

Legislation Newsletter

Calling all “instrument makers”

In Victoria (Australia) agencies which propose subordinate legislation (mainly, regulations) are required to comply with specific procedural requirements at the time they are made. Not only that, subordinate legislation is given a “life” of only ten years, following which the process must be followed once again. The reason for all of this is largely to ensure that alternatives to the proposed form of regulation are considered. The procedure which agencies are required to follow includes preparation of a regulatory impact statement, publicity and consideration of submissions made by stakeholders.

Proposals to extend these requirements to other documents are now being considered by the Victorian Government. The name of the initiative tells the story – it is part of the [Reducing the Regulatory Burden](#) program.

Under the proposal, consultation will be required before a legislative instrument is made, in much the same way as it is now required for subordinate legislation. There will, similarly, be a requirement for a regulatory impact statement to be prepared and publicised. The RIS is to assess costs and benefits, including –

“an assessment of the economic, environmental and social impact and the likely administration and

compliance costs including resource allocation costs”

of the proposal. The obligation to undertake this work will fall upon the sectoral agency, rather quaintly described in the proposals as the instrument maker.

Not all documents will trigger these new requirements. While a “legislative instrument”, in general terms, will be –

“an instrument made under an Act or statutory rule that is of a legislative character ...”

many documents are to be exempt if the proposals are implemented in their current form. These exemptions include local laws made by local government, planning schemes and instruments of a purely administrative character.

Submissions on the proposals were to be made by 15 February 2010. For more information, including a discussion paper, visit the Victorian Department of Premier and Cabinet website by [clicking here](#). The Department was seeking, in particular, comment on the following issues:

- the definition of “legislative instrument”;
- proposed exemptions from the RIS requirements;
- Ministerial certification of legislative instruments; and

- a revised definition of “appreciable burden”.

Parliamentary Bills – drafting and amendment

The Australian Office of Parliamentary Counsel (OPC) is a specialist office which drafts proposed Acts (Bills) for sectoral agencies – that is for the Australian Executive Government – for introduction into the Parliament. Similar offices operate in each of the States. Legislation which is enacted by the Australian Parliament invariably starts life as a Bill drafted by OPC, which explains why the OPC’s objective (“outcome”) is –

“Laws passed by the Commonwealth Parliament are drafted in such a way that they give legal effect to the intended policy and form a coherent and readable body of Commonwealth laws.”

Although OPC is an Executive Government agency it is also available to draft Bills and amendments for non-Government parties in the Parliament. This is not an activity which occupies much of OPC’s time, it seems. One of OPC’s performance indicators is—

“Private members’ Bills drafted where resources permit.”

The expression “where resources permit” suggests that drafting of Bills for non-Government parties is a spare time activity for OPC. In 2008-2009, however, it was not even this: the OPC 2008-2009 Annual Report records that no requests to draft private members’ Bills were received during that year.

It also transpires that the number of amendments drafted for non-Government parties is not large. The number is fewer than the number of amendments drafted for the Government itself (that is, amendments

by the Government to its own Bills), and sometimes fewer even than the number of amendments correcting OPC’s own drafting errors. The statistics for 2008-2009 (extracted from the OPC 2008-2009 Annual Report) are –

Parliamentary amendments drafted by OPC (Australia), 2008-2009

Govt. policy change	Govt. new policy	Correct drafting errors	Non-govt. amendts.	Total
812 (67.4%)	340 (28.2%)	14 (1.2%)	38 (3.2%)	1204

Evaluating draft bills and regulations – the Quebec system

The economic impact of proposed laws is an issue of importance to law-makers. In Quebec, Canada, the Secretariat of the Ministerial Committee for Economic Prosperity and Development in 2005 devised a series of questions for assessing draft bills and regulations submitted to Cabinet which would have an economic impact on business. It is not apparent how other economic impacts are to be measured, whether the questions have been modified since 2005 nor, indeed, whether the questions are still being asked. Still, it is of interest that [the questions include](#):

- **objectives** of the bill or draft regulation. (Actually, this is a heading, without questions under it. We can fill the gap: “What objectives are articulated in the draft bill or regulations?” and “Are these consistent with the objectives specified in the supporting documents?”);
- **can the problem be resolved** without recourse to legislation or regulation? (ahemm, a better question would be, “Can the objectives be achieved ...”);
- have **administrative requirements** regarding permits (&c) been strictly limited?
- [what are the] results of **consultations** with internal and external clients?

The consultation issue, as with the objectives issue, is left only as a heading and not a list of question. We can start the list:

“Has comprehensive and effective consultation about the proposal taken place?”

Importantly, the Quebec questions do identify both internal and external consultation as being important. The so-called “clients” (*clientèles* in the [French version](#)) who are consulted, however, would better be described as stakeholders. The term client seems rather inappropriate for regulatory activity – arguably the public at large is a client, as regulation takes place to achieve public objectives. A stakeholder, by contrast, is a person or group with a special interest in a proposal.



The scene above is a road in Patna, India (November 2009). There are many stakeholders affected by road laws – as is the case with most laws.

Fee regulation

In a market-based economy service providers set their own prices. However, their businesses succeed only if people decide to buy those services – and not those of their competitors. This imposes a discipline on pricing: if a price rises relative to that offered by competitors then, if the market is functioning properly, demand

will fall. If prices are too high there will not be enough customers for a business to operate viably.

It is not uncommon for legislation to interfere with the operation of market-based pricing, for various reasons, such as to address market failure. The transport sector provides several examples of this: the taxi industry is perhaps the best known.

Recently in Victoria (Australia) pricing for accident towing and storage fees has been scrutinised by the Essential Services Commission. This came about because the [Accident Towing Services Act 2007](#) provides that charges for these services are to be those determined by the responsible Minister. The Minister also is constrained, though: the charges cannot be altered unless the proposal is referred to the Essential Services Commission for consideration.

According to the Essential Services Commission there are two competing objectives of price regulation (para. 2.2 of its [Review of Accident Towing and Storage Fees: Draft Report – Volume 2: Detailed Reasons and Methodology, March 2010](#)):

- to ensure that businesses generate sufficient revenue to recover the costs incurred in providing the service in order to maintain their viability into the future; and
- to provide adequate incentives for businesses to improve efficiency, which can then be shared with consumers through reduced prices.

The Commission refers to the “moral hazard” which occurs when an insured vehicle owner has little incentive to negotiate with tow truck drivers for the lowest fee because the driver is not directly paying for the service (“moral hazard”, apparently, is an economic term that means lack of incentive). This, along with other considerations, points to the need for industry regulation.

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