THE IMPORTANCE OF BEING LEGISLATIVE

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Introduction

Dixon J in *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee*[1] 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.

This notion that the effect of particular activities should not turn on an arid and debateable classification of the nature of the activity as legislative, executive or judicial is one that is often asserted in public law. However, the differentiation keeps returning and this is nowhere more apparent than in relation to delegated legislation. The classification of an instrument as "legislative" has significant consequences in relation to the making, parliamentary oversight, and judicial review, of the instrument. Perhaps surprisingly, this position is not changing. If anything the classification issue is becoming more important.

Delegated legislation creates problem for bureaucrats, parliaments and courts. The first problem to which delegated legislation gives rise is to identify what it is. The very general definition that I offered in the first edition of *Delegated Legislation* (1977), pp1-2 "instruments that lay down general rules of conduct affecting the community at large which have been made by a body expressly authorised so to act by an Act of parliament" attracted approval by courts from time to time.[2] One of its attractions was probably that it was so unspecific that it could be made to fit many situations.

The Administrative Review Council in its report *Rule Making by Commonwealth Agencies*[3] thought that it was unwise to attempt a more specific statement. However, the various versions of the ill-fated Commonwealth Legislative Instruments Bill eschewed this approach. It provided that a legislative instrument had to be of a legislative character. An instrument was to be 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.

This definition was then fleshed out with specific examples of instruments that were to be taken to be legislative.

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1 (1945) 72 CLR 37 at 80.

2 See most recently, *Latitude Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 110 ALR 209 at 228-9.

3 Report No 35,1992.

The problem lies of course in the fact that instruments that look like legislation can deal with particular issues and persons, while instruments that appear to be non-legislative can lay down general rules.

But does it matter? The answer is yes it does because:

- procedures for making instruments, including permitting public input, are different for legislative and executive instruments;

- parliaments are becoming more aware of their function of oversighting non-parliamentary legislation; and

- courts are continuing to differentiate between legislative and executive action in their application of review principles.

The Making of Instruments

It is clear that many public servants do not recognise that different sorts of public instruments should attract different attention. In the course of a review of actions of a Department I once found the ministerial instruments which formed the legal basis of significant and sensitive government action spiked on the files together with all the general correspondence, drafts of action papers, etc, that form the substance of bureaucratic daily fare. This makes one think that general definitions are not wise. It is probably better to put in place detailed descriptions and identifiers such as were included in the Legislative Instruments Bill. It is not fair to require public servants to differentiate between instruments on the basis of their effect rather than their form.

The form becomes important not because of any inherent quality but because of what flows from it. For many years the regulation was the traditional form of delegated legislation and its making, publication and parliamentary oversight were controlled. In an age that produced little legislation in either Act or delegated form this was manageable for executives, parliaments and courts. The executive was the first branch of government to find this too constraining and there was a steady adoption of other types of instruments that involved fewer constraints on making procedures, publication and parliamentary oversight. Bureaucratic convenience overrode the need for the public to know the law and for the parliament to review it. We are now going through a period of reaction to this.

Beginning in New South Wales and Victoria, requirements have been adopted for impact statements or other forms of explanatory memoranda to be produced relating to delegated legislation. Further, in some jurisdictions, consultation procedures must be followed before certain forms of delegated legislation are made. Legislative instruments additional to the traditional regulations or statutory instruments must be made available to the public. A staged repeal process is followed whereby there is a time limit after which legislation expires. These changes have been adopted in differing forms in most States but notably have foundered at the Commonwealth level.[4]

Apart from those public servants who deny the accuracy of those terms as descriptive of their function, and the inevitable bean counters, these changes have been accepted with very little fuss by either bureaucrats or members of the public. They seem to have become a part of the delegated legislation regime in those jurisdictions where they apply. They have

4 For a description of the position in the various Australian jurisdictions, see Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, (2nd ed, 1999) chs 2-11.

not led to the collapse of the public service but they have raised the understanding of both public and bureaucracy of the significance of delegated legislation.

The Commonwealth is functioning with a delegated legislation regime that is now not representative of the thinking applying elsewhere in Australia and which is simply outmoded. The fault for this lies most curiously in the parliamentary chamber that for decades led the way in enlightened management of delegated legislation. The Senate's insistence on amendments to the Legislative Instruments Bill has resulted in a triumph for those trogloditic areas of the public service that deny public involvement in government. The Australian public has been condemned to being ruled by instruments into which they have no input and about the existence of which they may have no knowledge.

To summarise the issue, in a number of States various instruments are designated as being of such importance to the public that there is public consultation before their making, they are made publicly available and their continuance in force is monitored. In contrast, the range of instruments thus dealt with in a number of other jurisdictions, notably the Commonwealth and the ACT, is left for the public service to determine on a case by case basis. This has the effect of excluding the public from participation in the legislative process and also leads to the making of what can properly be described as secret law.

While the Commonwealth is lagging behind the States in empowering citizens in the legislative process, it led the way in enabling members of the public to understand non-legislative instruments. If a person is affected by a decision of an administrative character, that person can usually obtain a statement of the reasons for the making of the decision. This bold innovation, reversing the common law position, was adopted through the operation of the *Administrative Decisions (Judicial Review) Act 1977*. It has been followed in Queensland and the ACT and in more limited scope in some other States.

This change in the law has led to a number of decisions classifying government decisions as legislative or administrative. The relevant cases are set out in Butterworths *Administrative Law Service* at para [312B]. Those cases indicate that the form of the instrument and the extent to which it affects members of the public generally will be significant indicators of its classification. Parliamentary involvement in the procedures relating to the instrument such as tabling or disallowance requirements will also point to the instrument being legislative. Factors pointing against an instrument being legislative have been that a minister has had the power to amend the instrument and that the content of the instrument was closely constrained by the empowering Act. It will always be a question of judgment whether an instrument can properly be designated as "legislative" and some instruments are going to fall close to the line.

The position thus exists that if a decision is classified as legislative in some jurisdictions, a procedure for public input into the content of the legislation is attracted. There are also detailed provisions relating to publication of the legislation. In others this is not the case. In contrast, the Commonwealth and some other jurisdictions require the revelation of the reasoning that underlay an administrative decision. Others still apply the common law approach rejecting the legal need for such advice. It can be seen that the legislative/administrative classification becomes all-important to the procedures that must be followed in relation to the instrument in question.

Parliaments and Delegated Legislation

The last 20 years have seen a remarkable change in the attitude of parliaments to delegated legislation. Up to the 1970s the Senate led the way in providing a means whereby parliamentarians might require the content of regulations to recognise or not override certain

fundamental rights. Now all jurisdictions have committees that examine certain legislative instruments against stated criteria and which press governments to accept those standards in drafting the legislation. The relative success of these committees varies but there is no question that the "being there" effect has a significant result on the content of delegated legislation.[5]

However, what most committees, with the notable exceptions of those in the Senate and the ACT, fail to provide is an oversight of the increasingly broad range of legislative instruments that are made by the executive. The jurisdiction of all the parliaments is to review delegated legislation that is tabled in that parliament. The definition of these instruments becomes crucial to the scope of the work of the committee charged by the parliament to examine the legislation. In most States the instruments tabled are limited to the traditional forms of regulations, rules,etc. These then are all that a committee gets to see. But executives are making an increasing number of legislative instruments in forms other than the traditional. If this is done, parliamentary scrutiny is avoided.

It is necessary therefore for parliaments to turn to the generic description of legislative instrument as their touchstone for jurisdiction. This was proposed for the Commonwealth in the Legislative Instruments Bill. The Senate has had experience of the significance of non-regulation instruments through the increasing use of the "disallowable instrument" category of legislation provided for by section 46A of the *Acts Interpretation Act 1901*. The operation of this section requires a case by case consideration of the question whether an instrument has such legislative characteristics that it should be subject to parliamentary review. It is to the credit of Commonwealth legislators that there has been a generous attitude taken to the desirability of prescribing instruments as falling within this description. The result has been that the Senate now reviews more non-regulation instruments than those that fall within the traditional categories.[6] The position would very likely be the same in the States if the range of reviewable instruments was similarly designated.

The adoption of a generic description of reviewable instruments would bring within the purview of parliaments the full range of instruments that their public role of oversighting delegated legislation demands. So in the case of parliaments, the significant issue is not so much the definition of legislative but the range of instruments that fall within the description. Limiting the range of instruments leaves it open for the executive to include inappropriate material within a legislative instrument but avoid parliamentary scrutiny.

The Courts and Delegated Legislation

There remain some significant differences in the approach that the courts take to the validity of delegated legislation compared with executive decisions. These have stemmed from the courts' perception of their role in relation to questioning decisions of legislation-makers even though the same persons may immediately after making legislation carry out a function of executive decision-making. The nature of the instrument will produce a different result. Consider the following illustrations.

Application of the rules of natural justice

The starting point to any consideration of the issue whether procedural fairness must be afforded a person affected by legislation is that "The legislature is not likely to intend that a statutory power of a strictly legislative nature be conditioned on the observance of the principles of natural justice, for the interests of all members of the public are affected in the same way by the exercise of such a power": per Brennan J in *Kioa v Minister for Immigration*

5 Ibid.

6 Ibid, para 1.14.

and Ethnic Affairs.[7] There has been some breach in the inflexibility of this principle, see *Bread Manufacturers of NSW v Evans*[8] where it was suggested that if an instrument otherwise legislative in form applied only to an individual's rights, then that person could claim the right to a hearing. However, I have found only one Australian case where this approach had been followed: *Lyster v Camberwell CC*[9] where the exercise by the Governor of the power under the Local Government Act to repeal a Council by-law was said to be so particularised that the Council was entitled to a hearing. (For a Canadian example, see *Development Co Ltd v Village of Wyoming*.[10])

Compare the approach to administrative decisions. There is a right to a hearing if a person can show that they are affected by a decision: *Haoucher v Minister for Immigration and Ethnic Affairs*.[11] However, if no person is singled out as being particularly affected by the decision, the right to a hearing is lost: *Botany Bay CC v Minister for Transport and Regional Development*.[12] Alternatively, the nature of the hearing may be curtailed. The end result may not be very different from that where a decision is classified as legislative but the presumption is effectively reversed.

If a decision is described as legislative it will be assumed that procedural fairness has no application unless it is possible to attract the *Bread Manufacturers* test. The likelihood of this occurring is demonstrated by the paucity of examples. If the decision is administrative, procedural fairness applies unless it is possible to show that the person seeking to assert the principle is not more affected than others.

Mind of the decision-maker

One of the most frequently used grounds for challenge to an administrative decision is that of relevancy: the decision-maker failed to take account of a relevant factor or took into account an irrelevant factor. I know of no case involving a legislative instrument where this has been a basis for challenge. Perhaps this is because challenges to legislation are based on arguments of *ultra vires*: that the empowering provision does not support the legislation purporting to be made under it. But if this be so, why does the same argument not apply to administrative decisions? There too the issue turns on the interpretation of the power that supports the decision.

Perhaps the reason for this difference in approach lies in a reluctance on the part of the courts to investigate the reasons why a legislator reached a particular conclusion. There is no doubt that few Acts would survive a challenge based on relevancy grounds! Much early delegated legislation was also the product of the collective minds of the makers in the form of local government rules. But this is not the position in the case of the bulk of delegated legislation now made. It has its origin with the same persons who make administrative decisions. Even the limitation that the decisions of the Crown's representative were unchallengeable which could have been thought to constrain review of the higher levels of delegated legislation has now gone: *R v Toohey; Ex parte Northern Land Council*.[13] More significantly, the courts have contemplated that a legislative decision can be challenged on the basis of improper purpose.

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7 (1985) 62 ALR 321 at 373.

8 (1981) 38 ALR 93.

9 (1989) 69 LGRA 250.

10 (1980) 116 DLR (3rd) 1. See further *Delegated Legislation in Australia*, above, paras 13.2-13.4.

11 (1990) 169 CLR 648 particularly per Deane J at 653.

12 (1996) 41 ALD 84.

13 (1981) 151 CLR 170.

Toohey's case involved the validity of regulations made by the Administrator of the Northern Territory. Local government legislation was held invalid on motive grounds in *Kwiksnax Mobile Industrial & General Caterers Pty Ltd v Logan CC*[14] and in *Bailey v Connole*.[15] The cases acknowledge the difficulties of proof of motive, particularly in the case of a multi-member elected body: see particularly *In re the Mayor of the City of Hawthorn; Ex parte The Co-operative Brick Company Limited*.[16] There used to be a difference in approach in the determination of motive in the case of legislation of local government bodies between administrative and legislative decisions. It seemed easier to establish impropriety in the case of the former than the latter. However, the *Kwiksnax* case and *Haines v Annwrack Pty Ltd*[17] (a decision of the NSW Court of Appeal) seem to have equated the two types of activity.

In summary, a different approach is taken in relation to relevance between legislative and administrative instruments. However, this distinction is not so apparent in relation to impropriety as a ground of review. Why there should be this difference in approach is not immediately apparent.

Pseudo-merits review: unreasonableness/ proportionality

Whether there is a difference between unreasonableness and proportionality as grounds of review has been the subject of disagreement. *Minister for Resources v Dover Fisheries*[18] says that they should be considered separately and I shall do so here.

Unreasonableness has always held some place in the panoply of grounds for reviewing delegated legislation even though Dixon J's statement in *Williams v Melbourne Corporation*[19] that unreasonableness is not a separate ground of review but merely an indicator of *ultra vires* has carried great weight. The likelihood of success on this ground had been minimal - up until 1992 there had been only one successful case this century and even it was overruled in a later case: *Ingwersen v Borough of Ringwood*,[20] overruled by *Brunswick Corporation v Stewart*.[21] However, there now seems to be a greater willingness to consider the possibility of delegated legislation being unreasonable and there were two successful actions in 1992: *Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy*[22] and *La Macchia v Minister for Primary Industries and Energy*.[23] Both cases concerned a fishery management plan. While this can properly be classified as a legislative instrument it sits very close to the border with an executive decision and it may be that this was influential in the decision reached.

It is clear that the courts continue to be reluctant to find delegated legislation invalid on unreasonableness grounds. An apparently harsh effect on a person is not sufficient: *Octet Nominees Pty Ltd v Grimes*;[24] *Zhang Fu Qiu v Minister for Immigration and Ethnic Affairs*;[25] *De Silva v Minister for Immigration and Ethnic Affairs*.[26] The legislation will be interpreted in

14 [1994] 1 Qd R 291.
15 (1931) 34 WALR 18.
16 [1909] VLR 27; see also Mason J in *Tooheys* case, above, at 226.
17 (1980) 39 LGRA 404.
18 (1993) 116 ALR 54.
19 (1933) 49 CLR 142.
20 [1926] VLR 551.
21 (1941) 65 CLR 88.
22 (1992) 27 ALD 633, affd on appeal 112 ALR 21.
23 (1992) 110 ALR 201.
24 (1986) 68 ALR 571.
25 (1994) 37 ALD 443.
26 (1998) 51 ALD 537.

such a way as to avoid an unreasonable outcome if more than one interpretation is available: *Minister for Resources v Dover Fisheries Pty Ltd*;[27] *Melbourne Pathology Pty Ltd v Minister for Human Services and Health*.[28] And perhaps more questionably, it will be assumed in the case of local government legislation that it will be reasonably administered to avoid unreasonable consequences: *South Australia v Tanner*;[29] *Southorn v Jovanovic*.[30]

While courts have always been cautious about overturning administrative decisions on the basis of unreasonableness, it has seen something of a revival in recent years and there has not been the reluctance to press it in aid that is apparent in relation to delegated legislation: see, for example, *Park v Minister for Immigration and Ethnic Affairs*.[31]

Proportionality as a test of invalidity of delegated legislation was sanctioned by the High Court in *South Australia v Tanner*:[32]

> ...the test of validity is whether the regulation is capable of being considered to be reasonably proportionate to the end to be achieved...It is not enough that the court itself thinks the regulation inexpedient or misguided. It must be so lacking in reasonable proportionality as not to be a real exercise of the power.

The influence of Dixon J's statement in *Williams's* case referred to above is very apparent.

There have been some successful applications to challenge delegated legislation on the lack of proportionality ground: *Re Gold Coast City By-laws*;[33] *Paradise Projects Ltd v Gold Coast CC*;[34] *Re Gold Coast City (Touting and Distribution of Printed Matter) Law 1994*[35] (all of which concerned a succession of by-laws dealing with the same subject-matter); *House v Forestry Tasmania*.[36]

And some unsuccessful: *SA v Tanner*, above; *Dover Fisheries*, above; *State Bank of SA v Hellaby*;[37] *Zhang Fiu Qiu*, above; *Bienke v Minister for Primary Industries and Energy*.[38]

Interestingly in regard to the successful cases, unreasonableness was also argued as a basis of invalidity but without success. Apparently proportionality involves a lower degree of "wrongness".

The test of proportionality for validity of delegated legislation was derived from the constitutional sphere. There is some suggestion that its value there is being questioned: see *Victoria v Commonwealth*;[39] *Leask v Commonwealth*.[40] Where it will go in relation to delegated legislation is unclear. My guess is that it will revert to a variation of the *Williams* test inquiry, ie as an indicator of *ultra vires*.

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27 (1993) 116 ALR 54.
28 (1996) 40 ALD 565.
29 (1989) 83 ALR 631.
30 (1987) 63 LGRA 277.
31 (1996) 41 ALD 487.
32 (1989) 83 ALR 631 at 636.
33 [1994] 1 Qd R 130.
34 [1994] 1 Qd R 314.
35 (1995) 86 LGERA 288.
36 (1995) 5 Tas SR 169.
37 (1992) 59 SASR 304.
38 (1996) 135 ALR 128.
39 (1996) 138 ALR 129 at 147.
40 (1996) 140 ALR 1 at 18.

In the present context the interest in the test lies in the fact that it seems to have attracted greater attention in relation to the validity of legislation than in regard to administrative decisions: see the discussion by John McMillan, "Recent Themes in Judicial Review of Federal Executive Action".[41]

Compliance with making requirements

An issue to which the courts have paid considerable attention in determining the validity of delegated legislation is that of compliance with prescribed procedures relating to the making of legislation. Such procedures can be divided into four categories:

- making the legislation
- publishing the legislation
- laying the legislation before the parliament
- making copies of the legislation available to the public.

The attitude of the courts has been to require strict compliance with the specified procedure relating to the first two categories only. Whether it is appropriate to permit non-compliance with requirements relating to the third and fourth categories is questionable. The procedures have been stated with a particular public interest in mind. The problem with the third category has been overcome in some jurisdictions by the legislation being amended to make the position clear that non-compliance with tabling requirements spells invalidity but in NSW, Victoria and South Australia the common law position still prevails.[42]

In regard to making legislation available to the public, only Barwick CJ in *Watson v Lee*[43] has ever suggested that the inability of a person to be able to obtain a copy of legislation goes to the enforceability of the legislation. However, section 20 of the Victorian *Subordinate Legislation Act 1994* provides that a person cannot be convicted or prejudicially affected under the terms of a statutory instrument if it is shown that at the relevant time a copy of the instrument could neither be purchased nor inspected. This is most relevant in relation to many lower level legislative instruments the availablity or indeed the existence of which is often unknown to the public.

It is my impression that the approach adopted by the courts to these formal aspects relating to the making of delegated legislation is generally to impose a stricter burden of compliance than is done in the case of administrative instruments. The consequences of a failure to comply with a designated procedure has become the key to whether compliance will be required or not.[44] It seems reasonable for the courts to take the attitude that the consequences flowing from a failure to comply with the procedures relating to the making of delegated legislation are likely to have an adverse effect on the public and therefore strict compliance should be required.

Conclusion

It is sometimes fashionable to assert that a clear distinction between legislative and executive instruments cannot be made. Certainly it is difficult to do so. However, as has

41 (1996) 24 Fed L Rev 347 at 354.

42 For details, see *Delegated Legislation*, chs 2-11.

43 (1979) 26 ALR 461.

44 Pearce and Geddes, *Statutory Interpretation in Australia* (4th ed, 1996) Paras 11.14-11.27.

been demonstrated, 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.