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Transparency and Rule Making in Australia

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A: INTRODUCTION

The absence at common law of any obligation of rule-makers to consult before making rules or even to publish the rules, leaves any attempt to secure transparency in rule-making in Australia to statutory intervention. Statute has traditionally played an important but limited part. In Australia formal statutory requirements for the making of delegated legislation have followed the Westminster tradition. When rules of a legislative character, called delegated legislation or legislative instruments, are made, they must be notified in the government gazette, scrutinised by a parliamentary committee, tabled in parliament with the potential for disallowance, and published in a formal manner. These requirements are set out in interpretation statutes in each jurisdiction. They achieve only a basic degree of transparency. The interpretation statutes have not traditionally made general provision for consultation with individuals or groups whose interests are affected by a proposed rule, or an opportunity for comment to be made.[1]

In 1984 Victoria was the first of the Australian states to introduce statutory requirements to prepare and notify regulatory impact statements when making rules, and to consult with interest groups when the rules are made.[2] This was accompanied by sun-setting provisions that trigger review of rules in accordance with this process. The Victorian reform followed a report that was heavily influenced by its examination of notice and comment rule making procedures in the United States and the theories of citizen participation that underpin them.

In 1989 New South Wales followed Victoria.[3] Tasmania[4] and the Australian Capital Territory[5] followed later. Since the requirements are similar, attention will be confined to the procedures under the NSW statute. Unlike Victoria, the reform in NSW was directed principally to reducing red tape for small business.

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[1] There are specific requirements for notice and an opportunity for consultation before certain instruments are made, such as planning instruments.

[2] *Subordinate Legislation Act* 1984 (Vic). This has now been repealed and replaced by the *Subordinate Legislation Act* 1994 (Vic). Parts 2 and 2A of the 1994 Act deal with RISs and consultation.

[3] *Subordinate Legislation Act* 1989 (NSW) ("*SL Act*").

[4] *Subordinate Legislation Act* 1992 (Tas)

[5] *Legislation Act* 2001 (ACT) Parts 5.2, 5.3.

B: NEW SOUTH WALES

Notice and Regulatory Impact Statements

Under the *Subordinate Legislation Act* 1989 (NSW) ("*SL Act*"), before any statutory rule is made, the responsible Minister must as far as is reasonably practicable comply with the guidelines in Schedule 1 to the Act.[6] This imposes an onerous list of decision-making requirements, including cost-benefit analysis. The scope of the *SL Act* is limited, with these requirements applying only to the making of "statutory rules" (regulations, by-laws, rules or ordinances made by the Governor or approved or affirmed by Governor (except for Schedule 4 instruments).[7] Power to make legislative instruments can be delegated to any member of the executive branch, such as a Minister or statutory authority without the need for approval by the Governor.

Before any principal statutory rule is made, the responsible Minister must as far as is practicable prepare a regulatory impact statement (RIS) complying with Schedule 2.[8] The principal statutory rules are those with some substance, as distinct from rules of a machinery or formal nature. However there are exceptions to the application of these requirements.[9]

The RIS is to state whether the benefits of making the rule outweigh the costs to the community. The RIS should also describe the consultation program to be undertaken.

Consultation

The consultation required by the *SL Act* is described in clear terms. A notice is to be published in the government gazette and another relevant newspaper, advising that it is proposed to make a statutory rule, that the RIS is available for inspection, and inviting submissions.[10] The persons to be consulted are representatives of consumers, the public, relevant interest groups, sectors of industry and commerce. [11]

Once the RIS has been made, and the process of receiving written submissions completed, the written submissions are sent to Legislation Review Committee.[12] The Committee applies criteria set out in the *Legislation Review Act* 1987 (NSW) ("*LR Act*") s 9(1)(b).

The duties to engage in cost benefit analysis and prepare an RIS are expressed to apply "so far as is reasonably practicable".[13] The *SL Act* expressly provides that non-compliance with the procedures does not render a statutory rule invalid.[14] The requirements under the *SL Act*, to structure the rule-making process by inter alia, cost benefit analysis, to prepare an RIS, and to consult, are not enforceable in a court. Accountability may be sought via the legislative branch of government. One of the statutory criteria to be applied by the Legislation Review Committee is whether the delegated law-maker has complied with the RIS and consultation

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[6] *SL Act* s 4.
[7] In the *Legislation Review Act* "regulations" is defined more broadly. The result is that in NSW some legislative instruments are subject to scrutiny by a parliamentary committee and to potential disallowance, but are not subject to the RIS and consultation procedure under the *Subordinate Legislation Act*.
[8] *SL Act* s 5.
[9] *SL Act* s 3 with Sch 4; s 6 with Sch 3.
[10] *SL Act* s 5(2)(a).
[11] *SL Act* s 5(2)(b).
[12] *SL Act* s 5(4).
[13] *SL Act* ss 4, 5.
[14] *SL Act* s 9.

procedures.[15] The Committee makes a report to parliament in which it may recommend disallowance on the ground of non-compliance with these procedures.[16]

Sunsetting

In NSW statutory rules falling within the scope of the *SL Act* sunset after five years.[17] There are exceptions. Further, the delegated law-maker can obtain a postponement of the repeal of certain statutory rules.[18] The Governor, who is vested with the power to allow a postponement,[19] acts on the advice of the Executive Council. Its advice will reflect that of the Minister responsible for the legislative instrument.

Parliametary committee

In the early days of the *SL Act* occasional references were made in reports by the Regulation Review Committee, then responsible for scrutiny of statutory rules, to submissions it had received. Even more rarely, the reports revealed that the Committee had met with representatives of an interest group to discuss a proposed rule. However when the Committee acquired an additional function of scrutiny of bills, with a change in its name to the "Legislation Review Committee", its focus upon scrutiny of rules markedly diminished. It no longer publishes reports on particular rules. Its digest reports give little information about the kinds of submissions received. Of the statutory criteria the Committee applies, the most prominent is whether the proposed rule trespasses unduly on individual rights and liberties.[20]

No suggestion has been given in any recent report that the Committee has given an oral hearing to any person or group that made a submission. Recommendations for disallowance are infrequently made. In some cases the digest report records that the Committee wrote to the responsible Minister expressing its concern about a proposed statutory rule not meeting one of the statutory criteria. The outcome of that consultation with the Minister is left uncertain. Nor do the Committee's digest reports do not indicate whether a House of Parliament has disallowed a statutory rule following a recommendation from the Committee.

A general non statutory process

In NSW the Better Regulation Office ("BRO") within the Department of Premier and Cabinet monitors a non-statutory process of submitting a regulatory impact assessment with a new bill or instrument. This may cover some delegated legislation that is not already subject to the *SL Act*. The BRO does not monitor consultation.[21]

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[15] *LR Act* s 9(1)(b)(viii).
[16] *LR Act* s 9(1)(b)(viii).
[17] *SL Act* s 10.
[18] *SL Act* s 10A, Sch 5.
[19] *SL Act* s 11.
[20] *LR Act* s 9(1)(b)(i). For example, the *Assisted Reproductive Technology Regulation 2014* re-made a regulation providing for the registration of ART providers, disclosure of information and record keeping in relation to gamete donation, and maintenance of a central register. The Committee considered whether the regulation trespassed unduly on individual rights and liberties because of its impact on the privacy of donors. However the Committee took into account that the regulation was not retrospective, so that donors aware of new regime, and made no further comment: Legislation Review Committee *Legislation Review Digest No 64/55 – 4 November 2014*.
[21] Issues Paper *Review of NSW Regulatory Gatekeeping and Impact Assessment Processes* (Sept 2011).

C: FEDERAL RULE-MAKING

Reform

Federal regulations are scrutinised by the Senate Standing Committee on Regulations and Ordinances. The Committee applies a limited number of criteria, set out in standing orders. It is a bipartisan committee, with strong expectations that the Senate will disallow a regulation if the Committee so recommends. The criteria applied do not include whether the delegated law-maker has provided adequate consultation.

In a 1992 report the Administrative Review Council ("ARC") recommended that RIS and consultation procedures be introduced in the making of federal legislative instruments.[22] During the 1990s several bills to implement the measures recommended by the Council lapsed without enactment.[23]

Finally, in 2003 the *Legislative Instruments Act* 2003 (Cth) ("*LI Act*") was enacted. Its most important reform was the establishment of a Federal Register of Legislative Instruments ("Register"), modelled on the United States Register of similar name.[24] The *LI Act* was directed to ensuring transparency of legislative instruments in the sense that they were readily accessible by electronic means in one location.[25] Existing instruments were to be "backcaptured" over specified periods so that all instruments were ultimately entered on the Register. This strengthened existing provisions for notification and publication, enhancing transparency with regard to ensuring that rules are accessible.

The *LI Act* added an additional mechanism that strengthened ex post facto notification. Not only the instrument but also an explanatory statement for it was to be placed on the Register.[26] While there are exceptions, these statements are notoriously uninformative, being paraphrases of the clauses in the instrument.

However the *LI Act* failed to implement the ARC's recommendation for the introduction of a "legislative instrument proposal" along the lines of the RIS in Victoria and NSW.[27]

Several other reforms achieved by the *LI Act* have secondary significance for transparency. It introduced a uniform nomenclature for federal delegated legislation: "the legislative instrument".[28] Measures were put in place to improve the drafting of all legislative instruments.[29]

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[22] Administrative Review Council *Rule Making by Commonwealth Agencies* Report No 35 (1992).

[23] Following the introduction of the Legislative Instruments Bill 1994 (Cth), two parliamentary committee reported, amendments were made in the Senate, but the bill lapsed when elections called in 1994. The Legislative Instruments Bill 1996 (Cth) incorporated amendment made to the 1994 Bill, but had a greater focus on anti-red tape for business, The Senate proposed amendments and returned the Bill to the House of Representatives, where in 1997 it was laid aside. The Legislative Instruments Bill (No 2) 1996 was a potential double dissolution trigger, but lapsed when federal elections called in September 1996.

[24] *LI Act* Pt 4.

[25] *LI Act* Pt 4.

[26] The *LI Act* s 26 former) required an explanatory statement to be lodged in the Register with the legislative instrument. Failure to do so did not affect the validity or enforceability of the instrument.

[27] Administrative Review Council *Rule Making by Commonwealth Agencies* Report No 35 (1992).

[28] This regularisation of nomenclature assisted in removing uncertainty as to the status of some rules, sometimes called "quasi-legislation". See also *LI Act* s 10.

[29] *LI Act* Pt 2. Drafting is to be undertaken by parliamentary counsel.

While the *LI Act* introduced sunsetting after 10 years for legislative instruments,[30] the significance of sunsetting is diminished when the re-making of the instrument is not accompanied by any RIS or any real consultation procedure.

Consultation and notice

The ARC's recommendation that delegated law-makers have a duty to consult with interest groups before making instruments was diluted. Under the grand heading "Part 3 – Consultation Before Making Legislative Instruments" were just three sections, 17, 18 and 19, that did not deserve the description "consultation". Section 17(1) provided that before a rule-maker makes a legislative instrument, particularly where the proposed instrument will have a direct, or substantial indirect, effect on business, or restrict competition, the rule-maker must be satisfied that any consultation the rule-maker considers to be appropriate and reasonably practicable to undertaken, has been undertaken. This section did not impose a duty to consult. It emphasised that whether consultation occurred was a matter of discretion. This was an apparently unfettered discretion, leaving it to the rule-maker to decide whether consultation was "appropriate".

Section 17(2) was a curious provision, inviting the rule–maker to look back on the decision regarding the nature of any consultation, already made and implemented, and assess whether "the consultation that was undertaken was appropriate". In answering that question the rule maker is expressly given a discretion to "have regard to any relevant matter". This includes the extent to which the consultation drew on the knowledge of persons having expertise in fields relevant to the instrument, and ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.[31] Section 17 does not disclose any particular purpose of this ex post facto reflection on the part of the rule-maker.

At the end of s 17 there appears a note that the explanatory statement to be placed on the Register is to contain a description of the consultation undertaken, or, if there was no consultation, the explanation for its absence. This originally duty flowed, mysteriously, from the definition of explanatory statement in s 4 of the *LI Act*.[32]

Consultation is of little value if the person consulted is not notified of the content of the proposed instrument. No provision was made in the *LI Act* for the proposed instrument to be notified to the public. Section 17(3) expressly gave the rule-maker a discretion as to whether the proposed rule was notified to bodies or representatives of persons likely to be affected by it, by providing that consultation "could involve notification, either directly or by advertisement". Section 17(3) expressly provided that this reference to the possibility of notification was not to limit by implication the form of any consultation which the rule-maker engaged in under s 17(1) (as a matter of discretion). That notification and the content of any

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[30] *LI Act* Pt 6.

[31] *LI Act* s 17(2)(a) and (b).

[32] A review of the operation of consultation under the *LI Act* revealed that agencies seemed unaware of s 17: Senate Standing Committee on Regulations and Ordinances *Consultation under the Legislative Instruments Act 2003 Interim Report* 113th Report (June 2007). There was a lack of detail in explanatory statements of the consultation undertaken. The definition in s 4 of the *LI Act* of "explanatory statement" referred in s 4(d) to inclusion of a description of the nature of consultation if it was undertaken under s 17 before the instrument was made. Section 4 is only a definition, an inappropriate place to discuss consultation procedures. In 2012 subsection (1A) was inserted into s 26, picking up the definition of explanatory statement. A note referring to s 26(1A) was inserted at the end of s 17. The s 4 definition was amended to simply refer to s 26. The statement must also include a statement of compatibility prepared under the *Human Rights (Parliamentary Scrutiny) Act* 2011 (Cth): *LI Act* s 26(1A)(f) (former). The note stated that a failure to lodge the statement in accordance with s 26(1) does not affect the validity of the instrument: *LI Act* s 26(2) (former).

notification was entirely a matter for the discretion of the rule-maker, was given further emphasis. Section 17(3) went on to provide that any such notification, if it was done, "could invite submissions" by a specified date, "or might invite" participation in public hearings".

These references to consultation suggested that it was a path to be trod tentatively, only where necessary, and without offering too much. Section 17 sent a message of discouragement to rule-makers with regard to consulting. As if this were not sufficient, s 18(1) provided that despite s 17, the nature of an instrument may be such that "consultation might be unnecessary or inappropriate". There followed in s 18(2) a list of seven classes of instruments that were "examples" of those where the rule-maker may be satisfied that consultation is not necessary or appropriate. These are an instrument of a minor or machinery nature; or required as a matter of urgency; or required by an issue of national security; or relating to service in the Australian Defence Force.[33] Two further classes are extremely broad. The first is any instrument relating to employment.[34] The second is an instrument that gives effect to a decision announced in the Budget that (i) repeals, imposes or adjusts a tax, fee or charge; (b) confers, revokes or alters an entitlement; or (c) imposes, revokes or alters an entitlement.[35]

Finally, making it absolutely clear that transparency is not necessary, s 19 provides that if the rule-maker fails to consult, that failure to consult does not affect the validity or enforceability of an instrument.

Non-statutory process

The federal legislative process has not been entirely without regulatory impact assessment. The federal Office of Best Practice Regulation ("OBPR"), a division of the Department of Finance and Deregulation, administers a non-statutory requirement for regulatory impact to be assessed at federal level. The OBPR issued a *Best Practice Regulation Handbook* in November 2006. It requires that regulation with a significant impact be accompanied by an RIS.[36] These are not statutory requirements. Nor do they provide for consultation with interested persons or groups or an opportunity for comment. They are not directed to securing transparency.

Further legislative change

On 6 March 2016 the *Acts and Instruments (Framework Reform) Act* 2015 (Cth) (*Framework Act*) commenced. The *LI Act* was re-named the *Legislation Act* 2003 (Cth). Its principal work was to extend the Register to include Acts as well as instruments, re-naming it the Federal Register of Legislation. As to notification and consultation with respect to rule-making, little changed.

Section 17(1) was amended to remove the reference to giving particular attention to whether consultation is appropriate and reasonably practicable to undertake, where the proposed instrument will have a direct, or substantial indirect, effect on business, or restrict competition. Section 17(1) is now expressed in general terms, still inviting the rule-maker to reach a state of satisfaction as to whether it is appropriate or reasonably practicable to consult. The note at the end of s 17 is amended to refer to s 15J(2), which is now the source of the duty to describe the consultation undertaken in the explanatory statement.

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[33] *LI Act* s 18(2)(a),(b),(d),(g).
[34] *LI Act* s 18(2)(f).
[35] *LI Act* s 18(2)(c).
[36] OBPR serves a similar function for the Council of Australian Governments ("COAG").

The heading to Part 2 is removed. The *Framework Act* leaves the balance of s 17, and s 19, intact, but repeals s 18. Sections 17 and 19 now belong to "Part 2 – Key Concepts for Legislative Instruments and Notifiable Instruments". That is in keeping with the fact that the former ss 17, 18 and 19, and the present ss 17 and 19, do not promote consultation. Nor should the new expression "notifiable instruments" suggest that notification requirements have been introduced. This is a new class of instruments of a machinery nature or concerned with commencement of instruments. They are not disallowable and do not sunset. Since ss 17 and 19 refer only to legislative instruments, the exception formerly made in s 18 for such instruments is widened through the new class. The amendment to s 17(1) removes the suggestion given to rule-makers to at least take a closer look at the possibility of consultation where the proposed instrument affects business or competition. The repeal of s 18 removes the added emphasis given to the absence of any duty to consult when certain classes of rules are made.

Trans-Pacific Partnership

The Trans-Pacific Partnership ("TPP") is a trade agreement amongst twelve Pacific rim countries, including the United States and Australia, signed on 4 February 2016, after seven years of negotiation. It contains measures to lower tariffs, promote innovation, productivity and competitiveness and establish an investor-state dispute settlement mechanism.

The federal reluctance in Australia to embrace RIS and rule making procedures may face a challenge as steps are taken to draft legislation incorporating the requirements of the TPP into domestic law. Chapter 26 – Transparency and Anti-Corruption in the TPP has not yet attracted attention in Australia.

Australia is already compliant with the a requirement in Art 26.2(5) to promptly publish a federal regulation of general application that affects the matters with which the TPP is concerned, together with an explanation of its purpose and rationale. This is covered by the Federal Register and the requirements under the *Legislation Act* to publish explanatory statements for legislative instruments and bills. The TPP only requires such publication in the case of regulatory measures in the areas covered in the TPP.

The TPP speaks of measures not just in a law or regulation, but also in a procedure or administrative ruling of general application with respect to a matter covered by the TPP. It is possible in these areas that some federal regulatory measures may be introduced through policy. Administrative rulings by regulatory agencies are not published on the Federal Register. The extent to which such rulings would be published may depend on whether they are adjudicative decisions or policies that are requirement to be published by the *Freedom of Information Act* 1082 (Cth).

However Article 2.6 requires much more than publication at the end of the day. Article 26.2(2)(a) requires a party to the TPP, to the extent possible, to publish the regulatory measure in advance. Interested persons and other parties to the TPP are to be given a reasonable opportunity to comment on the proposed measures.[37] In the case of a proposed regulation by a party's central government with respect to any matter covered by the TPP, that is likely to affect trade or investment between the parties, each party is to publish the proposed regulation in an official journal or on an official website, preferably online and consolidated into a single portal.[38] The regulation should be published at least 60 days before comments are due, giving an interested person sufficient time to evaluate the proposed regulation. When notified, the regulation should be accompanied by an explanation of its

[37] TPP Art 2.6(2)(b).
[38] TPP Art 2.6(4)(a).

purpose and rationale.[39] There should be a period for receipt and consideration of comments. The party to the TPP is encouraged to explain any significant modifications made to the proposed regulation, preferably on an official website or in an online journal.

The federal government may attempt to discharge its obligations under Article 26.2(2)(a) and 26.2(4) by administrative procedures and policies. Footnote 2 to Article 26.2(4) proposes some methods for discharging the obligation that are less formal than statutory duties of notice and comment. This might not be a sufficient discharge of the obligation in the Australian common law context. Policies are not binding and do not have the force of law. Even if a less formal path is taken, it will be necessary to amend ss 17 and 19 of the *Legislation Act*.

D: CONCLUSIONS

A complex and varying scene persists in Australia with regard to general requirements for giving notice and an opportunity for comment before rules are made. A gulf exists between the absence of general rule-making requirements at the federal level, and the adoption in Victoria, NSW Tasmania and the ACT of onerous requirements for RISs and consultation. The difference is not entirely stark. The non-statutory OBPR requirements for RISs for federal regulations are rigorous, even though they are not transparent. While inspired in Victoria by notice and comment rule-making in the United States and theories of citizen participation underpinning it, the consultation procedure as it now operates in NSW does not even approach a deliberative process. In NSW written submissions are made, but there are no oral hearings, and litigation associated with the rule-making requirements is foreclosed. The federal approach is marked by a reluctance, or even fear, of imposing general notice and consultation requirements on rule-making. That may persist, leave the implementation of Australia's obligations under the TPP to provide transparency in the making of relevant regulations as no more than a pale reflection of notice and comment rule-making in the United States.

[39] TPP Art 2.6(4)(c).