

Papers on Parliament No. 15

May 1992

Parliamentary Scrutiny of
Quasi-legislation

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Published and Printed by the Department of the Senate
Parliament House, Canberra
ISSN 1031-976X

Published 1992, Reprinted 1993

Papers on Parliament is edited and managed by the Research Section, Department of the Senate.

All inquiries should be made to:

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Telephone (06) 277 3057

ISSN 1031-976X

Cover design: Conroy + Donovan, Canberra

Note

This issue of *Papers on Parliament* consists of a paper by Stephen Argument, Secretary to the Senate Standing Committee for the Scrutiny of Bills, which was originally prepared as a sub-thesis submitted in June 1991 as partial fulfilment of the requirements of the degree of Master of Public Law, Australian National University.

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Chapter 1

Introduction

Not long ago, practitioners could live with reasonable comfort and safety in a world bounded by Acts of Parliament, Statutory Rules and Orders and judicial decisions. One of the tendencies of recent years is for this world to become an expanding universe. Decisions of administrative tribunals are comparatively well-known additions to the lawyer's burden. A more interesting and perhaps less well-known accretion consists of what may be called administrative quasi-legislation.¹

The most important area of concern to the Committee at present ... is the increasing use of new legislative and administrative techniques outside the usual experience of legislative scrutiny. The conceptual framework of delegated legislation is straightforward; an Act of Parliament will set out the broad scheme of a policy or program within a fairly detailed framework, with executive law-making confined to matters too technical, trivial, detailed or changing to justify the procedural solemnity and rigor of an Act of Parliament.

These new techniques of 'quasi-legislation', however, turn the established theory on its head.²

Though expressing essentially the same sentiments, these statements are actually separated by more than forty five years. If quasi-legislation posed problems in 1944, when R E Megarry (who made the first statement) gave his seminal warning against the expansion of the legislative universe, then it is unlikely that there has been any improvement over the following 46 years. Indeed, the expansion is now more correctly described as an explosion.

This paper deals with the difficulties presented by quasi-legislation and the means available to address those difficulties. In particular, the paper considers the position of the Parliament in relation to quasi-legislation and the options open to Parliament as a means of controlling the use and content of quasi-legislation. The contents of the remaining chapters are as follows.

Chapter 2 sets out a rudimentary definition of what is meant by 'quasi-legislation', with reference to what is understood by the term 'legislation'.

Chapter 3 contains some examples of quasi-legislation promulgated under Commonwealth law.

¹ Megarry, RE, 'Administrative quasi-legislation', (1944) 60 *Law Quarterly Review* 125, at pp 125-6.

² *Commonwealth Parliamentary Debates* (Senate), 15 June 1989, p 4129 (Senator Collins).

Chapter 4 discusses in greater detail the kinds of problems posed by the increasing use of quasi-legislation. These problems go beyond mere expansion of the legislation universe. They also involve deficiencies in drafting, lack of accessibility and an undermining of the power of the Parliament. The discussion refers, where relevant, to the examples given in Chapter 3.

The parliamentary scrutiny which is applied to conventional forms of legislation is discussed in Chapter 5. The extent to which quasi-legislation receives this kind of scrutiny and the possible advantages of applying such scrutiny to quasi-legislation on a more uniform basis are considered in Chapter 6.

Other possible alternatives, including some discussion of different approaches adopted in other jurisdictions, are discussed in Chapter 7.

Chapter 8 contains the conclusions to be drawn from the material presented and arguments set out in the preceding chapters.

The illustrations and the analysis presented in this paper are all drawn from and based on the occurrence of quasi-legislation under Commonwealth law and as dealt with by the Commonwealth Parliament. Quasi-legislation raises the same basic problems in all relevant jurisdictions. However, the experience of other jurisdictions is referred to in Chapter 7 only, insofar as that experience offers possible guidance for dealing with quasi-legislation.

Chapter 2

Legislation and *Quasi*-legislation

It is necessary at the outset to define what is meant by the term 'quasi-legislation'. In doing so, it is useful to reflect initially on what is understood by the term 'legislation'.

'Legislation'

The Macquarie Dictionary defines 'legislation' as

- n. 1. the act of making or enacting laws.
2. a law or a body of laws enacted.³

Similarly, in 1932, the United Kingdom Parliament's Committee on Ministers' Powers (the Donoughmore Committee) stated:

The word 'legislation' has grammatically two meanings - the operation or function of legislating; and the laws which result therefrom.⁴

For the purposes of this paper, it is the latter definition (in each case) that is relevant.

Another helpful definition can be derived from a comment made by Professor Dennis Pearce, in his book entitled *Delegated Legislation in Australia and New Zealand*⁵. Professor Pearce observed that:

[L]egislation cannot be made by a body other than the parliament without the authority of the parliament.⁶

Extrapolating from this definition, 'legislation' refers to the sum total of those laws made by a parliament itself, and those laws made on behalf of (and with the express authority of) that parliament. It is the sum total of the Acts of a parliament (which are generally categorised as being 'primary' legislation) and the delegated or subordinate legislation promulgated by authority of those manifold Acts.

The Donoughmore Committee made a distinction between 'legislative' and 'executive' activity. Legislative action was defined as the process by which general rules of conduct are laid down, without reference to individuals or particular cases. Executive action was regarded as the application of those general rules to particular cases.⁷ This distinction is not pursued in the context of this paper, which focuses on the distinction between legislation (as defined above) and quasi-legislation.

At this point it is also acknowledged that, in this area of the law, it is not unusual for writers and commentators to struggle to define what they mean by 'delegated' or

³ *Macquarie Dictionary* (Second revision)(1987, The Macquarie Library Pty Ltd, Sydney), p 991.

⁴ *Report*, 1932, Cmd 4060 (1932, HMSO, London), p 15, para 2.

⁵ (1977, Butterworths Pty Limited, Sydney).

⁶ Pearce, DC, *Delegated Legislation in Australia and New Zealand* (1977, Butterworths Pty Limited Sydney), p 1.

⁷ Committee on Ministers' Powers, *Report*, 1932, Cmd 4060 (1932, HMSO, London), pp 5-6. See also Pearce, DC, *Delegated Legislation in Australia and New Zealand* (1977, Butterworths Pty Limited, Sydney), pp 1-2.

'subordinate' legislation. They have similar difficulties in assessing the justifications for an instrument appearing as delegated rather than primary legislation. It is not necessary to traverse these questions for the purposes of this paper.

Simply put, delegated legislation consists of the second part of Professor Pearce's definition quoted above. It consists of legislation made by persons and bodies other than a parliament who have been given the authority to make such legislation by an Act of that parliament. In Professor Pearce's words,

one can define delegated legislation as 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.⁸

'Quasi-legislation'

It appears that the term 'quasi-legislation' was first used in 1944, in an article by RE Megarry entitled 'Administrative quasi-legislation'⁹. In that article, Mr Megarry (as he then was) referred to an 'interesting ... accretion' that could be called 'administrative quasi-legislation'.¹⁰ By way of elaboration, Mr Megarry said:

This falls into two categories. First, there is the State-and-subject type, consisting of announcements by administrative bodies of the course which it is proposed to take in the administration of particular statutes.¹¹

As examples of this first category, Mr Megarry referred to 'Practice Notes' issued to indicate how certain provisions of the war damage legislation would be interpreted and announcements by the United Kingdom's Inland Revenue authorities concerning tax concessions.

The second category of administrative quasi-legislation is the subject-and-subject type, consisting of arrangements made by administrative bodies which affect the operation of the law between one subject and another.¹²

In relation to this second category, Mr Megarry cited an agreement which the Home Office had negotiated with private insurance companies, pursuant to which the companies agreed that they would not raise a particular defence in workers' compensation proceedings.¹³

Mr Megarry's seminal categorisation has been cited with approval recently in a book by Professor Gabriele Ganz, entitled *Quasi-legislation: Recent developments in secondary legislation*.¹⁴ In that book, Professor Ganz suggested that quasi-legislation

8 Pearce, DC, *Delegated Legislation in Australia and New Zealand* (1977, Butterworths Pty Limited, Sydney), pp 1-2.

9 (1944) 60 *The Law Quarterly Review* 125.

10 Megarry, R E, 'Administrative quasi-legislation', (1944) 60 *Law Quarterly Review* 125, at p 126.

11 *ibid.*

12 Megarry, RE, 'Administrative quasi-legislation', (1944) 60 *Law Quarterly Review* 125, at p 126.

13 *ibid.*, at pp 126-127.

14 2nd edition (1987, Sweet and Maxwell, London).

was 'problematical because it is not a term of art'.¹⁵ However, she drew attention to an 'exponential growth of statutory and extra-statutory rules in a plethora of forms', citing as examples:

Codes of practice, guidance, guidance notes, guidelines, circulars, White Papers, development control policy notes, development briefs, practice statements, tax concessions, Health Service Notices, Family Practitioner Notices, codes of conduct, codes of ethics and conventions are just some of the guises in which the rules appear.¹⁶

Professor Ganz re-stated this list in 1989, in the course of proceedings at the Third Commonwealth Conference on Delegated Legislation.¹⁷ At that conference, Professor Ganz went on to say that quasi-legislative instruments:

may be contained in circulars, White Papers, annual reports, manuals, statements in the House of Commons, and even press releases, or they may appear under their own label. They may even be set out in a statutory instrument.¹⁸

At that same conference, Senator Patricia Giles, then a member and now Chair of the Senate Standing Committee on Regulations and Ordinances, presented a paper on the scrutiny of quasi-legislation in Australia.¹⁹ In that document, and in the course of her oral presentation to the conference,²⁰ Senator Giles referred to quasi-legislative instruments as being documents which, typically, empowered persons or authorities to "direct", "determine", "notify", "order", "instruct", "declare", "issue" or "publish", etc.²¹

Summary

'Quasi-legislation is not a term of art. It can be applied to a wide variety of instruments. Examples of the kinds of instrument issued pursuant to Federal legislation to which the definition of quasi-legislation can be applied are discussed in more detail in Chapter 3 below. However, in concluding these introductory comments, it is salutary to return to the Macquarie Dictionary for a definition of quasi-legislation. Bearing in mind the definition of 'legislation' as 'a law or body of laws enacted', the Macquarie Dictionary defines 'quasi' as follows:

- adj.* 1. resembling; as it were. -*adv.*
2. seemingly, but not actually.²²

Putting the two definitions together, quasi-legislation may be regarded as something *resembling* a law or which is *seemingly* a law. More importantly, however, on the

¹⁵ Ganz, G, *Quasi-Legislation: Recent Developments in Secondary Legislation* (2nd edition) (1987, Sweet and Maxwell Limited, London), p 1.

¹⁶ *Ibid*, pp 1-2.

¹⁷ *Record of Proceedings* (1990, HMSO, London), p 20.

¹⁸ Third Commonwealth Conference on Delegated Legislation, *Record of Proceedings* (1990, HMSO, London), p 20.

¹⁹ Giles, P, 'Scrutiny of Federal quasi-legislation in Australia', reproduced in Third Commonwealth Conference on Delegated Legislation, *Record of Proceedings* (1990, HMSO, London), Appendix 5, p 123.

²⁰ Third Commonwealth Conference on Delegated Legislation, *Record of Proceedings* (1990, HMSO, London), p 25.

²¹ Giles, P, 'Scrutiny of Federal quasi-legislation in Australia', reproduced in third Commonwealth Conference on Delegated Legislation, *Record of Proceedings* (1990, HMSO, London), Appendix 5, at p 123.

²² *Macquarie Dictionary* (Second Revision) (1987, The Macquarie Library Pty Ltd, Sydney), p 1390.

basis of this dictionary definition, it should be remembered that quasi-legislation is not *actually* legislation. This point will be dealt with in greater detail in Chapter 4.

Chapter 3

Quasi-legislation - Some Examples

In order to better understand the problems posed by quasi-legislation, it is helpful to set out some examples of the kinds of instruments which might be regarded as coming within the definition. Given the difficulty of defining what is meant by quasi-legislation, the examples given are diverse. The examples given do not *all* involve the kinds of problems posed by quasi-legislation (and which are discussed in greater detail in Chapter 4). Those which do not are presented merely as examples of quasi-legislation and the forms which it can take.

Rules of Court

One of the longest-standing examples of quasi-legislation in the Commonwealth sphere is the body of rules which regulate the practice and procedure of Commonwealth courts. Those rules are intended to regulate the manner in which the business of the courts is conducted, covering such matters as forms, time limits, attendance of parties and witnesses, appeals and costs, as well as more difficult matters such as the means by which certain facts may be proved.

In the late 1970s, the Senate Standing Committee on Constitutional and Legal Affairs (as it then was) conducted an inquiry into rules of court. The Committee presented its report to the Senate in March of 1979.²³ In its report, the Committee observed that

[a]lthough the rules regulate only the practice and procedure of the court, they can affect the exercise of significant rights. Indeed, in an extreme case, a right conferred by a statute or the common law may be effectively negated by rules of court which make it impossible for a person to exercise that right effectively. For example, an action may be struck out for want of conformity with pleadings.²⁴

The Committee observed that, generally speaking, the rules of the various Commonwealth courts were made by the judges of those courts.²⁵

Given their potential to impact significantly on individual rights and on the operation of duly enacted laws of the Commonwealth Parliament, this could be regarded as presenting something of a problem to the Parliament in its capacity as the supreme law-making institution. However, as the Committee detailed in its report, the rules made by the various courts are not immune from parliamentary scrutiny. By virtue of a range of provisions contained in the various constating Acts, the rules of the several Commonwealth courts are required to be tabled in each House of the Parliament and are subject to disallowance by either House.²⁶ Nevertheless, as the Senate Standing

²³ *Journals of the Senate*, No 91, 21 March 1979, p 638.

²⁴ Senate Standing Committee on Constitutional and Legal Affairs, *Report on Parliamentary Scrutiny of Rules of Court*, Parliamentary Paper No 288 of 1979, p 3.

²⁵ See, generally, Senate Standing Committee on Constitutional and Legal Affairs, *Report on Parliamentary Scrutiny of Rules of Court*, Parliamentary Paper No 288 of 1979, especially at p 3.

²⁶ See *Judiciary Act 1903*, ss 86 and 87; *Federal Court of Australia Act 1976*, s 59; *Family Court Act 1975*, s 123.

Committee on the Scrutiny of Bills has observed, the power to disallow is a somewhat blunt instrument of control.²⁷

Income Taxation Rulings

Possibly the largest and most visible body of quasi-legislation exists in the form of the Taxation Rulings issued by the Commissioner for Taxation. They are promulgated pursuant to an initiative which was put into effect in 1982, at least in part as a result of obligations created by the *Freedom of Information Act 1982*. In particular, they are intended to fulfil the Commissioner's obligation under that Act to make available for public scrutiny copies of documents used by his or her officers in making decisions.²⁸ To date, in excess of 2600 rulings have been issued, covering a wide variety of issues and situations.²⁹

The first ruling issued set out the rationale behind the new system:

A Taxation Ruling will issue in respect of any decision which satisfies the following criteria;

- (a) provides an interpretation, guideline precedent, practice or procedure to be followed in making a decision that affects the rights or liabilities of taxpayers; and
- (b) establishes a new or revised interpretation of our administration of the tax laws; and
- (c) affects all taxpayers or a section of the tax-paying community, ie, not simply an individual instance.

Taxation rulings will replace memoranda and other forms of advice from Head Office relating to new or revised interpretations of the taxation law.³⁰

The Commissioner reiterated and expanded on this statement of intention in 1988, in Taxation Ruling IT 2500, which states that rulings

are issued on a regular basis and provide guidance for both the public and staff of the Australian Taxation Office on matters of policy, procedural instruction and interpretation of tax law. The majority of Taxation Rulings cover the interpretation of the income tax law and, where appropriate, detail guidelines, precedents, practices or procedures that affect the taxation rights or liabilities of the general public. Rulings are also an appropriate vehicle for the Australian Taxation Office to clarify administrative developments arising from new or revised interpretations of income tax law.³¹

²⁷ See, eg. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 3 of 1991 (Journals of the Senate, No 70, 6 March 1991, p 815)*, pp 8, 10, 12-3.

²⁸ See *Taxation Ruling No. 1*, p 1, reproduced in *Australian Income Tax: Australian Taxation Office Rulings and Guidelines, Volume 1* (1985, Butterworths Pty Limited, North Ryde), p 2101.

²⁹ See, generally, *Australian Income Tax: Australian Taxation Office Rulings and Guidelines, Volume 1* (1985, Butterworths Pty Limited, North Ryde) and *Volume 2* (1987, Butterworths Pty Limited, North Ryde).

³⁰ *Australian Income Tax: Australian Taxation Office Rulings and Guidelines, Volume 1* (1985, Butterworths Pty Limited, North Ryde), p 2101.

³¹ *Australian Income Tax: Australian Taxation Office Rulings and Guidelines, Volume 2* (1987, Butterworths Pty Limited, North Ryde), p 3955.

It is clear that such rulings have at least the potential to operate as law. Indeed, in a submission to the Senate Standing Committee on Legal and Constitutional Affairs in 1987, the Commonwealth Ombudsman advised that, in his experience in dealing with officers of the Australian Taxation Office, officers at many levels of that Office regarded them as binding on decision makers.³² Indeed, the Institute of Affiliate Accountants submitted to the Committee that some rulings were

couched in such a way as to have the effect of encouraging Taxation Office employees to treat such rulings as if they have the force of law.³³

The Ombudsman submitted to the Committee that some tax agents appeared to treat them on the same basis.³⁴

Though the concerns cited above were no doubt genuine, it should be noted that the Australian Taxation Office has consistently maintained that this is neither the effect nor the intent of such rulings. Taxation Ruling No. 1 states:

In using Taxation Rulings it should be recognised that they cannot supplant the terms of the law.³⁵

Similarly, and more expansively, Taxation Ruling IT 2500 states:

It is important to recognise that Taxation Rulings do not have the force of law and that each decision affecting the taxation liability of a taxpayer can only be made in the light of the established facts of particular transactions.³⁶

That ruling goes on to say:

Moreover, no conduct of the Taxation Office can operate as an estoppel against the operation of taxation legislation (see *FCT v Wade* (1951) 84 CLR 105 at 116-7; 5 AITR 214 at 224; 9 ATD 337 at 344, per Kitto J).³⁷

While it referred to the views of the various organisations who had made submissions about the actual effect of rulings, the Legal and Constitutional Affairs Committee expressed no view on the suggestions that they were treated as law. The Committee did, however, recommend that each ruling should contain a caveat to the effect that the ruling does not have the force of law and that each case would be considered on

³² Senate Standing Committee on Legal and Constitutional Affairs, *Income Tax Rulings*, Parliamentary Paper No 217 of 1987, p 22, referring to a submission from the Commonwealth Ombudsman, at p 2.

³³ Senate Standing Committee on Legal and Constitutional Affairs, *Income Tax Rulings*, Parliamentary Paper No 217 of 1987, p 22, referring to a submission from the Institute of Affiliate Accountants, at p 1.

³⁴ Senate Standing Committee on Legal and Constitutional Affairs, *Income Tax Rulings*, Parliamentary Paper No 217 of 1987, p 22.

³⁵ *Australian Income Tax: Australian Taxation Office Rulings and Guidelines, Volume 1* (1985, Butterworths Pty Limited, North Ryde), p 2101.

³⁶ *Australian Income Tax: Australian Taxation Office Rulings and Guidelines, Volume 2* (1987, Butterworths Pty Limited, North Ryde), p 3955.

³⁷ *Ibid.*

its merits.³⁸ In the Government response to the report, the Commissioner for Taxation indicated that this recommendation (and, indeed, the other recommendations contained in the report) would be 'fully and promptly adopted'.³⁹

Instruments Issued Pursuant to the *National Health Act 1953*

As a case study in the forms which quasi-legislation can take, the *National Health Act 1953* provides a wealth of material. First, it contains numerous clauses providing for the relevant Minister to make 'determinations',⁴⁰ 'declarations'⁴¹ and 'rules'⁴² and to formulate 'principles'⁴³ under various powers contained in that Act and in relation to the exercise of those powers. The instruments issued in exercise of these powers are subject to disallowance by either House of the Parliament, pursuant to a) provisions set out in detail in the relevant clauses, b) reference to the disallowance provisions of the *Acts Interpretation Act 1901* or c) as a result of being designated a 'disallowable instrument' for the purposes of the *Acts Interpretation Act*. The relevance of disallowance is discussed in greater detail in Chapters 6 and 7 below.

In addition to the instruments which are disallowable, the *National Health Act* contains an even greater number of provisions allowing the Minister (or, in some cases, the Secretary of the relevant Department) to 'appoint',⁴⁴ 'authorise',⁴⁵ 'certify',⁴⁶ 'declare',⁴⁷ 'determine',⁴⁸ 'direct',⁴⁹ 'exempt',⁵⁰ 'impose conditions',⁵¹ 'require'⁵² or 'specify'⁵³ in relation to various matters relevant to the administration of the Act. These powers relate to such diverse and important matters as the meaning of certain important definitions for the purposes of the Act (section 39), the level of standard fees (subsection 40AGA(2)), additional contributions to be paid by approved nursing home patients (subsection 40AI(1)), the qualifications applicable to nurses from various external territories (section 58D), the non-payment of benefits (section 59), the keeping of records (section 61), the conditions governing the registration of organisations (sections 73, 73A and 73B), the appointment of an inspector to investigate an organisation (subsection 82R(4)), the supply of pharmaceutical benefits (sections 88 and 93) and the divulgence or not of information (section 135A). The exercise of these powers can affect large numbers of individuals.

38 Senate Standing Committee on Legal and Constitutional Affairs, *Income Tax Rulings*, Parliamentary Paper No 217 of 1987, recommendation 1, p 23.

39 Government response, p 2. Tabled in the Senate on 18 December 1987 (see *Journals of the Senate*, No 42, 18 December 1987, pp 463-4).

40 See the following provisions: 4(1) (in relation to the definitions of 'basic private table' and 'basic table'), 40AA(6)(ce), 40AFA(3), 40AFB(3), 40AH, 45D, 47(2B) and 49.

41 See the following provisions: 4(1) (in relation to definitions of 'nursing home for disabled people'), 85(2) and (2AA).

42 See the following provisions: 99AAA(4) and 99AAB(3).

43 See subsection 40AG(9).

44 See subsection 82R(4).

45 See paragraph 135A(6)(j).

46 See the following provisions: ss 135A(7) and 139A.

47 See the following provisions: ss 40AC(1) and 45E(1).

48 See the following provisions: ss 39, 40AA, 40AD(1)-(1C), 40AGA(2) and (3), 40AI(1), 40AGA(2) and (3), 48A(4), 58(1), 59(1), 68A(a) and (c), 73BAB(1)(c) and (d), 73BB(7), 73BC(5D), 73G(5), 84(3), 84C(4A), 84AH(1), 84(3), 85A(1) and (2), 85B(1), 88(1A), 93(1) and (2), 98B(2), 98C(1), 98E(1) and 138.

49 See the following provisions: ss 58GA(2) and (7), 60A, 73BH and 73D(1).

50 See subsections 73BAC(1) and (2).

51 See the following provisions: ss 73, 73A, 73B.

52 See subsection 82R(1).

53 See section 39AA.

All of the various non-disallowable provisions referred to above essentially involve the exercise of powers contained in the Act. Most, but by no means all, are explicitly required to be exercised in writing. A smaller proportion of these 'instruments in writing' are required to be published in the *Gazette*.⁵⁴ There is no apparent logic as to why some powers are to be exercised in writing and some are not or as to why some are required to be published in the *Gazette* and some are not. Similarly, there is no discernible method in the designation of some instruments as being subject to disallowance while many others are not.

Some Further Examples - A Closer Analysis

While the above account of the quasi-legislative elements of the *National Health Act 1953* gives a useful indication of the kinds of instruments with which this paper is concerned, in order to illustrate the kinds of problems involved it is useful to examine in greater detail some further examples of this type of instrument and how they operate. This will also lead into the conceptual analysis contained in Chapter 4.

Codes of Practice Under Clause 70 of the *Occupational Health and Safety (Commonwealth Employment) Bill 1990*

On 18 October 1990, the Occupational Health and Safety Bill 1990 was introduced into the House of Representatives. The Bill proposed to provide for the protection of the health and safety of Commonwealth employees at work. It proposed to do so by imposing a general duty of care on employers, manufacturers and suppliers of plant and substances and installers of plant, as well as on employees themselves.

Clause 70 of the Bill provided for the preparation of codes of practice '[f]or the purpose of providing practical guidance to employers'. These codes of practice would be prepared by the Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees and be approved by the Minister. The Minister was also to have the power to amend or revoke such codes (subclause 70(1)).

Subclause 70(5) contained a requirement that where the Minister approved, amended or revoked a code of practice, a notice of the approval, amendment or revocation be published in the *Gazette*. In addition, paragraph 70(5)(b) required the Minister to cause a document setting out the code of practice as approved (or the amendment or revocation, as the case may be) to be laid before each House of the Parliament within 15 sitting days of the notice being published in the *Gazette*.

Subclause 70(7) of the Bill provided that a person would not be liable to any civil or criminal proceedings by reason only that they had failed to observe a provision of a code of practice. However, clause 71 then went on to set out in detail provisions governing the use of codes of practice in proceedings under the Act. It provided as follows:

Where in any proceedings under this Act it is alleged that a person contravened a provision of this Act or the regulations in relation to which an approved code of practice was in effect at the time of the alleged contravention or failure:

⁵⁴ See the following provisions: ss 39AA, 40AGA(7), 40AI(1), 68(a) and (c), 84C(4A), 84HA(1), 85(8), 85A(4), 85B(1), 88(1A) and 93(2A).

- (a) the approved code of practice is admissible in evidence in proceedings; and
- (b) if the court is satisfied, in relation to any matter which it is necessary for the prosecution to prove in order to establish the alleged contravention, that:
 - (i) any provision of the approved code of practice is relevant to that matter; and
 - (ii) the person failed at any material time to observe that provision of the code of practice;that matter is taken to be proved unless the court is satisfied that in respect of that matter the person complied with that provision of this Act or the regulations otherwise than by way of observance of that provision of the approved code of practice.

This provision of the Bill attracted unfavourable comment from the Senate Standing Committee for the Scrutiny of Bills.⁵⁵ After noting that the codes of practice were to be admissible in court proceedings, the Committee went on to say:

Clause 71 ... contemplates action being taken for 'failure to observe' a provision of a code of practice. If this is the case, then the code of practice appears to have an effect which approaches that of a piece of legislation.⁵⁶

The role of the Scrutiny of Bills Committee is discussed in greater detail in Chapter 5 below. The Committee's role in relation to this particular clause and to similar provisions in other bills is discussed in Chapter 7.

For present purposes, it is important to note the grounds on which the Committee commented on the clause. Noting the fact that (a) the codes of practice were intended to be accorded a certain status in court proceedings and that (b) the clause contemplated breaches of a code (as opposed to provisions of the legislation) being relevant in court proceedings, the Committee suggested that the code appeared to be intended to have something close to a legislative effect. As is discussed in Chapter 4, this concern is central to the problems which such instruments generally create: they operate as law (or something close to it) without being subject to the same parliamentary scrutiny as is applied to a law.

Directions Issued Pursuant to Subsection 251(1B) of the *Social Security Act 1947*

Section 251 of the *Social Security Act 1947* gives the Secretary of the Department of Social Security the power to write-off or waive debts owed by social welfare recipients to the Commonwealth under that Act. These debts generally arise as a result of overpayment, whether as a result of mistake or fraud on the part of the recipient.⁵⁷

⁵⁵ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny of Bills Alert Digest No 9 of 1990 (Journals of the Senate, No 38, 7 November 1990, p 390)*.

⁵⁶ *Ibid*, at p 18.

⁵⁷ See, generally, Senate Standing Committee on Legal and Constitutional Affairs, *Debt recovery under the Social Security Act and the Veterans' Entitlements Act (Journals of the Senate, No 20, 22 August 1990, p 228)* especially at pp 10-11.

In October 1988, a Bill was introduced to amend the *Social Security Act*. That Bill, the Social Security Legislation Amendment Bill 1988, proposed to amend section 251 of the Act.⁵⁸ Proposed new subsection (1A) required the Secretary, in exercising his/her discretion to waive or write-off debts, to act in accordance with any relevant directions issued by the Minister for Social Security pursuant to proposed new subsection (1B). Pursuant to proposed new subsection (1C), the Minister was to be required to table any such directions in both Houses of the Parliament within 15 sitting days of their having been made. However, there was no power for the Parliament to disallow such directions.

The directions were to be formally binding on the Secretary, who was to be required to act 'in accordance with' any such directions. They were also to be binding on a body reviewing a decision by the Secretary under the provision as, in reviewing such a decision, the review body (in this case, the Social Security Appeals Tribunal or the Administrative Appeals Tribunal) would be required as a general principle of administrative law to put itself in the shoes of the original decision-maker.⁵⁹ However, in addition to this general principle, the Explanatory Memorandum to the Bill stated that, in exercising the power of the Secretary (by way of review), the Social Security Appeals Tribunal and the Administrative Appeals Tribunal were to act in accordance with any ministerial directions issued pursuant to proposed new subsection 251(1B).⁶⁰

The Senate Standing Committee for the Scrutiny of Bills drew the provision to the attention of the Senate.⁶¹ In particular, the Committee referred to the extent to which the directions would be binding and on whom. In its report, the Committee said:

In view of the binding effect of [directions] issued by the Minister pursuant to proposed subsection 251(1B), it may be more appropriate to make such [directions] disallowable instruments for the purposes of the *Acts Interpretation Act 1901*.⁶²

The then Minister for Social Security did not agree. In his response to the Committee he said:

It is necessary that the directions issued by the Minister [pursuant to this provision] ... are of a binding nature to obviate the difficulties encountered by the Department when faced with trying to reconcile decisions made by the Administrative Appeals Tribunal and the departmental policy on effective debt management and control.⁶³

Despite the Committee's concerns, the provision passed into law and the new subsections were duly inserted into the *Social Security Act*.⁶⁴ They were subsequently

⁵⁸ Clause 57.

⁵⁹ Aronson, M and Franklin, N, *Review of Administrative Action* (1987, The Law Book Company Limited, North Ryde), p 238, referring to s43 of the *Administrative Appeals Tribunal Act 1975*.

⁶⁰ Explanatory Memorandum, p 79.

⁶¹ Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 1988*, Parliamentary Paper No 402 of 1988, pp 264-6.

⁶² Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 1988*, Parliamentary Paper No 402 of 1988, p 265.

⁶³ Senate Standing Committee for the Scrutiny of Bills, *Second Report of 1989*, Parliamentary Paper No 466 of 1989, p 36.

⁶⁴ Act No 133 of 1988. It should be noted, however, that attempts were made in the Senate to amend the legislation in accordance with the Committee's concerns (see Senate, *Hansard*, 13 December 1988, p 4070).

considered in the course of a wider inquiry into the debt recovery procedures of the *Social Security Act* by the Senate Standing Committee on Legal and Constitutional Affairs, which also recommended that the directions should be subject to disallowance.⁶⁵ In reaching this conclusion, the Committee referred to a submission from the Senate Standing Committee on Regulations and Ordinances which stated that the directions were 'clearly legislative' because they were binding on the Social Security Appeals Tribunal and the Administrative Appeals Tribunal.⁶⁶ In view of this fact, the Regulations and Ordinances Committee said that the directions should be subject not only to tabling but also disallowance.⁶⁷

On 14 February 1991, the Government response to the Legal and Constitutional Affairs Committee's report was tabled.⁶⁸ The recommendation concerning disallowance was not accepted.⁶⁹

Summary

It should be clear from these illustrations that quasi-legislation takes a variety of forms and goes by an assortment of names. Quasi-legislative instruments are subject to a range of different forms of what might loosely be termed 'scrutiny', from no scrutiny at all to tabling and disallowance. They also vary in their effect and the extent to which their effect approaches that of legislation. What they have in common is that they have an effect which approximates that of a law. What they also have in common is that they are not *actually* laws and should never be regarded as such.

⁶⁵ Senate Standing Committee on Legal and Constitutional Affairs, *Debt recovery under the Social Security Act and the Veterans' Entitlements Act* (*Journals of the Senate*, No 20, 22 August 1990, p 228), recommendation 17, pp 62-3.

⁶⁶ Submission, p 2, referred to in Senate Standing Committee on Legal and Constitutional Affairs, *Debt recovery under the Social Security Act and the Veterans' Entitlements Act* (*Journals of the Senate*, No 20, 22 August 1990, p 228), p 62.

⁶⁷ Submission, p 1, referred to in Senate Standing Committee on Legal and Constitutional Affairs, *Debt recovery under the Social Security Act and the Veterans' Entitlements Act* (*Journals of the Senate*, No 20, 22 August 1990, p 228), p 62.

⁶⁸ *Journals of the Senate*, No 64, 14 February 1991, p 745.

⁶⁹ Government's Response (*Journals of the Senate*, No 64, 14 February 1991, p 745), p 17.

Chapter 4

Problems Posed by Quasi-legislation

The problems posed by quasi-legislation are two-fold. First, there are practical difficulties, originating from the fact that the kinds of instruments to which the term can be applied are proliferating in terms of both variety and volume. A subsidiary practical problem is that instruments are promulgated without any apparent regard to the need for them to be accessible and intelligible.

Second, there is the more serious problem of legitimacy. The inaccessibility of such instruments, in turn, involves questions as to their legal effect. In addition, as the effect of these instruments approaches that of legislation, significant questions are raised in the context of the Parliament's role as the supreme law-maker.

Proliferation of Quasi-legislative Instruments

It is worth recalling at this stage the prophetic words of RE Megarry which were cited in the Introduction to this paper. Writing in 1944, Mr Megarry said:

Not long ago, practitioners could live with reasonable comfort and safety in a world bounded by Acts of Parliament, Statutory Rules and Orders and judicial decisions. One of the tendencies of recent years is for this to become an expanding universe.⁷⁰

If this was a concern to Mr Megarry in 1944, it would surely be a matter which would cause him some anxiety today.

Emeritus Professor Douglas Whalan, who is the legal adviser to the Senate Standing Committee on Regulations and Ordinances, has been attempting in recent years to map the 'expanding universe' referred to by Mr Megarry and to measure its growth. Professor Whalan has done so by reference to the reports of the Regulations and Ordinances Committee (which has a particular role in relation to delegated legislation and which is discussed in greater detail in Chapter 5 below). In 1989, in an address to an Administrative Review Council conference on rule-making,⁷¹ Professor Whalan referred to figures which he had extracted from the Regulations and Ordinances Committee's *Seventh Report*, which was tabled on 26 October 1949. He noted that, according to that report, the Committee examined a total of 192 instruments in the course of the year. Of those 192 instruments, 142 were Statutory Rules (the relevance of which is discussed below) and 50 were Ordinances or regulations made under Ordinances.⁷² Professor Whalan noted that the figures for the following year were

⁷⁰ Megarry, RE, 'Administrative quasi-legislation', (1944) 60 *Law Quarterly Review* 125, at pp 125-6.

⁷¹ Whalan, DJ, 'The features of the Commonwealth system for parliamentary scrutiny of delegated legislation', address to Administrative Review Council conference on rule making, held in Canberra on 31 August 1989 (unpublished).

⁷² Senate Standing Committee on Regulations and Ordinances, *Seventh Report* (reproduced in *Journals of the Senate*, Session 1951-52-53, pp 421-6).

much the same, with a total of 210 instruments comprising 166 Statutory Rules and 44 Ordinances or Regulations made under Ordinances.⁷³

Moving ahead to the Committee's *Thirty-eighth Report*,⁷⁴ which gave the relevant figures for 1971, Professor Whalan noted that the total of 284 instruments considered by the Committee was made up of 214 Statutory Rules and 70 Ordinances or regulations made under Ordinances.⁷⁵ He also referred to a comment made by the Committee in 1974, in its *Fiftieth Report*.⁷⁶ In that report the Committee said:

An important feature of Federal delegated legislation in Australia is that there has not been a proliferation of different types of instruments as there has been in some countries.⁷⁷

By the late 1980s, this situation had changed dramatically. In its *Eighty-sixth Report*,⁷⁸ the Committee set out the following figures in relation to the total number of instruments scrutinised by the Committee over the three previous years:⁷⁹

1986-87	832
1987-88	1032
1988-89	1352

While the sheer volume of these instruments is telling in itself, the Committee also provided details on the nature of the instruments examined in 1988-89:⁸⁰

Statutory rules	398
Public service and defence legislation determinations	386
ACT and other territory ordinances, regulations and other instruments	265
Civil aviation orders	120
Primary industry plans, notices, orders and other instruments	52
Health legislation determinations, declarations, approvals, principles and notices	35
Statutory authority by-laws	23

⁷³ Senate Standing Committee on Regulations and Ordinances, *Eighth Report* (reproduced in *Journals of the Senate*, Session 1948-49, pp 199-207).

⁷⁴ Parliamentary Paper No 100 of 1971.

⁷⁵ Senate Standing Committee on Regulations and Ordinances, *Thirty-eighth Report*, Parliamentary Paper No 100 of 1971, p 1.

⁷⁶ Parliamentary Paper No 271 of 1974.

⁷⁷ Senate Standing Committee on Regulations and Ordinances, *Fiftieth Report*, Parliamentary Paper No 271 of 1974, p 15.

⁷⁸ Senate Standing Committee on Regulations and Ordinances, *Eighty-sixth Report*, Parliamentary Paper No 93 of 1990.

⁷⁹ *Ibid*, at p 3.

⁸⁰ *Ibid*.

Of the 1352 instruments examined, the 398 Statutory Rules represent less than one third. The remaining instruments were promulgated pursuant to a myriad of provisions contained in scores of Acts.

As great a concern as the number of instruments is the bewildering array of different types of instrument. Professor Whalan recently wrote:

Only 3 sorts of instruments were listed in the early 1970s whereas I now have 72 different kinds of instruments separately listed in my filing index. The earlier figure may be slightly misleading, ... but the increase in variety is startling. ... I have noticed a tremendous move away from the more formal instruments.⁸¹

Though this proliferation, in volume and variety, of instruments need not be a problem of itself, it presents significant difficulties for the Regulations and Ordinances Committee (whose role is discussed in greater detail in Chapters 5 and 6). It also illustrates the increasing use of forms of legislative instruments which do not easily fit within the existing processes and procedures for scrutiny. Finally, it underlines the concern expressed by Mr Megarry in his plaintive 1944 submission on behalf of the practitioner (legal or otherwise) who is attempting to come to grips with the rules which govern a particular area. As the Committee on Ministers' Powers observed in 1932, even '[t]he most scientific explorer cannot make a map of a jungle'.⁸²

Quality of Drafting

Professor Whalan, in his capacity as legal adviser to the Regulations and Ordinances Committee, has also been a trenchant critic of the variable drafting which has become evident in the increasing number of quasi-legislative instruments which fall outside the regime of the Statutory Rules series. Statutory Rules are provided for by the *Statutory Rules Publication Act 1903*, which requires that

[a]ll statutory rules shall forthwith after they are made be sent to the Government Printer, and shall, in manner prescribed, be numbered, and (save as prescribed) be printed and sold by him.⁸³

The Act defines 'Statutory rules' as

rules, regulations, or by-laws, made under any Act, which:

⁸¹ Letter from Professor Whalan to the author (in his capacity as Secretary to the Senate Standing Committee for the Scrutiny of Bills) dated 2 December 1990 (unpublished), p 3.

⁸² Committee on Ministers' Powers, *Report*, Cmd 4060 (1932, HMSO, London), p 27.

⁸³ *Statutory Rules Publication Act 1903*, s 5(1).

- (a) relate to any Court within the Commonwealth, or to the procedure, practice, or costs therein, or to any fees or matters applying generally throughout the Commonwealth or any part of the Commonwealth; or
- (b) are made by the Governor-General, or any Minister, or the Inter-State Commission, or any Government department.⁸⁴

Subsection 5(2) of the Act sets out additional requirements concerning the dating and numbering of such rules.

It is generally agreed that being subject to what the (then) Chairman of the Regulations and Ordinances Committee called 'the presentational discipline of the *Statutory Rules Publication Act*⁸⁵ is a factor which enhances instruments produced pursuant to that regime and detracts from those that are not subject to that discipline. Instruments which are subject to the *Statutory Rules Publication Act* also benefit from being 'professionally drafted exclusively by legal specialists in the Attorney-General's Department'.⁸⁶ In addition to producing a professional product, centralised drafting also promotes consistency in the instruments produced.

The kinds of instruments which are issued, say, pursuant to the *National Health Act 1953* (discussed in Chapter 3 above), are not covered by the provisions of the *Statutory Rules Publication Act*.⁸⁷ Those instruments which are designated as disallowable instruments are specifically exempted from the operation of these provisions.⁸⁸ The non-disallowable instruments simply do not come within the definitions on which the *Statutory Rules Publication Act* operates.

Instruments such as those identified in the *National Health Act* (even disallowable instruments) are generally drafted within the departments involved, which means that there is no consistency in the form or drafting style of such instruments. Comparing this situation with the regime applied to Statutory Rules, Professor Whalan had this to say:

There is relatively easy access to statutes, regulations and, indeed, ordinances. Not only are they drafted by specialist professionals, but they are properly published in a series in print that can be read without the aid of a microscope. In contrast, some disallowable instruments have turned up on rather scrappy bits of paper, with the drafting in them of poor standard and with an indecipherable signature.⁸⁹

Accessibility

⁸⁴ *Statutory Rules Publication Act 1903*, s 2.

⁸⁵ Senate, *Hansard*, 15 June 1989, p 4129 (also reproduced in Senate Standing Committee on Regulations and Ordinances, *Eighty-sixth Report*, Parliamentary Paper No 93 of 1990, p 15).

⁸⁶ Giles, P, 'Scrutiny of Federal quasi-legislation in Australia', reproduced in Third Commonwealth Conference on Delegated Legislation, *Record of Proceedings* (1990, HMSO, London), Appendix 5, at p 124.

⁸⁷ Though this is disputed by some - see discussion in Chapter 7.

⁸⁸ *Acts Interpretation Act 1901*, s46A(1)(c).

⁸⁹ Whalan, DJ, 'The final accolade: Approval by the committees scrutinizing delegated legislation', paper given to seminar conducted by the (Commonwealth) Attorney-General's Department, entitled 'Changing attitudes to delegated legislation', held in Canberra on 23 July 1990, at p 9.

As alluded to in the quote from Professor Whalan above, a subsidiary problem arising out of quasi-legislative instruments falling outside the ambit of the *Statutory Rules Publication Act* is that they are hard to gain access to. Following on from the passage reproduced above, Professor Whalan said:

So it is difficult to know who made the law or why and, even if one did know, it is even more difficult than usual to know what the law actually is.

Furthermore, a member of the public would have great difficulty finding out the current state of the law, as much of this law is not properly published.⁹⁰

This point was also raised in the context of the Senate Standing Committee on Legal and Constitutional Affairs' inquiry into debt recovery under the Social Security Act and the Veterans' Entitlements Act (which is discussed in Chapter 3 above). In the course of that inquiry, that Committee considered provisions contained in section 251 of the *Social Security Act* which allowed the relevant Minister to issue 'directions' in relation to the write-off and waiver of debts. Those directions operate formally to bind the Secretary of the Department of Social Security when making decisions as to whether or not to write-off or waive debts owed to the Commonwealth by welfare recipients. However, despite their binding effect of directions on recipients, administrators, legal advisers and adjudicative bodies alike, there is no guarantee that any of these individuals or bodies can gain easy access to such directions.⁹¹

Mr Julian Disney, then Co-ordinator of the Welfare Rights Centre and a witness before the Legal and Constitutional Affairs Committee said:

One of the problems is, of course, public access to the rules. It is hard enough to get access to regulations, but if there are to be new categories of statutory instruments like ministerial directions under section 251 of the Social Security Act, will people be able to get access to them readily enough? There is no regular series, there is no easy way of finding them, even for those people who are broadly familiar with searching for statutory instruments.⁹²

Inaccessibility of legislation is not simply a problem of practicalities. As is discussed below, it also arguably detracts from the legitimacy of the legislation.

'Secret' Legislation

A more cynical view of the inaccessible nature of quasi-legislation is that it is 'secret' legislation. At a 1990 seminar conducted by the Commonwealth Attorney-General's Department, entitled 'Changing attitudes to delegated legislation', it was suggested that all subordinate legislation was, in effect, 'secret' or 'hidden' legislation because it

⁹⁰ Whalan, DJ, 'The final accolade: Approval by the committees scrutinizing delegated legislation', paper given to seminar conducted by the (Commonwealth) Attorney-General's Department, entitled 'Changing attitudes to delegated legislation', held in Canberra on 23 July 1990, p 9.

⁹¹ Though, of course, the provisions of the *Freedom of Information Act 1982* could be of assistance in this regard, if the existence of the directions is disclosed or known.

⁹² Senate Standing Committee on Legal and Constitutional Affairs, *Debt recovery under the Social Security Act and the Veterans' Entitlements Act, Evidence*, p 596.

does not usually reach the public eye until after it has become operative.⁹³ If this is the case, the kinds of quasi-legislation found in, say, the *National Health Act* are positively invisible, as some need never reach the public eye.

It has been suggested that the increased use of quasi-legislative instruments is part of a deliberate plan to avoid the unwelcome attention of the Parliament. As early as 1972, the then Chairman of the Senate Standing Committee on Regulations and Ordinances, Senator Ian Wood, warned the Senate about 'instruments in writing' being used in preference to regulations or ordinances, in order to evade his Committee's scrutiny.⁹⁴ More recently, Mr Robert Wiese MLA, a member of the Western Australian Parliament's Joint Standing Committee on Delegated Legislation, said:

[I]t is a matter for real concern that government departments will knowingly seek to reduce a parliamentary committee's jurisdiction by adopting forms of statutory instrument that are not caught by the definition "regulation" in the empowering Act.⁹⁵

Mr Peter O'Keeffe, a Clerk Assistant in the Senate and a former Secretary of the Standing Committee on Regulations and Ordinances, has been more blunt:

These imaginative names and classifications serve only one purpose - to create the pretence that the species of legislative or quasi-legislative instrument in question is different in kind from a statutory rule and therefore warrants different treatment by way of drafting, presentation and promulgation under the complete control of the relevant policy department.⁹⁶

Similarly, in 1947, in *Blackpool Corporation v Locker*,⁹⁷ Lord Justice Scott (who had been a member of the Donoughmore Committee on Ministers' Powers), made the following comment in relation to Ministry of Health 'circulars':

I am tempted to wonder whether someone in the Ministry of Health thought the name 'circulars' would save them from recognition as delegated legislation!⁹⁸

Instruments such as these are a prime example of what Lord Hewart called 'departmental legislation'⁹⁹ or, to put it another way,

law made by administrators, for administrators [and] known only to administrators.¹⁰⁰

⁹³ Burgess, V, 'Experts advise on "secret" legislation', *The Canberra Times*, 24 July 1990, p 3 and (by the same author) 'Inside the secret rule book by which we live', *The Canberra Times*, 29 July 1990, p 9.

⁹⁴ Senate, *Hansard*, 29 February 1972, p 265.

⁹⁵ 'A regulation by any other name', paper presented to Third Conference of Australian Delegated Legislation Committees, Perth, 22 May 1991, p 1.

⁹⁶ O'Keeffe, P, 'Who is Watching the Regulators', *Business Council Bulletin*, (58) October 1989, 32, at p 35.

⁹⁷ [1948] 1 KB 349.

⁹⁸ *Blackpool Corporation v Locker* [1948] 1 KB 349, at p 368.

⁹⁹ Lord Hewart of Bury, *The New Despotism* (1929, Ernest Benn Limited, London), p 59.

¹⁰⁰ O'Keeffe, P, 'Who is Watching the Regulators?', *Business Council Bulletin*, (58) October 1989, 32, at p 33.

It is not possible to reach any sort of conclusion as to the reasons, if any, behind what is clearly a pronounced trend toward this less formal law-making. Indeed, it is not necessary for the purposes of this paper to even try. What is relevant, however, is that there is a level of law-making which is increasingly the province of bureaucrats and into which the Parliament often cannot intrude.

If, as is suggested in relation to some of the examples referred to in Chapter 3 above, the instruments in question are actually legislative in character, it points to two significant problems. One is the effect that such a devolution of legislative power has on the supremacy of Parliament. The other is the effect that such quasi-law can legitimately have, given the absence of parliamentary input into its formulation.

'The Rule of Law and the Lore of Rules'¹⁰¹

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*,¹⁰² Lord Justice Scott said:

[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.¹⁰³

This passage was cited with approval by Justice Stephen of the High Court in the leading Australian case of *Watson v Lee*.¹⁰⁴

After noting the obligations which existed under British law (as they do in Australia) to publish Acts of Parliament and statutory instruments, Lord Justice Scott 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.¹⁰⁵

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.¹⁰⁶

101 This is the title of an article by Professor Dennis Pearce, which appears in *Legislative Studies*, Vol 4, No 2, Spring 1989, 3.

102 [1948] 1 KB 349.

103 *Blackpool Corporation v Locker* [1948] 1 KB 349, at p 361.

104 (1979) 144 CLR 374, at 394.

105 *Ibid*, at 362.

106 *Ibid*.

In the course of his decision, Lord Justice Scott also referred to the maxim that ignorance of the law is not a defence.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹

These points are well made. The fact that what is not law can be nevertheless applied as law is a problem in itself. However, the fact that the individuals to whom such quasi-laws apply often have no way of even being aware of these laws surely brings such applications into serious doubt.

Summary

It has been asserted that the new techniques of quasi-legislation 'stand ... established theory on its head'.¹¹⁰ Certainly, quasi-legislation involves serious difficulties of both a practical and a conceptual nature. The fact that it is generally badly drafted, hard to understand and almost impossible to locate makes it an undesirable and potentially dangerous addition to the legislative framework. These problems, in turn, raise serious questions not only about the use of quasi-legislation but also its validity.

¹⁰⁷ *Ibid*, at 361.

¹⁰⁸ Held in Canberra on 31 August 1989. Discussed further in Chapter 7.

¹⁰⁹ Pearce, DC, 'The Rule of Law and the Lore of Rules', *Legislative Studies*, Vol 4, No 2, Spring 1989, 3, at p 4.

¹¹⁰ Senate, *Hansard*, 15 June 1989, p 4126, at p 4129 (Senator Collins).

