

THE LEGISLATIVE INSTRUMENTS BILL LIVES!!

*Stephen Argument**

The (stormy) passage of the Bill

Despite the pessimism that may have been evident in the article in *AIAL Forum* No 39,¹ on 4 December 2003, the Federal Parliament passed the Legislative Instruments Bill 2003 ('Bill'), a mere 9 years since the first attempt to enact such legislation (and 11 years since the Administrative Review Council's 1992 report, *Rule Making by Commonwealth Agencies*) and at only the 4th such attempt. What a blessed relief!

Even so, the passage of the Bill was by no means plain sailing. First, the Bill was the subject of an inquiry by the Senate Standing Committee on Regulations and Ordinances. That Committee recommended that various amendments be made to the Bill.² The recommendations were largely accepted by the Government, with the result that a raft of Government amendments were proposed when the Senate finally considered the detail of the Bill, on 2 December 2003.³ Despite (again) generally supporting the Bill, the non-Government parties in the Senate defeated two of the Government amendments and passed an additional amendment moved by the Australian Democrats ('Democrats').

The two Government amendments defeated related to the effect of retrospectively commencing legislative instruments that have a disadvantageous effect on the rights of individuals or would impose liabilities on individuals retrospectively. According to the Government, they were merely an attempt to 'modernise' the drafting and to avoid 'the law changing part way through a day'.⁴ The Australian Labor Party ('ALP') and the Democrats smelt (or perhaps imagined) a rat, however, and linked the proposed amendments to the recent attempt to excise Melville Island from the Australian Migration Zone.⁵

The Democrats amendment related to the consultation provisions in the Bill. As noted in the earlier article, a noteworthy feature of this version of the Bill is that it contained a greatly-simplified process for public consultation in relation to legislative instruments, providing that, before a rule-maker made a proposed legislative instrument that was 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. The Democrats amendment proposed that consultation should also be necessary where a legislative instrument was likely to have a direct, or substantial indirect, effect on:

- any other sector of the community;
- human rights or civil liberties; or
- the natural, Aboriginal, cultural or built environment.⁶

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When the Bill was returned to the House of Representatives, the Government rejected the Democrats amendment passed by the Senate. The ALP maintained its position that the Government amendments defeated by the Senate were aimed at addressing issues from the attempt to excise Melville Island.⁷ The Government (in effect) insisted on those amendments.

The Bill was returned to the Senate on 4 December 2003. Fortunately (for proponents of the Bill), the Senate did not insist on its amendments, with the ALP voting with the Government on this issue.⁸ As a result, the Bill had passed both Houses.

Where to from here?

Clause 2 of the Bill provides that the operative parts of the Bill commence on a date to be fixed by Proclamation. The commencement date must be 'a first day of January or a first day of July occurring after the day on which this Act receives the Royal Assent' (subclause 2(3)). Subclause 2(4) of the Bill provides that if the provisions have not commenced within 12 months of Royal Assent then they commence on first day of January or of July that next occurs. The Bill received the Royal Assent on 17 December 2003. This means that the relevant provisions must be proclaimed to commence on 1 January or 1 July 2004. Failing that, they would automatically commence on 1 January 2005. It seems likely that this last will be the date of commencement.⁹

As a result, agencies affected by the Bill have up to 12 months to prepare for the regime to be introduced by the enactment of the Bill. They must now ensure that they have identified all instruments that will be affected, though this has presumably largely been done already as part of the finalisation of exemptions from the Bill's operation. They must also put in place processes to ensure that the new tabling and lodgement requirements are met.

Possibly more onerous, however, will be the backcapturing requirements. An assessment must now be made of all existing legislative instruments and a decision made as to whether they should continue in force or be allowed to lapse. Finally, there is sunseting, which could creep up on agencies, with the effect that useful instruments could expire. Agencies must, therefore, institute internal processes to manage sunseting and to track instruments as they age. These processes should also allow for a period of consideration well ahead of the sunset date, so that agencies can properly review their legislative instruments and request an extension of their operation, if necessary.

Even with the lessening of the burden in relation to consultation, the Bill clearly involves significant new challenges for Government agencies. The benefits of the Bill, however, in terms of consistent management of, and improved accessibility to, legislative instruments, surely make those burdens worth bearing.

Endnotes

- 1 See Stephen Argument, 'The Legislative Instruments Bill: Lazarus with a triple by-pass?', (2003) 39 *AIAL Forum* 44.
- 2 See Regulations and Ordinances Committee, Legislative Instruments Bill 2003, Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003, 111th Report, October 2003, available at http://www.aph.gov.au/senate/committee/regord_ctte/leg_instruments/index.htm.
- 3 See Senate, *Hansard*, 2 December 2003, at 18286-95.
- 4 See Senate, *Hansard*, 2 December 2003, at 18287-8 (Senator Ellison).
- 5 See, eg, 'Boatpeople land at Melville Island', *The Age*, 4 November 2003.
- 6 See Senate, *Hansard*, 2 December 2003, at 18291.
- 7 See House of Representatives, *Hansard*, 3 December 2003, at 23240-3.
- 8 See Senate, *Hansard*, 4 December 2003, at 18639-40.
- 9 Attorney-General's News Release, 'Better Public Access to Delegated Legislation on the Way', 9 December 2003, R044/2003.