with a triple by-pass?', 2003 (39) *AIAL Forum* 44; and 'The Legislative Instruments Bill lives!', 2004 (40) *AIAL Forum* 17.

Application to instruments 'of a legislative character'

The single most significant element of the *Legislative Instruments Act 2003* (LIA) is its application to all instruments made in exercise of a power delegated by the Parliament that are 'of a legislative character'. Section 5 of the LIA provides that an instrument is 'of a legislative character' if:

- (a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and
- (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

Why is this definition significant?

The significance of this definition is that, unlike other jurisdictions, the regime provided for by the LIA operates by reference to what an instrument *does*, rather than by what it is called. While the operative definitions in some other jurisdictions refer to instruments having a legislative character, the fact is that, in all other Australian jurisdictions, whether or not an instrument is subject to the relevant regime for publication, tabling and disallowance is governed by whether or not the instrument in question is a 'disallowable instrument',⁴ a 'regulation',⁵ a 'statutory instrument',⁶ a 'statutory rule',⁷ a 'subordinate law',⁸ 'subordinate legislation'⁹ or 'subsidiary legislation',¹⁰ depending on the jurisdiction.

The effect of this approach to instruments is that all that is required for an instrument not to be subject to the relevant publication, tabling and disallowance regime is for it to be designated as something other than the term that triggers the operation of that regime. From a theoretical perspective at least, it is difficult to justify a process that operates on the basis of what legislative instruments are called, rather than what they do.

Nomenclature should be irrelevant, not the least because (in my experience) it is a reflection of variations in bureaucratic practices and preferences, drafting approach or in what the Parliament might be prepared to allow at a particular time. More importantly, however, I consider that this sleight-of-hand with nomenclature has, in the Commonwealth at least, been the single biggest contributor to the explosion of 'quasi-legislation' that occurred in the 25 or so years prior to the enactment of the

⁴ *Legislation Act 2001* (ACT), section 9;

⁵ *Subordinate Legislation Act 1978* (SA), section 4; *Interpretation Act* (NT), section 61.

⁶ *Statutory Instruments Act 1992* (Qld), section 7.

⁷ *Subordinate Legislation Act 1989* (NSW), section 3; *Subordinate Legislation Act 1994* (Vic), section 3; *Statutory Instruments Act 1992* (Qld), section 8.

⁸ *Legislation Act 2001* (ACT), section 8;

⁹ *Statutory Instruments Act 1992* (Qld), section 9; *Subordinate Legislation Act 1992* (Tas), section 3.

¹⁰ *Interpretation Act 1984* (WA), section 5.

LIA.¹¹ I am confident that the LIA has put a stop to this exponential growth in legislative instruments that fall outside of the publication, tabling and disallowance regime, and the discipline that this regime brings with it.

Why is the publication, tabling and disallowance regime important?

In my work on quasi-legislation, I have always said that there are four basic problems. They are:

- the proliferation of instruments not covered by the existing regimes;
- the poor quality of drafting of such instruments;
- the inaccessibility of such instruments; and
- the lack of appropriate parliamentary scrutiny for such instruments.

The LIA addresses all four issues. Proliferation becomes irrelevant, because instruments are now covered by the LIA, irrespective of what they are called. All that matters is whether or not they are 'of a legislative character'.

Poor drafting is addressed in two ways. First, section 16 of the LIA gives the Secretary of the Attorney-General's Department an obligation to 'cause steps to be taken to promote the legal effectiveness, clarity and intelligibility to anticipated users, of legislative instruments'. These steps may include (but are not limited to):

- undertaking or supervising the drafting of legislative instruments; and
- scrutinising preliminary drafts of legislative instruments; and
- providing advice concerning the drafting of legislative instruments; and
- providing training in drafting and matters related to drafting to officers and employees of other departments or agencies; and
- arranging the temporary secondment to other departments or agencies of Australian Public Service employees performing duties in the department; and
- providing drafting precedents to officers and employees of other departments or agencies (section 16(2)).

¹¹ See, generally, Pearce and Argument (note 1), at [1.11] to [1.18]. See also 'Quasi-legislation: Greasy pig, Trojan Horse or unruly child?', paper delivered to the Fourth Australasian Conference on Delegated Legislation and First Australasian and Pacific Conference on the Scrutiny of Bills, held on 28-30 July 1993 (published in (1994) 1 (3) *Australian Journal of Administrative Law* 144).

Section 16(3) of the LIA also requires the Secretary to cause steps to be taken to prevent the inappropriate use of gender-specific language.

The second way in which the drafting issue is dealt with is in the sense that if instruments are recognised as having a legislative effect and have to be registered, then surely agencies will take more care to ensure that they say and do what they are supposed to do. It is too much of a risk not to do so.

It is the accessibility issue that is arguably the most important, however. What the LIA does is ensure that people can work out what the law is, by virtue of the fact that all 'legislation' is now publicly available. Requiring that instruments be tabled in the Parliament could have been enough in itself (in the sense that the Table Offices of both Houses are an excellent source of documents and information tabled in the Houses) but the LIA does more. It establishes a Federal Register of Legislative Instruments (**FRLI**),¹² on which all legislative instruments must be registered. If they have to be registered on FRLI, you would like to think that this guarantees that they can be found. Indeed, if nothing else, it helps ensure that persons affected by legislative instruments can at least be aware that they exist. This is another great leap forward.

The parliamentary scrutiny issue is dealt with by the fact that the LIA ensures that instruments of a legislative character receive appropriate scrutiny *by the legislature*.

Is the definition a cure-all?

It would be naïve, however, to suggest that the introduction of this definition is a panacea. In addition to the significant workload issues that the operation of the LIA creates for Commonwealth agencies (see further below), a threshold issue for Commonwealth agencies is now determining whether or not an instrument is 'of a legislative character'. This can be a difficult proposition.

The concept of 'legislation' is generally defined by distinguishing legislative and executive activity. The distinction was authoritatively made by the Donoughmore Committee (the Committee on Ministers' Powers) of the United Kingdom Parliament in 1932 (Report, 1932, Cmd 4060).¹³ The Donoughmore Committee distinguished legislative and executive authority by adopting the approach that legislative activity involves the process of formulating general rules of conduct without reference to particular cases (and usually operating prospectively), while executive action involves the process of performing particular acts, issuing particular orders or making decisions that apply general rules to particular cases.

¹² Available at www.frli.gov.au.

¹³ (The Committee on Ministers' Powers, see Report, 1932, Cmd 4060.

A similar basis for distinction was adopted in Australia, by the High Court. In *Commonwealth v Grunseit*,¹⁴ Chief Justice Latham stated that:

[t]he general distinction between legislation and the execution of legislation is that legislation determines the content of the law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases. (at 82)

Likewise, in *Minister for Industry and Commerce v Tooheys Ltd*,¹⁵ the Full Court of the Federal Court stated that:

[t]he distinction [between legislative and administrative acts] is essentially between the creation or formulation of new rules of law having general application and the application of those general rules to particular cases. (at 265)

More recently, Justice French of the Federal Court cited, with approval, the definition put forward in the 1st edition of Pearce, of ‘delegated legislation’ referring to ‘instruments that lay down general rules of conduct affecting the community at large which have been made by a body expressly authorised to do so by an Act of parliament’.¹⁶

The distinction is not always easy or logical to make, however, nor does it always produce the most logical result. In making a decision in a particular case, for example, an administrator will often formulate a general principle that will be applied to the determination of such cases in the future. Similarly, Acts of Parliament – which would logically be regarded as legislative – can sometimes properly be seen as executive or administrative in character, because of their application to a particular fact situation or to a named individual.¹⁷

This aspect of the legislative/administrative distinction was considered last year, by Justice Selway of the Federal Court, in *McWilliam v Civil Aviation Safety Authority*.¹⁸ After referring to 2 of the leading authorities on this issue,¹⁹ Justice Selway stated:

¹⁴ (1943) 67 CLR 58.

¹⁵ (1982) 42 ALR 260.

¹⁶ *Latitude Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 110 ALR 209, at 228-9, referring to Pearce, DC, *Delegated Legislation in Australia and New Zealand* (1977, Butterworths, Sydney), at [1].

¹⁷ For example, the *Community Protection Act 1990* (Vic) expressly applied to the care or treatment and the management of a named individual, Gary David. Similarly, the *Community Protection Act 1994* (NSW) expressly applied only to Gregory Wayne Kable. See also discussion in *Randwick City Council and Another v Minister for Environment and Another* (1999) 167 ALR 115, at 134-5.

¹⁸ [2004] FCA 1701.

¹⁹ *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 and *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 185 ALR 573.

[T]hese decisions should not be understood as suggesting that administrative and legislative decisions fall into two mutually exclusive categories and that such categories can be identified by particular characteristics. (at [39])

His Honour went on to state:

That difficulty is exacerbated in relation to administrative functions simply because, under the Westminster system of government, the executive branch may exercise legislative powers delegated by the Parliament. This has the practical effect that it is impossible under Australian constitutional arrangements to draw a clear or 'bright line' distinction between legislative and administrative powers. (at [41])

Indeed, Justice Selway concluded that 'there is no reason in principle why the same decision could not be described as being both an administrative and a legislative decision' (at [42]). His Honour makes a very good point and provides perhaps the only logical way of dealing with the Gary David and Kable situations (discussed in footnote 16).

In the particular case, Justice Selway noted that counsel for the Civil Aviation Safety Authority had 'properly' conceded that a decision under a particular provision could be legislative or administrative 'depending upon the nature of the decision and who it affected'. His Honour went on to state:

For example, a decision requiring all pilots to adopt a particular safety procedure when approaching airports might be viewed as a broad policy decision which might be characterised as being a decision that was not of an administrative character. On the other hand, a decision that a major airport was unsafe for use by commercial airlines and prohibiting that use might be characterised as an administrative decision. Such a decision would be made by a statutory body (rather than by the Parliament or the Governor General in Council), it would be made in an 'Instrument' (rather than by an Act or Regulation), it would relate to a specific airport, it would be based upon specific findings, rather than broad policy considerations and so forth. (at [43])

This latter point, in particular, echoes similar issues grappled with by the courts in distinguishing between administrative and judicial power.²⁰

The bottom line is that Commonwealth agencies now face a difficult task in determining whether or not an instrument is 'legislative'. Whether or not an instrument is legislative determines whether or not the instrument must be registered if it is to continue to have effect. Significantly, there is no scope for agencies to register instruments 'just to be on the safe side', as the Attorney-General's

²⁰ See, eg, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, at 267.

Department, which is responsible for the new regime, has indicated that this approach is not acceptable. In its *Legislative Instruments Act e-bulletin No 1* (April 2004), the Attorney-General's Department stated:

Relying on registering everything, just to make sure all legislative instruments are caught, may not be the best way to go. [The Office of Legislative Drafting] is unlikely to accept instruments for registration that are clearly not legislative without a very good reason.

And here's the sting:

Agencies should obtain legal advice from their legal service provider as soon as possible, to resolve the question of legislative character of an instrument.

If requested, [the Office of Legislative Drafting] can also provide formal advice of this nature on a billable basis ...

The difficulty with this approach is that it is not instruments that are 'clearly not of a legislative character' that are the problem. It is the instruments where it is not clear that are the problem. It is the kind of instruments that Justice Selway was dealing with in *McWilliam* that are causing the headaches. If the question was 'clear', it would not be an issue.

Obviously, there are interesting times ahead. With its commencement on 1 January 2005, the LIA applies to all instruments made after that date. The more problematic application to existing instruments is a ticking time-bomb, in the sense that Commonwealth agencies have until 1 January 2006 to lodge for registration legislative instruments made between 1 January 2000 and 31 December 2004. Agencies then have until 1 January 2008 to lodge for registration instruments made before 1 January 2000 (LIA, section 29). In both cases, failure to lodge an instrument by the relevant date has the effect that, on the day after the last lodgment day, the instrument:

- (a) ceases to be enforceable by or against the Commonwealth, or by or against any other person or body; and
- (b) is taken to have been repealed (section 32).

As a result, there is currently a real pressure on agencies to make the call as to whether their instruments are legislative or not. And to get it right.

Other strategies

Professor Jim Davis (via Professor Pearce) has recently drawn my attention to another way of dealing with the potential conundrum of whether or not something is a legislative instrument. He pointed to provisions in the Auslink (National Land Transport) Bill 2004 that expressly deal with the issue of whether or not various

instruments are legislative and, if so, the extent to which the LIA applies.²¹ Clearly, this is a very sensible approach.

What about the effect on the Senate committee?

It should not be forgotten that the increased workload issue does not apply only to agencies. It is inevitable that the LIA will also mean more work for the Senate Standing Committee on Regulations and Ordinances, as that Committee's 'net' must surely have widened, with many instruments that previously escaped the Committee's attention now coming within its remit.

I was surprised to discover that I said as much in 1992, when dealing with the 'quasi-legislation' problem:

[D]oubts have been expressed about the capacity of the Parliament to cope with ever-increasing volumes of legislative and quasi-legislative instruments. Ultimately, the burden is placed on committees such as the Senate Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances. Therefore, if the Parliament adopts a more rigorous approach to quasi-legislation it must also re-evaluate its own processes for dealing with quasi-legislation.²²

It will be interesting to observe whether, in fact, the workload of the Regulations and Ordinances Committee increases.

Other features of the Legislative Instruments Act

A summary of the key provisions of the LIA is attached (**Attachment A**), together with a list of key dates (**Attachment B**). In brief, the other key features of the LIA are, in no particular order:

- the introduction of consultation requirements in relation to legislative instruments;
- the reduction of the period within which an instrument must be tabled from 15 sitting days of making days to 6 sitting days of the instrument being registered; and
- the introduction of a 'sunsetting' regime for legislative instruments, with a 10 year sunset period.

I do not propose to discuss any of these issues in any detail. One thing that might be noted, however, is that the consultation requirements set out in Part 3 of the LIA are

²¹ See clause 5(4), which provides that the instrument in question is a legislative instrument but that neither the disallowance provisions nor the sunsetting regime applies, and clause 17(4), which provides that the relevant instrument is not a legislative instrument.

²² See Argument, S, 'Parliamentary scrutiny of quasi-legislation', 15 *Papers on Parliament* (May 1992), p 26.

much less onerous than those that would have been imposed by previous versions of the legislation. Section 17 requires a rule-maker to undertake 'appropriate' consultation before making a legislative instrument. The obligation is imposed 'particularly' where the instrument is 'likely ... to have a direct or substantial indirect effect on business' or is 'likely ... to restrict competition' (section 17(1)). Consultation is very much at the discretion of the rule-maker, however, in that the obligation is on the rule-maker to be satisfied that 'any consultation that is appropriate and that is reasonably practicable to undertake' has been undertaken. This contrasts with the more detailed and prescriptive consultation requirements set out in previous versions of the legislation (and recommended by the Administrative Review Council, in its report on *Rule making by Commonwealth agencies*²³).

Section 17(2) provides rule-makers with guidance in determining whether any consultation that has been undertaken was 'appropriate'. Section 17(3) indicates what forms consultation might take. Section 18 exempts certain categories of instruments from the consultation requirements. Section 19 provides that a failure to undertake consultation does not affect the validity or enforceability of a legislative instrument.

While it remains to be seen what use rule-makers make of the Part 3 requirements, it should also be noted that these requirements do not in any way derogate from the consultation requirements imposed as part of the Regulatory Impact Statement (RIS) process, by the (Commonwealth) Office of Regulation Review.²⁴

Apples and oranges and lemons

In preparing this paper, it belatedly came to my attention that, in the abstract that I provided to the organisers of this conference, I agreed to re-visit my 'Apples and oranges' paper.²⁵ In that paper, given to the conference held in Sydney, in 1999, I foolishly attempted to assess the performance of the various legislative scrutiny committees against each other. Big mistake!! And not one to be repeated.

That said, the exercise that Professor Pearce and I have recently been engaged in, for the purposes of the new edition of Pearce and Argument, have generated some thoughts, some of which equate with elements of the 'scorecard' that I developed as part of the 'Apples and oranges' paper.

²³ Parliamentary Paper No 93 of 1992.

²⁴ See Attorney-General's Department, *Legislative Instruments Act e-bulletin No 2* (May 2004). See also the Office of Regulation Review website, at www.pc.gov.au/orr/reform/risaims.html, for the RIS requirements.

²⁵ 'Apples and oranges: A comparison of the work of the various Australian delegated legislation committees', 1999 (21) *AIAL Forum* 34.

The first thing to note is the significant developments that have taken place since 1999.

I have already said enough about the LIA.

Another significant development (and I should stress that the issues that I now discuss are in no particular order) is the establishment of a scrutiny of bills committee in NSW. To be more precise, in 2003, the NSW Parliament established the Legislation Review Committee, a committee with a scrutiny of bills function, as well as a scrutiny of subordinate legislation function.²⁶

The establishment of the Legislation Review Committee brings to five the number of jurisdictions with a committee that performs a scrutiny of bills function.²⁷ Those jurisdictions are now in the majority! It also brings to four the number of jurisdictions in which the committee performs a dual function.²⁸

An innovation that was brought in by the NSW committee has been the establishment of a panel of expert legal advisers, who are called upon according to their particular areas of expertise.

For me, an interesting side-issue with the establishment of the NSW committee is its relationship to calls for the establishment of a Bill of Rights. Between 1999 and 2001, the NSW Parliament's Standing Committee on Law and Justice investigated the desirability of a statutory Bill of Rights for NSW. The committee reported in October 2001, finding that it was not in the public interest for the NSW government to enact a statutory Bill of Rights.²⁹ The committee went on to recommend the establishment of a scrutiny of bills committee.³⁰ The NSW government accepted the recommendation.

Three other interesting developments have occurred in the ACT. First, the ACT enacted the *Legislation Act 2001*, an innovative piece of legislation that combined (among other things) the *Interpretation Act 1967* (ACT) and the *Subordinate Laws Act 1989* (ACT), the two pieces of legislation within which the ACT committee had primarily operated. More importantly, however, the Legislation Act established the *ACT Legislation Register*, an electronic database that is now the authoritative source of ACT legislation.³¹ It is a marvellous resource.

²⁶ The Legislation Review Committee is established under the *Legislation Review Act 1987* (NSW), by amendments made by the *Legislation Review Amendment Act 2002* (NSW). See also, Argument, S, 'NSW committee to protect rights and liberties', *Law Society Journal*, 41 (9) October 2003, p 53.

²⁷ The others being the ACT, the Commonwealth, Queensland and Victoria.

²⁸ The others being the ACT, Queensland and Victoria.

²⁹ Standing Committee on Law and Justice, *Report No 17 A NSW Bill of Rights* (October 2001), Finding 1, p 114.

³⁰ *Ibid*, Recommendation 1, p 132.

³¹ See sections 18 to 26. The ACT Legislation register can be found at www.legislation.act.gov.au.

Second, the ACT enacted the *Human Rights Act 2004*, which provides 'an explicit statutory basis for respecting, protecting, fulfilling and promoting civil and political rights'.³² The effect of that Act has, no doubt, been dealt with comprehensively by others at this conference. From a legislative scrutiny committee perspective, however, the key development is the role given to the ACT committee, under section 38 of the Human Rights Act, to report to the Legislative Assembly on human rights issues raised by bills presented to the Assembly. Curiously, however, the committee has no role in relation to human rights issues raised by *subordinate* legislation.

Third, the ACT committee has (only very recently) appointed a second legal adviser, with one legal adviser now devoted entirely to the scrutiny of bills function and the other to the scrutiny of subordinate legislation function.

Another development since 1999 is not really a development at all, in the sense that some very good work has not yet come into fruition. Between 2000 and 2002, the Victorian committee conducted an extensive inquiry into the operation of the *Subordinate Legislation Act 1994* (Vic). It is telling that the first recommendation contained in the committee's report, entitled *Inquiry into the Subordinate Legislation Act 1994*,³³ was that the Subordinate Legislation Act be amended to introduce a similar concept to that contained in the LIA, so that the publication, tabling and disallowance requirements of the Subordinate Legislation Act apply in relation to instruments 'of a legislative character'. Unfortunately, the government did not support that recommendation.³⁴

So the Commonwealth remains as the only jurisdiction with the cherry on top of its legislation cake.

The final issue that I would like to flag in this context is that of the Internet accessibility of the work of the various committees. In the 'Apples and oranges' paper, I noted that material relating to all the committees except the South Australian committee was in some way accessible via the Internet. I am pleased to note that, this time around, South Australia is no longer the poor relation and that a wealth of material on the committees' work is now available on the Internet.

I should also take this opportunity to thank the staff of the various secretariats, who I have annoyed by e-mail, with questions about committee statistics, etc.

³² See ACT Human Rights Office website, at <http://www.hro.act.gov.au/index.html>.

³³ September 1992, available at www.parliament.vic.gov.au/sarc/publications.htm. See, in particular, Recommendation 1, at pp 18-38.

³⁴ I should also note that, in addition to setting out an analysis of the operation of the Subordinate Legislation Act, the report also contains an excellent summary of the legislative scrutiny situation in various other jurisdictions (including several overseas jurisdictions).

Other issues

I would like to conclude by flagging some issues that I believe that Professor Pearce and I will be looking at when (if?) we come to revise Pearce and Argument the next time. One is the evolution of the dual role of committees. It will be interesting to see whether there is a tendency for the scrutiny of bills function to dominate the work of committees with the dual function. Of course, we will follow the development of the NSW committee with particular interest, as it has developed out of a committee with a very strong track record in scrutinising subordinate legislation.

A related issue is whether the work of committees with the dual function might be quarantined in some way, either by establishing a subordinate legislation subcommittee (as in Victoria) or by having separate legal advisers for the different functions (as in the ACT).

I see the real challenge now as ensuring that scrutiny of subordinate legislation does not get left by the wayside. Given that it is subordinate legislation that has led to the development of this conference as a valuable and ongoing institution, it would be a little odd if the scrutiny of bills function came to be the dominant focus of the committees that attend.

Another issue is whether the motion for disallowance is a dying art. Having recently re-examined the issue for the purposes of the re-write of Pearce and Argument, I was struck by the paucity of disallowance motions in most of the jurisdictions. What does this mean? Surely the subordinate law makers are not learning?

A related issue, which is far too controversial for me to touch, is whether the fact that, more and more, governments have 'the numbers' in the legislatures from which the various committees are drawn has any influence in the number of disallowance motions. I would like to think not.

In that vein, the make-up of the Senate after 1 July 2005 might be thought to have an effect on the work of the two Senate committees. Again, I would like to think not. It has to be noted that the Regulations and Ordinances Committee, in particular, has a long history both of bipartisan operation and of respect for its recommendations. It has previously operated (with no evidence of diminished effectiveness) in situations where the government has had a majority in the Senate and, presumably, will do so again.

Another bite at the cherry

Though it is obviously too early to assess the full impact of the LIA, I cannot but applaud its enactment (which, frankly, came as something of a surprise). Apart from finally bringing the Commonwealth jurisdiction 'up to speed' with various of the States, the LIA then takes the Commonwealth into the lead. The application of the

LIA regime on the basis of instruments 'having legislative effect' is a substantial improvement on the regimes operating in all other jurisdictions. It means that legislative scrutiny applies regardless of how an instrument is designated. It operates on the basis of what the instrument *does*, rather than what the instrument is called. In so doing, it addresses the quasi-legislation issue head-on. This is a truly momentous development and one that other jurisdictions would do well to follow.

LEGISLATIVE INSTRUMENTS ACT 2003

KEY PROVISIONS

Section 2	Commencement provisions
Section 5	Definition of 'legislative instrument'
Section 6	Instruments specified as 'legislative instruments'
Section 7	Specific exemptions from definition
Section 10	Attorney-General's power to certify whether or not an instrument is legislative
Section 12	Prohibition against retrospective operation of legislative instruments
Section 16	Secretary of Attorney-General's Department's obligations re drafting standards, etc
Sections 17-19	Consultation requirements
Section 20	Federal Register of Legislative Instruments
Section 24	Obligation to lodge 'new' legislative instruments
Section 26	Obligation to lodge explanatory statements
Section 29	Obligation to lodge 'old' instruments
Sections 31 and 32	Effect of failure to lodge
Sections 33, 34 and 35	Provisions relating to compilations
Section 36	Early backcapturing
Sections 38 and 39	Tabling requirements
Section 42	Disallowance provision
Section 44	Specific exemptions from disallowance provisions
Sections 45-48	Provisions dealing with the effect of disallowance
Section 50	Sunset provision
Section 51	Attorney-General's power to defer sunseting
Section 52	Requirement that Attorney-General table list of instruments due to sunset
Section 54	Specific exemptions from sunset provisions
Sections 59 and 60	Provisions for review of operation of Act

LEGISLATIVE INSTRUMENTS ACT 2003**KEY DATES**

1 January 2005	Act commences and applies to all new legislative instruments
1 January 2006	Legislative instruments made between 1 January 2000 and 31 December 2004 must be lodged for registration
1 January 2008	Legislative instruments made before 1 January 2000 must be lodged for registration Review of operation of Legislative Instruments Act to commence
1 April 2009	Review of operation of Legislative Instruments Act to be completed
1 April 2013	Suggested review date for legislative instruments made between 1 January 2000 and 31 December 2004
1 April 2015	Suggested review date for legislative instruments made before 1 January 2000
1 April 2016	Sunset date for legislative instruments made between 1 January 2000 and 31 December 2004
1 January 2017	Review of operation of sunseting provisions to commence
1 October 2017	Review of operation of sunseting provisions to be completed
1 April 2018	Sunset date for legislative instruments made before 1 January 2000