THE *LEGISLATIVE INSTRUMENTS ACT 2004* — IS IT THE CHERRY ON THE TOP OF THE LEGISLATIVE SCRUTINY CAKE?

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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In the (soon to be superseded) 2nd edition of *Delegated Legislation in Australia*, Professor Dennis Pearce and I stated: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.
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> 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 occasions[3]), 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.

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:

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(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',[1] a 'regulation',[2] a 'statutory instrument',[3] a 'statutory rule',[4] a 'subordinate law',[5] 'subordinate legislation'[6] or 'subsidiary legislation',[7] 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 LIA.[8] 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, s 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 (s16(2)).

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),[9] 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).[10] 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.

A similar basis for distinction was adopted in Australia, by the High Court. In *Commonwealth v Grunseit*,[11] 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*,[12] 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, French J 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'.[13]

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.[14]

This aspect of the legislative/administrative distinction was considered last year, by Selway J of the Federal Court, in *McWilliam v Civil Aviation Safety Authority*.[15] After referring to two of the leading authorities on this issue,[16] Selway J stated:

> [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, Selway J 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, Selway J 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.[17]

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 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 Selway J 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 had 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, s 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 (s 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 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.[18] 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.[19]

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:

- 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 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' (s 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 provision 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*[20]).

Section 17(2) provides rule-makers with guidance in determining whether any consultation that has been undertaken was 'appropriate'. Section 17(3) indicates what form 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.[21]

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.[22] 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 Dennis Pearce and I have recently been engaged in, for the purposes of the new edition of *Pearce and Argumen*t, have generated some

thoughts, some of which equate with elements of the 'scorecard' that I developed as part of the 'Apples and oranges' paper.

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.[23]

The establishment of the Legislation Review Committee brings to five the number of jurisdictions with a committee that performs a scrutiny of bills function.[24] Those jurisdictions are now in the majority! It also brings to four the number of jurisdictions in which the committee performs a dual function.[25]

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.[26] The committee went on to recommend the establishment of a scrutiny of bills committee.[27] 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.[28] It is a marvellous resource.

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'.[29] 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 s 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 of the committee's report, entitled

Inquiry into the Subordinate Legislation Act 1994,[30] was that the Subordinate Legislation Act be amended to introduce a similar concept to that contained in the LIA. This was 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.[31]

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.

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, as 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.

ATTACHMENT 1

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, 32	Effect of failure to lodge
Sections 33, 34, 35	Provisions relating to compilations
Section 36	Early backcapturing
Sections 38, 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 sunsetting
Section 52	Requirement that Attorney-General table list of instruments due to sunset
Section 54	Specific exemptions from sunset provisions
Sections 59, 60	Provisions for review of operation of Act

ATTACHMENT 2

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 sunsetting provisions to commence
1 October 2017	Review of operation of sunsetting provisions to be completed
1 April 2018	Sunset date for legislative instruments made before 1 January 2000

Endnotes

1 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.
2 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.
1 *Legislation Act 2001* (ACT), s 9;
2 *Subordinate Legislation Act 1978* (SA), s 4; *Interpretation Act* (NT), s 61.
3 *Statutory Instruments Act 1992* (Qld), s 7.
4 *Subordinate Legislation Act 1989* (NSW), s 3; *Subordinate Legislation Act 1994* (Vic), s 3; *Statutory Instruments Act 1992* (Qld), s 8.
5 *Legislation Act 2001* (ACT), s 8;
6 *Statutory Instruments Act 1992* (Qld), s 9; *Subordinate Legislation Act 1992* (Tas), s 3.
7 *Interpretation Act 1984* (WA), s 5.
8 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).
9 Available at www.frli.gov.au.
10 The Committee on Ministers' Powers, see Report, 1932, Cmd 4060.
11 (1943) 67 CLR 58.
12 (1982) 42 ALR 260.
13 *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].
14. 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.
15 [2004] FCA 1701.
16 *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 and *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 185 ALR 573.
17 See, eg, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, at 267.
18 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.
19 See Argument, S, 'Parliamentary scrutiny of quasi-legislation', 15 *Papers on Parliament* (May 1992), p 26.
20 Parliamentary Paper No 93 of 1992.
21 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.
22 'Apples and oranges: A comparison of the work of the various Australian delegated legislation committees', 1999 (21) *AIAL Forum* 34.
23 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.
24 The others being the ACT, the Commonwealth, Queensland and Victoria.
25 The others being the ACT, Queensland and Victoria.
26 Standing Committee on Law and Justice, *Report No 17 A NSW Bill of Rights* (October 2001), Finding 1, p 114.
27 Ibid, Recommendation 1, p 132.
28 See ss 18 to 26. The ACT Legislation register can be found at www.legislation.act.gov.au.
29 See ACT Human Rights Office website, at http://www.hro.act.gov.au/index.html.
30 September 1992, available at www.parliament.vic.gov.au/sarc/publications.htm. See, in particular, Recommendation 1, at pp 18-38.
31 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).