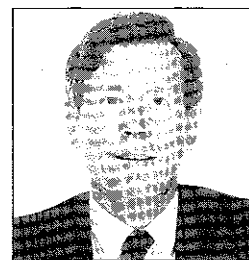


Canberra Rules: With a Register of Legislative Instruments

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You know all those notices which appear in the Commonwealth Government Notices Gazette? The ones announcing the making of statutory rules, or food standards, or therapeutic goods approvals, or land acquisitions, or by-laws, or ordinances, etc, etc? Well, prepare to bid almost all of them farewell by 1 January 1995, if the Attorney-General's Department has its way

With them should also go the present frustrations associated with obtaining copies of some of them from the originating agencies

The Government has introduced into the Senate its *Legislative Instruments Bill 1994*. The Bill represents the Government's response to the major recommendations of the Administrative Review Council's Report No 35, "Rule Making by Commonwealth Agencies". It sets out a new regime governing drafting standards and the procedures for the making, publication and parliamentary scrutiny of all delegated legislation

Let's look at how the system is supposed to work, before addressing some more general potential problems. Note that this article is not addressing what is supposed to happen within the Government. That will have to wait for another article. What is described here is what you, outside Government, should see from 1 January 1995

Legislative Instruments - The New System

WHAT IS A LEGISLATIVE INSTRUMENT?

Does your work involve "legislative instruments"? Well, as might be expected, the term "legislative instrument" is carefully defined in the Bill and you should check there for the details. In broad terms, however, it includes: statutory rules, ordinances, proclamations, rules, by-laws, or other instruments made in the exercise of a power delegated by the Parliament, ie normally delegated in the parent Act

In short, there are probably not too many law librarians whose work does not involve "legislative instruments"

Non-Legislative Instruments

There are a number of kinds of “non-legislative instruments” which are also defined in detail in this Bill. Examples are: some security, defence or police instruments, or ministerial directions issued to government business enterprises. They may still not need to be published and, where they are published, they will continue to be published in the Gazette.

Of course, just to make things really confusing, some of those non-legislative instruments are disallowable by the Parliament. Obviously, they will become public in the act of tabling and, furthermore, Schedule 4 of the new Bill says that they must be published in the Gazette or, at least, notice must be given of their making and where copies can be obtained.

CONSULTATION BEFORE PUBLICATION OF LEGISLATIVE INSTRUMENTS

The Bill contains a schedule which lists all Acts considered to affect business. From 1 January 1996, any legislative instrument made under those Acts will need to be preceded by a Legislative Instrument Proposal, to permit “public” consultation, although there are exceptions, listed in the Bill. In the past, prior consultation was entirely at the discretion of the issuing authority.

The Bill, however, gives organisations which are preparing legislative instruments considerable “flexibility” with regards to consultation. They can seek a determination from their Minister that they need consult with only certain organisations, eg peak industry groups, and that will suffice. The present system of “magic circles” will, therefore, unfortunately, continue, much to the frustration of those law librarians whose partners are not in some particular magic circle. Why the Bill does not require public notices for **all** legislative instruments which require public consultation is not clear. Perhaps that would reduce bureaucrats’ and insiders’ power unacceptably?

The rule-maker must include, in the explanatory statement which will accompany the instrument when tabled, details of consultation required and, if not undertaken, why. There are no legislative penalties or disadvantages for drafters who fail to consult at all. Failure to consult will not invalidate an instrument. For cynical public servants, making a simple error and not consulting, at all, may seem the best course of action, sometimes.

Recalling how some public service organisations responded (or did not respond) to the passage of the *Freedom of Information Act 1982*, one suspects that consultation will be more honoured in the breach than in the observance, at least for the first few years. Nevertheless, it must be agreed that what is proposed on consultation is better than what has been happening.

Clearly, law librarians are going to be involved in the consultation process. They will have to be able to explain not only the processes required in the

Bill, but also why some irate, badly-miffed partner has not had an opportunity take part in the consultation processes for a legislative instrument to which they are sure they could have brought immense expertise.

PUBLICATION OF LEGISLATIVE INSTRUMENTS

All legislative instruments will be published on an electronic database, called the Federal Register of Legislative Instruments. Until an instrument is available on the Register, it cannot come into force.

This will impose new constraints on Ministers and senior public servants. Previously, some instruments did not need to be gazetted, coming into force when signed (and, just sometimes, then being kept in the bottom drawer of the bureaucrat's desk until needed).

Because the Register will record the date and time of the publishing of every instrument, there should be less scope for arguing, for example about whether some commercial deal was concluded before the Government sought to prohibit it with a legislative instrument. (Obviously, it may be necessary for those commercial legal arrangements or agreements to include the time, as well as date, of their signing. Presumably, some form of certification will be required.)

There will be a separate Index, published in both electronic and paper form. It is not clear how frequently, or how expeditiously, the paper Index will appear. Noting the variations in some indices, only optimistic or lucky librarians would rely on the Index.

The full text of each instrument will be on the Register, albeit in one of three sections, depending on when the instrument came into force.

Note that electronic publication of instruments will bear little relation to their consolidation. All you will see on the Register will be the various amendments to, say, the *Migration Regulations*. You can either download, then try your hand at an unofficial consolidation, or you can wait for the official consolidation. Noting that the *Migration (1993) Regulations* were originally gazetted in November 1992, came into force on 1 February 1993, were amended twelve times and eventually overtaken by the *Migration Regulations 1994* on 1 September 1994, without ever being consolidated officially, law librarians may find it advantageous to be able to do their own unofficial consolidations of key legislative instruments.

Paper copies of all legislative instruments will be available for purchase from the AGPS bookshops, using demand printing. Obviously, these will be just the actual instruments, unconsolidated until the Attorney-General's Department has done the official consolidation. (Note the requirements for evidentiary material, discussed below.)

Obviously, until all lawyers are computer literate and capable of conducting their own searches of the Register, law librarians will need to be expert in searching the Register of Legislative Instruments

PARLIAMENTARY SCRUTINY

Just as delegated legislation is presently subject to parliamentary scrutiny and, possibly, disallowance, under the *Acts Interpretation Act 1901*, so too will legislative instruments be (and some esoteric documents like disallowable non-legislative instruments, too)

The main differences will be:

The power to disallow legislative instruments will be contained in the *Legislative Instruments Act* (when passed), not the *Acts Interpretation Act 1901*.

Whereas at present fifteen sitting days are available before delegated legislation must be tabled, under this Bill the Principal Legislative Counsel will have only six sitting days to table legislative instruments made on or after the commencing day. The normal fifteen days periods to move disallowance, etc, then apply

The Parliament will not be able to disallow individual provisions of legislative instruments. The entire instrument will have to be disallowed. Careful packaging of nice and nasty provisions by a Government could make it politically awkward to disallow some instruments

Another difference, which could produce changes for those of us with an interest in the workings of Parliament, is that the Principal Legislative Counsel will be responsible for arranging the tabling of all legislative instruments. Previously, except for Statutory Rules, the Ministers or their Departments were generally responsible. Timeliness was not always a strong point, especially when there was something to hide

TRANSITIONAL PROVISIONS

You know what the current system is, how instruments are made and published, don't you? (Just say "Yes", and promise yourself that you will get a better handle on the new system.) Well, there obviously has to be a way to get from the present system to the new system

For the period of transition from the present system to the brave new world of this Bill, there are further definitions, based on when the legislative instrument is made and when it comes into effect, to catch those instruments which will have already been made when the new system starts

Another section of the Bill also tells us how long Departments will have to review all their old legislative instruments and either ditch them or re-validate them and get them up on the new system. All instruments:

- since 1 January 1990 must be on the new system by 1 September 1995;
- since 1 January 1980 must be on the new system by 1 March 1996;
- and
- before 1980 must be on the new system by 1 March 1997

In other words, after 1 March 1997, any legislative instrument which is not on the electronic register will have no current validity

However, even the “stable” situation, after the new system has settled down, is so complex and strange that I think we should ignore the transitional stage for the rest of this article

THE GAZETTE

As already indicated, it is intended to do away with much of the current contents of the *Government Notices Gazette* series. There will still be some sorts of instruments, however, which will need to be gazetted, like disallowable, non-legislative instruments, or Governor-General’s proclamations. It appears that a slimmed-down *Government Notices Gazette* series will be used for these

Other Gazette series, like the *Public Service Gazette*, or the *Business Notices Gazette*, which insolvency practitioners rely on, will continue. Doubtless, however, the Australian Securities Commission will push hard, again, to do away with its monthly *ASC Gazette*, preferring to rely on its own electronic databases, too.

Some librarians may feel that it will be a retrograde step, going from a single repository for publication, i.e. the Gazette, to a split system, involving both the paper-based Gazette and the electronic Register of legislative Instruments.

OTHER ACTS AFFECTED

The new Bill will amend, among others, such Acts as the:

- *Acts Interpretation Act 1901*
- *Administrative Decisions (Judicial Review) Act 1977*
- *Family Law Act 1975*
- *Federal Court of Australia Act 1976*
- *High Court of Australia Act 1979* and
- *Industrial Relations Act 1988*.

Those Acts are not entirely without consequence for much of the legal profession. For that reason, alone, one might assume that there has been considerable public consultation about this new Bill

Consultation about the Bill

"Well", I hear you mutter, "How come no one has told me yet, and when will they tell me?"

The short answer to the first question is that you are supposed to have read the Bill, which was introduced into Parliament on 30 June 1994. As for the second question, although there is some funding identified to explain the new system to the Government departments and agencies, who have to prepare the legislative instruments, **there is no money to tell anyone else**, presumably because it is assumed that we, the governed, will just find out for ourselves (And to some extent, this, and other, media articles will overcome part of that problem)

"But doesn't this electronic register thing", I hear you scream, in a strangled sort of way, "mean that every law and accounting firm in the country will need to be able to search it? Possibly on a daily basis? Doesn't that mean immense changes in the way we do business and train our people? Won't everyone need modems and, possibly, additional information technology equipment by 31 December 1994? Won't that affect my 1994-95 budget?" Of course it will, but that does not appear, to the Attorney-General and his Department, to be any of their concern

So, on the assumption that librarians in Government departments and agencies will be told all they need to know about drafting and releasing legislative instruments, let's focus the rest of this article on aspects which the rest of us will need to consider

How Else Will the Bill Affect Me?

INSPECTING THE REGISTER

The Register will be maintained in electronic form within the Attorney-General's Department. It is envisaged that access for the public will be either free, via terminals set up in the AGPS bookshops, or charged, via database providers. Several problems are immediately apparent:

The AGPS bookshops will be crowded with lawyers or staff, waiting to access the Register for free searches, rather than pay to subscribe to various database providers. (Anyone spot an opportunity for refreshment kiosks and waiting lounge concessions?)

Noting the difficulty ordinary folk often experience with computer searches, AGPS may need to be careful that any assistance provided by their bookshop staff is not construed to be "advice" One can imagine claims for compensation if a search fails to find something which is, in fact, on the Register

On the other hand, of course, unless the public is provided with extensive assistance, it could be argued that their access to this form of law has been severely curtailed, especially when compared with the present system of availability in Gazettes in all public libraries, where all the public needs is time and the ability to read.

That part of the population which does not have ready access to AGPS bookshops will be disadvantaged. That includes Wollongong, Newcastle, Geelong and all other, even more bucolic, pollution- and information-free country areas

Whereas a subscription to the admittedly not-well-indexed *Government Notices Gazette* costs \$290 p a , providing unlimited access once they are on the library shelf, the cost of access to the electronic register will probably be at least \$4 or \$5 every time it is searched. How often does your library need to check on the Gazette, and how much does that cost, in terms of your time? Note that you will probably still need to subscribe to the (slimmer) *Government Notices Gazette*, if only to follow the making of non-legislative instruments

Electronic searching may be just the thing for some sorts of searches, e.g. any instruments made under a specific section of a particular Act. However, browsing through, say, all the notices made under the *Telecommunications Act 1991*, to see how some legislatively-gifted bureaucrat authorised a telecommunications carrier to do something which the Government wanted to remain hidden, may range from very difficult to very expensive to do on a database

Agreement has yet to be arrived at with any database provider to make electronic access possible, noting the 1 January 1995 target date. Unless this occurs, it will be all law firms which will have to queue at the AGPS bookshop. (In that event, don't go to work for a provincial law firm, unless you like travel.)

In short, it is extremely doubtful that this proposed system will comply with the Attorney-General's stated policy objective of "Equal Access to the Law"

MAINTAINING THE REGISTER OF LEGISLATIVE INSTRUMENTS

When an instrument has been made, it will be the originating authority's responsibility to ensure that it is passed to the proposed new position of Principal Legislative Counsel, in the Attorney-General's Department. The Principal Legislative Counsel will be responsible for ensuring that all Statutory Rules go on the Register, but other instruments, which can be made without any reference to that Office, will have to be formally transmitted to the Principal Legislative Counsel for inclusion. Remember: until an instrument is on the Register, it will have no force.

When an instrument is added to the Register, the time and date of its coming into force will be recorded electronically. Noting the importance of timing for many instruments, particularly those intended by the Government to head-off commercial developments, like foreign investment proposals, it will be most important to be able to guarantee the integrity of the register. In other words, who will ensure that it is not tampered with?

The Principal Legislative Counsel

The temptation to tamper with the Register could occur on behalf of either or both Government and commercial interests. The simplest form of tampering would probably be to falsify the date and time the instrument came into effect. Furthermore, the tampering could take not only the obvious form of computer hacking, but also political pressure.

The Bill makes no mention of "maintaining the integrity of the Register" in the responsibilities of its guardian, the Principal Legislative Counsel. It merely makes the Counsel responsible for "maintaining the Register".

The Bill gives the Principal Legislative Counsel quite awesome powers. Section 14(1) says that he or she "may take any steps he or she considers likely to promote their [the legislative instruments'] legal effectiveness, their clarity and their intelligibility to anticipated users." Section 28(2) says "The Principal Legislative Counsel may alter the Index at any time for any purpose whatsoever, ..." (Note that the latter applies to the Index, not to the actual instruments. Nevertheless, as the Index is the only part of the system which will be published in hard copy, this is a sweeping power.)

It could be argued that to place a public servant in this position is most unfair, unless they have statutory independence and are required to report any political or executive pressure, or any exercise of these powers, to the Parliament, immediately.

EVIDENTIARY MATERIAL

Copies of instruments and information contained in the Register must be available for purchase from the AGPS bookshops. That will probably be achieved by demand printing by the bookshop staff.

The Bill states that extracts from the Register, i.e. legislative instruments, which are printed by the Government Printer (presumably AGPS bookshop outlets are assumed to be the "Government Printer"), do not require proof [i.e. further proof] "about the provisions and coming into operation (in whole or in part) of a legislative instrument"

Don't forget: the Gazette will no longer tell you when legislative instruments have been made. Further, the new system leaves unclear how expeditiously the AGPS must publish, say, Statutory Rules in their paper-based form. Thus, even if you continue to subscribe to the paper-based Statutory Rules, you will not be sure, without searching the Register, that nothing new has been "registered" since you received your latest subscription mailing. (I suppose that "registered" is the term which will replace "gazetted", at least for legislative instruments.)

This constraint on evidence also means that, although you will be able to search the Register electronically from your library, and look at the instruments printed from your own computer search, when it comes time to go to court it may be also time to go to the AGPS and join the queues to get your evidentiary copies of instruments.

There is a let-out provision under s.27(3) of the Bill that "A Court or Tribunal may inform itself about those matters in any way that it thinks fit" but that, presumably, will require the rules of each court or tribunal to address the issue. This provision seems aimed more at permitting judges to decide if they want to see a computer screen in their court.

Conclusions

The concept of having a single, publicly accessible repository for all legislative instruments is attractive, but may not have been achieved in this Bill.

The development of the electronic Register of Legislative Instruments means that we will have to be able to search both the Register and the Gazette, if we are to cover both legislative and non-legislative instruments, instead of the present situation, where whatever is public is published in the one Gazette.

Assuming that the *Legislative Instruments Bill 1994* is passed without amendments there will need to be significant changes in the way we all do business.

On balance, public access to the law, particularly away from the major cities, will be reduced or inhibited by systems currently proposed for publication.

The role and responsibilities of the Principal Legislative Counsel may require further consideration.

There does not appear to be enough time to sort out all the implications and bugs before the new system is presently planned to commence on 1 January 1995.

Further Developments

There appears to be considerable Parliamentary "interest" in the *Legislative Instruments Bill 1994*. That suggests that it may be amended quite substantially before it becomes an Act. I will try to keep you informed.

There is also much that you will need to know about the structure of the Register, but that can wait. For now, get a copy of the *Legislative Instruments Bill 1994* and start to consider its implications for your library.



PARLIAMENT OF
THE COMMONWEALTH
OF AUSTRALIA

Legislative Instruments Bill 1994

On 25 August 1994 the Senate referred the Legislative Instruments Bill 1994 to the Standing Committee on Regulations and Ordinances for inquiry and report by 10 October 1994.

The Bill makes important changes to the power of Parliament to scrutinise delegated legislation and to access by the public to such legislation.

The Committee invites any interested persons or organisations to lodge written submissions on the Bill by 23 September 1994 with:

**The Secretary
Senate Standing Committee on
Regulations and Ordinances
Parliament House SG49
CANBERRA ACT 2600**

Interested parties may also indicate that they wish to give evidence at a public hearing in Parliament House on Tuesday 4 October 1994 by writing to the above address or contacting the Secretary on phone (06) 277 3066 or fax (06) 277 5838.

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