MAKING THE RULES: A COMPARISON BETWEEN THE UNITED STATES AND AUSTRALIAN SYSTEMS

Moira Coombs

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Introduction

To compare the system of rulemaking in the United States with the system employed in Australia is to compare two different systems that have developed along quite different lines. Greater emphasis is placed on rulemaking in the US as indicated by the extensive level of resources expended on the processes involved. Much of that emphasis is placed on the consultation processes which ultimately produce the final rule. A final rule can sometimes take two to three years to complete, longer in some cases. The consultation processes in Australia at federal level are ad hoc and usually confined to informal contacts or 'captured consultation'[1] and not prescribed in legislation at present. Resources are generally expended in Australia on the legislative program as a whole rather than on the rulemaking process in particular. The emphasis rests upon the making of primary legislation which often sets out the frameworks and detail of legislative schemes. Secondary or delegated legislation is most often concerned with the procedural aspects of such schemes and is seen as a part of a scheme and not an end in itself as in the US.

This paper compares firstly the process of creating rules in both systems and considers the factors bearing upon the success or otherwise of the ways in which rules are created, their complexities, how efficiently rules are made and how they operate in practice. Secondly, the paper considers the levels of scrutiny and accountability to which the rules are subjected and how those systems vary between the US and Australia. Thirdly, the paper will consider ways in which each system has endeavoured to improve their respective systems to cope with problems relating to increasing regulation of government programs. Also the question of whether it is viable to adopt aspects of another system without fully understanding the implications of how that system may work in practice will be considered.

Rulemaking in the United States

Administrative Procedure Act 1946

In the US, the system of rulemaking is governed by the *Administrative Procedure Act 1946 (APA)*. Section 551 of the APA defines a 'rule' widely to include:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organisation, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganisations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

The administrative state before the 1930s was relatively secure and had been growing steadily. However, in the 1930s Roosevelt's New Deal 'led to a tremendous expansion of federal regulatory power in areas that included securities markets, labour relations, trucking, and the airlines. By the 1960s and 1970s this grew to include regulation in the environmental protection, consumer and traffic safety and social welfare' areas.[2] The administrative bureaucracy had blossomed considerably and the APA was passed in 1946 to attempt 'to legitimise the vast delegations of power that had been made to administrative agencies.'[3] There was at this time a definite indication that 'the 'nexus of policymaking' in fact was shifting 'from the constitutionally designated branches of government to the bureaucracy.'[4] Judge Rehnquist had referred to the APA as a 'new, basic and comprehensive regulation of procedures in many agencies, as well as a legislative enactment that settled long-continued and hard-fought contentions, and enacted a formula upon which opposing social and political forces have come to rest.'[5]

Informal Rulemaking

The APA sets out the required procedures to be taken by agencies in promulgating rules using the process of informal rulemaking or adjudication. The 'notice and comment' procedures contained in s.553 have been the primary means of rulemaking since 1946 and focus on procedures which require extensive consultation processes. For example they require that agencies prepare a *Notice of Proposed Rulemaking* that is usually the initial proposal based on in-house expertise and informal contacts with affected parties.[6] In Australia the extent of research for and preparation of draft regulations at federal level generally rely on in-house expertise and informal contacts with affected parties to produce the final regulations although more complex legislative schemes obviously involve more consultation because of their complex nature and possible impacts on the states or economy generally.

In the United States, the notice of proposed rulemaking is published in the Federal Register (s.553(b) APA) and the public is given the opportunity to comment, usually a period of between three to six months. The agency will consider these comments and include any ideas considered worthy in the agency's view to be part of the new rule. A concise general statement also accompanies the rule which explains the factual and policy bases of the rule. (s.553 (c))[7] The 'concise and general statement' or preamble has become more lengthy in recent years since the courts in the 1970s, particularly in *Kennecott Copper Corp v EPA*,[8] demanded more reasoned elaborations to enable the court and the public to follow the agency's thinking when reviewing complicated rulemakings. The courts went further in *Portland Cement Association v Ruckelhaus*[9] *486 F 2d 375*, when it was held that the notice of proposed rulemaking must disclose an agency's methodology and supporting studies in order to allow the public an opportunity to criticise the data. The 'concise general statement' must explain the agency's reasoning on key points, respond to material comments by outsiders and explain alternatives chosen and rejected.[10]

The imposition of these procedural requirements on informal rule-making demanded that agencies promulgate rules based on information in the public record in order to enable courts to review the rationality of the resulting regulations. Although the process from the view of those regulated was made considerably fairer it did result in the process itself becoming more cumbersome and legalistic.[11]

'Informal rulemaking has the clear advantage of clarifying the law in advance.'[12] This is a major asset in the US system that doesn't have a parallel in Australia at the federal level as yet but there are some states in Australia that have included provisions in their legislation requiring consultation. For example in New South Wales and Victoria the regulatory impact process prescribed in legislation stipulates a requirement that proposed regulations be advertised in advance and submissions invited from interested parties.[13] The proposals

contained in the Commonwealth Legislative Instruments Bill relating to publication and notification of all instruments in the Federal Register as well as the requirement to publish proposals in relation to rules affecting business will assist the Commonwealth to advance to a comparable level consistent with developments already operating in other Australian states.

Although the APA does not address the model for rule-making with as much precision as it does for adjudication, probably because rule-making prior to 1946 was not as frequent, it does present a framework for a simple quasi-legislative model for rule-making.[14] Interested parties are given an opportunity to participate in the making of the rule through written submissions or, if the agency chooses, through a public hearing. The public comment and the records of hearings all become part of the public record. Once rules are made they are subject to judicial review in accordance with the 'arbitrary and capricious' standard in s.706 of the APA.[15] This process is fairer and more rational because as Andreen points out, it opens up the policymaking process to all interested persons.[16] The lack of formal consultative processes is a definite gap in the Australian rulemaking process at the federal level and one which the Legislative Instruments Bill proposes to address in relation to rules affecting business.

Formal Rulemaking

Formal rulemaking under the APA applies where statutes require that rules are 'to be made on the record after opportunity for an agency hearing' (s.553(c)). Sections 556 and 557 then apply and that procedure requires public notice of the proposed rule as in informal rulemaking but then the procedure follows on very much like a formal adjudication.[17]

Statutes rarely require that hearings be conducted prior to the making of rules of general applicability. An example of such a statute is the federal *Food, Drug and Cosmetic Act* (21 U.S.C. 801) which provides that 'agency action issuing, amending or repealing, specified classes of substantive rules may be taken only after notice and hearing and that 'the Administrator shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based.'[18] These 'statutes usually require that the rules be formulated upon the basis of the evidentiary record made in the hearing.'[19] There are other statutes such as the federal *Seed Act* (7 U.S.C. 1561) that specify that hearings be conducted but do not have the further requirement of a decision 'on the record.'[20]

Negotiated Rulemaking – 'Reg negs'

In 1990 the *Negotiated Rulemaking Act* was passed as a way in which to counter the malaise in administrative law resulting, so Philip Harter contends, from 'a fundamental lack of consensus over appropriate rulemaking procedures and the nature of government regulations as a whole.'[21] He was commissioned by the Administrative Conference of the United States in 1982 to consider alternative methods of rulemaking to overcome the time and costs involved in informal rulemaking processes. The 'ossification' of the informal rulemaking process is a phenomenon written about prolifically. Basically it means that it is now much harder for an agency to promulgate a rule than it was twenty years ago.[22] This is mainly ascribed to the way in which 'hard look' review has developed and the way in which courts have acted aggressively in demanding requirements which cause the process to slow and in some cases disappear. The cause of 'ossification' in the informal rulemaking process is much disputed but the system has to a great degree 'ossified' in the past decade or so. Increasing complexities in the rulemaking process is illustrated by the example of the *Primary and Secondary Ambient Air Quality Standards* made under the *Clean Air Act* in 1970. At that time, they consisted of a single page in the Federal Register. The preamble in the 1987 revision of a single primary standard was 36 pages in the Federal Register,

supported by a 100 plus-page staff paper, a lengthy and costly million dollar Regulatory Impact Analysis and a multi-volume criteria document.[23]

It was envisaged that building consensus amongst interested parties to proposed rules using negotiated rulemaking would result in rules being made more expeditiously and without generating subsequent legal challenges.[24] It was thus seen as a cure-all for the 'ossification' process. The APA was consequently amended by adding a new sub-chapter concerned with establishing a framework, consistent with s.553 of the APA, to encourage agencies to use the process when it enhances the informal rulemaking process. The intent of the legislation was to authorise agencies to increasingly use settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials and arbitration as a means of combating conflict and challenges to the rules.[25]

'Reg negs' have generated much enthusiasm and support in the executive and legislative branches of the federal government as an innovative, efficient and effective means of developing regulations.[26] So enthusiastic was the Clinton Administration that they passed the *Administrative Dispute Resolution Act 1996* which 'confirmed ...the use of collaborative processes and has recognized that these methods have just as much place in agencies' activities as do formal adjudication, notice and comment rulemaking, and other more formal procedures.'[27] Further sunset dates and special oversight or reporting requirements were eleminated in the *Negotiated Rulemaking Act.* The amendments give the Office of Management and Budget power to take action to expedite the establishing of negotiated rulemaking committees to ensure that bureaucratic requirements do not impede agencies from taking advantage of the negotiated rulemaking process.[28]

In 1993, the Clinton Administration issued Executive Order 12,866 directing that each agency explore the use of consensual mechanisms for developing regulations, including negotiated rulemaking.[29] The initiative was part of Al Gore's 'Reinventing Government' initiative that was designed to make Federal Government less expensive and more efficient and to change the culture of the national bureaucracy – to redesign, to reinvent, to reinvigorate the entire National Government – and to put the **M** back in OMB.[30] The Government clearly thought that these changes would overcome the problems besetting the system and breath new life into it. In practical terms, the Clinton Administration achieved the cutting of 640,000 pages of internal agency rules, agencies eliminated 16,000 pages of unnecessary federal regulations affecting businesses and rewrote another 31,000 pages into understandable, plain language.[31]

Rulemaking in Australia

Acts Interpretation Act 1901 and Statutory Rules Publication Act 1903

The US system focuses very much on consultative procedures under the APA while the rule is being promulgated. Australia does not have legislation which dictates how rules are to be promulgated, that is, the manner in which the content is compiled. In the US the government is in fact developing the policy as it develops the rule. In Australia, the *Acts Interpretation Act 1901* and the *Statutory Rules Publication Act* set out the formal requirements for regulations and how they are published and the criteria to ensure that rules are validly made. They are purely procedural in nature.

The emphasis in Australia is on the making of primary legislation and that is where the resources are expended for the development of legislative schemes. In Australia it is the norm that 'an Act of Parliament will set out the broad scheme of a policy or program within a fairly detailed framework, with executive law-making confined to matters too technical, trivial, detailed or changing to justify the procedural solemnity and rigour of an Act of Parliament.'[32]

The delegated legislation is part of the primary legislative program that is put in place by the responsible Minister for the relevant portfolio.

The system controlling the making, scrutiny and publication of regulations has been in place for a long period of time. It has proved a stable and enduring system and as a result Australia is considered 'the possessor of the most advanced system of parliamentary scrutiny of delegated legislation.'[33] Although the system appears to have developed in an *ad hoc* way, the system as we know it now was settled by 1932 with the role of parliament firmly placed at the centre. Regulations are made and notified in the Commonwealth Government Gazette and laid before both Houses within 15 sitting days. Motions for disallowance of those regulations can be made within a further 15 sitting days of tabling. All these conditions fulfil s. 48(1) of the *Acts Interpretation Act 1901.*

During the last twenty years or so, other types of instruments have significantly increased in number. In 1987, section 46A was inserted into the *Acts Interpretation Act 1901* which considerably expanded the scope of federal parliamentary control in relation to these various types of instruments. If instruments satisfy the characteristics set out in s.46A and are referred to in the empowering legislation as being a 'disallowable instrument,' then they fall within the operation of the Act and are subject to the controls of parliamentary review in the same way as regulations are subject to review.

> The operation of this section (s.46A) requires a case by case consideration of the question whether an instrument has such legislative characteristics that it should be subject to parliamentary review. It is to the credit of Commonwealth legislators that there has been a generous attitude taken to the desirability of prescribing instruments as falling within this description. The result has been that the Senate now reviews more non-regulation instruments than those that fall within the traditional categories.[34]

The Commonwealth regime brings therefore, a great many of these instruments within the operation of the *Acts Interpretation Act 1901* and it is interesting to contrast this with the situation in Victoria, where the number of regulations falling within the definition of 'statutory rule' under the *Subordinate Legislation Act 1994*, is declining. In 1997, the Scrutiny of Acts and Regulations Committee dealt with 175 regulations but in 2000 it had decreased to 141.[35] The Inquiry into the *Subordinate Legislation Act 1994* in Victoria has suggested as a possible option for reform to adopt the definition of 'legislative instrument' contained in the Commonwealth Legislative Instruments Bill 1996 (No. 2).[36]

Parliament recognised from an early stage the need for direct parliamentary control over delegated legislation. Debate on the disallowance provision in the Acts Interpretation Bill 1904 was very much in favour of parliament maintaining its responsibilities over delegated legislation. Senator Gould commented in 1904 that he did 'not believe in giving the Executive powers which rightly belong to Parliament.'[37]

In 1931 the Scullin Government had tried government by regulation and pushed the system to the limit. It made regulations to give preference in employment to the Waterside Workers' Federation. The strategy employed by the Government was to table the regulations on the last of the 15 sitting days required for tabling and then re-enact the regulations after they had been disallowed. This process happened a number of times and they were re-enacted on the same day as Parliament was dissolved. The regulations were finally repealed by the Lyons Government on 8 January 1932.[38] In effect the strategy employed by the Scullin Government achieved what it had set out to do in relation to the Waterside Workers' Federation, and that was to give preference to the union. This they achieved for the greater part of 1931 with the consequence that the rival union was greatly weakened.[39]

There were a number of High Court cases generated as a result of the way in which the Scullin Government had manipulated the regulation-making process. One of those decisions

was *Victorian Stevedoring Co Pty Ltd v. Dignan*[40] which held the regulations to be within the legislative power of the Commonwealth Parliament principally because the 'delegation of legislative authority is an accepted feature of Anglo-Australian legal and constitutional development.'[41] Evatt J commented in his judgment that it was really a matter for Parliament to amend the legislation concerned and that the re-making of regulations did not exceed the Governor-General's statutory powers,

> Although the general power of the Governor-General to make the present regulations is derived from the *Transport Workers Act*, sec. 33(1) of the *Acts Interpretation Act* 1901-1930 shows that the power may be exercised from time to time as occasion may require. The Governor-General is the sole judge of the time and occasion, and his statutory powers and their exercise remain unaffected by the termination of a regulation previously made. It would be quite impossible for any Court to say for what period a disallowance of Regulation A should operate, so as to prevent the Executive Government from making a new regulation, B, to operate in substantially the same way as A. Indeed, the argument on this part of the case overlooks the fact that the power conferred on the Governor-General to make regulations is a continuing authority, which will endure until the statutes mentioned are repealed or amended.[42]

The situation of manipulating the time of tabling instruments discussed in *Dignan's* case[43] is still considered a problem in Australia today, and to combat this problem the Legislative Instruments Bill proposes that instruments be tabled within six sitting days after they are made or they cease to have effect. Governments at present can still benefit by 'dodging' the disallowance procedure for a while by tabling regulations on the last possible sitting day of the session or by making regulations during the parliamentary recess. This allows a period of operation before the rules are considered by Parliament. The fact that the legislation has been operating for some time may inhibit members and senators from moving its disallowance.[44] More recently the Howard Government tried a similar strategy when making the Workplace Relations Amendment Regulations in December 1998. The regulations attempted to implement an unfair dismissal exemption for small businesses employing 15 or fewer persons, legislation that had been before the Senate twice and had been rejected on both occasions.[45] The Parliament did not have an opportunity to consider the regulations until it sat again in February of 1999. Senator Faulkner commented in the disallowance motion that

> the Prime Minister and the Minister for Employment, Workplace Relations and Small Business will not accept the will of the Senate, of the parliament. They have subverted the parliamentary process and attempted to introduce the same unfair dismissal exemptions through the back door by regulation.[46]

The regulations were subsequently disallowed in February 1999.

Dignan's case was also interesting in that it contrasted the rulemaking power and its exercise in the United States system with that of Australia. Sawer states that 'the regulations were challenged on the basis that the nature of the delegation of power to the Executive was so broad that it infringed the principle of separation of powers.'[47] However, the Court rejected that notion on the grounds that according to the 'gradual course of decision any sharp separation of legislative from executive powers had been rejected.'[48] The High Court considered the US system to be quite different from the way in which rulemaking power is delegated and exercised in Australia; and Sawer comments that

> the American doctrine requiring the delegating Act to set out standards or principles for the delegate body to observe did not apply in Australia. It was agreed that complete abdication of legislative power by parliament would be unconstitutional, and it was suggested that delegation of a whole head of power might be; some stress was placed on the relation between parliament and executive in the Anglo-Australian system of responsible government, from which it appears that wide delegation to bodies other than the Governor-General-in-Council might be differently regarded.[49]

Dixon J pointed to the distinction made in the US between a delegation of power to make a law that involves a discretion and conferring a discretion as to its execution.[50] In the US

when legislative authority was delegated to agencies the delegating Act was required to provide guidance and set out standards so as to avoid problems associated with the separation of powers doctrine. The Supreme Court has justified the delegation of power by saying that as long as the delegation of power is done within the confines of the delegating Act, then separation of powers doctrine is not infringed particularly if the courts are able to 'ascertain whether the will of Congress has been obeyed.'[51] Dixon J in Dignan's case referred to Justice Holmes and his 'dissenting opinion in *Springer v. Government of the Phillipines Islands*[52] has doubtless lent support to the notion that many of the consequences of the separation of powers are avoided in substance, although acknowledged in form.'[53] In Australia the delegation of authority is made under a statute to the Governor-General who is empowered to make regulations under a range of legislation. Usually the power is delegated in general terms but sometimes it refers to either a specific activity or enumerated activities. By contrast, an agency in the United States such as the Environmental Protection Agency (EPA) has power to decide if rules are needed within a particular area such as 'Clean Air' and its associated range of matters related to air quality standards. The statute does not specify areas or enumerate particular activities where the EPA can make rules – that is the province of the agency to decide under its delegation.

The actions by the Scullin Government in 1931 resulted in major changes to the rulemaking system at the time. After they lost power in 1931, the *Acts Interpretation Act 1904-1930* was amended and section 10A was inserted. This section prohibited the re-making of regulations which had been disallowed by either House of Parliament within six months after the date of the disallowance.[54] Parliament thereby reasserted its control over the process and this is embodied in a statement by the Acting Attorney-General Senator McLachlan that

> Having regard to the fact that the power is vested in Parliament, no government should have the right to bring into operation a regulation that has been disallowed by either House of Parliament unless a resolution for its disallowance has been rescinded.[55]

The other significant development in 1932 was the setting up of the Senate Standing Committee on Regulations and Ordinances which was intended to provide parliamentary machinery for the routine examination of the steadily growing number of instruments tabled in accordance with the *Acts Interpretation Act*.[56] The idea that Parliament is superior to the executive in the making of regulations has not really varied from that time and rulemaking has remained closely aligned with the parliamentary process since then. The system has worked reasonably well and difficulties with the system appear to have come about as a result of the evolution and diversity of various kinds of legislative instruments, that is more properly described as an explosion.[57] Problems arise in Australia because this proliferation of instruments does not 'fit easily within the existing processes and procedures for scrutiny.'[58]

Australia's system in comparison with that of the US keeps delegated legislation very much a part of the parliamentary process whereas in the US the role of Congress is almost non-existent. Indeed 'Congress is incapable of monitoring the rulemaking process closely enough to keep agencies accountable,'[59] because of the large and complex nature of the regulatory system.

Scrutiny Mechanisms

United States

In the United States all three branches of government jealously guard their review roles in relation to rulemaking.[60] The nature of the review by each branch is very different and the extent varies between the branches

Judicial Review

The judicial branch has developed a procedure known as 'hard look' review which gained momentum during the 1970s. The reviewing court is

> obliged to examine carefully the administrative record and the agency's explanation, to determine whether the agency applied the correct analytical methodology, applied the right criteria, considered the relevant factors, chose from among the available range of regulatory options, relied upon appropriate policies and pointed to adequate support in the record for material empirical conclusions.[61]

Rules can be set aside under the APA if they are found to be 'arbitrary or capricious' or if there is an 'abuse of discretion.' Judge Leventhal who first referred to the term 'hard look' review in *Citizens to Preserve Overton Park v. Volpe*,[62] considered that 'the court does not make the ultimate decision but insists that the official or agency take a 'hard look' at all relevant factors.'[63] The Supreme Court also considered that 'the inquiry is to be searching and careful, the ultimate standard of review is a narrow one.'[64] This 'probing' standard of merits-oriented review first enunciated in *Overton Park* has become known as the 'hard look' doctrine of judicial review.[65]

In Professor McGarity's opinion, the 1970s saw an aggressive judicial approach toward 'hard look' review with a tendency to define issues in terms of political value judgments rather than relying on agency expertise in matters. Some major agency rulemaking initiatives were stymied by numerous judicial remands as a result.[66] He considers that the impact upon agencies was to impede their freedom to facilitate the rulemaking process and with detrimental effects, to the extent that agencies now are extremely conscious of the possibility of judicial reprimands and the consequences to the agency if that should happen. Agencies tend to be 'constantly 'looking over their shoulders' at the reviewing courts in preparing supporting documents, in writing preambles, in responding to public comments, and in assembling the rulemaking record.'[67] This has forced some agencies to abandon rulemaking in favour of case-by-case recalls.[68] Professor McGarity illustrates his discussion with an example involving the EPA where he points to the dangers involved when stringent judicial review in effect goes counter to the public interest. When the EPA was attempting to develop standards for industrial dischargers of pollutants in accordance with the then 'best practicable technology available' in the 1970s, they were constantly thwarted by judicial reprimands. The result was that the EPA gave up in all but one case and ultimately, it failed to develop 'best practicable technology' standards for most of the pollutants in most of the industries for which it had a judicial remand.[69] In McGarity's view 'the predictable result of stringent 'hard look' judicial review of complex rulemaking is 'ossification.'"[70]

Congressional Review

McGarity considers that Congress has not implemented a regularised institutional role for itself in reviewing individual rulemaking efforts.[71] These rulemakings are equivalent to regulation making in Australia. Similarly to the Australia system, Congress has the opportunity under the *Congressional Review Act* to review final regulations issued by federal agencies. Rules that may attract the attention of the Act are those with an annual economic impact of $100 million or more, where consumers may be affected by major increases in costs and prices or where there is the possibility of a significant adverse impact relating to employment, productivity, competition or investment. The Act provides a 60-day window for Congress to accept or reject the final regulation and as well such congressional action is subject to presidential veto.[72]

Congressional authorization committees, Bryner contends, can have a number of non statutory means of oversight and control of agency rulemaking by the use of hearings, investigations and the requesting of agency and program reports. However such activities

seem more oriented toward broad policy issues rather than inquiries into agency implementation programs.[73] 'The potential for effective oversight is constrained by the limited power and resources of oversight committees and by the difficulty they face in challenging an agency with influential friends and supporters elsewhere in Congress.'[74] The result is that these committees are not able to provide systematic or careful oversight of agency rulemaking activities. 'But such time consuming, uncoordinated effort provides only a narrow kind of accountability and one that might often run contrary to the intent of law and the extent to which rules and regulations are applied fairly and consistently.'[75] However McGarity considers that such ad hoc review by interested committees 'cannot be understated,'[76] and provides a useful deterrent to the abuse of power by agencies.

A significant legislative technique to control delegated legislative powers by Congress was the legislative veto. The legislative veto was exercised through a number of statutes and empowered one or both Houses to override delegated agency decisions by passing a resolution that annulled the action that had been taken by agencies under their delegated power. Schwartz likens the process to tabling legislative instruments before Parliament.[77] However, although the process is similar to disallowance procedures in Australia, the structure is quite different because the power to veto lies within statutes and is not part of the congressional process that applies to all legislation. Bryner considered it an attractive tool for Congress because

> it enabled Congress to delegate responsibility for making difficult policy choices and blame for politically unpopular ones, and claim credit for acting in response to political demands in reversing unpopular actions. The legislative veto allowed Congress to permit presidential judgment, discretion and initiative while safeguarding its own prerogatives and served as a practical basis for compromise over the division of authority and responsibility between the legislature and executive in areas of shared constitutional jurisdiction and political conflicts and disagreements. It often induced compromise on particularly intractable policy disputes.[78]

However the legislative veto was declared by the Supreme Court in 1983 in *Immigration and Naturalization Service v. Chadha*[79] to violate the constitutional requirement of the separation of powers.[80] The veto was said to 'violate the Presentment Clause that requires all legislation to be presented to the President before becoming law. Secondly, it violated the requirement that no law can take effect without the concurrence of both houses of Congress.'[81] 'It meant that the 200 or so statutory provisions that included legislative vetoes were void.'[82] However, even after *Chadha*, Congress can still undo initiatives directly by statute or by limitations placed on agency appropriations.[83]

In Coglianese's opinion Congress can and does affect regulations through appropriations bills, hearings and oversight which may explain why the *Congressional Review Act* has effectively lain dormant for five years until recently when it was used by Congress and President Bush to repeal an Occupational Safety and Health Administration (OSHA) ergonomics rule.[84] It is not possible for Congress to scrutinise every single rule. The sheer volume of rules produced precludes that happening. For example in the five year period from 1996 to 2001, federal regulatory agencies issued 20,000 new rules.[85] The role of Congress then is very different to Parliament's role. Rules are not scrutinised by Congress as part of a regularised process but if Congress disagrees with a rule it can pass a statute to reverse its effect as is the case in Australia or it can invoke the *Congressional Review Act* that is subject to presidential veto. Congress can also alter an agency's jurisdiction to curtail certain rulemaking efforts.[86] There appears to be much duplication of effort if Congress should disagree with an agency's view on how a policy should be approached and implemented, the agency then has to recommence the rulemaking process to produce a rule with which all branches are happy.

Presidential Review

The 1980s witnessed increasing influence in direct presidential review of delegated rulemaking. This resulted in Reagan's push to 'regain control' over a runaway bureaucracy, according to McGarity.[87] Executive Order 12,291 required agencies to submit all rules to the Office of Management and Budget (OMB) for review. Agencies cannot consider new rulemaking initiatives or send proposed or final rules to the Federal Register without OMB approval. The OMB process was the vehicle by which presidential micro-management of the rulemaking process took place. President Bush continued this practice and assigned in 1990 control of the process under Executive Order 12,291 to the Council on Competitiveness. The Council was chaired by the Vice President and composed of key economic and legal advisers such as the Secretaries of Commerce and the Treasury, the Attorney-General, the Director of OMB, the Chairman of the Council of Economic Advisers and the President's Chief of Staff.[88] Taking account of the nature of the system and the fact that agencies can decide for themselves what rules they need to make, the Executive has had to build some accountability mechanisms back into the system of rulemaking to ensure that its policy initiatives are implemented by the agencies.

Another requirement that was implemented by Executive Order 12,498 was to create a 'regulatory agenda' of all executive branch rulemaking initiatives. Every agency is required to submit its rulemaking initiatives planned for the year to OMB for approval. If the OMB does not include any of the items on the agenda, the agency is then not able to proceed with a notice of proposed rulemaking.[89] OMB's review, in McGarity's opinion, has proved to be far more intrusive than either judicial or congressional review but many would argue that with the President and Vice President as part of the review function as well as being elected officials 'helps foster public accountability.' McGarity considers this situation is ideal in principle as the President who is at the 'apex of government' can provide the OMB and the Council on Competitiveness with a 'unique perspective' on policymaking in the federal bureaucracy. So in theory the Executive are in a better position to implement policy across the Executive Branch, to ensure its consistency, and 'to help prevent agencies from acting at cross-purposes with one another.' [90] However in practice there is not much accountability by elected members of the Executive and instead the reviewing function tends to fall to unelected bureaucrats in the OMB and the Council on Competitiveness.

The result of delegation of rulemaking power to agencies by Congress appears to have spawned a very powerful organisation in OMB. McGarity's view is that 'the OMB sometimes attempts to supplant its own judgments for congressional policy judgments, they also attempt to substitute their own judgments in the very highly technical areas of science, engineering and economics for that of the agencies to whom Congress has delegated responsibility.'[91] In cases where this has occurred, it indicates a serious flaw in the way in which accountability mechanisms are intended to operate.

Significant rulemaking initiatives of great importance to the agencies, industries and beneficiary groups concerned can take years to be approved and in some cases may not be approved. McGarity points to an example with the EPA in connection with one of its rulemaking exercises, concerning important corrective action governing the extent to which hazardous waste disposal facilities must clean up existing contamination, seemed to cause conflict with OMB, so much so, that the agencies took two years to argue over the content of the rule.[92] Clashes are not confined to agencies, OMB also clashes frequently with congressional subcommittees who jealously guard their influence over agency rulemaking as well. The effectiveness and the potency of the rulemaking system is grossly affected by such stoushes and it would appear that it is quite amazing when an agency is able to finalise rules that relate to complex and technical areas having travelled the maze of regulatory requirements from all branches of government. It seems that the system is overburdened

with review. It would appear that 'ossification' cannot be solely laid at the door of the judicial branch.

Australia

Luckily for Australia, the system of rulemaking is closely aligned to the Parliamentary process and operates in a more coordinated and cohesive fashion. The reason is that Parliament authorises the making of a specific delegation of power under various statutes and although approval is made to make delegated legislation in a particular subject area, 'it should not be assumed to give the executive government an absolute discretion to make whatever legislation it thinks fit.'[93] As Barwick pointed out in *Giris v Federal Commissioner of Taxation*[94] that while there is no doubt that 'the Parliament may delegate legislative power it may not abdicate it.'[95]

In the US on the other hand, Congress delegates a general rulemaking power to agencies to make rules in particular subject areas, and in these situations informal rulemaking procedures apply. A delegation of power in the US under a statute that requires a rule to be made on the record after an agency hearing dictates that the formal rulemaking procedure will be used as set out in the APA. By contrast, in Australia a particular statute will indicate a delegation of power to the Executive and specify the subject area in which the agency may make rules and also specify the type of instrument to be made under that delegation. Although Parliament may not want to legislate directly in relation to those delegated matters, it is only logical that Parliament should wish to retain a supervisory capacity over how the delegation of power is exercised.

The tabling of delegated legislation is the primary way in which Parliament can maintain control of the way in which powers of delegation are used. As the tabling process is part of Parliamentary procedure, the Minister responsible for tabling the legislation can be held accountable for any concerns which the Parliament may have relating to the exercise of the power. If one or other of the Houses is concerned with the nature of the delegated legislation, a motion of disallowance can be put forward. Although Bernard Schwartz likened the legislative veto to disallowance of legislative instruments in Australia, they are really quite different as the disallowance procedures are built into the *Acts Interpretation Act 1901* and apply to all regulations and instruments of a legislative nature falling within the operation of s.46A. By comparison, the legislative veto provisions of Congress were contained in some statutes but not all.

Scrutiny Committees in Parliament provide an extremely useful filter process for delegated legislation. A fixed definite procedure is followed once instruments have been tabled. There appears to be no systematic approach in the US as there is in Australia in relation to the activities of parliamentary legislative scrutiny committees. Senate Standing Order 23 (2) states that all regulations, ordinances and other instruments made under the authority of Acts of Parliament which are subject to disallowance or disapproval by the Senate are referred to the Senate Standing Committee on Regulations and Ordinances.[96] The importance of the Committee to the parliamentary process, as Pearce and Argument state is that it has become an integral part of the legislative process. It engages in technical legislative scrutiny and applies parliamentary standards to ensure the highest quality of delegated legislation.[97] It has the power to recommend that any instruments or parts of instruments may be disallowed. This is rare as any concerns are almost always dealt with by the responsible Minister concerned after being approached by the Committee.

The Committee is responsible for ensuring that delegated legislation meets certain criteria and that it does not trespass upon certain fundamental rights and principles.[98] It ensures that the legislation accords with the terms of the statute, that it does not impinge on personal rights and liberties, and that those rights are not dependent on administrative decisions

which are not the subject of merits review and that it does not contain matters that are more appropriately dealt with in primary legislation. The Scrutiny of Bills Committee established in 1981 ensures as part of its responsibilities that bills do not inappropriately delegate legislative powers.

Like the US and the OMB, the Office of Regulatory Review (ORR), now part of the Productivity Commission within the Treasury portfolio, aims to perform a similar role within the Executive in applying compliance mechanisms. Issues of regulatory reform have formed a major part of the government's review on competition policy. The ORR vets and reviews regulations to ensure they are properly formulated and do not impose undue costs on business and the community.[99]

The Government's law and justice policy statement in 1998 had also foreshadowed a consultation process in relation to regulatory activity and part of that would include a requirement for a regulatory impact statement. Such statements indicate matters such as the objectives of the proposed regulation, the alternatives for achieving those objectives, the costs and benefits for each alternative and the reason for the adoption of the measure advanced.[100] This proposal was contained in the Legislative Instruments Bill 1996 (No.2) however, as the bill did not pass the Senate, the Government accordingly set up the ORR within the Treasury portfolio.

Regulatory Impact Statements (RISs), very like the US equivalent, are required for legislation which have an impact on business. The aim is to encourage all departments to consider all possible alternatives and their associated costs and benefits and to choose the alternative with the maximum positive impact upon the economy.[101] Aspects of the US system have clearly been utilised in relation to the creation of the ORR although the Commonwealth has followed Victoria's lead. Perton considers that the RIS is an important addition to the process:

> the RIS process strengthens our democracy. Whilst there are many avenues for the citizen and organisations to lobby in respect of Bills in the Parliament, the RIS process offers the only genuine public input into the regulatory process. The process is seen as more important today than ever before because many more substantive issues are being left by Acts to be realised in subordinate legislation. This makes the need for public justification of regulatory proposals much greater, as they are not debated in the public arena, that is, the Parliament.[102]

In the Commonwealth, RISs are required to be tabled in Parliament. The Office of Regulation Review, before the regulatory proposal and RIS go to Cabinet for approval advises on the adequacy of the RIS. A weakness was highlighted by the Inquiry into the *Subordinate Legislation Act 1994* in Victoria concerning the Commonwealth system where it commented that although 'the Commonwealth requires that RISs be tabled in Parliament, there is no requirement that the RIS produced for Cabinet be the same as the RIS tabled in Parliament.'[103]

The involvement of the courts in the promulgating of rules is quite alien to Australia's system. The courts become involved after the legislative instruments have become operational and where individuals or groups are affected by the operation of those legislative instruments. In *Shanahan v. Scott*[104] the High Court held that regulations cannot extend the operation of a statute :-

> [a general regulation making power] does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorize the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.[105]

The issue of procedural fairness has arisen in a number of cases relating to the delegated legislative process. The view of the courts is encapsulated in a statement by Brennan J in *Kioa v. West,* that 'the legislature is not likely to intend that a statutory power of a strictly legislative nature be conditioned on the observance of the principles of natural justice, for the interests of all members of the public are affected in the same way by the exercise of such a power.'[106] Dunphy, however, makes the point that 'Brennan J saw no reason for ruling out the application of the principles of natural justice in relation to exercises of legislative power which singled out individuals by affecting their interests in a manner that was substantially different from the manner in which the interests of the public at large are being affected.'[107] Generally though, the 'courts have declined to extend the doctrine of natural justice to apply to the formulation by the executive of rules of a legislative character.'[108] If the courts did interfere it could be interpreted as trespassing upon the executive's right to implement its policies.

There is the possibility that delegated legislation can be challenged on the basis of unreasonableness. Pearce considers that there is now a 'greater willingness' on the part of the courts to consider the possibility of a ground of unreasonableness as indicated by two successful decisions in 1992 however, since then the 'courts continue to be reluctant to find delegated legislation invalid on unreasonableness grounds,'[109] 'principally because it involves the court in what is largely a subjective assessment of the 'reasonableness' of the provision.'[110]

Strategies to Improve Rulemaking Processes

United States

In the United States the *Negotiated Rulemaking Act* passed in 1990 was hailed as a cure for the 'malaise' that beset federal rulemaking during the 1980s. Congress established the procedural guidelines encouraging the use of 'reg negs' and permanently reauthorized the Act in 1996. The Act does not require agencies to use formal negotiated procedures for rulemaking, but rather authorises a procedure to enable agencies to bring interested parties into the rulemaking process before it issues a proposed rule.[111] 'Vice-President Al Gore's National Performance Review enthusiastically endorsed 'reg neg' as a means of reducing the time taken to promulgate a rule and the costs involved in litigation and non-compliance. Judge Patricia Wald considers ' reg neg by far the most innovative and revolutionary aspect of ADR' as applied to matters of public law.'[112]

The reasons for such enthusiasm are many and varied. Statistics were quoted while the bill was before Congress to imply that the current system of rulemaking had to be improved and something done quickly by the Government. It was said that 'roughly 80% of the 300 regulations issued each year by the Environmental Protection Agency ended up in court.'[113] This figure has been bandied about by numerous people and was attributed also to former EPA Administrator William Ruckelshaus who also claimed 30% of that 80% of rules were significantly changed as a result of litigation.[114] These statistics seem to have taken on a life of their own and have greatly influenced the decisions taken concerning the push for negotiated rulemaking in the US. However, Coglianese points out in his empirical study of conventional and negotiated rulemaking outcomes that in interviews conducted with EPA staff that 'no systematic analysis of these figures underlay these claims. Rather, it was based on a ball-park estimate of the number of rules published in the agency's regulatory agenda and a similar estimate of the number of petitions handled by the Office of General Counsel.'[115]

Coglianese's investigation and comparison of the two systems led him to the conclusion that 'negotiated rulemaking saves no appreciable amount of time nor reduces the rate of litigation.'[116] The 'hype' in the literature implies that negotiated rulemaking is the norm. In

fact, of the 3,762 rules finalised in 1996 only seven were negotiated rules, a percentage of 0.19% for that year.[117] The average time taken for an EPA rulemaking exercise using informal rulemaking procedures is approximately three and a half years from the development of an initial proposal to the promulgation of a final rule.[118] Coglianese examined the 35 regulatory negotiations to date. The shortest required half a year and the longest nearly seven years.[119]

Coglianese points out also that care needs to be taken when comparing figures for informal rulemaking and negotiated rulemaking. Even though rulemaking at the EPA takes about the same amount of chronological time, much more concentrated amounts of time are demanded by the negotiated rulemaking on the part of the agency and non-agency participants.[120] 'The negotiated rulemaking process contains all the elements of the conventional procedure, but in 'reg neg' all of them are compressed into one pre-emptive, intense, time consuming negotiated interaction.' [121]

'Negotiated rulemaking, distinguished by its search for consensus, has been an oversold solution to an overstated problem.'[122] There are some recognised disadvantages to using negotiated rulemaking. Coglianese considers that the process fosters more conflict than it reduces, particularly in the areas of decisions relating to the membership of the negotiated rulemaking committee, the consistency of final rules with negotiated agreements and the potential for an overall heightened sensitivity to adverse aspects of rules.[123] He also considers it very difficult to maintain the fragile consensus through the various stages of a negotiation given the realities of the federal regulatory process. A consensus reached during the early stages of a negotiation may not manage to come through all the situations that may cause it to unravel.[124] He questions the need to reach absolute consensus when learning may be equally well achieved in discussion-oriented sessions.[125]

Other concerns with the process relate to the way in which the process may 'subtly subvert the basic, underlying concepts of American administrative law, that is the agency's pursuit of the public interest through law and reasoned decisionmaking. In its place, negotiated rulemaking would establish privately bargained interests as the source of putative public law.'[126]

Concerns have also been raised that the process would be contrary to the non-delegation doctrine relating to the 'potentially unlawful or unconstitutional delegation of legislative authority to private entities', a factor rejected most strongly by the Supreme Court in *Schechter Poultry v. United States* .[127] The argument involves the role of the agency as sovereign actor charged with the responsibility of pursuing the public interest. However in negotiated rulemaking the role of the agency is reduced to the 'level of a mere participant in the formulation of the rule and essentially denies the agency any responsibility beyond effectuating the consensus achieved by the group.'[128] In effect the agency has subtly shifted its function, from that of sovereign decisionmaker to that of an interested party to the negotiation. Choo refers to a comment by Judge Posner in *USA Group Loan Services v. Riley* where he dubbed 'reg neg' as 'a novelty in the administrative process and likened an advance commitment by an agency to abide by a consensus developed by a negotiating committee to 'an abdication of regulatory authority to the regulated...'[129] These concerns are associated with 'the implicit delegation from Congress to make law, consistent with the agency's authorizing statute. The statute is not just a brake or anchor on agency autonomy, it is the source and reason for the agency's actions.'[130] To that end Funk considers the theory and principles of regulatory negotiation are inconsistent with the theory and principles of the APA.[131]

Australia

The Legislative Instruments Bill proposes a number of enhancements to enable our existing system to better cope with the untenable aspects relating to delegated legislation that have crept into our system, such as the volume and complexity of quasi-legislation now in existence. The Bill recommends that all subordinate legislation be covered by the legislation to 'provide greater certainty about the regime applicable to legislative instruments.'[132] It will help overcome the very great problem of 'secret' legislation that is virtually inaccessible to the public as much of it is not subject to the *Statutory Rules Publication Act 1903* and therefore is not published.[133] It will force the Executive to direct its focus away from using non-disallowable instruments as a way of governing, that is now seen, suggests Argument as 'perhaps part of the deliberate plan to avoid the unwelcome attention of the Parliament.'[134]

As all legislative instruments are included within the operation of the bill, they will all be subject to parliamentary scrutiny. This will have a very positive impact on the array of delegated legislation that is 'currently in a parlous state.'[135] The overall impact of the Bill, Argument contends is that a legislative instrument;

> would be subject to an ordered and stringent regime in relation to drafting, publication, registration, scrutiny and in some cases, public consultation. It is also important to note that, if an 'instrument that is of a legislative character' is not made in accordance with the provisions of the Bill then it may be unenforceable.[136]

The mandatory consultation process for delegated legislation impacting upon business is a new innovation in the system at the federal level. The proposals are closer to the systems in New South Wales and Victoria that appear to mimic the 'notice and comment' procedure in the US system. The bill will require 'notification of a proposal to make a legislative instrument affecting business and the development of a legislative instrument proposal containing analyses of the need for the regulation, the costs and benefits of it and alternative ways of achieving the objectives of the proposal.'[137] The process is seen as a way of identifying defects within the proposal and dealing with them before the instrument is made. Pearce is concerned that there is likely to be more public involvement and influence on the content of the secondary form of legislation than there is on the primary legislation.[138] Although the bill adopts procedures that exist presently in New South Wales and Victoria in relation to consultation, it still needs to be borne in mind that difficulties exist when making comparisons between very different systems such as the US and Australia. The placing of greater emphasis on rulemaking processes in Australia than existed previously could create problems by making it a very costly exercise to produce legislative instruments. The nature of the relationship of rules to the parent statute that authorises their creation is also quite different in each country. Pearce's concern about the paradox will be a very real concern when the Bill becomes an Act. As the Australian system operates in quite a different way in practice to the way in which the US system operates, care needs to be taken when adopting aspects of a system, and how transplanted aspects affect the balance of the existing system.

The Legislative Instruments Bill would direct rulemaking into a consultative environment that leaves primary lawmaking lacking the same degree of openness. While consultation is a good thing and will result in better rules, the system needs to be balanced between primary and secondary law making. The balance needs to be commensurate with the importance attached to each of the processes as currently exists or perhaps the increased complexities in the system of rulemaking will justify that the whole system needs to be reassessed so that there is a more rigorous treatment of legislative instruments. This means that the primary legislative process may also need to be examined to address any apparent imbalance. However, as Asimov states 'parliamentary control is an ineffective check against ill-considered rules'[139] and consultation that is mandatory for important rules does provide

accountability by allowing those parties most affected by the rules to have a say and to ensure public input into more complex rulemaking activities in a more structured and logical way.

If Australia is going to adopt aspects of the US system it has to be more receptive of the fact that the US system is very much focused on 'openness' and adhering to democratic principles (or tries to) where the public interest is considered paramount. When consultation is part of the statutory process in rulemaking, greater accountability is ensured and the process will be made more consistent with the concept of procedural fairness.[140] However the process of consultation should not be seen as a substitute for parliamentary scrutiny in relation to disallowance, where representatives of all Australians have an opportunity to comment on the content of rules. There is no need to have all three branches scrutinising legislation to the same degree as in the US unless it is controversial. The operation of consultative procedures, alternative compliance mechanisms such as the ORR and parliamentary scrutiny procedures should produce rules of high quality.

The courts have a role to play where interests of individuals are threatened, particularly in situations where certain government 'ministers do not want their regulations reviewed.'[141] Some of the proposals in the Legislative Instruments Bill are cause for concern as well, particularly those provisions that allow the Attorney-General to issue a conclusive certificate to the effect that an instrument is not legislative without any parliamentary scrutiny of the instrument concerned. The bill also proposes to exclude the Senate's scrutiny for certain types of instruments such as regulations that provide for national legislative schemes, as well as certain quarantine proclamations and migration instruments.[142]

Conclusion

A number of innovative aspects of the US system can and should be adopted in relation to rulemaking but it is important that the context from which those perceived innovations come is well understood and compensated for when grafting them into the Australian system. Care should be taken in this process with a view to possible ripple effects into other branches of government. There should be some idea of the extent of the burden it may place on the court system if it has to become more involved in protecting the rights of affected individuals in relation to delegated legislative decisions. There is no benefit to be gained by placing increased burdens on the judicial system in relation to rulemaking at the expense of dispensing with the parliamentary system that has endured and works well. Caution should be exercised so as to ensure that the parliamentary scrutiny procedures are not eroded and their importance downgraded.

Although the quality of rulemaking has improved with compliance mechanisms in place within the executive, all three branches of government should ensure that there is not a shift away from the parliamentary process which is the ultimate forum where all legislative activity takes place. Although tensions exists between the legislature and the executive, there is room for compromise and the Legislative Instruments Bill will ensure 'a significant shift in control over delegated legislation back towards Parliament.'[143]

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