Subordinate Rule Making - An Historical Perspective

Stephen Bourke
Principal Legal Officer
Administrative Review Council

Any system of rule making can be thought of as a means to impose a set of values over the way a society conducts its activities. In England and Australia, as with other Western common law countries, those values emerge as democratic principles where the rule of law is dominant.

Separation of powers is entrenched in the Australian Constitution. But history shows that the law making function has been practised by the Crown (now the Executive) as well as the Parliament.

Delegating legislative power to the Executive has not been without its difficulties given the distinct constitutional roles of Parliament and the Executive. Nevertheless responsible government sees the executive in control of at least one of the Houses of Parliament. An examination of the history of subordinate rule making provides an important perspective for any future reform.

Early Delegated Legislation in England

While there are instances of the making of delegated legislation dating back to the 14th and 15th centuries, it was only comparatively recently that delegated legislation became a popular method of rule making. The Committee on Minister's Powers (The Donoughmore Committee) cited an enactment made in 1385 concerning the staple as the earliest example of an Act allowing the making of delegated legislation.

The staple consisted of four products - wool, leather, tin and lead - and the marketing was regulated by the *Statute of the Staple*. Merchants, known as Staplers, had a monopoly in the staple and the mayors of towns from where the staple was exported held Staple Courts. However, the Statute of the Staple is on the Rolls of Parliament, not in the statute book. It gave the King power to determine the places where the staple could be held, the time of commencement, and the form and method of execution.

The reign of Henry VIII had many instances of Acts giving the power to make delegated legislation - the earliest of those being the *Statute of Sewers* made in 1531. This gave the Commissioners of the Sewers power to impose rates on land owners and to distrain and impose penalties for non-payment.

The *Statute of Proclamations* in 1539 is one of the most striking instances where an Act sets out the power to make delegated legislation, in this case in the widest possible terms. The Statute required 'that Proclamations made by the King shall be obeyed'. It empowered Henry VIII, with the advice of his Council,

> 'to set forth proclamations under such penalties and pains and of such sort as to His Majesty and his said Council should seem necessary and requisite, the said proclamations to be obeyed, observed and kept as though they were made by Act of Parliament unless the King's Highness dispense with any of them under his great seal'.

The Act also provided that Sheriffs or other officers were required, within fourteen days, to proclaim His Majesty's proclamations in market-towns, other towns or villages and post them up 'openly upon places convenient therein'. This statute is therefore not only an early example of delegated legislation but also a form of statutory rules publication.

This was not, however, Henry VIII's only use of delegated legislation. Section 59 of the *Statute of Wales*, made in 1542, empowered the King to 'alter the laws of Wales and to make laws and ordinances for Wales, such alterations and new laws and ordinances to be published under the great seal and to be *as of good strength, virtue and effect as if made by the authority of Parliament*' (emphasis added) So it is that a clause in an Act that provides a power to amend either that Act or another Act by delegated legislation is termed a 'Henry VIII' clause.

Other instances of use of the power to make delegated legislation can be found through to the nineteenth century, but its frequency certainly diminished after the reign of Henry VIII.

The industrial revolution saw the emergence of an increasingly complex society. The regulation of the activities of citizens required more detailed rules to cope with the complexities of life and also required more time to make those rules.

English statute law at the beginning of the

nineteenth century often made extensive reference to regulations. The regulations were not made by a delegate of Parliament, but were contained within the Act itself. Unlike the standard division today (important matters of principle are contained in the Act and administrative detail in the regulations), the statutes passed by Parliament during the nineteenth century dealt with matters of great detail. For example, the statute regulating cotton mills covered matters such as the age of employees in the mills, hours of work and times for breakfast and a time for dinner.

However, delegated legislation was still occasionally used. The *Poor Law Amendment Act 1834* (Imp) empowered the Poor Law Commissioners to make regulations for the management of the poor. It gave the Commissioners very wide powers in carrying out their function to those who were 'deserving' of assistance - a far cry from today's Social Security Act.

The way rules were made began to change as Parliament could no longer devote the time required to making the detailed rules necessary to govern. Increasingly Parliament delegated to the executive the function of working out the details.

Instances of delegating legislative authority to the Executive in England increased throughout the nineteenth century, but with the onset of World War I, delegated rule making became far more common.

As the trend through the nineteenth century saw a greater use of delegated legislation as a method of rule making in the United Kingdom, it also revealed a greater need for an efficient mechanism to scrutinise this form of law making. In 1893 the Rules Publication Act was passed imposing a requirement for advance publicity. A notice of a proposal to make rules had to be published at least 40 days before the making of the rule and a notice where copies of the proposed rule were available was also required. Publication was to be in the London Gazette. The Act also allowed representations or suggestions to be made in writing and any such suggestions or representations had to be taken into account.

There was also a measure of scrutiny by the Committees of Parliament. The Special Orders Committee of the House of Lords was established in 1925. Its scrutiny was confined to orders which required Parliamentary approval before commencement. Orders of the House of Commons were outside its jurisdiction.

The next significant event was the release of the report by the Donoughmore Committee on Minister's Powers in 1932. The Committee was hastily appointed after the release of *The New Despotism* in 1929 by the then Lord Chief Justice of England, Lord Hewart. This book was a forthright attack on delegation to the Executive which Lord Hewart attributed to a bureacratic conspiracy. The Committee reported that it could not find any evidence to support the allegations of conspiracy and stated that the process of government would quickly come to a halt if all laws had to be made by Parliament. Nevertheless it recommended establishing a new standing committee of the House of Commons 'to consider and report on ... every regulation and rule made in the exercise of delegated legislative power, and laid before the House in pursuance of statutory requirement'.

The recommendation was not acted on at that time and there seems to have been, at least prior to World War II, little parliamentary interest in the scrutiny of delegated legislation. Indeed, a motion put to the House of Commons on January 27, 1937 'that in the opinion of this House, the power of the Executive has increased, is increasing and ought to be diminished' failed for lack of a quorum. It was not until 1943 that the House of Commons established the first Select Committee on Statutory Instruments and until 1973 that both Houses of Parliament in the United Kingdom established a joint scrutiny committee.

The *Rules Publication Act* 1893 remained the only statutory requirement for the publication of delegated legislation in the United Kingdom until 1946 when the Statutory Instruments Act was passed. That Act required publication and tabling and permitted disallowance of certain instruments.

The Use of Delegated Legislation in Colonial Australia

As New South Wales was made part of the British Empire by occupation rather than by conquest or cession, so the law in force from the time of colonisation was the law of England. The *New South Wales Statute* of 1787 stated that it might be necessary to establish a colony, a civil Government and a court of criminal jurisdiction. New South Wales was subsequently made as a

place for the transportation of convicts by two Orders-in-Council under that Statute

Copies of the Governor's orders and regulations were sent to the United Kingdom Secretary of State. The *Historical Records of Australia* report that "the Governor assumed powers of legislation, uncontrolled and entirely on his own initiative, as great as those which are the prerogative of Parliament and greater than those of the King".

The first recorded challenge to the validity of delegated legislation in New South Wales was instituted by John Macarthur. He argued that regulations forbidding the free introduction and sale of spirits were invalid. The Historical Records again report a conversation between Governor King and John Macarthur where Macarthur contended that no local order or regulation could be binding unless sanctioned by an Act of Parliament.

It has been suggested that Macarthur's stand was based on a pamphlet issued by Jeremy Bentham published in 1803 when Macarthur was in England. The pamphlet was entitled

> "A Plea for the Constitution, shewing the enormities committed, to the oppression of British subjects, innocent as well as guilty, in breach of Magna Carta, the Petition of Right, the Habeas Corpus Act and the Bill of Rights...in and by the Design, Foundation and Government of the Penal Colony of New South Wales".

Bentham was critical of the constitutional situation in New South Wales and argued that the first Governor went to the colony without "the smallest particle of legislative power."

In 1815, Ellis Bent, the Judge-Advocate, was also critical of the way successive Governors had assumed the power to legislate. He wrote:

> a Governor of this Colony claims and exercises a power to make Laws in this Colony, not merely By-laws and police regulations, but general laws, upon all subjects, intended to be binding upon all classes, highly penal in their consequence, and in many instances directly contrary to the spirit and principles of the law of England.

Despite the lack of proper constitutional foundation, the orders, regulations and proclamations survived. It was only toward the end of Governor Macquarie's term in office thirty years later that the British Law Officers declared that Macquarie had been acting illegally in attempting to establish the Bank of New South Wales by Charter.

The English Parliament next acted in 1823 by passing the New South Wales Act. This authorised the King to grant charters of justice for New South Wales and Van Dieman's Land, to extend the right to jury trial by Order-in-Council, to constitute a Legislative Council for New South Wales and to make New South Wales and Van Dieman's Land separate colonies. The Legislative Council had an advisory role, the right to initiate legislation remained with the Governor, although ordinances of that Council could not be inconsistent with the laws of England. An Executive Council was created.

With the powers given to Governor Phillip and to successive governors, they were able to rule in a more or less autocratic way. Rule by proclamation, order and decree of the Governor was normal. However, as the number of free settlers increased and trade became established, the structure and makeup of the colony changed and this type of rule became increasingly unsatisfactory. There was pressure from the free settlers to have a greater voice in the governance of the colony. With the establishment of the Colonial Parliament in 1823, the move to responsible and democratic government began in earnest although delegated law making continued to contribute significantly to the law.

The Commonwealth Parliament

With the establishment of the Commonwealth Parliament in 1901, the role of the Executive in the rule making process was recognised and delegated legislation contemplated, from the outset. The doctrine of the separation of powers contains inherent tension between Parliament's law-making role and the fact that it is impracticable for Parliament to examine the minutiae of legislation. Not surprisingly, this has been resolved in favour of practicality and the High Court has never doubted that Parliament can delegate legislative power to the Executive.

Accepting that Parliament could delegate its legislative power, attention was turned very early in the life of the Federation to scrutiny of the Executive in the exercise of its delegated legislative power. Although the Acts Interpretation Act was the second Act passed by the

Commonwealth Parliament (the first being the Consolidated Revenue Act) it did not then contain disallowance provisions. Any disallowance procedure was left to be inserted into specific Bills. For example, clause 256 of the first Customs Bill contained a provision for disallowance of regulations but only on motion by both Houses of Parliament. However, in the debates, the relevant Minister successfully moved an amendment to provide that disallowance could be by either House.

When the Rules Publication Bill came before Parliament in 1903, there was an attempt to include a general disallowance provision. The parliamentary debate was diverted by a series of technical amendments raised by a Ministry suspicious of any attempt to control Executive authority. Concerns were expressed that the Rules Publication Bill was not the appropriate vehicle for a general disallowance provision. In the end, and after a very confusing debate, the motion was withdrawn but the ground work had been laid for the concept of a general disallowance provision.

In 1904, the Attorney-General, Senator Drake-Brockman introduced an Acts Interpretation Bill designed

> 'to avoid the necessity of repeating provisions in all our Bills, to deal with them once and for all in this Bill, so that it may be understood when certain expressions occur that they have the meanings it assigns to them'.

Clause 11 of the Bill set out the conditions under which Regulations under an Act were to be made. They were to be notified in the Gazette, could not be retrospective, and were to be laid before both Houses of Parliament within 30 sitting days, unless a contrary intention appeared.

This Bill presented the opportunity for another attempt to re-introduce a general disallowance provision. It was successfully passed in the Senate after some debate and then passed by the House with a further amendment that notice of motion was required before a motion for disallowance could be put. This was to overcome difficulties that might arise should a private member seek to disallow the Government's regulations!

The next significant event occured soon after the time of the release in the United Kingdom of Lord Hewart's work, *The New Despotism.* The Bruce Government in Australia had been voted out of officeand the incoming Scullin Government faced a hostile Senate. The Senate became very active in amending Government Bills and the Government resorted to enacting the amended matters by regulation. Consequentially, the Senate's power of disallowance was used quite liberally. Indeed the attempt by the Government to legislate preferentially for members of the Waterside Workers Union was disallowed some 12 times in 1930-1931 and provided the basis for the High Court challenge in *Dignan's* case.

With a change in Government in 1931, the new Lyons Government enjoyed a Senate majority and set about making some changes to the Acts Interpretation Act, the main one being, not surprisingly, a provision to prevent a disallowed regulation being introduced for a period of six months. The other major change was the establishment of a Senate Committee to scrutinise all delegated legislation.

Arguments against the establishment of such a committee were raised by Sir Robert Garran, then Solicitor-General. He did not think that its work would be very interesting or useful and it would be unlikely to attract members. Those in support saw it as enhancing the role of the Senate as a house of review. Robert Menzies was among those and argued that regulations ought to be confined to administrative matters ensuring that would be one of the primary roles of the committee. Consequently, on 11 March 1932, the Senate established the Senate Standing Committee on Regulations and Ordinances, which exists to this day.

Greater attention is now being given to the scrutiny of delegated legislation. Reforms in Victoria and New South Wales recognise that, unless this is properly controlled, there remains the capacity for too many important matters to be decided by delegated legislation.

Administrative Review Council

Reports, Submissions and Letters of Advice

Since the last edition of *Admin Review* the Council has provided

- a letter of advice to the Attorney-General on the National Health and Medical Research Council
- a submission to the Working Party on the Administrative Appeals Tribunal
- a report to the Attorney-General: 'Review of the Administrative Decisions (Judicial Review) Act Statements of Reasons for Decisions'
- a discussion paper from a Council consultant concerning procedures in the Australian Broadcasting Tribunal
- a letter of advice on the new telecommunications carrier arrangements
- a submission to the Senate Standing Committee on Finance and Public Administration Inquiry into the Office of Ombudsman.

Current work program - developments

Broadcasting

The discussion paper 'Review of the Australian Broadcasting Tribunal Inquiries Procedures' prepared for the Council by the Communications Law Centre of the University of New South Wales has now been published. It is noted at page 25.

Community Services & Health

The Council recently provided advice on the National Health and Medical Research Council. The Council has now commenced the next stage of the Project and is examining a range of decisions made under programs administered by the Commonwealth Department of Community Services and Health, with a view to recommending the administrative review principles which ought to apply to grants programs made within that portfolio. The Project will examine the reviewability of decisions concerning:

- funding of service providers, and
- the provision of services to consumers.

One element of the Project will be determining the extent to which any general principles arrived at should be modified when decisions are made:

- under an inter-governmental program, or
- by a non-governmental or local government body.

The Council hopes to release an Issues Paper in July and to consult widely before reporting to the Attorney General late in the year. Those interested in being consulted should contact the responsible Project Officer, Mr James Renwick, on (06) 257 6117.

Intellectual Property

Dr Margaret Allars of the University of Sydney is preparing a consultant's paper on review of patents decisions.

Rule Making

Seminars on Rule-making were held in Sydney, Melbourne and Canberra, and addresses were made to the Conference on Administrative Law held in Canberra on 29 and 30 April by various members of the Council and the Secretariat. The Report to the Attorney General is now being finalised.

Multicultural Australia

A report is to be forwarded to the Attorney General shortly.

Review of the Administrative Decisions (Judicial Review) Act: Statement of Reasons for Decisions

This report, prepared by a consultant, Mr Denis O'Brien of Minter Ellison, has now been forwarded to the Attorney-General and published. It completes the Council's consideration of the AD(JR) Act. It is noted at page 24.