

Letter 3 Inquiry into the Legislative Instruments Bill 2003 and the Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003

The Council was invited to comment on the Bills that represented the most recent attempt to implement the Council's recommendations in its 1992 report *Rule Making by Commonwealth Agencies*. The Council noted variations between its recommendations and the Bills but did not consider these differences to be significant and supported the enactment of the legislation.

11 September 2003

Mr James Warmenhoven
Secretary
Senate Standing Committee on Regulations & Ordinances
Parliament House
Canberra ACT 2600

Dear Mr Warmenhoven

Inquiry into Legislative Instruments Bill 2003 and Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003

Thank you for your letter of 25 August 2003 inviting a submission from the Administrative Review Council in relation to these two Bills.

In its Report No. 35, *Rule Making by Commonwealth Agencies*, the Council advocated enactment of a Legislative Instruments Act to prescribe procedures for the making, publication and supervision of delegated legislative instruments.

Since the publication of that Report in March 1992, there have been three attempts, in 1994, 1996 and 1998, to enact such legislation.

The Council prefaces its comments on the proposed legislation by expressing the hope that, on this occasion, legislation will be enacted by the Parliament to implement the reforms first proposed by the Council over a decade ago.

With broad reference to the aspects of the proposed legislation referred to the Committee by the Senate for consideration, the Council makes the following comments on the proposed legislation. Unless otherwise specified, references to 'the Bill' are to the Legislative Instruments Bill.

The Council notes that many of the key concepts advocated by the Council in its Report, such as the establishment of a Federal register of legislative instruments, and provision for consultation, tabling, disallowance and sunseting of legislative instruments are reflected in the proposed legislation.

Although the legislation also reflects some departures from or additions to the procedures recommended by the Council, these differences are often not significant and frequently represent ways of arriving broadly at the same end point, albeit by a slightly different route. They are hardly remarkable given the effluxion of time.

The mechanisms contained in the proposed legislation to ensure the quality of the drafting and the transparency of legislative instruments are illustrative.

Quality of legislative instruments

In its Report the Council noted the indifferent drafting standards reflected in many legislative instruments, recommending that the Office of Legislative Drafting be given responsibility under the legislation for ensuring the preparation of delegated legislation to an appropriate standard (Recommendation 4).

It also recommended the drafting of instruments of a legislative character by the Office of Legislative Drafting or that arrangements for drafting should be made with that Office (Recommendation 5(1)) and that better drafting in agencies should be encouraged by a range of measures designed to ensure that agencies maintain a connection with standards set by the Office (Recommendation 5(2)).

Clause 16 of the Bill substantially implements Recommendations 4 and 5(2) by giving the Secretary of the Attorney-General's Department responsibility for ensuring high standards of drafting and outlining steps that may be taken to achieve this which mirror the measures recommended by the Council. It is, accordingly, acceptable to the Council.

Transparency

Consultation prior to the introduction of any law, whether an Act of Parliament or a legislative instrument, is enhanced by obtaining a variety of views upon it, especially from members of the public. Consultation is also consistent with principles of procedural fairness and encourages government accountability.

In its Report, subject to certain exceptions, the Council envisaged an extensive process of consultation for legislative instruments, including mandatory 'first round' public consultation prior to the making of any such instrument (Recommendation 9).

A consultation strategy was recommended for inclusion in the Legislative Instruments Act (Recommendation 11) including advertising and the publication of a draft instrument and rule-making proposal.

While under the Bill an absence of consultation does not affect validity (clause 19), clause 17(1) requires that before making a legislative instrument, a rule-maker must be satisfied 'that any consultation that is considered by the rule-maker to be appropriate and that is reasonably practicable to undertake, has been undertaken'.

Clause 18(2) sets out examples of instruments where the rule-maker may be satisfied that consultation is unnecessary or inappropriate. These mirror a number of the exceptions to mandatory consultation recommended by the Council in its Report (Recommendation 9).

The Bill also provides that consultation may be unnecessary or inappropriate in relation to a number of other instruments, including instruments relating to issues of national security, employment or management or service of members in the Australian Defence Force.

Under the Bill, rule-makers are required to include a description of the nature of consultation undertaken under clause 17 or an explanation of why such consultation was not undertaken in the explanatory statement to the instrument (clause 4). This statement must be tabled with the instrument in the Parliament.

On balance, the Council is of the view 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.

Parliamentary scrutiny

The Council notes that the proposed scrutiny provisions provided for in the Bill substantially reflect the approach recommended by the Council in its Report.

Clause 38 of the Bill is illustrative, implementing recommendations by the Council that all instruments to which the legislation applied should be subject to parliamentary scrutiny and control and to tabling in Parliament (Recommendations 14 and 15).

Additionally, clause 39 requires delivery to each House of an explanatory statement relating to each instrument laid before it. The Council considers this a useful inclusion and one likely to be acceptable to rule-making agencies and also, importantly, of assistance to those affected by the instrument.

The Council's recommendation that disallowance by either House of Parliament should remain the norm for parliamentary control of delegated legislation and should be prescribed by the Legislative Instruments Act (Recommendation 16) is implemented by clause 42 of the Bill, with exceptions to the disallowance procedure set out in clause 44. These exceptions will be discussed further below.

Exceptions to the application of the Bills

There are a number of exceptions to the application of the Bill. Instruments where the consultation requirements contained in the Bill may be unnecessary or inappropriate have been dealt with above.

Exceptions relating to instruments declared not to be legislative instruments (clause 7), disallowable instruments (clause 44) and instruments subject to sunseting (clause 54) are discussed below.

Instruments declared not to be legislative instruments

In its Report, the Council recommended that the Legislative Instruments Act should apply to every delegated instrument that is legislative in character, unless expressly excluded by its enabling provision (Recommendation 3(1)). In the case of exclusion, it was anticipated that the Senate Standing Committee on Scrutiny of Bills would look closely at the provision, and agencies might be required to justify their proposal to exclude the operation of the Act (paragraph 3.19 of the Report).

The Bill applies to all instruments as defined in the Bill (clause 5) unless specifically excluded. The definition is widely couched and the factors to be considered in determining whether or not an instrument is a legislative instrument are consistent with those identified by the Council in its Report (see paragraphs 3.2 – 3.11).

Clause 7 of the Bill declares certain instruments not to be ‘legislative instruments’ and therefore outside the scope of the legislation:

- instruments specified in a table under clause 7(1)(a). This includes 24 items, many of which are specific to particular pieces of legislation. Item 24 would allow additional instruments to be prescribed by regulations for the purposes of this table
- future instruments declared not to be legislative instruments by the Act or disallowable legislative instrument under which they are made (clause 7(1)(b))
- rules of court for the High Court, the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court (clause 9).

The rationale for the instruments included in the table under clause 7(1)(a) is discussed in the explanatory memorandum to the Bill (p 6), where it is said that instruments are included in the list either to clarify that they are not legislative instruments or because of strong countervailing policy reasons that make registration undesirable or inappropriate even though they are legislative.

The Council notes that as further exceptions are to be established by way of the regulations, they will be subject to Parliamentary scrutiny and disallowance.

The Bill also allows the Attorney-General to certify whether a pre-existing instrument is or is not a legislative instrument in cases of doubt, subject to judicial review (clauses 10 and 11). The ability to seek prior certification by the Attorney-General would seem to present a useful and resource-effective alternative to sole reliance on censure by the Senate Standing Committee on the Scrutiny of Bills.

Merits review is not available in relation to such decisions, although judicial review is. In the Council's view, given the broad discretionary nature of the decision in question, judicial review is the appropriate form of review in this instance.

In relation to rules of court, the Council recommended that they generally should be covered by the regime proposed for the Legislative Instruments Act, including consultation and sunseting requirements.

The Council notes that the Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill includes amendments to the legislation applicable to each court that would apply the provisions of the Legislative Instruments Act other than sections 5, 6, 7, 10, 11 and 16 to the rules of court.

Overall, the Council is supportive of the approach adopted in the Bill in this area.

Exceptions to disallowance

In the Council's report, the issue of exceptions to the disallowance provisions is not specifically addressed although the implication is that no exceptions were envisaged (Recommendation 16).

Clause 44 of the Bill excludes certain legislative instruments from the provisions for disallowance by either House of Parliament contained in clauses 42 and 43:

- instruments made in relation to intergovernmental bodies or schemes (clause 44(1))
- instruments specified in a table under clause 44(2). This contains 44 items, again mostly specific to instruments made under particular legislative provisions but with the possibility of further instruments being prescribed by regulations for the purposes of this table.

In the case of intergovernmental agreements or schemes, the explanatory memorandum to the Bill suggests (p 23) that exception is on the basis that the Commonwealth 'should not unilaterally disallow instruments that are part of a unilateral scheme'.

The Council queries why instruments made under international agreements, such as instruments made by bodies established under the Trans Tasman Mutual Recognition Agreement, should not also be exempt.

In raising the issue, the Council notes that its Report advocated that, where possible, the procedures recommended for making, publication and review of delegated legislation should apply to legislative instruments made under intergovernmental agreements or schemes. Where this was not possible, the Council recommended minimum standards which did not include disallowance by Parliament (Recommendation 31).

The Council notes that the rationale for the instruments listed in clause 44(2) is elaborated on in the explanatory memorandum to the Bill (p 23).

As under clause 7, further exceptions can be established by way of the regulations, and will therefore be subject to Parliamentary scrutiny and disallowance.

Exceptions to sunseting

Part 6 of the Bill contains procedures for sunseting legislative instruments approximately 10 years after their commencement, with provision for short-term deferral by the Attorney-General or a further 10-year extension by either House of Parliament. Clause 54 excepts certain legislative instruments from the application of the Part:

- instruments made in relation to intergovernmental bodies or schemes (clause 54(1))
- instruments specified in a table under clause 54(2). This table is similar in format to the tables in clauses 7 and 44 and contains 51 items.

The exception for intergovernmental agreements or schemes under clause 54(1) is said in the explanatory memorandum to the Bill (p 26) to be on the basis that instruments should not be subject to a unilateral sunseting process which would cause them to cease to exist in only one of the jurisdictions that are party to the agreement.

As with the exception of such agreements under clause 44, the Council queries why there is not also an exception for the instruments of bodies established under international agreements.

The rationale underlying the exceptions to sunseting listed in clause 44(2) is set out in the explanatory memorandum to the Bill (p 27). Exceptions to sunseting were not addressed by the Council in its Report (Recommendation 23).

As a general proposition, the Council considers that exceptions to both disallowance and sunseting should be based on transparent and consistent grounds and should be subject to Parliamentary scrutiny and accountability.

In conclusion, I would like to thank you once again for providing the Council with the opportunity to comment on this Bill. Should you wish to contact the Council further, you should speak in the first instance to the Council's Executive Officer, Margaret Harrison-Smith, on tel. no. 02 6250 5801.

Yours sincerely



Wayne Martin QC
President