The Senate

Regulations and Ordinances Committee

Consultation under the
Legislative Instruments Act 2003

Interim Report

113th Report

June 2007

ISBN 978-0-642-71822-8

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CONSULTATION UNDER THE *LEGISLATIVE INSTRUMENTS ACT 2003*

INTERIM REPORT

Proposals for consultation

1. The *Legislative Instruments Act 2003* commenced on 1 January 2005, finally giving statutory effect – some thirteen years later – to the recommendations of the Administrative Review Council (ARC) in its 1992 report *Rule Making By Commonwealth Agencies*. The ARC had recommended major reforms to the process by which Commonwealth delegated legislation was drafted, was made accessible, and was scrutinised.

2. One of the ARC's recommendations concerned consultation during the drafting of legislative instruments. Specifically, the ARC recommended that there should be mandatory public consultation before any legislative instrument was made.[1]

3. The ARC went on to observe that this requirement for public consultation should be subject to certain exceptions (eg, where an instrument provided for a change in fee levels, or was of a minor machinery nature, or where advance notice of an instrument would enable some individuals to gain an advantage, or where the Attorney-General tabled a certificate that consultation should not occur in the public interest).[2] The ARC noted that submissions from agencies argued against the establishment of formal consultation arrangements in this form:

> It was claimed that the present arrangements for consultation were sufficient. Agencies argued that because of current informal practices, general consultation requirements enshrined in statute would be counterproductive. Any formal requirements to consult would be resource intensive and the benefits of consultation would not outweigh the costs.[3]

4. The Legislative Instruments Bill 1994 was introduced into the Senate on 30 June 1994. To a large extent, the bill responded to the ARC's recommendations including requiring consultation where changes to legislative instruments affected business. This bill was the subject of two parliamentary committee inquiries, and was

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1 Administrative Review Council, *Rule Making by Commonwealth Agencies*, Report No 35, Australian Government Publishing Service, Canberra, 1992, p 36.

2 Administrative Review Council, op cit, pp 38-39.

3 Administrative Review Council, op cit, p 36.

still awaiting passage when the Parliament was prorogued prior to the 1996 federal election.

5. The Legislative Instruments Bill 1996 was introduced into the Senate on 8 October 1996. Like the 1994 bill, it provided for mandatory consultation where a legislative instrument directly affected business (or had a substantial indirect effect). However, the 1996 bill introduced a more lengthy and prescriptive consultation process which required a legislative instruments proposal and a consultation statement; the 1994 bill required a post development consultative process.

6. The 1996 Bill was the subject of lengthy debate and amendment in the Parliament, with both Houses failing to agree to an amended Bill in the same form

7. The 1996 Bill was reintroduced in the Senate on 23 March 1998. Although there was bipartisan support for the principle of changing the Commonwealth's rule making processes, the Parliament could not agree on certain aspects of the proposal ─ including the effect of non-compliance with consultation requirements and the Bill was laid aside when the Parliament was prorogued for the 1998 federal election.

Existing consultation requirements

8. The Legislative Instruments Bill 2003 was introduced into the Parliament on 26 June 2003. Where the 1996 bill provided for a prescriptive mandatory consultation regime, the 2003 bill simply contained general provisions which encouraged consultation. An amended version of this bill was eventually passed by both Houses and received Royal Assent on 17 December 2003.

9. In general terms, section 17 of the *Legislative Instruments Act 2003* encourages rule-makers to undertake 'appropriate consultation' before making an instrument, particularly where that instrument is likely to have a direct or a substantial indirect effect on business or restrict competition.

10. In determining whether any consultation that was undertaken was appropriate, subsection 17(2) authorises the rule-maker to have regard to any relevant matter, including the extent to which consultation drew on the knowledge of persons having expertise in fields relevant to the proposed instrument, and the extent to which consultation ensures that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.

11. Subsection 17(3) provides that consultation might involve notification (whether direct or indirect) to those likely to be affected by a proposed instrument. Such notification could be by way of an invitation to make submissions, or to participate in public hearings on the proposed instrument.

12. Subsection 18(1) states that the nature of an instrument may be such that consultation may be unnecessary or inappropriate. Subsection 18(2) provides examples of instruments having such a nature, including instruments:

(a) that are of a minor or machinery nature and that do not substantially alter existing arrangements,

(b) that are required as a matter of urgency,

(c) that give effect to Budget decisions,

(d) that concern national security,

(e) for which appropriate consultation has already been undertaken by someone other than the rule-maker,

(f) that relate to employment matters, or

(g) that relate to the management of, or to the service of, members of the Australian Defence Force.

13. Section 19 states that the fact that consultation does not occur does not affect the validity or enforceability of a legislative instrument.

14. Finally, section 4 of the Act provides that the Explanatory Statement that accompanies an instrument should contain a description of the nature of any consultation that was undertaken and, if no such consultation was undertaken, should explain why no consultation occurred.

Concerns at the existing provisions

15. It has been suggested that this consultation regime provides for only limited accountability.[4] The only avenue by which the Parliament or other interested parties may test the veracity of the process is the consultation information included in the Explanatory Statement of the instrument. Because rule-makers are encouraged (rather than required) to consult, the bill makes no provision for a body to monitor the process and provide advice on whether consultation is appropriate in the circumstances.

16. Professor Dennis Pearce has suggested that the existing consultation processes were 'more constrained' than in the earlier version of the bill, and Ms Jennifer Burn has argued that the community would be better served by stronger measures to ensure consultation is carried out.[5] The Clerk of the Senate has observed that the consultation

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4 Senate Regulations and Ordinances Committee, *Inquiry into the Legislative Instruments Bill 2003*, *Submission*, No.7, p.5 (Ms Jennifer Burn).

5 Senate Regulations and Ordinances Committee, *Hansard*, (17 September 2003) p R&O 5 (Professor Pearce); Submission No 7, p.5 (Ms Burn).

process proposed in the 2003 Act had now been diluted "to the equivalent of dishwater".[6]

Regulatory impact statements

17. In its report on the 2003 bill, the Committee noted that the existing consultation process operates alongside the existing (non-statutory) regulatory impact statement (RIS) process introduced by Cabinet directive in 1997.

18. Under the RIS process, rule-makers are required to prepare a regulatory impact statement where an instrument directly affects, or substantially indirectly affects, business. These statements accompany instruments when they are tabled in the Parliament.

19. The Office of Best Practice Regulation (formerly the Office of Regulation Review) monitors and provides advice to agencies on this process. In evidence to the Committee's inquiry into the 2003 Bill, the Attorney-General's Department observed that "the Government's regulatory best practice policy requires consultation early in the policy development process on both regulatory options and the need for regulation. If a regulatory proposal fulfils the RIS requirements – including community consultation and engagement – it is likely to fulfil the requirements for consultation under the 2003 Bill".[7]

Initial Committee views on consultation

20. In reporting on the 2003 Bill, the Committee expressed the view that accountability under the new scheme was weaker than that provided for in the 1996 bill:

> Under the 2003 bill, Parliament will be left to determine whether the consultation undertaken by a rule-maker was appropriate to ensure the legislative instrument met the needs of the community. This decision will often occur after an instrument is in force, leaving the Parliament in the position of having to disallow the instrument if it considered the consultation was inappropriate. [8]

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6 Senate Regulations and Ordinances Committee, *Inquiry into the Legislative Instruments Bill 2003*, *Submission*, No.1, p.2.

7 Senate Regulations and Ordinances Committee, *Inquiry into the Legislative Instruments Bill 2003*, Answer to a question on notice, 30 September 2003.

8 Senate Regulations and Ordinances Committee, 111th Report, *The Legislative Instruments Bill 2003*, October 2003, para 5.18.

21. The Committee concluded that, given the history and development of the bill, the consultation process as set out should be given an opportunity to work. It adopted the views of the ARC in its submission to the inquiry that:

> the consultation process provided for in the Bill, though tempered, is broadly consistent with the principles of procedural fairness and accountability underlying the recommendations made by the Council in its Report. Importantly also, the process represents an approach which might be anticipated to be supported rather than resisted by rule-making agencies.[9]

22. The Committee considered that the bill would be strengthened with the inclusion of provisions specifically acknowledging the preparation of regulatory impact statements. However, it suggested that the complementary operation of the informal consultation and RIS processes should be allowed to operate for a period, with their effectiveness monitored and evaluated when the bill was reviewed in three years time.

Purpose of this Interim Report

23. The *Legislative Instruments Act 2003* has now been in force for more than 2 years. The purpose of this report is to set out some preliminary observations on the operation of the consultation provisions of the Act during the years 2005 and 2006.

24. In 2005, the Committee examined more than 2100 instruments. It drew the attention of departments and agencies to their statutory duty to include information on consultation on 110 occasions. It had reason to seek further information on the adequacy of consultation on 24 occasions.

25. Similarly, in 2006, the Committee examined more than 2200 instruments. It drew the attention of departments and agencies to their statutory duty to include information on consultation on 53 occasions. It had reason to seek further information on the adequacy of consultation on 14 occasions.

26. These trends have continued throughout 2007.

Lack of consultation

27. The Committee remains concerned that, notwithstanding that the obligation to provide information about consultation has been in operation for almost 2½ years now, many departments and agencies still seem unaware of its existence, or seem only intermittently aware of it: one instrument prepared by an agency will provide the

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[9] Senate Regulations and Ordinances Committee, *Inquiry into the Legislative Instruments Bill 2003,* Submission No 5, p 3.

necessary information, another prepared by the same agency will not. This lack of familiarity with the obligation seems to extend widely – even to instruments prepared by the Attorney-General's Department, which has overall responsibility for the Legislative Instruments Act and for registering instruments and Explanatory Statements.

28. Given that the obligation to provide consultation information is, in effect, hidden within the definition of 'explanatory statement' in section 4 of the Act, it may be that making this obligation more prominent may increase awareness of its existence.

Apparent inadequacy of consultation

29. As noted above (in para 1.14) section 4 of the *Legislative Instruments Act 2003* requires an Explanatory Statement to describe the nature of any consultation that was undertaken and, if no such consultation was undertaken, should explain why no consultation occurred.

30. During the period covered by this report, the Committee has encountered Explanatory Statements that have noted, variously:

- "the instrument has been made after consulting with persons likely to be affected"
- "the strategic assessment was publicised and comments sought. All comments received have been taken into consideration …"
- "the Tribunal has informed itself through consultation in accordance with established practice"
- "draft copies of the instrument have been sent to relevant persons and organisations for comment"

31. In each case, the consultation information provided is cursory, generic and unhelpful. The Explanatory Statement has not described the "nature" of the consultation that has been carried out (eg how the instrument was publicized; how 'relevant persons' were identified; how many comments were received; whether any comments received were critical of the proposal; and how the comments received (if any) were taken into consideration.

32. Some Explanatory Statements almost tantalise with their lack of detail. For example, the Explanatory Statement accompanying a specific taxation determination referred to consultation with 'taxation professional peak bodies and relevant groups or associations'. Similarly, in relation to guidelines issued under the higher education

support legislation, the Explanatory Statement referred to consultation with "the higher education sector", and in relation to some building and construction industry regulations, the Explanatory Statement stated that "extensive consultation was undertaken with building industry participants". The Explanatory Statement accompanying revised consumer product information standards under the Trade Practices Act referred to "an extensive consultation process with industry stakeholders".

33. In each case, while the information provided indicated that it was likely that a significant degree of consultation had taken place, it nevertheless did not describe the "nature" of that consultation, as the Act requires. It would have been both helpful and reassuring if the organisations and bodies consulted were identified and the tenor of their views set out.

34. On at least one occasion, the Committee has queried an Explanatory Statement that simply advised that no consultation had been undertaken, but gave no reasons for this. And on at least two occasions, the Committee has queried Explanatory Statements which have provided that "consultations will be held with the Federal Leader of the Opposition and the Premiers and Chief Ministers of the States and Territories." On each occasion, the Explanatory Statement did not indicate whether such consultations had in fact taken place, or whether they had been arranged.

Exceptions to consultation

35. The Explanatory Statement accompanying some migration regulations observed that "limited consultations have occurred given the urgency of the regulations". Urgency is one of the recognised exceptions to the need to consult. However, it would have been helpful in this case if the Explanatory Statement had explained why the regulations were urgent, and what the nature of the 'limited consultation' was.

36. In relation to another instrument, the Explanatory Statement observed that no consultation had been undertaken as the amendments were "minor and machinery of government in nature". Minor and machinery amendments which do not alter existing arrangements are another of the recognised exceptions to the need to consult. In the case of this instrument, the Explanatory Statement failed to fully address the requirements of the exception.

37. An instrument that revoked and replaced some family assistance guidelines was also not the subject of consultation under the 'minor and machinery' exception. However, the Explanatory Statement did not indicate why the previous guidelines had been revoked, nor how the new guidelines differed from the old. Without this

information, it was not possible to evaluate the applicability of the exception to this instrument.

38. More worryingly, perhaps, the Explanatory Statement for some Australian Crime Commission Regulations noted that they had been made to overcome the effect of a Federal Court decision which was currently under appeal. The Explanatory Statement then observed that the amendments were of "a minor or machinery nature" and thus consultation was not warranted. The Committee sought further advice on how regulations drafted to overcome the effect of a court decision could be seen as 'minor or machinery'.

39. To similar effect, it was suggested that consultation was unnecessary in relation to an aged care determination as it was of a 'minor or machinery' nature. The Committee noted that the purpose of the determination was to ensure that a Complaints Resolution Scheme could deal with complaints about an approved provider's failure to provide agreed accommodation, food and services. Given that this had the potential to affect the liability of a provider where complaints were made, it appeared unlikely that these amendments could properly be characterised as 'minor or machinery' in nature.

40. Another possible exception to the need for consultation occurs for instruments for which appropriate consultation has already been undertaken by someone other than the rule maker. The Explanatory Statement for some Workplace Relations Regulations stated that consultation had taken the form of submissions to a Senate inquiry into a bill which had canvassed the issues dealt with in the regulations. As the regulations had not been drafted at the time of the Senate inquiry, the Committee sought further advice about consultation on the regulations in the form in which they had been drafted.

41. Another misconception of concern to the Committee is the observation in a number of Explanatory Statements that consultation was not undertaken because an instrument did not have a significant impact on business. Subsection 17(1) of the Act provides that consultation is particularly <u>important</u> if an instrument is likely to have a significant effect on business, or to restrict competition. However, section 18 <u>does not</u> provide the reverse – that consultation is unnecessary or inappropriate simply because an instrument has little effect on business. Instruments may have little effect on business and yet still require extensive consultation with those affected.

42. The Committee proposes to examine consultation information in Explanatory Statements in greater detail and, if necessary, report further to the Senate later in 2007.

Senator John Watson
Chairman