COMMENTARY ON PAPER BY ASSOCIATE PROFESSOR FRANCE HOULE

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At the risk of being jingoistic, Professor Houle's fascinating insight into the way Canada deals with delegated legislation[1] demonstrates that, like other jurisdictions, Canada has much to learn from Australia, rather than the other way around.

In this commentary, I will pick up just a few of the matters dealt with by Professor Houle and offer some comments about the Australian experience. I will also make some observations about the effect of the *Legislative Instruments Act 2003* (LIA) and the role that it has in keeping Australia at the cutting edge of delegated legislation.

Regulatory impact assessment in the Australian jurisdictions

Over the past 20 years, 'regulatory impact' has developed as a criterion for legislative scrutiny in Australian jurisdictions. Victoria led the way, introducing a statutory requirement for 'Regulation Impact Statements' (RIS) in 1984.[2] New South Wales, Queensland, Tasmania and the ACT have subsequently followed this lead.

While I do not propose to give a detailed assessment of the effectiveness of regulatory impact assessment in these jurisdictions, it must be said that it is patchy (to say the least). In all jurisdictions there is a significant discretionary element, insofar as to whether or not a regulatory impact assessment is required. In the ACT, for example, an RIS must be prepared if a proposed subordinate law is likely to impose appreciable costs on the community, or part of the community.[3] It is for the Minister administering the proposed subordinate law to decide whether or not the proposed law will impose appreciable costs on the community, etc. The requirement is also subject to various exemptions.[4]

In NSW, Tasmania and Victoria (but not the ACT), the regulatory impact assessment process involves public consultation or, at least, a requirement to consider whether public consultation is necessary. While (as I discuss further below) public consultation can never replace proper parliamentary scrutiny of legislation, the extent to which these mechanisms produce 'better' delegated legislation cannot be understated. There is no doubt that input from affected persons or bodies (including through avenues provided by parliamentary review committees) can only lead to an end product that is better than what might ordinarily be produced by government departments and agencies left to their own devices.

Regulatory impact assessment at the Commonwealth level

I should say something about the position in the Commonwealth. Earlier versions of the LIA (of which there were several) contained detailed regulatory impact and consultation requirements. As enacted, however, the consultation requirements of the LIA (contained in Part 3) are much less onerous and entirely discretionary.

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Section 17 of the LIA 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' (subsec 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 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*[5]).

Subsection 17(2) provides rule-makers with guidance in determining whether any consultation that has been undertaken was 'appropriate'. Subsection 17(3) indicates what forms 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 by the Office of Regulation Review (ORR).[6] These requirements apply equally to both primary and delegated legislation.

The ORR website states:

> It is mandatory for Australian Government departments, agencies, statutory authorities and boards to prepare a RIS for all reviews of existing regulation, proposed new or amended regulation, quasi-regulation and proposed treaties involving regulation, which will directly or indirectly affect business, or restrict competition. The Australian Government's RIS requirements are explained in *A Guide to Regulation* (1998).
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> In April 1995, the Council of Australian Governments (COAG) endorsed a set of guidelines - which were amended in November 1997 and June 2004 - to promote good regulatory practice, including the use of RISs by Ministerial Councils and national standard-setting bodies. These principles and guidelines apply to agreements or decisions to be given effect through principal and delegated legislation, administrative directions or other measures which, when implemented, would encourage or force businesses or individuals to pursue their interests in ways they would not otherwise have done. In the communiqué of 25 June 2004 …, COAG made several changes to the principles and guidelines to ensure greater clarification about the operation of RISs involving Australia and New Zealand regulators.[7]

The ORR website also sets out the following information on the RIS process:

> **Aims of the RIS process**
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> While much regulation is necessary and beneficial this is not always the case. In some circumstances, regulation may not be the best means of achieving relevant policy objectives. Where regulation is needed, there will usually be a number of options from which to choose, with different features and effects. The Regulation Impact Statement (RIS) process seeks to assist officials to move towards 'best practice' regulatory design and implementation.
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> Preparation of a RIS formalises and documents the steps that should be taken in policy formulation. It provides a consistent, systematic and transparent process for assessing alternative policy approaches to problems. It includes an assessment of the impacts of the proposed regulation, and alternatives, on different groups and the community as a whole. The primary role of the RIS is to improve government decision-making processes by ensuring that all relevant information is presented to the decision maker when a decision is being made.
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> A RIS has seven key elements which set out:
> (1) the problem or issues which give rise to the need for action;
> (2) the desired objective(s);

(3) the options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objective(s);
(4) an assessment of the impact (costs and benefits) on consumers, business, government, the environment and the community of each option;
(5) a consultation statement;
(6) a recommendation statement; and
(7) a strategy to implement and review the preferred option.

In addition, relevant to all seven criteria is an overriding requirement that the degree of detail and depth of analysis must be commensurate with the magnitude of the problem and with the size of the potential impact of the proposals.

For proposals which maintain or establish restrictions on competition (such as barriers to entry for new businesses or restrictions on the quality of goods and services available), it must be established that:

- the benefits to the community outweigh the costs; and
- the Government's objective can be achieved only by restricting competition;

both of which are requirements under the Competition Principles Agreement.

Finally, apart from the seven elements outlined above, timing and the extent of consultation with the ORR is also taken into consideration when assessing compliance with the Government's RIS requirements.[8]

I have always been sceptical of the effectiveness of the ORR requirements, as opposed to the legislated requirements that would have been imposed if one of the earlier versions of the LIA had been enacted. My scepticism stems from the ease with which I assumed that non-legislated requirements could be avoided. This scepticism may have been misplaced, however.

In its most recent survey on the operation of the RIS process, *Regulation and its Review 2004-05*,[9] the ORR reported that in 2004-05, RISs were prepared for 84% of the 85 Commonwealth regulatory proposals that required them. Of those prepared, three were assessed as inadequate, giving an overall compliance rate of 80%.[10] While I thought these figures were surprisingly good, in fact they represented a significant decrease in overall compliance from the previous year, when the rate was 92%.

These statistics aside, I am not in a position to offer an opinion about the effectiveness of the RIS process at the Commonwealth level. Apart from any other reason, it is not the focus of my interest in the scrutiny of delegated legislation. On the figures, however, it would seem that there is a relatively high level of compliance with the ORR requirements, despite their lack of legislative basis.

The RIS as an extrinsic aid to interpretation

If an RIS is prepared in relation to a Bill, the *Cabinet Handbook* (May 2000) indicates that it should generally be included in the Explanatory Memorandum to the Bill.[11] Though the *Federal Executive Council Handbook* contains no such requirement in relation to delegated legislation, I am advised that the practice is to include the RIS with the Explanatory Statement to a regulation, if one has been prepared.

If an RIS has been incorporated into an Explanatory Memorandum or an Explanatory Statement (as the case may be), this means that, as a result of para 15AB(2)(e) of the *Acts Interpretation Act 1901*, the RIS can be used as an extrinsic aid to interpreting the relevant legislation. In particular, if it is capable of assisting in the ascertainment of the meaning of the provision, it can be used:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

It is therefore uncontroversial that an Australian court could make use of an RIS as an aid to interpretation. The more important issue is whether it would actually assist the court in its deliberations, not whether the court has the wherewithal to make proper use of the RIS. Explanatory memoranda and statements are, in the Commonwealth jurisdiction at least, notoriously bland and unhelpful documents. This point was eloquently made by Higgins CJ of the ACT Supreme Court, when, in a recent decision, his Honour stated:

> The explanatory memorandum, consistently with the apparent purpose of such documents of explaining as little as possible, merely stated in respect of the proposed s 51A ……[12]

That said, I am not aware of any use, by a court, of an RIS *pre se* as an extrinsic aid to interpretation.

The deference of the courts to the Executive

In her paper, Professor Houle refers to the 'technocratic' use of Regulatory Impact Analysis Statements (RIAS) in Canada. As I understand this term, it refers to the reliance, by the courts, on the expertise of the 'Public Administration' in putting material in a RIAS that the courts can then rely upon to assist in resolving issues of interpretation. It occurs to me that this has echoes of the deference that Australian courts have had to the Executive in matters of delegated legislation.

In *Douglas and Jones's Administrative Law* (5th ed), the authors state:

> It should be noted …. that successful attacks on the validity of subordinate legislation are rare. There are various reasons for this. They include the relative discretion enjoyed by rule-makers as compared with administrative decision-makers; the fact that rule-makers normally have much more time to devote to decision-making than makers of purely administrative decisions; the careful vetting process which typically characterises the rule-making process; and review by parliamentary committees charged, inter alia, with examining the legality of the legislation before them.[13]

A similar view is put in Pearce and Argument's *Delegated Legislation in Australia* (3rd ed), where the authors note that the courts' approach to delegated legislation generally involves a presumption as to validity and a reluctance to substitute judicial opinion for that of the legislation-maker (see, for example, paras [14.6] and [21.12]).[14]

Pearce and Argument refer to the High Court's decision in *Gibson v Mitchell* where, in considering what was 'necessary or convenient' for carrying out the purposes of the *Post and Telegraph Act 1901* (Cth), Isaacs J stated:

> Those words in that collocation mean necessary or convenient from the standpoint of administration. Primarily, they signify what the Governor-General may consider necessary or convenient, and no court can overrule that unless utterly beyond the bounds of reason and so outside power. [15]

A similar approach can be found in the approach of various courts to the concept of unreasonableness. An interesting proviso, however, occurs (in Pearce and Argument's view) in the context of situations where the delegated legislation in question is not subject to

scrutiny by the Parliament. In *Evans v Minister for Immigration and Multicultural and Indigenous Affairs*, Gray J stated:

> The absence of legislative scrutiny to the content of the notice is a further ground on which the need for strict judicial scrutiny of the performance of the Minister's function is based.[16]

This echoed a statement of Thomas J in *Paradise Projects Pty Ltd v Gold Coast City Council*:

> The by-laws which I have concluded to be *ultra vires* are typical examples of lazy drafting. It is much easier to frame general prohibitions than to define exactly what is intended. Those who draft ordinances should identify their true target rather than attack the community with grapeshot. Unless this trend is identified and curbed by the courts, we may find practically every form of human activity contrary to some by-law or regulation, or that a permit is required for virtually every form of everyday activity. If the courts do not control these excesses, nobody will.[17]

Strong stuff!!

In my view, one of the advantages of an RIS process is that it helps to identify the true 'target' and lessens the chance of legislation as 'grapeshot'.

Knowledge of the law

In her paper, Professor Houle notes that, since societies operate on the basis that citizens are presumed to know the law, it follows that individuals affected by a law should be able to ascertain the limits of permissible conduct under the law. This is an issue that I have previously written about, in the context of my tirades against the use of 'quasi-legislation'.[18]

The gist of my concern has been that a subsidiary - but perhaps more serious - aspect of the difficulty encountered by the general public in gaining access to the vast body of quasi-legislative instruments promulgated under various Acts is the effect that this has on the legitimacy of such instruments. In *Blackpool Corporation v Locker*, Scott LJ (a member of the Donoughmore Committee on Ministers' Powers) stated:

> [T]here is one quite general question affecting all ... sub-delegated legislation, and of supreme importance to the continuation of the rule of law under the British constitution, namely the right of the public affected to know what the law is.[19]

This passage was cited with approval by Stephen J of the High Court in the leading Australian case of *Watson v Lee*.[20]

After noting the obligations which existed under British law (as they do in Australia) to publish Acts of Parliament and statutory instruments, Scott LJ went on to say:

> On the other hand, if the power delegated to the minister is to make sub-delegated legislation and he exercises it, there is no duty on him, either at statute or common law, to publish his sub-delegated legislation: and John Citizen may remain in complete ignorance of what rights over him and his have been secretly conferred by the minister on some authority or other, and what residual rights have been left to himself.[21]

His Honour went on to say that, if this was the case, then

> [f]or practical purposes, the rule of law, of which the nation is so justly proud, breaks down because the aggrieved subject's legal remedy is gravely impaired.[22]

In the course of his decision, Scott LJ also referred to the maxim that ignorance of the law is not a defence. This point was made in a similar context by Professor Dennis Pearce, in 1989, in the course of his address to an Administrative Review Council conference on rule-making. Professor Pearce suggested to the conference that

> the possibility arises that a court might hold that there is an obligation to publish legislation if the presumption that a person is presumed to know the law is to be maintained.[23]

These points are well made. Fortunately, however, they are now less of an issue in the Commonwealth jurisdiction, as a result of the enactment of the LIA.

Delegated legislation and the Legislative Instruments Act 2003

This is an opportune time for me to say something about the LIA.

The enactment of the LIA was, arguably, the single greatest legislative contribution to the law of delegated legislation since Henry VIII. By far the most significant element of the 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:

(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', [24] a 'regulation',[25] a 'statutory instrument',[26] a 'statutory rule',[27] a 'subordinate law',[28] 'subordinate legislation'[29] or 'subsidiary legislation',[30] depending on the jurisdiction.

The effect of the approach to instruments in the non-Commonwealth jurisdictions 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.[31] 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?

Four basic problems are manifested in the 'development' of delegated legislation in the 20 or 30 years prior to the enactment of the LIA. 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 (s 16(2)).

Subsection 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),[32] 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.

Acceptance of the law

This leads me to my final comment on Professor Houle's paper. Professor Houle refers to the 'contentious' claim that the public consultation involved in an RIAS process gives rise to a 'social contract' between the Government and the governed, indicating an 'acceptance of the law by the governed'.

This caused me to re-visit my 'Parliamentary scrutiny of quasi-legislation' paper, where I stated:

> Though consultation might offer many benefits to the people affected by a proposed rule or guideline and while several of the provisions referred to involve a collateral benefit in ensuring wider publication, they do nothing toward redressing the problem of proper accountability to the Parliament and the further problems which that lack of accountability involves. The executive arm of government still ends up making the laws (or the quasi-laws) instead of the Parliament. In any event, consultation matters little unless those doing the consulting actually listen to and act on the responses that they receive.[33]

Acceptance of the law, by the public, is one thing. It cannot, however, operate to give validity to legislation that is otherwise invalid.

Conclusion

As I stated at the outset, Professor Houle's paper gives a fascinating insight into recent developments in delegated legislation in Canada and, in particular, into the use by the courts of the RIAS process as an extrinsic aid to the interpretation of regulations. It also provides an opportunity to measure the Australian approach to delegated legislation against that of Canada. In the light of that comparison, Australians can justifiably feel proud about the way in which Australia (in many ways) leads the world in relation to delegated legislation.

Endnotes

1 In this commentary, the term 'delegated legislation' is preferred, though the term 'subordinate legislation' is used where that is the term used in a particular jurisdiction.
2 See *Subordinate Legislation (Review and Revocation) Act 1984* (Vic). The terms 'regulation impact statement' and 'regulatory impact statement' are variously used by Australian jurisdictions. In this commentary, the abbreviation 'RIS' is used to refer to both derivations.
3 See *Legislation Act 2001* (ACT), s 34.
4 See *Legislation Act 2001* (ACT), s 36.
5 Parliamentary Paper No 93 of 1992.
6 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.
7 http://www.pc.gov.au/orr/reform/risrequirements.html
8 http://www.pc.gov.au/orr/reform/risaims.html.
9 http://www.pc.gov.au/research/annrpt/reglnrev0405/index.html.
10 See pp xvi to xix.
11 See *Cabinet Handbook* (May 2000) (http://www.pmc.gov.au/parliamentary/index.cfm), para 2.13.
12 See *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125, para 82.
13 Douglas, R, *Douglas and Jones's Administrative Law* (5th ed), 2006, The Federation Press, Sydney, p 333.
14 Pearce, DC and Argument, S, *Delegated Legislation in Australia* (3rd ed), 2005, LexisNexis, Sydney.
15 (1928) 41 CLR 275, p 279.
16 (2003) 203 ALR 320, p 326.
17 [1991] 1 Qd R 314, p 321.
18 See, generally, Argument, S, 'Parliamentary scrutiny of quasi-legislation' (15) *Papers on Parliament.*
19 [1948] 1 KB 349, p 361.
20 (1979) 144 CLR 374, at p 394.
21 [1948] 1 KB 349, p 362.

22 [1948] 1 KB 349, p 362
23 Pearce, DC, 'The Rule of Law and the Lore of Rules', Legislative Studies, Vol 4, No 2, Spring 1989, 3, p 4.
24 *Legislation Act 2001* (ACT), s 9;
25 *Subordinate Legislation Act 1978 (SA), s 4; Interpretation Act (NT), s 61.*
26 *Statutory Instruments Act 1992* (Qld), s 7.
27 *Subordinate Legislation Act 1989* (NSW), s 3; *Subordinate Legislation Act 1994* (Vic), s 3; *Statutory Instruments Act 1992* (Qld), s 8.
28 *Legislation Act 2001* (ACT), s 8;
29 Statutory Instruments Act 1992 (Qld), s 9; Subordinate Legislation Act 1992 (Tas), s 3.
30 *Interpretation Act 1984* (WA), s 5.
31 See, generally, Pearce and Argument, *Delegated Legislation in Australia* (3rd ed), 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).
32 Available at www.frli.gov.au.
33 Argument, S, "Parliamentary scrutiny of quasi-legislation" (15) *Papers on Parliament*, pp 23-24.