

# BOOK REVIEW

*Reviewed by David Creed\**

*Delegated Legislation in Australia*, 2nd edn, by Dennis Pearce and Stephen Argument, Butterworths, rrp \$95.00

There has always been discussion about the most appropriate role for the Senate, Australia's house of review and states' house. This discussion has continued after the 3 October 1998 general elections, which, like other elections in recent years, gave one political group a handy majority in the House of Representatives but did not deliver a similar result in the Senate. This led Senator Helen Coonan and others to put forward proposals which would increase the likelihood of a workable Senate majority for one or other of the two major political groups. There has also been debate about electoral mandates, the nature of parliamentary consideration of bills implementing the government's electoral platform and of the appropriate relationship in a representative democracy between the executive and an upper house. This debate is characteristic of a healthy body politic, but it would be a pity if it did not include recognition of an important parliamentary function, which is to review and scrutinise delegated legislation made by the executive and the judiciary. This excellent new edition of *Delegated Legislation* by Professor Dennis Pearce and Mr Stephen Argument is therefore particularly welcome.

There is a relatively small number of books which are basic reading for all those interested in public affairs in Australia and this is one of them. First published in 1977 and with no new edition until now, this may not be what Hamlet had in mind when he railed against the law's delay, but the book is certainly a pleasure postponed. Nevertheless it is no less welcome and valuable on that account.

The book is divided into two basic parts. The first, written by Stephen Argument, a former Senate officer, gives a general introduction to delegated legislation and deals with making, publication, commencement and parliamentary review. The second and far larger part, written by Professor Pearce, addresses judicial review of delegated legislation.

The best part of Mr Argument's contribution is the Introduction, which in 19 pages sets out all of the main concepts and issues affecting delegated legislation. This is a concise but flowing summary which should be required reading not only for law students but also for students of political science and public administration. It should also be a compulsory element in all continuing education courses for legal practitioners.

The bulk of Mr Argument's work is nine chapters, one for each of the commonwealth, states and territories, each chapter having the same title and discussing the procedural and parliamentary aspects of delegated legislation, particularly the operation of legislative scrutiny committees. This is a valuable reference for each of those jurisdictions, but of necessity involves considerable subdivision. For instance, the chapters on South Australia and Tasmania are each seven pages long with 19 headings and subheadings, while that on the ACT is six pages long with 19 headings. This means that many of the headings are dealt with by only a few lines. One wag commented that these chapters have more classifications than the Karma Sutra. It may have been preferable to arrange these chapters on a thematic basis rather than on political borders, but this is a quibble. Also, these chapters are drawn together by a chapter of concluding comments.

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Mr Argument's chapters on state and territory parliamentary review of delegated legislation are, however, especially useful as a salutary reminder to those of us based in the national capital that vigorous parliamentary activity exists outside Canberra and that ordinary Australians may be affected more directly by state regulations than by Commonwealth. The Chairs and members of the state and territory committees have also tended to be colourful characters, in the best meaning of that expression, who often have close contact with users of delegated legislation. This direct contact is denied the Senate committees, due to geographic factors and the national effect of Commonwealth delegated legislation. This has resulted in somewhat different cultures in the Senate committees on the one hand and the state and territories on the other, which is not to say that one is more or less effective, but simply that they may operate differently. All the Committees, however, share a common core commitment to active scrutiny of executive actions. The work of the delegated legislation scrutiny committees refutes any suggestion that parliaments in Australia are mere rubber stamps for the actions of the executive. It should be emphasised that such scrutiny is not limited to the upper houses of parliaments, although parliamentary review in unicameral legislatures presents particular challenges. Queensland, the third largest state, is unicameral yet a succession of Chairs of its scrutiny committee from both sides of politics has actively reviewed and questioned executive law making.

One criticism of Mr Argument's work is that he appears to be under the impression that Commonwealth delegated legislation is not accompanied by Regulation Impact Statements, which he regards as a bad thing. In fact, there are quite detailed RIS requirements for legislation affecting business. This legislation includes bills, delegated legislation, treaties and quasi-legislation. These requirements, imposed by administrative means, have been in place for some years and were tightened in 1997. Although limited to legislation affecting business, in practice this includes most important delegated legislation. The Senate Regulations and Ordinances Committee scrutinises these in the usual way and has found many instances of matters in RIS about which it has written to ministers. Also, in relation to staged repeal Mr Argument appears to be unaware of the Legislative Review Program for all legislation restricting competition or affecting business, which has as one of its objects the repeal of unnecessary legislation. The Commonwealth RIS requirements and the LRP are both supervised by the Office of Regulation Review of the Productivity Commission, which recently presented its first annual report on regulation review. Following this Report the Committee arranged to meet with the Chairman of the Productivity Commission to discuss matters of common interest. In the last paragraph of his concluding chapter Mr Argument singles out RIS and staged repeal as areas where the Commonwealth is "very much behind" several other jurisdictions. This conclusion, however, is not correct. There is more than one way to skin the RIS and staged repeal cats and at the Commonwealth level this has been done by administrative direction rather than by Act.

Little need be said about Professor Pearce's analysis of judicial review of delegated legislation, which takes up the great bulk of the book. These chapters are a comprehensive survey of all aspects of the topic, written with clarity and authority. They are free of jargon and unnecessary technical expressions and as such will interest not only lawyers but also parliamentarians and administrators. The facts of the cases cited also present a fascinating panorama of Australian public life.

Of course there is room for discussion about which individual cases should be included. For instance, Professor Pearce cites but gives no details of *Thomas Borthwick and Sons (Pacific) Ltd v. Kerin* (1989) 87 ALR 527, where the Minister, relying on a most restrictive interpretation of parliamentary power, argued that disallowance by the Senate of three Orders was invalid. The Federal Court, however, preferred a more expansive interpretation, of which the Senate has subsequently taken full advantage. Also, the book does not refer to comments by Mason C.J. in *Australian Capital Television Pty. Ltd v. The Commonwealth*

(1992) 177 CLR 106 at 147, which would be endorsed by every legislative scrutiny committee. The Chief Justice, who wrote the Foreword to the first edition of this book, said:

In my view, it is impossible to justify the validity of a regime which restricts freedom of communication in relation to the electoral process when the operation of the regime depends upon the making of regulations at the discretion of the Executive government according to unspecified criteria.

Again, however, these are mere quibbles.

The book is a splendid tribute to the authors on a subject which should be better known. In some ways delegated legislation reflects the story of Australia. Professor Pearce reminds us that Governor Phillip read out delegated legislation when proclaiming the establishment of the first colony on our shores. On a more contemporary note, this review is being written amid the national catastrophe of the second cricket test in Kingston, the television broadcast of which was provided for by delegated legislation made by the Minister on 25 February 1999. Unfortunately, however, the drafting style of the 1999 instrument is in sad contrast to the regal elegance of Governor Phillip's proclamation.