

Rules, Regulations and Red Tape

Parliamentary scrutiny of delegated legislation*

Dennis Pearce

Introduction

Let me begin with an imaginary dialogue:

‘I will only keep you for a second.’

‘But, hang on a second, how long is a second?’

‘Well I can tell you that it is: “the duration of 9 192 million 631 thousand 770 periods of the radiation corresponding to the transition between the 2 hyperfine levels of the ground state of the caesium 133 atom”, because it is set out in the *National Measurement Regulations 1999* and is thereby the law.’

‘But who said it was the Law?’

‘The Governor-General.’

‘But how can the Governor-General make the law? He is the head of the Executive. It is Parliament that makes laws.’

‘The Parliament cannot make all the laws; there are just too many rules that have to be laid down if our society is to be properly regulated. Many are highly technical and do not need the attention of the Parliament once it has determined the policy that is to underpin the law.’

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House on 25 June 2004.

The definition of the second of time is a good example of this. It is based on international agreement. The Parliament could not have any useful input into its content. So it is better dealt with by an expert body that understands the detail of the world of weights and measures.

In cases like this, the Parliament authorises other persons to make laws. This is known as delegated legislation because the Parliament delegates its power to make laws to others—often the Governor-General but also ministers and various government officials.’

‘And so the Parliament washes its hands of the legislation and leaves it to others to produce what they think should be the law?’

The answer to that is ‘Not quite’. And it is what we are here to talk about today.

Parliamentary review of delegated legislation

One hundred years ago the Commonwealth Parliament considered the question: ‘What oversight should be exercised by a Parliament in relation to legislation made by its delegates?’

The response of the Parliament was to enact the *Acts Interpretation Act 1904* and include in it a requirement that all regulations be laid before each House of the Parliament. Regulations were then the principal form of delegated legislation. The Act thereby ensured that the Parliament was apprised of the content of the law that its delegates were producing.

The Bill setting out the requirement for tabling regulations was introduced into the Senate by the then Attorney-General, Senator James Drake. However, the Senate amended the Bill by empowering any member of either House to move for the disallowance of a regulation that had been tabled. If such a motion were passed in either House, the disallowance had the effect of repealing the regulation.

This amendment was opposed by the government which said that this power should not apply generally but should be included on a case by case basis following an examination of the regulation-making power in each Bill as it came before the Parliament. This was what had been happening up until then. However, the senators claimed that there should be a uniform process rather than a debate each time a new Bill was introduced. As has frequently happened in regard to delegated legislation, the Senate had its way and the amendment was subsequently agreed to by the House of Representatives.¹

A significant element of this disallowance power was that the power to initiate action was given to individual members of the Parliament. As importantly, action to disallow a regulation could be taken by the House in which the motion was moved. It was not necessary for the disallowance motion to be passed by both Houses of the Parliament. The proposal to include this power in the Act caused some consternation in the House of Representatives. Some members correctly foresaw that it would enable the Senate

¹ This power to disallow tabled regulations existed in some states at this time.

to set aside government regulations. However, the view of those more concerned with the need of the Parliament to be able to control executive action prevailed.

In addition to the inclusion of the power of the Parliament to disallow regulations, the Act provided that regulations were to commence on notification in the *Gazette* or such later day as the regulations provided. This prevented any backdating of regulations, but the provision was amended in 1937 to prevent only back dating that adversely affected a person other than the Commonwealth.²

The Bill passed all stages in the Parliament on 18 May 1904 and was assented to and came into force on 14 June 1904.³ (It is not clear why a separate Act was made rather than amend the existing *Acts Interpretation Act 1901*. The two acts proceeded in parallel until they were combined in 1937.)

This mechanism for parliamentary oversight of delegated legislation established just over one hundred years ago has been maintained to this day. There have been a number of amendments to the procedures, some of which have been adopted to overcome executive attempts to undermine the system. However, the basic principle of tabling after making, with either House of the Parliament having a right to set aside the legislation, remains. It will apply also in the new regime for making and publishing of delegated legislation under the *Legislative Instruments Act 2003* that comes into force on 1 January 2005.

However, lest it be thought that the passage of the Acts Interpretation Act in 1904 exemplified a golden age of parliamentary enlightenment, it should be noted that the very next motion passed by the Senate was one recording its grave objection to the introduction of Chinese labour into the Transvaal.⁴

The tabling and disallowance regime

The principal features of the tabling and disallowance regime are:

- (1) All regulations (now extended to a wider range of legislative instruments) have to be tabled within a certain time after making. Presently this is fifteen sitting days. This can be a considerable period, particularly if the Parliament is in recess, for example over the summer. The time for tabling legislation made say on 15 December is not likely to commence to run until mid-February. The Legislative Instruments Act will shorten this tabling time to six sitting days—still a considerable time.

Failure to table legislation initially led to its being a nullity with the consequence that anything done in reliance on the legislation was invalid. This necessitated the passage on occasions of an Act to validate action taken under delegated legislation where tabling had been overlooked. However, now the effect of

² *Acts Interpretation Act 1901*(AIA) s 48.

³ For detail of the background to the Act see Robert Walsh and John Uhr, 'Parliamentary disallowance of delegated legislation: a history of the basic provisions in the Acts Interpretation Act' *Legislative Studies Newsletter* no. 10, 1985: 11–20.

⁴ *Commonwealth Parliamentary Debates*, 16 March 1904: 553–585.

failing to table by the due date is that the legislation thereafter ceases to have effect.⁵

The significant feature of the fifteen day tabling requirement is that most delegated legislation comes into operation when it is made or on a date specified in it. It is thus likely to be in force when it is tabled. This can act as a constraint on disallowance as is discussed below.

- (2) After tabling, any member may, during the next ensuing fifteen sitting day period, move a motion that the legislation be disallowed. As noted above, this disallowance power is directed to existing legislation, not legislation that is yet to commence operation. This is known as negative resolution procedure. The legislation is set aside after it has been operating and this could be for some months.

To disallow legislation after it has been operating for some time is a bold step as people will have conditioned their activities in accordance with the legislation. This is a constraint on the Parliament exercising its disallowance power. However, it has not proved, in practice, to present a total bar to the Parliament disallowing legislation.

The alternative approach would be for the legislation not to commence until the Parliament said that it could. This is described as an affirmative resolution procedure. It is seldom used in relation to Commonwealth delegated legislation but has greater use in England. The idea underlying it is to enable there to be public comment on the legislation and the opportunity for the Parliament to determine whether the legislation should be made. Whether this procedure should be given greater credence in Australia is returned to below.

- (3) If a motion for disallowance is tabled, it must be passed, rejected or otherwise resolved within the next fifteen sitting days. If it is not dealt with, the motion is taken to have been carried.⁶

This is perhaps the most significant element of the regime as it obliges the government to take action. It cannot simply allow the disallowance notice to remain on the *Notice Paper* of the House in the expectation that it will lapse on the prorogation or dissolution of the particular Parliament.

The working of the regime

Despite what might be thought of as a relatively benign regime for the oversight of delegated legislation, the executive has at times tried to thwart the exercise of the disallowance power. In 1931 for a period the Senate would disallow a set of contentious regulations and the executive would remake them as soon as the Parliament was adjourned. The disallowance motion would again be passed when the Parliament resumed and again the regulations remade when it adjourned.⁷ To overcome this defiance of the will of the Parliament (or at least the Senate) the *Acts Interpretation Act 1904* was amended in 1932 to prevent the remaking of a regulation

⁵ AIA s 48(3); *Legislative Instruments Act 2003* (LIA) s 38(3).

⁶ AIA s 48(5) (inserted in 1937); LIA s 42(2).

⁷ See Walsh and Uhr, *op. cit.* at p. 16 for further background.

the same in substance as that disallowed within six months of the disallowance unless the disallowance resolution was rescinded.

Further amendments were made in 1988 to prevent the repeal and remaking of legislation during the period for tabling (with a view to avoiding the obligation to table the legislation) and during the period for disallowance after tabling (for the purpose of negating any motion to disallow).

Provisions have also been included in the Acts Interpretation Act to limit the ability of the executive to legislate by incorporating other material in regulations. Such other material may only be incorporated to the extent that it is in force when the delegated legislation is made. It cannot be incorporated on a from time to time basis. To act otherwise would allow another person, in effect, to make the legislation and it would not be subject to any parliamentary oversight.⁸

Until 1987 the tabling and disallowance regime applied only to regulations, so labelled, and to any other forms of legislation that made specific provision for tabling. Territory Ordinances and Rules of Court were so specified but very few other forms of delegated legislation. It was well known that there were many other instruments of a legislative nature: determinations, notices, schemes, guidelines and so on. Indeed, there is reason to think that these other forms of legislation were on occasions used to avoid the exposure of the instrument to the tabling and disallowance regime.

A major change occurred in 1987 with the inclusion of s 46A in the Acts Interpretation Act. That section established a category of what are termed 'disallowable instruments'. These instruments are subjected to the same oversight regime as applies to regulations. It is now common practice for new provisions empowering the making of legislative instruments to designate them as disallowable instruments thus bringing them within the tabling and disallowance power of the Parliament. The Senate Scrutiny of Bills Committee requires an explanation if a legislative instrument is not designated as falling within s 46A.

The inclusion of this provision in the Acts Interpretation Act was a significant recognition of the need for the Parliament to be informed of the making of delegated legislation and provided with the opportunity to disallow it. The number of pieces of legislation falling within the description of disallowable instruments now exceeds the number of traditional regulations.

From 1 January 2005, the Legislative Instruments Act will widen the net still further by requiring all instruments of a legislative character to be registered on a publicly available electronic register. An instrument is of a 'legislative character' if 'it determines the law or alters the content of the law, rather than applying the law in a particular case; and 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.'⁹

⁸ See AIA s 49A. At present there is no obligation to make incorporated material available to the Parliament but under the LIA, a House of the Parliament may require the incorporated material to be made available for inspection: see s 41.

⁹ LIA, s 5.

This is a major step in identifying delegated legislation and making it available. When I was conducting a review of certain action of a Department, I found in the middle of a general file, all duly registered, spiked and folio numbered, the legislative instrument on which the scheme that I was looking at was based. It is doubtful if it would ever have seen the light of day again. Certainly no member of the public would have been able to gain access to it and it would have presented difficulties for the Department if it had had to produce the original. It is to identify this sort of hidden law that the Legislative Instruments Act is directed.

Instruments on the Federal Register of Legislative Instruments must be tabled in the Parliament within six sitting days of registration and will be subject to disallowance¹⁰.

With the commencement of this legislation, the Parliament will have finally moved to accepting responsibility for the oversight of all legislation whether it emanates from the Parliament itself or from a delegate of the Parliament.

Whether this means of reviewing delegated legislation is adequate is returned to below. First, it is necessary to consider the means by which the Parliament informs itself about the content of delegated legislation and whether or not it should be disallowed.

Regulations and Ordinances Committee

It is a valuable step in the process of oversight of delegated legislation for the Parliament to have all such legislation brought to its attention. However, it is unrealistic to expect parliamentarians to have the time or the expertise to examine each of the now nearly 2000 pieces of legislation that are laid on the table of the Parliament each year.

The Senate recognised this and on 17 March 1932 appointed the Standing Committee on Regulations and Ordinances. Senate Standing Order 23 presently provides:

- (1) A Standing Committee on Regulations and Ordinances shall be appointed at the commencement of each Parliament.
- (2) All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the committee for consideration and, if necessary, report.
- (3) The committee shall scrutinise each instrument to ensure:
 - (a) that it is in accordance with the statute;
 - (b) that it does not trespass unduly on personal rights and liberties;
 - (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

¹⁰ LIA, s 38.

(d) that it does not contain matter more appropriate for parliamentary enactment.

The Committee has usefully expanded this bare outline of its role by publishing a statement setting out, under the heads of review, the issues with which it will be concerned. This statement is included in the Committee's annual reports. It, and the reports, reveal that the Committee has concerned itself not only with the content of the legislation reviewed but also its manner of presentation to the public and the quality of its drafting.

Legislation can cause as much difficulty to the public from the obscurity of its requirements and its inaccessibility as from its actual prescriptions. Try to interpret the following:

In the Nuts (Unground) (Other Than Ground Nuts) Order, the expression 'nuts' shall have reference to such nuts, other than ground nuts, as would but for this amending order not qualify as nuts (unground) (other than ground nuts) by reason of their being nuts (unground).

The Committee's acceptance of a role in requiring clarity in the legislation it reviews is a valuable aid to the quality of the statute book.

These matters have been recognised in the Legislative Instruments Act. Its principal purpose is to make legislation publicly available. However, it also makes reference to the need for quality of drafting and the publication of explanatory material.

The Committee has also insisted on the preparation of explanatory memoranda to assist in the understanding of what might otherwise appear to be questionable provisions. (It is hoped that one accompanied the Veterans' Entitlements (Special Assistance—Motor Cycle Purchase) Regulations 2001 which provide for a person to be entitled to assistance towards the purchase of a motor cycle if the person is a veteran who has lost a leg or both arms as a result of war-caused injury.)

Apart from its concentration on these more technical matters, the Committee has overseen the need to protect personal rights and liberties through examining legislation to ensure that it does not impose retrospective burdens on persons; does not allow executive interference with accepted rights such as freedom from invasion of property and privacy; does not give a public official subjective discretions; and provides for rights of appeal on the merits against executive decisions.

The Regulations and Ordinances Committee has been one of the great success stories of the Senate. It has been replicated in many legislatures in Australia and in other countries.

Each year now the Committee examines just under 2000 legislative instruments against its terms of reference. It raises issues of concern in relation to about ten per cent of the instruments. The majority of these concerns are dealt with by way of an explanation from the relevant minister or by the minister undertaking to attend to the Committee's concerns when next the legislation is being amended.

Where there is a delay in dealing with the issues that the Committee has raised or an initial response has not satisfied the Committee, the Chair of the Committee will move a disallowance motion in the Senate. This has, in recent years, always produced a response. The Senate has not had to disallow a regulation on the initiative of the Committee since 1988. This is simply because, over the many years of its existence, the Senate has always supported a disallowance motion when moved by the Committee. The executive knows that it must reach an accommodation with the Committee or lose its legislation.

Early in its life, the Committee determined that ‘questions involving government policy in regulations and ordinances fell outside the scope of the Committee’¹¹ Taken at face value, this self-denying ordinance would have resulted in their being little on which the Committee could report as the whole text of a regulation represents government policy. However, what the Committee means is that it will not examine the policy basis for the adoption of legislation—but it will look at the way in which that policy has been implemented.

So if, for example, a policy to require fruit growers to provide returns of production is given effect by permitting inspectors to enter the premises of a grower without a warrant, the Committee will regard that as breach of its criteria even though it is the policy of the government to permit such entry. However, the Committee will not look at the policy decision to require the provision of returns.

The effect of this approach has been to shield the Committee from party political differences and has produced an uncommon level of bi-partisanship in its work. It is this that has made the Committee so successful and which has persuaded the Senate to support it when there has been a show-down with the executive.

The existence of the Committee has also had an effect on the quality of legislation that is produced by the executive. The fact that the Committee will scrutinise legislation against the stated criteria has sent the message to the executive that legislation that offends is likely to be questioned and possibly disallowed—to the embarrassment of the minister concerned. This means that drafters of legislation have a powerful weapon to control over-zealous officials who wish to include powers that breach basic principles in their legislation.

The Committee has been ably assisted in its task by not only a dedicated secretariat but also a coterie of external legal advisers, the last three of whom I have been fortunate enough to have as colleagues at the ANU Law Faculty.

The Committee has had to contend with an ever-increasing workload since the creation of the disallowable instruments category of delegated legislation. The number of instruments scrutinised has more than doubled since the mid-1980s. The advent of the Legislative Instruments Act is likely to see a further increase, but of what size is not known because the whole point of the Act is to identify previously unacknowledged delegated legislation and subject it to parliamentary oversight.

¹¹ 4th Report para 5.

The Regulations and Ordinances Committee has been a key factor in the control that the Parliament has exercised over delegated legislation. It has served to highlight that this control is exclusively the province of the Senate. The House of Representatives has not adopted any role in parliamentary oversight of delegated legislation.

Is the present oversight process sufficient?

Sir Ninian Stephen said in *Watson v Lee*

[The history of delegated legislation] reflects the tension between the needs of those who govern and the just expectations of those who are governed. For those who govern, subordinate legislation, free of the restraints, delays and inelasticity of the parliamentary process, offers a speedy and flexible mode of law-making. For the governed it may threaten subjection to laws which are enacted in secret and of whose commands they cannot learn: their reasonable expectations that laws shall be both announced and accessible will only be assured of realisation by the imposition and enforcement of appropriate controls upon the power of subordinate legislators, whose power, as Fifoot observed 'requires an adequate measure of control if it is not to degenerate into arbitrary government' (*English Law and its Background*, 1932).¹²

It was not until the enactment of the Legislative Instruments Act that it could be said the Commonwealth Parliament was doing all that it should in respect of the oversight of delegated legislation simply because there was a large body of legislation that was not being tabled. This shortcoming has now been remedied and at least the full range of such legislation will be publicly available and subjected to parliamentary scrutiny.

However, this is but a first step. Gary Banks, chairman of the Productivity Commission said in a paper entitled 'Challenges in Regulatory Reform':

Regulation is essential to the proper functioning of a society. Whether through primary or delegated legislation, or more informal arrangements, rules create order and the basis for stability and progress. They shape incentives and influence how people behave and interact. And they can help societies deal with otherwise intractable economic, social and environmental problems.¹³

But he then went on to note that this goal can only be achieved through good regulation. Bad regulation undermines society's capacity to deal with those problems. Good regulation he said should meet three tests:

- it must be the most effective way of addressing an identified problem;
- it must impose the minimum burden on those regulated; and
- it must cause the minimum amount of collateral damage to others.

¹² (1979) 155 CLR 374 at 394.

¹³ See Productivity Commission website: www.pc.gov.au. See also on that website: S. Argy and M. Johnson, 'Mechanisms for Improving the Quality of Regulations: Australia in the International Context', 2003, particularly the suggested checklist for assessing regulatory quality at p. 6, and the OECD checklist for regulatory decision-making, p. 14.

The question that must be asked is whether the Parliament is playing a sufficient role in ensuring that Commonwealth delegated legislation meets these criteria.

Tabling processes

If the Parliament is to play a useful function in overseeing delegated legislation it must be appraised of that legislation as soon as possible after it has been made. The time provided for tabling legislation started as 30 days, was changed to fifteen sitting days and from 1 January 2005 will be six sitting days. These time limits are all based on the time that it takes to print copies of the delegated legislation and physically deliver them to the Parliament for formal tabling.

As noted previously, the use of sitting days as the time frame for action to be taken means that the time within which action must be taken can be lengthy. It also has the effect that the executive can manipulate the time taken for setting the parliamentary review process in motion. Until the legislation is tabled, no motion for disallowance may be moved. A senator can, with the permission of the Senate, table the legislation him or herself but first it is necessary to obtain a copy of the legislation.¹⁴ In the meantime it will be in force. This may be sufficient for it to achieve its purpose (for example, the recent excision of Melville and Bathurst Islands from the Australian Migration Zone).¹⁵

The present physical tabling process represents another era. We are about to enter a time when the authoritative version of delegated legislation will be that which is on the electronic Federal Register of Legislative Instruments. Yet the Parliament will still be functioning on hard copies that are brought to it from a printery (that is no longer government owned).

It seems to me that, after 1 January 2005, upon registration of an instrument on the Register, it should be immediately transmitted electronically to the Clerks of each House of the Parliament. The receipt of that version of the instrument should be deemed to constitute its tabling. It should then be sent on to each member of the Parliament in the same way as the printed copy is now. The instrument would then be available for parliamentary scrutiny and if needs be for rapid action to disallow it.

The Parliament is enabling the executive to call the tune on this issue of bringing legislation to its attention.

Commencement

The Parliament acted very sensibly in preventing the backdating of the commencement of regulations that would adversely affect a person other than the Commonwealth. This approach was carried through to disallowable instruments and will be applicable also to the new regime of legislative instruments.¹⁶ The Regulations and Ordinances Committee has also looked very closely at legislation to ensure that persons are not adversely affected by any retrospectivity.

¹⁴ Harry Evans (ed.), *Odgers' Australian Senate Practice*, 10th ed., Department of the Senate, 2001: 348.

¹⁵ And see Ernst Willheim, 'Government by regulation: deficiencies in parliamentary scrutiny?' *Public Law Review*, vol. 15, 2004: 5.

¹⁶ AIA s 48; LIA s 12.

However, the process whereby legislation comes into force prior to parliamentary review limits the effectiveness of the disallowance power. People will be affected even though the legislation may subsequently be disallowed or amended following Regulations and Ordinances Committee intervention. This limitation flows from the negative resolution procedure that is used in Australia. This could be overcome by a greater willingness on the part of the Parliament to insist on the inclusion of the affirmative procedure process in legislation. Under this, delegated legislation does not commence unless a formal resolution approving it is passed.

However, it is recognised that this approach makes an extra demand on already limited parliamentary time. For this reason alone it is resisted in all but exceptional cases.

An approach that is to be found in the *A New Tax System Family Assistance Administration Act 1999* is worthy of much wider use. Section 162 of that Act provides that instruments made under the Act do not take effect until the end of the period in which they can be disallowed by the Parliament. This gives full recognition to the review role of the Parliament without making any demands on parliamentary time. General use of such a provision should be encouraged.

If this is thought to be too radical, commencement could at least be postponed until the legislation in question is tabled. If the suggestion of electronic communication for tabling set out above were to be adopted, this would not be necessary. However, if the present practice is to continue, there seems no great reason why, in the majority of cases, the commencement could not await tabling. Urgent cases could be dealt with as an exception to the general rule but with an explanation being required in the explanatory statement which could then be checked by the Senate Committee. This approach would provide an inducement to the executive to expedite the tabling process. It would also ensure that the Parliament was more immediately involved in the legislation-making process.

Pre-making consultation

The *Rules Publication Act 1903*, when first enacted, provided for advance notice of 60 days to be given of the intention to make a rule. This was intended to warn the public of the proposed law and to provide an opportunity to make representations as to its content. The requirement was repealed in 1916.

The Administrative Review Council's Report 'Rule Making by Commonwealth Agencies'¹⁷ which provided the stimulus for the Legislative Instruments Act proposed a formal requirement for notice and consultation prior to making an instrument. This recommendation was influenced by the experience in Victoria where mandatory consultation must be undertaken before a number of instruments are made.¹⁸ In the United States, consultation, including public hearings, prior to making of rules is obligatory.

¹⁷ Report no. 35, 1992.

¹⁸ *Subordinate Legislation Act 1994* (Vic), s 6.

Earlier versions of the Legislative Instruments Bill contained mandatory requirements in relation to consultation but these were omitted from the final version. Section 17 of the Act contains requirements to consult, particularly where business or competition is affected. However, the requirements are effectively only exhortatory as the only obligation is to describe the consultation processes in the explanatory statement for an instrument.

If delegated legislation is likely to affect business or restrict competition, an executive scheme requires a Regulatory Impact Statement (RIS) relating to the proposed legislation to be submitted to the Office of Regulation Review (ORR) for consideration. This process is a valuable step in securing consultation with interested parties.

The ORR says that:

RISs tabled in the Parliament with Memoranda and Explanatory Statements have provided greater transparency regarding the rationale behind the Government's regulatory decisions, resulting in the Parliament being better informed. In addition, Parliamentarians have drawn on published RISs in debate. For example, in 2002-03, there were 37 separate discussions in Parliament about particular RISs and regulatory policy issues (14 times in the Senate, eight in the House of Representatives and 15 times in the work of parliamentary committees). A wide range of issues were discussed, including vehicle and aircraft safety standards, urban speed limits, electromagnetic radiation protection, fisheries management, educational standards and international trade agreements. For the most part, discussions focussed on the analysis contained in the 'impact' and 'consultation' sections of RISs, as well as the likely small business impacts and the role of RISs in policy development.¹⁹

However, a RIS is required for only about five per cent of the instruments that are tabled. Whether there should be consultation prior to making is left to the legislation-maker to decide in most cases. There is no mechanism in place that requires the impact of proposed legislation to be ascertained from those that will be affected.

It is the lack of consultation prior to making delegated legislation that leads to allegations of 'red tape'. The delegated legislation-makers will not necessarily have any clear understanding of how the legislation will impinge on its subjects.

Acts are made after publication of the intended text in the form of a Bill. This provides the opportunity for those likely to be affected by the legislation to make representations as to its content. This is not the case with delegated legislation.

The Parliament does not have in place any mechanisms that will remedy this position. This is understandable to a point as one of the main reasons for delegating law-making power is to save parliamentary time. However, the absence of requirements for pre-making consultation when coupled with the commencement of legislation on

¹⁹ See www.pc.gov.au.

making gives the executive wide power to make delegated legislation that imposes unrealistic demands on the private sector.

This reinforces the case for postponing the commencement of legislation until after the time for disallowance to enable persons affected at least to bring their concerns to the attention of the Regulations and Ordinances Committee.

Parliament and policy

The major weakness in the oversight by the Parliament of delegated legislation is that the Parliament seldom reviews the policy embodied in the legislation. As noted above, the application of its criteria by the Senate Regulations and Ordinances Committee results in some policy issues being considered. However, these are limited to what might be termed interference with general human rights. The policy decisions that might be termed red tape—requirements for information, requirements for business licences, requirements for approvals to conduct an activity—are not questioned.

As far as parliamentarians generally are concerned, it is only overtly political delegated legislation such as, in recent times, control over immigration, that attracts attention.²⁰

The absence of formal machinery for consultation before making means that, if the Parliament is really going to exercise an oversight role in relation to the use by the executive of delegated power to make legislation, it needs to take steps to apprise itself of that legislation and have means available to those affected to raise their concerns.

This will require confrontation with the significant issue of principle—are Members of Parliament politicians or parliamentarians?²¹ It is this question that the Regulations and Ordinances Committee has conjured with successfully throughout its existence. It has managed to keep the politics at bay by limiting its role to issues where its members feel that they are not driven to support their party. However, by so doing it has left a large hole in the oversight of delegated legislation. More significantly, it has created a culture which denies that the Parliament should be involved in the oversight of the policy underlying delegated legislation.

This means that the executive is able to include in delegated legislation provisions that it would, at the very least, have to justify if they were included in an Act and, in the face of a hostile Senate, might not be able to enact. It is thus much easier for the executive to establish regimes of control through delegated legislation than it is through primary legislation.

What can be done about this?

²⁰ Perhaps the most striking use of the disallowance power was in 1967 when the Senate was recalled from the Winter recess and disallowed regulations to increase postal and telephone charges. A Bill to increase such charges had been defeated in the Senate and the regulations were seen as an attempt to get around this outcome: see *Commonwealth Parliamentary Debates* (Senate) vol. 34.

²¹ See Malcolm Aldons reviewing 'The Challenge for Parliament: Making Government Accountable', *Australasian Parliamentary Review*, vol. 18, 2003:152.

It is of value that the Scrutiny of Bills Committee sees as one of its tasks the need to bring to the attention of the Senate the breadth of delegated legislation making powers that are included in Acts. For example, it protested about a provision that stated:

The regulations may provide for prescribed decisions of the Secretary to be reviewed by prescribed review officers on applications, as prescribed, by prescribed persons.²²

However, it is doubtful whether the interest of this Committee alone will be sufficient to contain excessive regulation.

I suggest that there is some guidance to be found from the existing structure of the Senate Standing Committees. When first established, they were simply allotted a subject area and they dealt with any issues that were referred to them pertaining to that subject. They are now divided into legislation and references committees. The legislation committees look at bills and the references committees consider broader policy issues.

Could the Regulations and Ordinances Committee be similarly divided?

One division would continue to perform the valuable role that it presently carries out. The other would be a references committee to which could be referred delegated legislation that involves government policy issues of a significant kind that warrant investigation. This committee would be able to take evidence. It could make recommendations. It might well divide on party lines as do the standing committees now. However, the additional information that would emerge should it conduct an inquiry would provide a basis for informing the Senate whether it seemed appropriate for a Senator to move a disallowance motion.

The abandonment by the Parliament of a role in relation to the policy of delegated legislation has empowered the executive in a manner that the great settlements between the Crown and the Parliament that occurred in England in the seventeenth century were intended to prevent. It seems incongruous that political argument and possible division along party lines is accepted as appropriate for legislation in the form of bills but not for legislation made by the executive. This is particularly the case in relation to legislation that imposes obligations on persons and businesses to which the term red tape can be applied. The Parliament has opted out of any responsibility for these sorts of provisions.

I should like to suggest that the Parliament (and realistically that means the Senate) should examine afresh its obligations in relation to the oversight of delegated legislation. Without some greater interest being taken in the substantive content of the ever increasing body of this form of legislation, the parliamentarians of today must be taken to have ceded a significant part of their legislating role to the executive. If they do this they will have failed to meet the expectations of their predecessors one hundred years ago.

²² Migration Legislation Amendment Bill 1989 clause 61(1).



Question — It seems to me that there are two qualifications to what you are saying. One is the fact that delegated legislation, to be valid, must come within the scope of the Act. The other qualification is one of process. You mentioned the example that was picked up by the Scrutiny of Bills Committee, which simply highlights the reality that, very often, there is very little time to develop the details of policy. When a bill is being worked through, there is just a very general idea of how it is going to work, and there are various deadlines to be met to get it through the system. It is only later, when the regulations themselves are being drafted, that the uncertainty arises of how it is going to be made to work. The other aspect of that is, although there are deadlines that must be observed in the development of a bill, policy nevertheless continues developing. It is not uncommon that, by the time the department wants the regulations, they have thought through in much greater detail what they want, and the refined policy is different to the developing framework that did not really anticipate that sort of detail or approach. So often it is an element of the process that brings about these situations. Is there an easy answer to resolve that?

Dennis Pearce — I'd like to be able to boast at this point that the provision about the second of time was something that I did. I have two great contributions from the time that I was a drafter: I gave Australia decimal currency and I gave it the second of time. Not many people can boast about that. The point that you make is in a sense the same place I am coming from. When acts go through they have a skeletal idea of what the policy is going to be, so they try to anticipate that. There is considerable political pressure to get particular legislation out, and later on in the process there is draft legislation or other instruments that fit within the scope of that. I've had to do it too, so I know how difficult it is.

However if what you are going to be doing is spelling out the policy, that is shutting the Parliament out—and the Parliament really ought to have a say if there is a significant policy development being put into the legislative instruments that wasn't there in the act itself. It is for that reason that I think there should be some facility to be able to bring the issues back for parliamentary attention. I wouldn't imagine it is going to happen all the time. There are 2000 legislative instruments, and I would think that 1990 of them have minimal policy issues—but there are some that will have, and they are the ones that people later find are being bound up in red tape. They then wonder how on earth these sorts of requirements are thrust upon them, and they wonder how they can have a voice in what is being required of them.

Question — At the moment the Senate can either accept or reject the regulations placed before it, but it can't amend them. Is that a useful process, or not?

Dennis Pearce — It is always an interesting question. The Legislative Instruments Act will allow the disallowance of bits of a legislative instrument, provided they are discrete bits. It won't allow the disallowance or removal from a regulation of the 'not' that might colour the ultimate outcome. The Western Australian Parliament is I think the only one that has the power to actually amend regulations, and the danger that is

seen there is that an amendment will be made which has all sorts of implications and that the Parliament is not fully apprised of what they all are—which is of course different from the position when dealing with a bill, where they can find out what the impact of a particular change is going to be.

I have always been ambivalent about whether Parliament should have this power. In theory there is no reason why they shouldn't. One would have to be wary that whatever body was going to deal with it—and normally it would be just the Senate—was fully apprised of what the likely implications were of making such a change. So I lean against amendment, and more toward the capacity to be able to disallow individual items or parts of an instrument.

Question — Do you think that something could be done to limit the amount and the areas of a policy nature which are able to be made by regulation? I notice that when the disallowable instrument provision came in, a number of things that used to be part of legislation—and were therefore subject to parliamentary debate—now came in the form of disallowable instruments, and so could then slip through. It worries me that the current amendments could take that even further, and we could see more things coming under the terms of the new instrument, rather than in legislation and the consequent parliamentary debate. It also seems that the number of instruments that will come through under the new regime will make it almost impossible for the regulations committee or anyone else to quickly find where the relevant parts, which really should be in front of the Parliament, have been hidden in the regulations. So I was wondering if we need to have, say, the legislation committee look much more closely at legislation which allows things to become instruments, to pre-empt that. It seems the only way we can get policy back in front of parliamentary debate.

Dennis Pearce — That's a very valid point. The Scrutiny of Bills Committee has that as one of its terms of reference, and does take it seriously. The capacity to be able to identify fully the scope of the delegated legislation-making power in the time within which Scrutiny of Bills has to operate is a limiting factor in that, and it does point to the issues that you raise. Again, that is part of the reason that there is a need to increase the role of Parliament in relation to those sorts of instruments. But I think you quite properly point to the uncertainty that we now have before us, of how much of this material there is going to be, and whether it is going to be realistic to expect the Senate Regulations and Ordinances Committee—no matter how structured—to be able to get across all the elements of what is in this increased range of instruments. The fundamental question is how much should be dealt with by the Parliament and how much should be shuffled off to the executive? That is an issue that one would hope that most parliamentarians are asking themselves when they are looking at the instruments and at the acts.