LEGISLATIVE INSTRUMENTS BILL—R.I.P.?

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Introduction

During the parliamentary sittings that have recently concluded, one event that has gone relatively unnoticed is the apparent demise of the Legislative Instruments Bill, an important and innovative attempt to impose some much-needed discipline into Commonwealth delegated legislation. Set out below is a brief history of the Bill, it's main features and the reasons behind its apparent demise.

The Legislative Instruments Bill

In 1994, the previous (ALP) Government introduced the Legislative Instruments Bill 1994 (the 1994 Bill). This Bill was, in large part, the Government's response to the Administrative Review Council's 1992 report, *Rule making by Commonwealth agencies.*[1]

The 1994 Bill was subjected to fairly rigorous scrutiny by both Houses of the Parliament—including inquiry and report by parliamentary committees in both Houses[2]—and was amended significantly by the Senate, in the light of that scrutiny.

At the time of the 1996 federal election, the 1994 Bill—as amended by the Senate—was awaiting passage. When the election was called, the Bill lapsed. In its election policies, the Coalition affirmed its commitment to the reforms promoted by the 1994 Bill, focussing, in particular, on the Bill's potential benefits for business.[3]

This commitment was given effect when the current, Coalition Government was elected. The Legislative Instruments Bill 1996 (the 1996 Bill) was introduced into the House of Representatives on 26 June 1996. It incorporated many of the amendments that had been made to the 1994 Bill. The greater business focus was also evident in this version of the Bill, in provisions that would require public consultation in relation to legislative instruments "likely to have a direct, or a substantial indirect, effect on business".[4]

Unfortunately, this Bill has gone nowhere. Between June 1996 and December 1997, the Bill bounced between the House of Representatives and the Senate, essentially because the Senate kept making (and insisting upon) amendments that the Government (and, as a result, the House of Representatives) was not prepared to accept. Finally, on 5 December 1997, the House laid the 1996 Bill aside.

On 5 March 1998, the Legislative Instruments Bill 1996 [No 2] (the 1996 [No 2] Bill) was introduced into the House of Representatives. It is in the same form as the (original) 1996 Bill. On 14 May 1998, the Senate passed the 1996 [No 2] Bill, again with substantial amendments. This was despite the Minister for Justice, Senator Vanstone, telling the Senate at the opening of the substantive debate that:

> [t]he latest draft of amendments put forward are entirely unacceptable ... . For the reasons given to the Senate last year, the Government is unable to accept the many recycled amendments that I understand are now being proposed by the Opposition and the Greens. The Government will again reject those amendments in the other

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> House and the Bill will not be returned to this chamber.[5]

The 1996 [No 2] Bill now seems doomed though, given its re-introduction in the same form as the 1996 Bill, it stands as a potential double dissolution trigger, with the resulting possibility that it might be passed by a Joint Sitting, should a double dissolution be called. One might (for various reasons) wonder just how realistic a prospect this is.

In the remainder of this paper, I would like to touch (briefly) on the main features of the 1996 version of the Bill and also the amendments upon which the Senate has been insisting.

The Legislative Instruments Bill 1996

The Legislative Instruments Bill (in its various forms) has always promised to be the answer to various problems that have been identified in relation to delegated legislation. These problems have largely been a product of the development (without any discernible logic) of forms of delegated legislation that fall outside the established categories of delegated legislation (ie regulations, by-laws, etc). The most obvious problems are:

(a) proliferation (both in volume and in variety);

(b) inaccessibility;

(c) poor quality of drafting; and

(d) (in many cases) absence of parliamentary scrutiny.

I do not propose to say anything further about those issues here.[6] What I will do, however, is set out the main features of the Bill. For the sake of currency, I shall refer to the 1996 version of the Bill.

Clause 5 - Definition of "legislative instrument"

The first thing to note about the 1996 Bill is that it operates in relation to all "legislative instruments". The concept of "legislative instrument" is defined in subclause 5(1) of the 1996 Bill as an instrument in writing:

> (a) that is of a legislative character; and
> (b) that is or was made in the exercise of a power delegated by the Parliament.

Subclause 5(2) adds to this definition, by providing:

> Without limiting the generality of subsection (1), an instrument is taken to be 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.

Subclauses (3) to (6) make some more specific provision about what is and *is not* a legislative instrument, but I do not propose to deal with those provisions in detail here.[7]

The importance of this definition is that (in my view) it clearly encompasses the kinds of instruments that have previously been causing so much concern. The effect of something being a legislative instrument is that it would be subject to an ordered and stringent regime in relation to drafting, publication, registration, parliamentary scrutiny and, in some cases, public consultation. It is also important to note that, if an "instrument that is of a legislative character" is not made, etc in accordance with the provisions of the Bill then it may be unenforceable.[8]

The responsibilities of the Principal Legislative Counsel

Part 2 of the 1996 [No 2] Bill provides for the establishment (within the Attorney-

General's Department) of an office of "Principal Legislative Counsel". The responsibilities of this officer, set out in clause 15, are:

> (a) ensuring that all legislative instruments are of a high standard; and
>
> (b) maintaining the Register [see further below];
>
> (c) maintaining a database of all electronic copies of instruments given to the Principal Legislative Counsel...;
>
> (d) ensuring that all original legislative instruments lodged with the Principal Legislative Counsel ... are retained and, as necessary, transferred to the Australian Archives for storage;
>
> (e) delivering to each House of the Parliament copies of all legislative instruments for which ... Parliamentary scrutiny is required.

Clause 16 of the 1996 [No 2] Bill further provides:

> (1) To ensure that legislative instruments are of a high standard, the Principal Legislative Counsel may take any steps he or she considers likely to promote their legal effectiveness, their clarity and their intelligibility to anticipated users.
>
> (2) The steps referred to in subsection (1) include, but are not limited to:
>
> (a) undertaking or supervising the drafting of legislative instruments; and
>
> (b) scrutinising preliminary drafts of legislative instruments; and
>
> (c) providing advice concerning the drafting of legislative instruments; and
>
> (d) providing training in drafting and matters related to drafting to officers and employees of other Departments or agencies; and
>
> (e) arranging the temporary secondment to other Departments or agencies of staff responsible to the Principal Legislative Counsel; and
>
> (f) providing drafting precedents to officers and employees of other Departments or agencies.

If enacted, this provision would clearly give the Principal Legislative Counsel an important supervisory role in relation to the drafting of legislative instruments, which could only lead to an improvement in the quality and consistency of drafting.

Consultation

Part 3 of the 1996 [No 2] Bill provides for consultation prior to the making of legislative instruments. As indicated at the outset, the consultation requirements essentially apply in relation to legislative instruments "likely to have a direct, or a substantial indirect, effect on business".[9] Subclause 17(2) of the 1996 [No 2] Bill provides that the intention of this requirement is to improve the quality of proposed legislative instruments by:

> (a) drawing on the expertise of persons in fields relevant to the proposed instruments; and
>
> (b) ensuring that persons likely to be affected by the proposed instruments have an adequate opportunity to comment on the policy and content of the proposed instruments.

While I do not propose to deal with the consultation processes in any detail, it is important to note that the only legislative instruments in relation to which those processes are to apply are those made under the primary legislation specified in Schedule 2 of the 1996 [No 2] Bill (which is headed "Enabling legislation providing for legislative instruments likely to have an effect on business"). As you can well imagine, Departments were keen that their legislation not be listed in this Schedule.

It is also important to note that clause 28 of the 1996 [No 2] Bill provides for exemption from the public consultation process. Paragraph 28(1)(a) provides

that public consultation is not necessary if the rule-maker is satisfied that various conditions—most of which involve a significant subjective element—exist. Importantly (and contrary to the earlier version of the Bill), decisions under clause 28 would be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

The Federal Register of Legislative Instruments

Part 4 of the Bill provides for the establishment of a Federal Register of Legislative Instruments (the Register). The Register would be kept on computer[10] and would be accessible to the public.[11] Subject to certain exceptions, registration would be required in relation to all future[12] *and* past[13] legislative instruments. In simple terms, a failure to register an instrument would render it unenforceable.[14]

Parliamentary scrutiny

Part 5 of the 1996 [No 2] Bill provides for the parliamentary scrutiny of legislative instruments. The Part incorporates (and builds on) the provisions contained in sections 46, 46A and 48-50 of the *Acts Interpretation Act 1901*.[15] I do not propose to deal with the detail of the provisions here but suggest that the incorporation of the tabling and disallowance provisions of the Acts Interpretation Act into a Bill such as this is a sensible idea.

Sunsetting

Part 6 of the 1996 [No 2] Bill deals with sunsetting of legislative instruments. The inclusion of this Part is significant in that the 1994 Bill did *not* contain such provisions. This was, in turn, significant, because the ARC had recommended that provision be made for the sunsetting of legislative instruments.[16] It is also consistent with the kinds of views expressed by the Senate Standing Committee on Legal and Constitutional Affairs in its report, *The cost of justice: Checks and imbalances*,[17] and by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its report, *Clearer Commonwealth law*.[18]

The essence of the sunsetting regime is that legislative instruments would be automatically repealed—or "sunsetted"—5 years after commencement or, in the case of existing instruments that are required to be registered, of their being "backcaptured" on to the Register (ie registered under the procedures provided for by clauses 48 to 50 of the 1996 [No 2] Bill).

The Senate amendments

I now turn to the Senate amendments that are apparently the stumbling-block for the Legislative Instruments Bill. For ease of reference, I will refer to the amendments as proposed to the 1996 [No 2] Bill.

The amendments in question may be divided into the following categories:

(a) amendments directed at eliminating the use of gender-specific language in legislative instruments;[19]

(b) amendments making a certificate issued by the Attorney-General to the effect that a particular instrument is or is not a legislative instrument *itself* an instrument subject to parliamentary scrutiny and disallowance;[20]

(c) amendments directed at requiring that a Legislative Instrument Proposal (an aspect of the consultation process, provided by clause 21 of the 1996 [No 2] Bill)) contain a statement of the direct and indirect *environmental* costs and benefits of a particular option for achieving the objective of the instrument, in addition to a statement of the direct and indirect

social and economic costs and benefits of the option;[21]

(d) amendments providing further exemption from the consultation processes in relation to instruments "related to the prudential supervision of insurance, banking or superannuation or the regulation of the financial markets" or if "notice of the content of an instrument would enable individuals to gain an advantage over other persons";[22]

(e) amendments removing the exemption from disallowance given by subclause 61(7) of the 1996 [No 2] Bill to instruments relating to national legislative schemes;[23]

(f) amendments intended to give the Parliament a supervisory role in relation to the sunsetting of legislative instruments, in order to avoid "throwing good regulations out with the bad";[24]

(g) amendments intended to ensure that certain instruments dealing with terms and conditions of employment in the Australian Public Service are disallowable by the parliament;[25]

(h) amendments intended to modify the exemption from the sunset provisions (contained in subclause 66(1) of the 1996 [No 2] Bill) provided in relation to "any legislative instrument that gives effect to an international obligation of Australia" and "any legislative instrument that confers heads of power on a self-governing territory".[26]

It is not for me to second-guess the Senate (and, of course, the Government) by proffering a view as to whether or not the issues set out above are important enough to govern the life or death of the Legislative Instruments Bill. What I will say, however, is that, in my view, this is a **very** important Bill, containing reforms that are both meritorious and *long* overdue. It will be an enormous shame if, in effect, the baby ends up being thrown out with the bath-water.

Endnotes

1 Parliamentary Paper No 93 of 1992.
2 See Senate Standing Committee on Regulations and Ordinances, *Legislative Instruments Bill 1994, Ninety-ninth Report* (October 1994, Parliamentary Paper No 176 of 1994) and House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Legislative Instruments Bill 1994* (February 1995, Parliamentary Paper No 11 of 1995).
3 As part of both its *Law and Justice* and *New Deal for Small Business* policies.
4 Contained in Part 3 of the later versions of the Bill.
5 See Senate, *Hansard*, 13 May 1998, p 2597.
6 For further discussion of the problem, see, generally, Argument, S, "Parliamentary scrutiny of quasi-legislation", 15 *Papers on Parliament* (May 1992) and "Quasi-legislation: Greasy pig, Trojan horse or unruly child?" (1994) 1 *Australian Journal of Administrative Law* 144 and also the ARC report on *Rule making by Commonwealth agencies*.
7 Nor do I propose to deal with clause 7, which provides that rules of court are not legislative instruments, or clause 8, which allows the Attorney-General to certify whether or not an instrument is a legislative instrument.
8 See, eg, clauses 55 and 56 of the 1996 [No 2] Bill.
9 Subclause 17(1) of the 1996 [No 2] Bill.
10 See clause 37 of the 1996 [No 2] Bill.
11 See clause 38 of the 1996 [No 2] Bill.
12 See clauses 41 to 47 of the 1996 [No 2] Bill.
13 See clauses 48 to 50 of the 1996 [No 2] Bill.
14 See clauses 55 and 56 of the 1996 [No 2] Bill (though note that subclauses 55(2), 56(3) and 56(5) provide a validation mechanism).
15 Though with some modifications in relation to matters such as the time within which instruments must be tabled (see clause 58).
16 See *Rule making by Commonwealth agencies* (supra note 1), at pp 58-60.
17 Parliamentary Paper No 128 of 1993.
18 Parliamentary Paper No 127 of 1993.
19 See Senate, *Hansard*, 13 May 1998, pp 2598-2607, Thursday 14 May, pp 2722-3.
20 See Senate, *Hansard*, 14 May 1998, pp 2723-6.
21 See Senate, *Hansard*, 14 May 1998, p 2727.
22 See Senate, *Hansard*, 14 May 1998, pp 2727-9.
23 See Senate, *Hansard*, 14 May 1998, pp 2729-31.

24 See Senate, *Hansard*, 14 May 1998, pp 2732-3. The quote is from Senator Murray, and appears at p 2732.

25 See Senate, *Hansard*, 14 May 1998, pp 2733-4.

26 See Senate, *Hansard*, 14 May 1998, p 2734. The modifications in question would change "that gives" to "the sole or principal purpose of which is to give" and "that confers" to "the sole or principal purpose of which is to confer".

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