

THE IMPORTANCE OF BEING LEGISLATIVE: A REPRISE

*Dennis Pearce**

Ten years ago I gave a paper at the 1998 Annual Public Law Weekend entitled 'The Importance of being Legislative'.¹ In that paper I noted that there has long been criticism of the practice of purporting to classify government functions as being legislative on the one hand or administrative/executive on the other. I concluded that 'It is fashionable to assert that a clear distinction between legislative and executive instruments cannot be made. Certainly it is difficult to do so. However ... consequences do flow from the categorisation for requirements as to making, parliamentary oversight and judicial review of the two types of instruments. It therefore seems that the classification of functions doctrine will be around to test us for some time yet.'²

If anything, the need to be able to draw a distinction between the two types of activities has become more significant since then because of the enactment of the Legislative Instruments Act 2003 (LIA). This has been demonstrated in the recent decision of the Federal Court in *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee (Roche)*³, to which I return below.

The LIA requires 'legislative instruments' to be registered on the Federal Register of Legislative Instruments. A failure to register such instruments renders them unenforceable⁴.

Section 5 of the LIA defines a legislative instrument as follows:

- (1) a **legislative instrument** is 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.
- (2) 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.

The inclusion of this definition may be contrasted with the position in the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) where the meaning of an 'administrative decision' which may be reviewed is not expanded.

There has been no judicial consideration of the meaning of the definition in the LIA.

However, the courts have been obliged on many occasions to determine whether a decision is of an administrative character for the purposes of the application of the ADJR Act. Some of these cases have involved the issue whether a decision is to be classified as administrative or legislative.

* *Dennis Pearce is Emeritus Professor, ANU College of Law, Australian National University and Special Counsel, DLA Phillips Fox.*

The two leading decisions are *RG Capital Radio Pty Ltd v Australian Broadcasting Authority*⁵ and *Visa International Services Association v Reserve Bank of Australia*⁶ (*Visa*).

Tamberlin J in the *Visa* case⁷ conveniently summarised the Full Court's consideration of the legislative/administrative dichotomy in the *RG Capital* case as follows:

In *RG Capital* ... the Full Court pointed out that there is no simple rule for determining whether a decision is of an administrative or legislative character. The court proceeded to consider some of the matters discussed in the authorities and had regard to those considerations. The court considered the characterisation question taking a cumulative approach to various considerations. The particular matters which the court took into account included the following:

- . Whether the decisions determined rules of general application or whether there was an application of rules to particular cases.
- . Whether there was Parliamentary control of the decision.
- . Whether there was public notification of the making of the regulation.
- . Whether there has been public consultation and the extent of any such consultation.
- . Whether there were broad policy considerations imposed.
- . Whether the regulations could be varied.
- . Whether there was power of executive variation or control.
- . Whether provision exists for merits review.
- . Binding effect.

The court considered that it was necessary to take into account all of these considerations and no single one was determinative.

As a general guide, it seems that the more general the application of the decision in question, the greater the parliamentary connection and the broader the issues involved, the more likely it is that the decision will be classified as legislative. Conversely, if few people are directly affected, the executive has continuing oversight of the decision and merits review is available, the decision is likely to be considered to be administrative in nature.

This approach was followed by Branson J in *Roche*⁸.

Chapter 3 of the *Therapeutic Goods Act 1989* (Cth) provides for the determination of standards for therapeutic goods for use in humans and the registration and listing of such goods. It is part of a general scheme for the regulation of the availability of therapeutic goods that is supported by complementary Federal, State and Territory legislation. The goods are listed in the Standard for the Uniform Scheduling of Drugs and Poisons commonly referred to as the Poisons Standard.

The National Drugs and Poisons Schedule Committee, the respondent in *Roche*, makes decisions in relation to the classification and scheduling of substances. It had included one of Roche's medicines in a schedule to the Standard that permitted the sale of the medicine to be advertised publicly. Following complaints about the advertising of the substance, the Committee removed its listing from that schedule. This meant that the medicine could no longer be advertised directly to consumers.

Roche brought an application under the ADJR Act and under s 39B of the *Judiciary Act 1903* challenging this decision of the Committee.

Branson J found that the decision was legislative in character, not administrative, and it could not therefore be challenged under the ADJR Act. Her Honour took into account as indicators of the decision being legislative that the listing of the substance in the schedule was applicable to all versions of the substance, not just that manufactured by Roche; public consultation was an important step in the listing process; the listing was part of the national scheme controlling the sale and advertising of the substance; there was no provision for merits review of the listing decision; and the decision was published in the Gazette.

Pointing towards the decision being administrative in character was that the requirements governing the listing were fairly circumscribed and that there was no provision for the listing decision to be tabled in the Parliament. Her Honour considered that these factors were not sufficient to outweigh those that indicated that the decision was legislative.

To this extent, the decision in *Roche* is a straightforward enough application of the existing authorities. However, there are two further aspects of the decision that warrant consideration.

First, having held that the listing decision was not reviewable under the ADJR Act, Branson J then considered whether the decision could be challenged under s 39B of the Judiciary Act. Second, the practical implication of the judgment in relation to the listing decision should be noted: if the decision was legislative, the LIA applied to it.

Section 39B(1)(c) of the Judiciary Act gives the Federal Court 'jurisdiction in any matter...arising under any laws made by the Parliament'. Clearly the Committee's decision to remove the substance from the schedule permitting it to be advertised was such a matter. However, the novelty in Branson J's judgment lies in the manner in which she undertook the review of the decision.

As I discussed in my previous article, a distinction has traditionally been drawn between the grounds available to review decisions of a legislative and of an administrative character. The approach adopted by the courts has been to confine review of legislation to the issue of power. Is the legislation authorised by the empowering provision in the Act providing for its making? This has resulted in the grounds of review being more limited. This has particularly been the case in regard to the bases adopted for making the legislation.

Relevancy and irrelevancy have not been taken up as grounds for review. Motive for making as a ground has required an example of blatant use of the power for an unauthorised purpose. Acting under dictation or inflexible application of policy have never been seen as appropriate grounds for review of legislation, presumably because the content of legislation is almost by definition driven by these factors. Unreasonableness has been rejected as a separate ground of review, although it might come in by the back door of being an abuse of the making power. Natural justice is not required unless the persons affected by the legislation are so circumscribed that the legislation can be seen as really being a decision directed at them.

This differentiation between the bases for reviewing legislation and administrative decisions was strongly influenced by the fact that delegated legislation was, in times past, almost exclusively made by local government bodies, the Crown representatives and Ministers. The courts deemed it inappropriate for them to concern themselves with the issues dealt with in legislation made by these bodies whose primary accountability lay to their electors. Further, the content of much of this legislation was likely to be influenced by political considerations. However, at least at the Commonwealth level, following the passage of the LIA and its broadening of the range of instruments deemed to be legislative, the basis for making the distinction between legislative and administrative decisions for review purposes may be thought to have less relevance. Many legislative instruments will be made by the same persons who make administrative decisions.

Whether this is what underlay Branson J's approach in *Roche* is not made clear. However, her Honour ignored any distinction that might exist between the bases for reviewing the different types of decisions and reviewed the amendment of the Poisons Standard by applying the standard administrative law grounds. So the validity of the Committee's action was considered under the heads of relevancy and irrelevancy, unreasonableness, no evidence, dictation, inflexible application of policy and natural justice. No reference was

made to the older delegated legislation decisions that either reject or qualify the application of these grounds of review to legislative action.

Is this a portent for the future? Does it mean that the reluctance shown in the older cases to subject legislation to the level of scrutiny afforded administrative decisions is to be abandoned? Or is there going to be a differentiation drawn between what might be referred to as upper and lower level legislation? Perhaps those legislative instruments that are made by representative bodies and by the upper echelons of government will continue to be treated with a degree of deference while those that are made by administrators will be given the same oversight as administrative decisions made by those persons.

On the other hand, perhaps *Roche* points the way to the future. It was not long ago that the courts declined to review administrative decisions of Ministers and the Crown representatives on grounds such as motive and natural justice. That self-imposed judicial restraint has been abandoned. Is there any reason why such restraint should still be adopted where legislative decisions are concerned?

There will often be evidentiary problems, particularly where the motive or the bases for decisions have to be established, notably in the case of representative bodies. However, there does not seem to be any inherent reason why persons making legislative decisions should not be required to adhere to the same standards as those who make administrative decisions. The courts have recognised that there is flexibility in applying the grounds of review to administrative decisions both in regard to the decision maker and to the obligations that must be complied with. So it is recognised that Ministers will make decisions in a different way from public servants. The approach to the review of administrative decisions based on the grounds of motive, dictation and policy application has varied with the decision maker. Across the board, procedural fairness requirements are adapted to fit the circumstances.

As noted in my previous paper, Dixon J in *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee*⁹ said:

I do not think that in English law such a question [improper purpose as a ground of invalidity] will be found ever to be solved by ascertaining whether, upon a correct juristic analysis, the power should or should not be described as legislative.

The approach adopted by Branson J in *Roche* recognises the wisdom of this opinion. If followed, it would do much to render the importance of being legislative less significant. And that could not be regarded as other than beneficial.

However, if *Roche* indicates the possibility of an easing in the need to engage in a classification of functions for the purpose of determining the grounds on which a decision may be reviewed, it reveals a major issue that confronts Commonwealth public service decision makers. The effect of the LIA is that the correct classification must be given to a decision or it may be rendered unenforceable and action taken to implement it invalid.

The consequence of the finding in *Roche* that the decision was legislative resolved the application to have the decision set aside under the ADJR Act in favour of the respondent. However, the respondent then found itself in a much worse situation than if it had lost this part of the battle. If the action in removing the product from the schedule to the Poisons Standard was legislative, the instrument effecting the removal was a legislative instrument. It should therefore have been registered under the LIA. As it had not been registered, it had no effect.

Worse, the fact of the amendment of the Poisons Standard being held to be legislative action revealed that the Standard itself was a legislative instrument and as it had not been registered, it had no effect. Still worse, the Standard had been made prior to the commencement of the LIA. It was therefore subject to the back-capturing provisions of the LIA¹⁰. The failure to register it within the time provided for registration of existing instruments meant that it was deemed to have been repealed¹¹. If ever there was a Pyrrhic victory!

The upshot has been the making and registration on 14 December 2007 of a new Poisons Standard. Presumably there will also have to be a validating Act to cover the actions taken over the years that have passed since the original Standard was made.

The lesson in this sorry saga is evident. If a decision is open to be classified as legislative, it must be registered. This may be considered to be problematic in that it then requires the tabling and possible disallowance of the instrument embodying the decision. However, the alternative of the decision being unenforceable is much worse. There is also the worrying thought that some instruments that have been assumed to be administrative and not requiring registration may, if tested, fall the other side of the line. If they are found to be legislative, they will be unenforceable. One can predict a new line of argument being put by counsel in cases that involve challenges to government decisions.

Since writing this article the Trade Practices Amendment (Access Declarations) Bill 2008 has been introduced into the Parliament. It provides that certain declarations made under s 152AL of the Trade Practices Act are not, and are to be taken never to have been, legislative instruments. It is understood that the Bill was prepared following submissions of counsel in an action in which the declarations were relevant suggesting that they might be legislative.

For Commonwealth public servants the importance of whether their decision is 'legislative' still remains.

Endnotes

- 1 Published in 21 *AIAL Forum* 26.
- 2 *Ibid*, p 33.
- 3 (2007) 98 ALD 14.
- 4 LIA, ss 31, 32.
- 5 (2001) 113 FCR 185; 185 ALR 573.
- 6 (2003) 131 FCR 300.
- 7 At [592].
- 8 See n 3.
- 9 (1945) 72 CLR 37 at 80.
- 10 S 29.
- 11 S 30.