CLERP and FRILLY – Compare and Contrast[1]

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CLERP and FRILLY (actually written as FRLI) have been exercising the collective minds of law librarians on and off for many years. This paper is an attempt to trace and predict their development. It shows why law librarians ignore politics at their professional peril.

CLERP stands for the Corporate Law Economic Reform Program. FRLI is the Federal Register of Legislative Instruments.

CLERP

What Is CLERP and Where Did It Come From?

CLERP is a consultative and legislative process that commenced in March 1997. It represents the third major phase in the development of Commonwealth policy on the regulation of companies stretching back to the mid-1980s. Let us start at the beginning.

The corporate excesses of the early and mid-1980s exposed weaknesses in the regulation of the behaviour of some individuals when in positions of corporate power, and of groups of business people when acting collectively on behalf of some corporate entities. Although all of the problems could be ascribed to a lack of personal ethics and standards, there was a general perception that at least part of the problem lay in the weak and dispersed regulatory arrangements for company law. These regulatory arrangements, even in the mid-1980s, consisted of separate State bodies which often worked with (but never *for*) a weak, underfunded national regulatory body called the National Companies and Securities Commission (NCSC).

Having obtained agreement from the State Attorneys-General, the Commonwealth passed the *Corporations Act 1989* and established the Australian Securities Commission (ASC). In addition, some ACT legislation was passed as a model in certain areas of the law and duly mirrored by the State Parliaments. On 1 January 1990, the era of standard national regulation of corporations was ushered in - notwithstanding the occasional High Court glitch.

Setting the tone, one of the first acts of the new regulatory regime was to require that all registered companies display their Australian Company Number (ACN) on *all* stationery, business cards, cheques, etc. It is not possible, to put it politely, to quantify how many, if any, corporate crooks have ever been caught as recompense for the millions of dollars and thousands of hours of staff time spent by private business in implementing this and similar measures. It is possible, however, to state categorically, that it set the tone for nit-picking over-regulation by Commonwealth Attorney-Generals' Departments for several years thereafter.

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The pips in business started to squeak and in October 1992 the ALP Government responded by introducing the Corporate Law Reform Bill 1992. It was immediately clear that this was an inadequate response to the intensity of the corporate and legal protests and in April 1993 the Commonwealth Government announced the *Corporations Law Simplification Program*.

Numerous papers and draft bills were released for comment under the Simplification Program, covering issues as diverse as the de-registration of defunct companies and the content of annual returns. It was realised that an associated area – collective investments – also required rationalisation, if not simplification, and so another draft bill was thrown into the maelstrom. A whole industry grew up, writing or commenting upon the simplification processes. In the end, only one Act, the *First Corporate Law Simplification Act 1995*, was passed before the end of the era of ALP governments.

There were the usual problems with the public consultation processes. The production of the drafts of sections which were published for public comment often involved private consultation groups of legal specialists to advise the bureaucrats. Naturally, some could not resist the opportunity to gain media exposure and leaked details. Other legal specialists, distraught and quite discombobulated because *they* were not part of the magic circle, then blamed their law librarians for not keeping them informed, and they, in turn, blamed the likes of me.

There were also snide comments about how frequently a draft would be released for comment just before the public servant involved departed, blithely, for Christmas holidays, with submissions and comments due back about a week before he (usually he) returned. Nevertheless, it has to be said that the public consultation process was extensive. Consultation became part of the corporate law culture, if only because the root cause of much of the legislative activity by the bureaucracy had been the vehemence of complaints from the private sector, both legal and business.

The Coalition electoral victory on 2 March 1996 led within a few months, to a major re-arrangement of power within the public service in Canberra, ostensibly aimed at improving business efficiency and productivity. A large part of that involved the moving of responsibility (and staff) for business law from Mr Williams' Attorney-General's Department to Mr Costello's Treasury. (Not surprisingly, some cynics in Canberra saw this as motivated more by power than a drive for efficiency. Subsequent developments, however, demonstrated the wisdom of concentrating all the relevant bureaucrats within the same (politically powerful) ministry.)

Shortly after the March 1996 election, Mr Costello, as Treasurer, had already announced the initiation of a Financial Systems Inquiry, headed by Mr Wallis. Although aimed at competition in the banking and financial services industries, this inquiry was also to examine such issues as investment and therefore, prospectuses, etc, and would clearly be inter-related with any corporations law changes.

In March 1997 Mr Costello announced the start of the *Corporate Law Economic Reform Program* (CLERP). CLERP was to be far more than merely the simplification of company law by removing unnecessary regulation and simplifying the remainder. It was intended

to encourage corporate activity, particularly investment activity and with it, national economic development. Clearly, there was going to be an overlap with the Wallis Inquiry outcomes, the report of which was released only a month after CLERP started in April 1997.

Many of the Treasury public servants working on CLERP had been working for years on the earlier simplification program, albeit in the Attorney-General's Department. It is not surprising that since its inception in March 1997 the CLERP process has taken a somewhat similar course to the earlier simplification process. A policy framework document was released, followed by six policy reform papers for public comment. These papers covered: accounting standards, fundraising, directors duties and corporate governance, takeovers, electronic commerce and financial markets and investment products.

It might be worth pointing out that although it might appear from these dates that CLERP policy work was running almost a year behind Wallis, in fact that was not so. This was because the draft policies emanating from CLERP after March 1997 represented the fairly considered views of the Treasury and their private sector magic circles, requiring only more-or-less fine-tuning in the light of public comment. On the other hand, although Treasury staff had provided the Wallis Inquiry secretariat, the final recommendations of the Wallis report and, particularly, the Government's highly political responses to some of them, were not really clear until their release in April 1997. Only then could the detailed policies start to be developed for the financial services sector. The legislative implementation of both reform processes ran almost in tandem and it seems clear with hindsight that this was intentional.

Readers who are not totally confused by now may recall earlier mention of a draft Collective Investments Bill, being developed under the previous (ALP) government. While the Bill disappeared with that government, its memory lingered on. On 3 December 1997, the Coalition Government introduced the Managed Investments Bill 1997. Its interrelationships with both the CLERP and the Wallis outcomes will be obvious just from its title.

On the same day the Government also introduced the Company Law Review Bill 1997. The Bill was originally intended to address simplification issues, many of which had last been seen in a draft Bill circulated in June 1995 by the previous Government, rather than to provide significant economic stimulus, which is a major aim of the CLERP process. There were, however, some CLERP initiatives in this Bill and, with subsequent amendments made during its parliamentary passage, the Company Law Review Bill 1997 became, in effect, a CLERP Bill. The reason seems to have been the Federal election.

By December 1997, the Canberra talk was all a-go about a Federal election based on the Wik legislation. An election would, almost inevitably, have delayed the implementation of any CLERP measures by between six and twelve months. While the bureaucrats could do little more than hope that the Company Law Review Bill 1997 would be passed before the election was called, it did provide a vehicle for tacking on other urgently-required measures.

The Bill, therefore, somewhat lost its focus as a 'simple' simplification Bill during its passage through Parliament. Indeed, at one stage it looked as if all was totally lost when

the Senate insisted on adding provisions regarding the mandatory reporting of directors' remuneration. (The Government backed-down partially, which allowed the Act to be proclaimed on 30 June 1998.) All this was happening against a backdrop of the Prime Minister marching his Coalition troops on, and then off, the electoral battlefield several times

Similarly, the package of financial institutions regulation bills from the Wallis Inquiry, as well as the Managed Investments Bill 1997, managed to negotiate parliamentary processes and achieve the status of Acts of Parliament by July 1998. Some of these processes were less tidy than others, with bits of various Cheques Acts planned to come into force as late as December 1998. Other legislation, notably the Managed Investments Bill 1997, relied on what appeared to be obscure technical procedures, like the proclamation of sections of other Acts, to bring them into force, which will create headaches for lawyers and librarians in years to come

Meanwhile, what of CLERP? The real Corporate Law Economic Reform Bill 1998 was introduced into Parliament on 2 July 1998, a few days before Parliament rose for a well-earned break. It contained almost all the remaining elements of the CLERP process not already addressed, if only in part, viz accounting standards, fundraising, directors' duties and corporate governance, takeovers and financial markets and investment products.

Where Is CLERP Going?

Astute readers will have inferred two salient points from the preceding paragraph: the Bill died with the prorogation of the House of Representatives on 31 August 1998 and it did not contain the promised section on electronic commerce

Apparently the intention was that if the Federal election had not been called, the Bill was to commence its passage. The section on electronic commerce was to have been added during the parliamentary passage (September–October) if such technology-dependent policy could have been developed in time. If not, then there was always going to be a CLERP II Bill

As the Federal election was called, there is now a good chance that there will be time for the electronic commerce policy issues to be resolved, at least sufficiently to include them in a new, complete CLERP Bill

The Coalition has committed itself, as an election policy, to CLERP 7 – small business de-regulation, i.e. getting rid of some of the nit-picking measures introduced in 1990 (which is more or less where we started the whole business, back in 1992)

Thus, even if electronic commerce is still not resolved in time to be included in a new Corporate Law Economic Reform Bill 1998, we will still have Son of CLERP (small business de-regulation) following on in 1999, to which electronic commerce can be attached

Overall

Looking back, it sometimes seems that getting legislation through the Parliament, particularly for the supposedly apolitical public service, is a bit like playing Pooh Sticks

Readers will recall that in that game each player drops a stick in a small stream and sees which stick gets across the finish line first, with only minimal poking, blowing and splashing allowed to free one's stick from natural hazards. One's legislative stick is similarly at the mercy of the vagaries of the currents and snags of national political life

In the case of CLERP, one would have to say that the bureaucracy has done very well, considerably better, indeed, than their political masters have done with some of their own, more cherished, legislation

FRLI (FRILLY): The Contrast

The Federal Register of Legislative Instruments (FRLI) has a traceable pedigree almost as hoary as CLERP. There the similarities seem to end.

Background

In late 1992 the development of a revolutionary, authoritative Register was rumoured. The rumour was tracked to its source and, very tentatively, some information was forthcoming

Grudgingly, the Office of Legislative Drafting (OLD) provided the following information about FRLI:

- FRLI was an initiative of the Office of Legislative Drafting in the Attorney-General's Department. (Now, consider the immediate difference between FRLI and CLERP. CLERP was part of a response to private sector complaints whereas FRLI was starting life as an internal initiative of the bureaucracy.)
- FRLI was to (or will) provide a single, authoritative point of publication of all delegated legislation, e.g. regulations, statutory rules, determinations and other legislative instruments made by ministers or bureaucrats under authority delegated by the relevant Act of Parliament. It was to be electronic, with hard-copy being merely a back-up medium (and available for evidentiary purposes)
- Some instruments were to involve mandatory 'public' consultation prior to publication. It was, perhaps, indicative of the public service mindset behind FRLI that public consultation was not to be with the *public*! Oh, dear me, no! That would create far too much risk of awkward new ideas. No, 'public' consultation about instruments was to be with selected industry associations. (Note also that, although there was to be consultation about individual legislative instruments, OLD was very keen to develop the Bill itself with the minimum of public consultation.)
- If an instrument had not been published on the Register, it would have no force, i.e. no more bureaucratic magicians suddenly producing an otherwise unpublished ministerial determination from the second drawer of their desk as proof of what 'policy' had been all along.
- Associated with a single point of publication would be the scrutiny of departmental drafting standards by OLD.

Although OLD provided this information in interviews, it was accompanied by a request not to report on the issue until Cabinet had considered it. With the exception of a not-very-illuminating press statement, this news blackout was then further extended until the relevant legislation had eventually been tabled in Parliament. (I think it was at about this stage that

we were able to draw OLD's attention to the legitimate interests of the Australian Law Librarians' Group, which eventually led to a degree of consultation) One possible reason for OLD's caution about publicity became apparent.

Canberra rumours suggested that some elements of the bureaucracy saw FRLI as a power grab by OLD and, as power is the very currency of Canberra, to be resisted. Obviously if OLD was required to vet compliance with legislative drafting standards by all instruments on the new Register, it could hardly help but notice any errors of administrative law. That would give OLD an opportunity to poke its collective nose into everyone's business!

Technology was also a problem. There was the question of back-capturing all extant instruments, some of them probably hand-written on vellum. Then there was the publishing medium. In 1992 SCALE was an obvious choice, although OLD really had little idea how to make such a user-unfriendly medium accessible to the *hoi polloi*. Within two years the word 'Internet' was being talked about but, back in the early- and mid-1990s, there was concern that the Internet may prove to be just another technological fad. Would it be replaced within another two years?

The First Bill

OLD chose to burrow along in relative secrecy (or perhaps the analogy should be with an ostrich?) towards their objective until, Voila!, on 30 June 1994, the Legislative Instruments Bill 1994 was tabled in the Senate. The world gasped.

The Bill was despatched fairly promptly by the Senate to a committee inquiry. It soon became clear that OLD's idea of what constituted delegated legislation, was not always shared by other legal authorities or, particularly, by a fairly bloody-minded Senate. Indeed, some in the Senate felt that in passing the primary legislation upon which any delegated legislation depends, it was up to the Parliament (read 'Senate', in the absence of any sensible input from the House), to decide what the term was to mean, almost instrument by instrument.

Furthermore, some in the Senate, who worked not a million miles from the Clerk's Office, had strong views on any actions by the Executive which might appear to reduce the Senate's powers to scrutinise what the executive government might try to do via legislative instruments.

There were other problems. For example, whether Governor-General's proclamations were legislative instruments and if so, how they should be addressed in the FRLI Bill. If proclamations of Acts were lumped in with delegated legislation then obviously a single senator, by moving a motion of disallowance, could at least threaten to overturn the proclamation (commencement) of sections of Acts. To any Government which might have only just managed to get an Act passed by the whole Parliament, this would create a sort of double-jeopardy.

On the other hand, there are some instruments, also called 'proclamations', which obviously *are* made under authority delegated to the Governor-General, or to ministers, by the Parliament when passing an Act. These, and similar arguments about just what everyone was talking about, took on a life of their own. They seemed to indicate, however, that even OLD did not realise the scope of the legal task it had set itself.

Adding to OLD's misery were the usual nit-picking questions from law librarians (and others) about such things as the publishing medium (at that stage, SCALE), subscription arrangements, etc. Questions were also being asked about whether public libraries, which had been providing access to hardcopy gazettes, would be able to provide at least equivalent or preferably, better access via whatever electronic medium was selected. (One could write pages about how the public would have coped, in 1995, with electronic searching for what are often deliberately obscure instruments.)

It became clear within a few weeks that OLD's target date of 1 January 1995 for the introduction of FRLI was wildly optimistic. A series of delays and arguments followed until mercifully, the Bill lapsed with the prorogation of Parliament for the March 1996 election. The only real progress that had been achieved by then had been a decision that the Internet would now be the publishing medium.

In retrospect, it can be seen that this first Bill suffered from some very basic problems. Its drafters:

- did not address the needs of the users (Indeed, OLD seemed to think that *it* was the principal user.);
- tried to avoid scrutiny, possibly as a misconceived technique to reduce the possibility of bureaucratic opposition, as well as inconvenient suggestions;
- set an impossible target date, probably for similar reasons;
- included provision containing technical legal flaws; and
- tried to prescribe the technological medium in the legislation.

FRLI Mark II

The change of government in March 1996 brought added complexity to OLD's task. Many senators who had previously opposed the Bill now found themselves on the Government benches and required to support any reintroduced Bill. The new government did not control the Senate any more than the previous Government did (or did not). Thus for the Coalition senators, from their new vantage point of government, any measure which reduced the powers of the Senate to scrutinise government decisions looked much more attractive than it did to the same Coalition Senators only a year before! On the other hand, the now-Opposition Senators had a very clear idea what FRLI could mean to their powers, and seemed strangely less enamoured of parts of their own creation.

A new wild-card was the fact that the Coalition Government was seeking to privatise the Australian Government Publishing Service (AGPS) and its bookshops. These were to have provided part of the public access arrangements for FRLI, to have managed the hard-copy subscription services, and to have provided evidentiary material. Clearly, privatisation of the AGPS added another layer of complexity to the task of setting up FRLI.

For obvious reasons, OLD had also become a very keen supporter of another government initiative, to ensure Internet access in public libraries. The problem was that the libraries wanted the government to pay for their access and OLD had to be very careful how it addressed this issue in the second FRLI Bill, or it would have to put up the money. (In the end, the Department of Communications and the Arts, under Senator Alston, was given the money to start a program to provide Internet access to public libraries.)

OLD had the new government introduce its Legislative Instruments Bill 1996 on 26 June 1996. To paraphrase what has been said of Louis XVIII's courtiers, OLD had forgotten nothing and learnt nothing. The Bill ran straight into the same Senate obstacles as the Labor Government's Bill had. After protracted argy-bargy, the Coalition Government laid the Bill aside on 5 December 1997, along with several other somewhat more riveting Bills, like the Native Title Amendment Bill 1997.

On 5 March 1998, at the height of yet another double dissolution scare, the Government reintroduced the Bill, in the form of the Legislative Instruments Bill 1996 [No. 2]. This Bill was duly passed by the House and stymied again, in the Senate. Some jaundiced observers wondered what the Australian electorate would think of an election campaign theoretically focussed upon, inter alia, the *Legislative Instruments Bill 1996 [No. 2]* as one of the double dissolution triggers. Alas, Senator Harradine allowed the Government to pass its main legislation, the Wik Bill, the Government then wobbled on for a few months and then went to the 3 October "half-Senate" election, so the FRLI Bill is, once more, dead.

FRLI Today

So much for the legislation. In the meantime, OLD, in somewhat over-eager anticipation, had commenced its preparations for FRLI back in 1994. By late 1995, paper copies of many old instruments were being scanned and then (sob!) saved as ".tif" files ("tagged image format"), rather than as electronic text. That means that the only way elderly instruments can be searched for and retrieved is via the FRLI index system. More on this later.

A FRLI page has been placed on the Attorney-General's web site (http://frli.law.gov.au/frli) in anticipation of the system eventually being the official point of publication. Some departments are using it to publish *some* instruments, although standards of timeliness vary from premature, e.g. publishing some Statutory Rules *before* they have been gazetted, to tardy, publishing other instruments several weeks after gazettal.

Indexing/titling standards on FRLI remain somewhat variable, as anyone who attempts to use the page provided to "Browse New Instruments" can attest. Sometimes only the name of the instrument is provided. When that reads for example, "Committee Amendment Principles 1998 (No. 1)", one might wish that the name of the Act had been included. (In this case, the words *Aged Care Act 1957* might have conveyed about two orders of magnitude more meaning.)

Today, OLD has retained its organisational name of Office of Legislative Drafting (which will change to the "Office of the Legislative Counsel when/if the Bill passes). Everyone who is anyone, however, is already some sort of "Legislative Counsel" (Principal, Senior, etc) and they have bought lots of nice new computers.

The now-privatised AusInfo shops are providing public access to hardcopy versions of instruments, but one wonders what will happen if any of them close for commercial reasons? Public libraries are providing Internet access but, at this stage, evidentiary copies of instruments can only be obtained from the AusInfo shops.

More ominously, several Government regulatory agencies have been moving towards their own publication media. The Australian Securities Commission (now the Australian Securities and Investments Commission) has, since its inception, relied on its hardcopy Digest to publish its policies. It seems unlikely that ASIC will use FRLI. The former Insurance and Superannuation Commission, now part of the Australian Prudential Regulation Authority, outsourced publication of its policies a couple of years ago, but also publishes them on the Internet.

On reflection, it can be seen that the abortive attempts of OLD to establish FRLI since 1992 have had at least one measurable effect – to weaken the only unified publication medium that Government agencies once *had* to use – the Gazette.

Some may consider it a great pity that OLD did not embark upon the entire process as an evolutionary, rather than a revolutionary exercise. If OLD had started by publishing the Gazette in electronic form, no one could have objected. In the fullness of time (as they say), once an electronic Gazette had been proven, the next steps could have been taken, like stopping hardcopy publication. It would have required just a series of minor amendments to Acts like the *Statutory Rules Publication Act 1903* to make the electronic Gazette the official point of publication for all regulations and instruments covered by that Act.

After that, OLD could have tackled the Big One, the bureaucratic power elite that guards its control over unpublished departmental instruments. That particular fight could then have been waged over however long it took to come to a sensible resolution, without delaying the development of FRLI.

Where is FRLI Going?

Unless OLD suddenly develops lobbying skills, identifies the users of FRLI and *consults* with them, it is hard to see any logical reason for this proposal going any further when the next Parliament meets. The only thing FRLI seems to have in its favour is that it has become a source of embarrassment and *someone* will have to do *something* soon.

Compare CLERP with FRLI

The most obvious difference between the two measures has been that CLERP has developed with considerable public consultation, whereas FRLI has been treated as almost solely a matter for the bureaucracy.

Any argument within the CLERP process has been about particular policy measures, not about the overall aims of the process. By having the benefit of a wide range of public input, some of it from professionals who were at least as knowledgeable as the bureaucrats, many technical deficiencies could be resolved long before legislation was presented to Parliament.

Because it developed FRLI in relative secrecy, OLD seems to have been unable to identify all FRLI's technical deficiencies or, worse, all of its potential adversaries in time to head them off with either judicious drafting or lobbying. As a result, FRLI's adversaries were able to take advantage of its technical deficiencies without, in some cases, disclosing their real motives.

It should be pointed out, however, that this difference between CLERP and FRLI is not necessarily due to any superior insight by the bureaucrats planning the CLERP processes in the early years. They were responding to public pressure. Public consultation was perhaps unavoidable for CLERP.

It should also be acknowledged that CLERP is actually the third phase of a corporations law process extending back to the mid-1980s. The first two phases of that process were hardly resounding successes but at least someone appeared to learn from those mistakes. OLD has not yet shown similar mental flexibility.

A second major difference is that CLERP is merely part of an evolutionary process. FRLI was a revolutionary approach, both in terms of its policy aims and its (kiss of death) technology-dependence.

A third difference seems to have been the care with which the CLERP bureaucrats watched the parliamentary passages of much of their legislation. Whether or not FRLI could have met the Governments' (plural) various policy objectives *and* successfully avoided the perils of Parliament, we may never know. What we do know is that none of FRLI has done so yet, which does not appear to reflect well on OLD, as legislative midwives.

Lessons for Law Librarians

Why should you, as a law librarian, be more than amused about these esoteric goings-on in Canberra?

The first point is that a lot of money will be affected by any continuation of the CLERP process, hence your commercial and corporations lawyers have a deep and abiding interest in it and so, by definition, do you!

As far as FRLI is concerned, there is actually more for you to consider. Not only will your library need to be ready for the day when something like FRLI is finally in place, but you would do well to remember the agony of getting FRLI in place. Do you recall how concerned we were back in 1994/5 about the apparently urgent need to arrange appropriate computer systems to give us access to FRLI via Scale?

Next time you see a government initiative developing which is going to affect you as a law librarian, ask yourself whether its development processes resemble those of CLERP or FRLI. If the answer is FRLI, run for your life!