Legislation by Proclamation
Parliamentary Nightmare, Bureaucratic Dream

by Anne Lynch

Introduction

In September 1987, a great parliamentary sensation occurred. During question time, the Opposition in both Houses asked the Government whether, assuming the passage at a joint sitting of the Australia Card Bill the subject of the simultaneous dissolution of the Senate and the House of Representatives which gave rise to the July election its operation could be rendered nugatory because the making of regulations to bring the Act into operation could be nullified if the Senate, as a House with the capacity to disallow such regulations, chose so to do. The Leader of the Opposition in the Senate (Senator Chaney) tabled, by leave, an opinion from a retired public servant, Mr Ewart Smith, indicating that the effect of the regulation-making power contained in the Bill would be as described. After consideration of the opinion, the Government conceded that there was no way to overcome the consequences Mr Smith had indicated.

Despite the consistent efforts of the Regulations and Ordinances Committee over the past half-century or more, and despite, too, the valiant efforts of the youthful Scrutiny of Bills Committee, this event was arguably the first time that public attention has been focussed on the dramatic implications of the almost disregarded technical clauses of legislation. As with all abstruse, legalistic provisions of the

law, the mechanisms which make the law operative tend to be ignored, as much by legislators as by the purveyors of information to the public. As the Australia Card instance proved, however, such ignorance (in both senses) can be a ghastly mistake.

Proclamation of Acts

During discussions on the ramifications of the Australia Card legislation, mention was made that the problem could have been avoided if the provisions of the Act had come into operation by proclamation, rather than by regulation. The 'what might have beens' were, of course, of the hand-wringing variety; if, however, attention were to be drawn to a little-known byway of Senate history, the complacent assumption that, in all future legislating, resort to proclamations will solve all problems might not be well-founded. With a realisation of the higher stakes involved, the attention of legislators might, sooner rather than later, be focussed on the technical, enabling provisions of Acts.

Indeed, such a realisation has to some extent already occurred. In the report of Senate Estimates Committee D of October 1986, the following comments were made:

> **Proclamation of Acts**
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> The Committee was concerned to learn of the lengthy delays that have occurred in proclaiming the *Public Lending Rights Act 1985* and the *Protection of Movable Cultural Heritage Act 1986*, neither of which has yet been proclaimed.
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> The Committee appreciates that there can sometimes be a number of legitimate reasons for not proclaiming or delaying the proclamation of legislation. The Department explained to the Committee that the delays in these cases result from the Department having to prepare a gazette notice for the Minister to spell out the operation of the Public Lending Rights scheme and to develop a national cultural heritage control list. The Committee does not regard these explanations as satisfactory for the following reasons:
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> (i) There has been a considerable period of time since the Bills were introduced into Parliament. The Committee expects that if Regulations or any other actions need to be prepared consequent upon the passage of the Bills, such preparation would have commenced following their introduction or indeed in conjunction with the original drafting. The legislative history of

each Bill was as follows:

Public Lending Rights Act 1985

House of Representatives:	Introduced	17 April 1985
	Passed	9 May 1985
Senate:	Introduced	9 May 1985
	Passed	6 December 1985
Royal Assent:		16 December 1985

Protection of Movable Cultural Heritage Act 1986

House of Representatives:	Introduced	27 November 1985
	Passed	18 February 1986
Senate:	Introduced	11 March 1986
	Passed	1 May 1986
Royal Assent:		13 May 1986

In respect of the Protection of Movable Cultural Heritage Act, the Department indicated that it hoped the legislation will be proclaimed towards the end of 1987 two years after its introduction in Parliament!

(ii) The effectiveness of the Senate's capacity to review the Public Lending Rights Bill was reduced due to the Bill being pushed through the Senate's Committee of the Whole stage on the last sitting day in 1985, with the Government claiming its passage was urgently required.

The Committee is aware that there are a considerable number of Acts and sections of Acts awaiting proclamation. The Committee regards this situation as complete derogation of responsibility by departments and Ministers in allowing such a volume of legislation to remain inoperative. The Committee will be closely monitoring legislation with similar commencement provisions which are the responsibility of departments within the Committee's purview.

When the Appropriation Bills were being considered in the Senate on 17 November 1986, Senator Puplick expanded upon the issues raised in the Report. In illustrating his point, he gave quite horrifying examples of outstanding proclamations some dating back as far as six years and, reflecting the

comments of Estimates Committee D, made the particularly pertinent point that, in relation to one of the Acts on which the Committee had commented the *Public Lending Rights Act 1985*:

> We were told when the Bill was debated in this chamber that the amendments the Opposition sought to make to the legislation could not be made, that the Bill was an urgent Bill which could not be amended by the Senate in December 1985 because the House of Representatives had adjourned for the year and the Government was not prepared to recall it to deal with amendments which the Senate might have been persuaded to make.

The Committee took up the point again six months later, and in addition reported in equally trenchant terms on the Lemonthyme and Southern Rain Forests Commission of Inquiry Bill a Bill which was regarded as so urgent that the Senate needed to sit on a non-scheduled sitting day to ensure its passage. The Committee reported as follows:

> **Proclamation of Acts**
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> The Committee expressed concern in its October 1986 Report at the lengthy delays in proclaiming the *Public Lending Rights Act 1985* (Royal Assent 16 December 1985) and *Protection of Movable Cultural Heritage Act 1986* (Royal Assent 13 May 1986), thereby leaving the legislation inoperative. These Acts have still not been proclaimed.
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> The Department indicated that it took 'some time longer than anticipated' to finalise the details of the *Gazette* notice required for the Public Lending Rights scheme and, as a result of this delay, it was not possible to proclaim the Act in time to commence this financial year. The Department advised the Committee that, as there are major advantages in commencing the scheme at the start of an annual funding cycle, proclamation of the Act was delayed for 12 months and will now occur on 1 July 1987.
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> The Committee was, however, assured by the Department that 'there has been no disadvantage at all to the people under the PLR scheme, either for the authors or the publishers. The payments have continued.'
>
> In respect of the Protection of Movable Cultural Heritage Act, the Committee was informed that an Interim National Cultural Heritage Committee had been appointed and was actively working towards a proclamation date of 1 July 1987. The Committee's concerns at the effect of this delay were acknowledged by the Department in the following exchange:

> **Senator Newman** You recognise that, with this long lead time between the passing of the legislation and the proclamation, you are running all sorts of risks of things disappearing that you would have wanted to list, presumably.
>
> **Mr McArthur** The Committee is well aware of the risk. We are not too sure how valid it is, but there certainly is a risk of losing things.
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> *Hansard*, 16 April 1987, p. D13.

The Committee has again raised this issue as it is concerned, first, that the Senate's programming and consideration of certain legislation is being curtailed when it is claimed that passage of a particular Bill is urgently required when subsequent administrative actions clearly indicate there is no urgency, and secondly, that administrative delay may result in undesirable, if unintended, additional effects.

The effects on Senate programming were also highlighted by the passage of the Lemonthyme and Southern Forests (Commission of Inquiry) Bill. The Senate sat on Friday 3 April, not previously a scheduled sitting day, specifically to deal with this Bill. It subsequently received Royal Assent on 16 April and as at 6 May has still not been proclaimed.

The Senate subsequently met on 28, 29 and 30 April; and 1, 4, 5, 6 and 7 May. The Lemonthyme Act was proclaimed to come into effect on 8 May a refreshingly short time given the general pattern of the proclamation device but nonetheless the resort to proclamation was unfathomable given the declared urgency and straightforwardness of the legislation.

Background to Disquiet

As with all matters of this nature, in the case of proclamations the genesis of the realisation of their significance lay in work undertaken in a number of areas previously. In 1980 it was noticed that provisions which left to the executive the option as to whether, and if, enactments of the Parliament should begin to operate were, with increasing frequency, displacing the three most common ways of declaring the law of the Commonwealth; that is, by laws effective from the date of Royal Assent; by laws to come into effect on a specific date declared in the legislation; and by laws which come into operation 28 days after Royal Assent.

Increasingly, it was discovered, recourse was had to the words, usually contained in clause 2 of a bill, 'This Act shall come into operation on a day to be fixed by Proclamation'. Such a provision means that there is a discretion in the executive to suspend indefinitely the operation of laws passed by the Parliament. The consequences of this are many:

(a) what, in effect, the Parliament is doing is delegating its most important function, that of legislating, to the executive to implement the will of the people as expressed through its parliamentary representatives. Thus, in practical terms, it places in the hands of the bureaucracy an enormous power to gainsay or even override the wishes of the people;

(b) if legislation is passed without a time limit set on its implementation, it provides encouragement because there is no pressure to have structures and administrative details in place by a defined date to the bureaucracy to be tardy in implementing schemes determined by Parliament;

(c) it can be a method of window dressing, so that the executive can declare that an Act of Parliament has been passed in order to help a disadvantaged group within a community without ever having to mention that there is no intention to implement the proposals contained therein because of, for example, a lack of money;

(d) it can also be used as an instrument of blackmail for example, 'we will pass this legislation, but will not bring it into effect until you, the citizen, behave in a particular way which we do not like'; and

(e) finally, and in my view most significantly, the failure to proclaim a law whether in whole or, as now more frequently and insidiously occurs, in part leaves those with a need to be concerned about what the law is in a state of constant indecision and doubt. It is, one might have thought, reasonable to expect that the law is known to operate as a result of its passage through all three constituent parts of the Parliament; that is, by passage of a bill through the House of Representatives and the Senate and Assent by the Governor-General. This together with a known date of operation alone gives certainty to the law.

Present position

While, in the early days of commencement of acts by proclamation, the intentions of the draftsmen were perfectly reasonable a provision of this nature was regarded as a departure from the norm, Royal Assent, etc., and was used only when, for example, complex regulations could not be finally prepared until enabling legislation was authorised by the Parliament in recent years the practice of using proclamations has become an art form. As indicated in paragraph (e), among the worst features of recourse to proclamation is that it is no longer confined to Acts as a whole, but even to sections, subsections or paragraphs of Acts.

A few random examples might suffice to illustrate the point. The *Nursing Homes and Hostels Legislation Amendment Act 1986* contains the following commencement provisions:

2. (1) Section 30 shall be deemed to have come into operation on 5 June 1985.

(2) Sub-sections 5(l) and (2) shall be deemed to have come into operation on 22 October 1986.

(3) Sub-sections 5(3) and (4) shall come into operation on 6 May 1987.

(4) Sections 7, 16, 17, 21 and 22, sub-section 25(2) and sections 34, 35, 37 and 38 shall come into operation on such day as is, or on such respective days as are, fixed by Proclamation.

> (5) The remaining provisions of this Act shall come into operation on the day on which it receives Royal Assent.

Sections 16, 17, 21, 34, 35 and 37 came into effect on 1 May 1987; section 68 was operative from 24 April 1987, and the remaining provisions specified in the commencement provision still await proclamation.

The commencement provisions of the *Sales Tax (Exemptions and Classifications) Amendment Act 1987* also deserve to be quoted in full:

> 2. (1) Subject to this section, this Act shall come into operation on the day on which it receives the Royal Assent.
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> (2) Sub-sections 3(1) and 4(1) shall be deemed to have come into operation on 1 July 1987.
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> (3) Sub-sections 3(4) and 4(4) shall come into operation on a day to be fixed by Proclamation.
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> (4) Sub-sections 3(5) and 4(5) shall come into operation on the day on which the *Customs Tariff Act 1987* comes into operation.

And it seems surrealistically appropriate that a succession of Acts relating to the Public Service bureaucracy should have the most complex and confusing commencement clauses of all. I quote the *Public Service Reform Act 1984* as an exemplar of the some half-dozen Public Service Acts passed in the last six years:

> 2. (1) Sections 1, 2, 3, 4 and 7, sub-sections 29(1) and (3), sections 107 and 108, Parts III and IV and sections 15, 138, 142, 144 and 149 shall come into operation on the day on which this Act receives the Royal Assent.
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> (2) Section 21, sub-section 29(2), sections 32, 33 and 35, sub-sections 37(1) and 38(l), sections 39, 40 and 41, sub-section 43(1), sections 44 and 46 to 50 (inclusive), sub-section 56(1), section 59, sub-sections 87(1), 96(2), 97(4), 99(3), 100(2), 104(2) and 105(2), section 106, sub-sections 109(2), 110(3) and 130(2) and section 157

> shall come into operation immediately after section 27 of the *Public Service Acts Amendment Act 1982* comes into operation.
>
> (3) Section 13 and sub-sections 97(1), 100(1), 105(1), 109(1) and 130(1) shall come into operation immediately after section 15 of the *Public Service Acts Amendment Act 1982* comes into operation.
>
> (4) The remaining provisions of this Act shall come into operation on such day as is, or on such respective days as are, fixed by Proclamation.

The further complication contained in the last two examples, which link the operation of sections and subsections of the Acts with the operation of other Acts (often with their own provisions not effective until a day to be proclaimed), makes the process of discerning what the law is even more labyrinthine.

Unfortunately, these examples are not atypical.

A Matter of Principle

When the matter first arose in the early 1980's, the Parliament was concerned that, given the large amount of legislation that commences on a date fixed by proclamation (which is often a considerable time after assent), it was difficult, and time consuming, to keep a check on whether certain Acts, or sections thereof, had commenced to operate. While this suggests a pragmatic reason for concern, there was also a matter of high principle involved. Given that the Parliament had, in effect, delegated its legislative authority to the executive, the principle which underlay its desire to be notified that legislation was operative was a question of courtesy and proper constitutional relations between the Crown and Parliament. In February 1982, therefore, the then President of the Senate wrote to the Leader of the Government in the Senate, requesting that the Government consider introducing a mechanism whereby proclamation dates of Acts, or sections thereof, might be notified to the Parliament. The response of the Leader indicated that the Government would be willing to provide a computer printout of the proclamation dates to assist in record keeping.

As was pointed out at the time, however, the point at issue was not whether the information could be ascertained, albeit with some difficulty, but rather the formal

notification to the Parliament that the executive had exercised a legislative authority on the Parliament's behalf. During the next 18 months, discussions continued between officers of the various departments involved the Senate, the Secretary of the Federal Executive Council (an officer of the Department of Prime Minister and Cabinet), the Attorney-General's Department and officers of the Australian Government Publishing Service who have responsibility for publishing Proclamations in the Australian Government Gazette.

In the meantime, however, Senator Peter Rae, a Senator with a deep understanding of the constitutional relationships between Parliament, the executive, and the Governor-General, gave the following notice of motion:

> I give notice that, on the next day of sitting, I shall move That an Address be presented by the Senate to His Excellency the Governor-General, as follows:
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> MAY IT PLEASE YOUR EXCELLENCY
>
> We, the Senate of the Commonwealth of Australia in Parliament assembled, desire to present the following address:-
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> The Senate
>
> (a) noting the Constitutional responsibilities of the Queen, the Senate and the House of Representatives in relation to the passage of all proposed laws of the Commonwealth;
>
> (b) noting that each constituent part of the Parliament of the Commonwealth advises the others of agreement, amendment, and assent, as the case may be, to all such proposed laws; and
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> (c) noting that substantial numbers of laws which pass both Houses of the Parliament and receive the Royal Assent provide that such laws or provisions thereof shall come into operation on a day to be fixed by Proclamation, requests your Excellency to notify each House of the Parliament of each

> Proclamation which is made to specify a day on which an Act of the Parliament or any provision thereof shall come into operation.

The purpose of the notice was to make the point, in what the Senator regarded as a constitutionally proper way, that the Governor-General as, in effect, the legislature's delegate might deem it appropriate to advise the Parliament of the completion of the legislative process. Although the notice of motion was never moved, it unquestionably provided both the focus of and the impetus for this important issue, and subsequently arrangements were made for all proclamations of this nature to be tabled in each House of the Parliament.

The first such proclamation was tabled in December 1983. On tabling, the Deputy President made the following statement to the Senate on behalf of the President:

> I refer to the Proclamation by His Excellency the Governor-General which has just been tabled by the Clerk. This is the first occasion on which the proclamations of commencement dates of Acts have been tabled in the Parliament.
>
> This procedure has been adopted following initiatives by the Senate and is designed to inform honourable Senators of what, in many cases, might be considered to be the completion of the legislative process. It also provides a formal means of ensuring that all gazettals of proclamations are recorded appropriately within the Parliamentary Records.
>
> Honourable Senators would be aware that the date of the Governor-General's Assent to an Act is already reported in the Senate, and this new procedure will complement this practice.
>
> In conclusion, I wish to thank the Government for its assistance in facilitating the introduction of what I consider to be a most important procedure.

Further Questions

The Government having satisfactorily recognised that part of the constitutional principle which entitles the Parliament to be advised that the legislative process is now complete, other questions remain still to be resolved. As indicated earlier,

there are many reasons why recourse to proclamation should be made only in extremely limited circumstances. Also mentioned has been the fact that the Parliament, in relinquishing its legislative authority to the executive, is giving up a basic right, and its most important function that of legislating.

The resort to legislation by proclamation has been increasing rather than diminishing, culminating in a most extraordinary provision contained in a ridiculously named Act of the Parliament: the Laying Chicken Levy Act of 1988. In this case, not merely has Parliament delegated its power to legislate to the executive which in theory at least is responsible and accountable to the Parliament the commencement provision of the Act provides as follows:

> 2. (1) This Act commences on a day to be fixed by Proclamation.
>
> (2) The day fixed by Proclamation for the purposes of subsection (l) shall not be a day earlier than the day recommended to the Minister by the Australian Council of Egg Producers.

One would hope that the legislators were so taken up with the hilarity of the title of the bill that the provision escaped their attention. The alternative explanation that it is acceptable that legislative authority to bring the law into operation be handed over to a body, however well-intentioned, without any accountability to the Parliament is terrifying.

A further point: at least by the process of notification, the Parliament, and one would hope through the Parliament the people, is now informed as to what legislation is operative and, concomitantly, which laws people are expected to obey. The question arises as to whether an executive to which legislative authority has been delegated should give an account of its stewardship concerning those laws which are not yet operative, and the reasons for the delay. As the Reports of Estimates Committee D, quoted earlier, have indicated, at least some members of the Parliament are aware of this problem. It may be that, if sufficient impetus is generated by the work of that Committee, advice to the Parliament on that matter, comparable to the notification of proclamations, might be forthcoming.

Conclusion

One might be tempted to suggest that the matters here raised are evidence of a desire to cut down more trees or to empire-build. 'Make work' notions are often

attractive to the bureaucracy generally, and maybe even the Senate bureaucracy might be accused of having caught the disease. However, the theme of this paper has been the delegation, perhaps thoughtlessly, by the Parliament to the second arm of government of its primary function of law-making. That delegation should not be given lightly; nor should those to whom it is entrusted treat it with disdain.

The principle of certainty under the law can be assured only if the law is known and disseminated, in the least complicated way. The obscurantism of general legislative provisions is bad enough. To be forced to hunt through documentation other than the Act to establish whether a law is operative is appalling. It has been a long-established dictum that ignorance of the law is no excuse for transgression. With the myriad of difficulties placed in the way of even the experts in law in establishing what *is* the law, justice demands that the dictum might well need to be superseded. I would suggest, however, that the more desirable and effective method of avoiding the problem is to prevent it at the source during the passage of a Bill through the Parliament.