THE LEGISLATIVE INSTRUMENTS BILL— LAZARUS WITH A TRIPLE BY-PASS?

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Introduction

On 26 June 2003, the Federal Government introduced the Legislative Instruments Bill 2003 ('Bill') in the House of Representatives. The Bill is the latest in a series of attempts to put in place 'a comprehensive regime for the consistent management of, and public access to, Commonwealth delegated legislation'.[1] Similar Bills were introduced in 1994, 1996 and 1998 but, for various reasons, they were never passed into law. This article discusses the history of the Bill, its key features and also the differences between this and previous versions of the Bill.

What's the problem?

The Bill, and its predecessors, is, in large part, the Government's response to the Administrative Review Council's 1992 report, *Rule Making by Commonwealth Agencies* ('ARC Report').[2] The ARC Report recognised that delegated legislation in Australia, at the Commonwealth level, was something of a legislative jungle, with much of it being badly drafted and almost inaccessible to the general public. It also recognised that there was no discernible logic to the categorisation and nomenclature of delegated legislation or the extent to which particular examples of it were subject to scrutiny by the Parliament while others were not.
There are currently four basic problems. The first three are the:

- proliferation;
- poor quality of drafting; and
- inaccessibility;

of quasi-legislative instruments. This refers to the vast array of 'guidelines', 'directions', 'orders', 'rules' and other types of instruments that are provided for in Commonwealth legislation and that fall outside the jurisdiction of the *Statutory Rules Publication Act 1903* (Cth)).[3] The fourth problem is the tendency for legislative activity to be conducted other than by the legislature and without the scrutiny of the legislature.

It is important to note that comments about the poor quality of drafting should not be seen as a criticism of those who draft the vast bulk of instruments that are covered by the Statutory Rules Publication Act, that is, the Office of Legislative Drafting ('OLD'). Rather, it is a reflection of the fact that, since the kinds of instruments that are involved fall outside OLD's jurisdiction, they tend to be drafted by 'ordinary' public servants, rather than by professional drafters.

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History of the Bill's predecessors

In 1994, the (ALP) Federal Government introduced the Legislative Instruments Bill 1994 ('1994 Bill'). 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[4]—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 (then in opposition) affirmed its commitment to the reforms promoted by the 1994 Bill, focussing, in particular, on the Bill's potential benefits for business.[5] This commitment was given effect when the current (Coalition) Government was first elected. The Legislative Instruments Bill 1996 ('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 the 1996 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'.

The 1996 Bill went nowhere. Between June 1996 and December 1997, the 1996 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) ('1996 (No 2) Bill') was introduced into the House of Representatives. It was 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:

> The 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 House and the Bill will not be returned to this chamber.[6]

This response suggested that the 1996 Bill might be used as a double dissolution trigger. It was not. The Coalition Government was re-elected at the 1998 election. During the following Parliament, there were indications that a Legislative Instruments Bill would again be introduced but this did not occur in that Parliament.

The Bill

The central tenet of the Bill is to make 'legislative instruments' subject to a consistent requirements as to drafting, public consultation, disallowance by the Parliament and registration on a publicly-accessible electronic database.

A 'legislative instrument' is defined in the Bill as an instrument made in the exercise of a power delegated by the Parliament. The term includes regulations, ordinances, orders, determinations, guidelines and a myriad of other instruments. Significantly, the Bill operates in relation to instruments depending on their legal effect. It applies to instruments with 'a legislative effect', that is, instruments that determine or alter the content of the law, rather than apply it and that have 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 (clause 5). This is in contrast to the current situation, where the sorts of requirements imposed by the Bill operate more by reference to what an instrument is called. That is, the current

requirements concerning tabling, disallowance and publication apply in relation to 'regulations' and 'disallowable instruments' but, generally, not to orders, determinations, guidelines, etc.

Certain instruments are explicitly excluded from the definition of legislative instruments (clause 7).

The Bill imposes on the Secretary of the Attorney-General's Department an obligation to take steps to promote 'legal effectiveness, clarity, and intelligibility to anticipated users' of legislative instruments. This includes a role in the drafting or in supervising the drafting of instruments, scrutinising drafts, providing advice on drafting and providing training and precedents to officers of Government agencies (clause 16).

Under the Bill, legislative instruments must be tabled in the Parliament within 6 sitting days of being made (clause 38). This is a significantly shorter period than the 15 sitting days currently allowed by subsection 48(1) of the *Acts Interpretation Act 1901*. In this context, it should be remembered that, given the frequency of Parliamentary sittings, a period of 15 sitting days will generally cover a period of months rather than weeks. Once tabled, legislative instruments are subject to disallowance by either House of the Parliament, under provisions that replace the existing disallowance provisions of the *Acts Interpretation Act 1901* (clause 42).

As soon as practicable after they have been made, legislative instruments must also be lodged (in electronic form) with the Attorney-General's Department, for inclusion on the Federal Register of Legislative Instruments (clause 25). If a legislative instrument is not registered, it is not enforceable (clause 31). There is also a process for 'backcapturing' legislative instruments made prior to the passage of the Bill. For instruments made in the 5 year period prior to the enactment of the Bill, the rule-maker (ie the person who made them) has 12 months to lodge them for registration. For instruments made more than 5 years prior to the enactment of the Bill, a period of 3 years is allowed (clause 29). Failure to lodge these existing instruments within the stipulated timeframes renders them unenforceable (clause 32).

The Bill also contains mechanisms for 'sunsetting' existing legislative instruments. In simple terms, a legislative instrument ceases to have effect 10 years after being made, unless the Attorney-General is satisfied that this should be deferred (clauses 50 and 51). The purpose of such a mechanism is to ensure that the statute book is not cluttered by redundant or out-of-date instruments. If enacted, it would bring the Commonwealth into line with similar regimes in NSW, Queensland, South Australia, Tasmania and Victoria. A significant feature of the Bill is that it uses a 10 year sunset period, as do all the other named jurisdictions except NSW. This is double the 5 year period provided for in the previous version of the Bill (and which currently operates in NSW).

The effect of the sunsetting mechanism in NSW has been significant in reducing the number and volume of delegated legislation. The NSW Parliamentary Counsel compiles figures annually on the number of statutory rules and the number of pages of statutory rules, compared to previous years. The most telling comparison is between the numbers and number of pages of statutory rules when the sunsetting requirements came into effect (1990) and now. The relevant figures are:

	1 July 1990	1 May 2003
Total no. of rules:	976	445
Total no. of pages:	15,075	8,144

On these figures, the number of statutory rules operating today in NSW is approximately 46% of the number operating in 1990. These statutory rules occupy approximately 54% of the pages occupied in 1990. This is surely a significant reduction.

Certain legislative instruments are explicitly excluded from the operation of the sunsetting provisions (clause 54). The number of instruments excluded is substantially higher than in previous versions of the Bill.

The Bill provides that the Attorney-General must table in the Parliament a list of legislative instruments that are to be 'sunsetted', prior to the sunsetting taking place (clause 52) and gives either House the power to continue selected instruments in force (clause 53).

Another noteworthy feature of the Bill is that it contains a greatly-simplified process for public consultation in relation to legislative instruments. It provides that, before a rule-maker makes a proposed legislative instrument that is likely:

(a) to have a direct, or a substantial indirect, effect on business; or

(b) to restrict competition;

the rule-maker must be satisfied that any consultation that he or she considers to be appropriate *and* is reasonably practicable to carry out *has* been carried out (clause 17). While the Bill then suggests the forms that consultation might take, it does not contain the detailed provisions dealing with consultation that were set out in Part 3 of the 1996 Bill. Unlike previous versions of the Bill, there is no nomination of legislation that provides for legislative instruments that are 'likely' to have an effect on business. This means that the Bill leaves the decision as to whether consultation is required and, if so, what consultation is appropriate squarely with the rule-maker.

The 1996 Bill provided that the only legislative instruments in relation to which the consultation requirements applied were those made under the primary legislation specified in Schedule 2 of the 1996 Bill (which was headed 'Enabling legislation providing for legislative instruments likely to have an effect on business'). It is not surprising that, at the time of the 1996 Bill, Government agencies would have been keen that their legislation not be listed in this Schedule. This Bill avoids that issue.

It is important to note that a failure to consult has no effect on the validity or enforceability of a legislative instrument (clause 19).

The consultation process is also relevant in the context of 'regulatory impact statements' ('RIS').[7] The Australian Capital Territory,[8] NSW,[9] Queensland,[10] Tasmania[11] and Victoria[12] all have statutory requirements that (subject to certain specified exceptions) an RIS be prepared if delegated legislation is likely to impose an appreciable cost or burden on the community or on a part of the community. As the Second Reading Speech to the Bill notes, there is currently a requirement in the Commonwealth jurisdiction that an RIS be prepared - both in relation to delegated *and* primary legislation - if legislation will directly affect business, have a significant indirect effect on business, or restrict competition. These are administrative requirements only, however, and are not supported by legislation.[13]

The Bill contains many other differences when compared to the version introduced into the Parliament in 1998. Other than the (unexplained) dropping of the statutory position of 'Principal Legislative Counsel' (who would have assumed the obligations this Bill places on the Secretary of the Attorney-General's Department), the essence of those differences is that they appear to make the Bill less onerous for rule-makers than its predecessors. That said, it nevertheless seeks to impose a consistency and discipline that is currently lacking in

Commonwealth delegated legislation. We can only wait to see whether it meets with the approval of the Parliament. And hope that it does, as the reforms to be introduced by the Bill are both necessary and would also bring the Commonwealth into line with the majority of other Australian jurisdictions.

Endnotes

1 Note that the term 'subordinate legislation' is used in various jurisdictions and contexts to refer to the same form of legislation.
2 Parliamentary Paper No 93 of 1992.
3 For further discussion of 'quasi-legislation', see Argument, S, 'Parliamentary scrutiny of quasi-legislation', (15) *Papers on Parliament* (May 1990). See also Pearce, DC and Argument, S, *Delegated Legislation in Australia* (2nd ed) (1999, Butterworths, Sydney), at pp 7-12.
4 See Senate Standing Committee on Regulations and Ordinances Report No 99, *Legislative Instruments Bill 1994* (October 1994) (Parliamentary Paper No 176 of 1994); 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).
5 As part of both its *Law and Justice* and *New Deal for Small Business* policies.
6 Senate, *Hansard*, 13 May 2597, at page 2597. For further discussion of the detail of the Senate amendments, see 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 Inc, Canberra), at pages 259-60.
7 Sometimes referred to as 'regulation impact statements'.
8 See *Legislation Act 2001* (ACT), sections 34-7.
9 See *Subordinate Legislation Act 1989* (NSW), sections 5-7.
10 See *Statutory Instruments Act 1992* (Qld), sections 43-6.
11 See *Subordinate Legislation Act 1992* (Tas), sections 3A-10.
12 See *Subordinate Legislation Act 1994* (Vic), sections 6-12.
13 See *Legislation Handbook* (1999, Department of the Prime Minister and Cabinet, Canberra), at paragraphs 8.16-7 and, generally, *A guide to regulation* (2nd ed) (Office of Regulation Review, Canberra), especially at parts A3 and A12.