Review of the Legislative Instruments Act 2003

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Over the past forty years there has been an explosion in the volume of legislative rules, a proliferation of different types of legislative rules, and a diversification of bodies and officials authorised to make legislative rules. This has thrown up two key challenges – how to maintain parliament's control of the law making process, and how to ensure effective public access to legislative rules.

Different systems of government have come up with a variety of answers to those challenges. One answer is to create new committees of the parliament to scrutinise proposed laws, or to expand the responsibility of existing committees. Another answer is to harness the web, both to facilitate public consultation on proposed laws, and to make access to laws easier. Yet another answer is to create a new statutory framework to regulate all aspects of the subordinate legislation process.

The *Legislative Instruments Act 2003* (Cth) (LIA) involved responses of all three kinds. The objective, stated in s 3 of the Act, was 'to provide a comprehensive regime for the management of Commonwealth legislative instruments'. That comprehensive regime includes provisions on public notification of legislative instruments, public consultation, parliamentary scrutiny, drafting, and review and sunsetting.

The Act commenced operation on 1 January 2005. In recognition of the fundamental changes that it was introducing, the Act provided in s 59 that it should be reviewed after three years of operation by a committee appointed by the Attorney-General. A committee was appointed in 2008 comprising Mr Anthony Blunn AO, former secretary to a number of Australian Government departments, Mr Ian Govey, Deputy Secretary of the Attorney-General's Department, and the present author. The Committee reported to the Attorney-General in March 2009.[1] This paper discusses the findings and recommendations of the Committee.

The Legislative Instruments Act 2003

The origin of the Legislative Instruments Act was a report in 1992 of the Administrative Review Council, which is a body created by statute to advise the Attorney-General on administrative law reform.[2] In proposing an Act by that title, the Council referred to the 'vast

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1 The report is entitled *2008 Review of the Legislative Instruments Act 2003* (hereafter LIA Review Report) and is available at www.ag.gov.au/lia-review

2 *Administrative Appeals Tribunal Act 1975* (Cth) ss 47-58.

growth in the volume and diversity of delegated legislative instruments', the '[d]ifferent and often inconsistent practices for drafting, consultation, scrutiny and publication', and the 'patchy, dated and obscure' statutory framework of procedures and principles applying to statutory rules.[3] As an illustration of that problem, the Committee noted the growth over the previous eight years in the number of statutory rules and disallowable instruments. These had doubled in number from a total of 703 in 1982-83 to 1645 in 1990-91. Added to that was an 'unknown number of instruments which are legislative in character ... but are not subject to tabling and disallowance requirements'.[4]

The first Legislative Instruments Bill was introduced into the Australian Parliament in 1994. The proposed legislation thereafter had a chequered history, being reintroduced in 1996 and 1998 before eventual passage in 2003 and commencement in 2005.

The three year review required by the Act is an acknowledgement of the far-reaching nature of the changes that it introduced. The impact of the Act on government practice was captured by the degree of interest in the Committee's inquiry. The Committee received 63 submissions, mostly from Australian Government agencies, and held meetings attended by representatives of 48 agencies, courts, parliamentary committees, non-government bodies and law firms and associations.

The impact of the Act is reflected also in the volume of instruments that have now been registered on the electronic Federal Register of Legislative Instruments (which forms part of the ComLaw website). By 2009, the Register contained over 130,000 instruments, compilations and explanatory statements. This included over 37,000 legislative instruments. The Register, as the LIA Review Committee noted, is now 'a complete, accurate and authoritative record of every legislative instrument in force from 1 January 2008'.[5] The ComLaw website is visited by over 20,000 people per day, roughly two-thirds of whom access instruments on the Register.

The overall assessment of the Committee is that the LIA has succeeded in its three key objectives: providing an authoritative repository of Commonwealth legislative instruments and related documents, improving public access to instruments, and facilitating parliamentary scrutiny of instruments. On the other hand, further work is required on three other of the statutory objectives: encouraging public consultation in legislative rule-making, encouraging better drafting of instruments, and reviewing instruments as part of a sunsetting process.[6]

The Federal Register of Legislative Instruments

'The Register', as the Committee noted, 'is the cornerstone of the LIA and critical to the achievement of its object'.[7] It is therefore important that the Register is 'a complete, accurate

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3 Administrative Review Council, *Rule Making by Commonwealth Agencies*, Report No 35 (1992) at ix.

4 ARC Report at 8.

5 LIA Review Report at 25.

6 LIA Review Report at 3.

7 LIA Review Report at 21.

and authoritative record', and that it is easy to access and navigate. This issue was taken up in four different ways in the Report.

First, the Committee heard many complaints about the Register's performance and useability. The key criticisms were summarised thus:

- 'the available search function is limited and unreliable
- access to the Register is hampered by slow response times and freezing during downloading, and
- aspects of the structure and presentation of the Register … are confusing and do not make it easy to use and navigate.'[8]

These criticisms were acknowledged by the Attorney-General's Department, which maintains the Register. The problems stem from two causes. One is an inadequate computer system to underpin the Register, due in part to the short lead time in building the Register after passage and before commencement of the Act. Another is the unexpectedly high usage of the Register and the ComLaw website, which now attracts the same number of visitors per day as in the first month of operation.

The answer to that performance problem is a new ComLaw website, due for commencement in late 2009. It is expected that the new website will include new search functions that will meet many of the criticisms made by agencies. For the moment, the most the LIA Review Committee could do is recommend 'that the development of a new ComLaw system be completed as a matter of urgency' and 'that adequate funding be provided to improve the standards and the computer systems that underpin the Register'.[9]

A second shortcoming is that not all essential information relating to the operation or application of legislative instruments is currently available on the Register. For example, an event such as the disallowance or repeal of the enabling legislation, or a ruling of a court on the operation of an instrument, will not necessarily be reflected on the Register. The solution in part is for rule-makers to notify the Attorney-General's Department of relevant events.[10] The Department could also be authorised by regulation to discharge a housekeeping function, that would include formally revoking invalid instruments and correcting typographical errors.[11]

Some other recommendations of a technical kind were also designed to ensure that the Register is comprehensive. Items that should be included on the Register are an amendment of the administrative provisions of a legislative instrument, and all amendments to compilations.[12]

A third and related shortcoming is that the Register, being confined to legislative instruments, does not include some other instruments that are of a comparable nature and

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8 LIA Review Report at 31.

9 LIA Review Report, recommendations 22, 46.

10 LIA Review Report, recommendation 13.

11 LIA Review Report, recommendation 14.

12 LIA Review Report, recommendations 15, 16, 17.

that users might expect to find on the ComLaw website. Four categories were identified by the Committee: Administrative Arrangements Orders that establish Departments of State and define the legislation administered by each Department; Commonwealth Reserved Laws that still apply in the Australian Capital Territory after self-government; prerogative instruments, such as the instrument establishing the Order of Australia; and information in one of the 11 (or more) gazettes that are still published (such as the Australian Public Service Gazette, Tariff Concessions Gazette and Food Standards Gazette).

From time to time, other categories of instruments could usefully join this list. The Committee accordingly recommended the amendment of the LIA so that regulations could be made to specify additional categories of registrable instruments.[13] Non-legislative instruments that are included on this expanded Register should not be subject to the other provisions of the LIA (tabling, disallowance and sunsetting) unless legislation declares that to be so. Similarly, the validity or enforceability of a non-legislative instrument should not hinge on whether it is registered.[14]

If the Register is expanded to include non-legislative instruments, would it be more descriptive to retitle the Act the 'Statutory and Other Instruments Act'? The Committee chose not to take that path, essentially for the reason that the title of the Act is now well-known and historically significant.

Fourthly, the Report draws attention to difficulties associated with incorporation by reference of other documents in registered instruments. For example, an instrument might incorporate an Australian Standard, an international convention, or a code or manual published by a non-government body. This is permitted by s 14 of the LIA. The incorporated document must be provided if required to a House of the Parliament (s 41), but is not required to be published on the Register. In fact, copyright in the incorporated document could belong to another agency which publishes the document for sale, such as Standards Australia which sells standards at a price averaging between $80-$120. The Committee did not propose any firm solution to the problem of access and transparency that this can create, other than to caution against the practice and urge agencies to explore measures to make those documents publicly available either at low cost or in Australian Government libraries.[15] Clearly, this is an important issue that will require monitoring and further debate.

Scope of the LIA – legislative instruments

The statutes that applied to legislative instruments prior to the enactment of the LIA were mostly defined to apply to specified types of instrument, or to instruments made by a specified body. For example, the provisions of the *Acts Interpretation Act 1901* (Cth) regarding notification, tabling and disallowance applied to any instrument described as a 'regulation' (s 48) or designated as a 'disallowable instrument' by the Act under which it was made (s 46A). The *Statutory Rules Publication Act 1903* (Cth) regulating printing, numbering and sale of instruments applied to any 'rules, regulations, or by-laws, made under any Act by the Governor-General, or any Minister … or any Government department' (s 2).

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13 LIA Review Report, recommendation 11.

14 LIA Review Report, recommendation 12.

15 LIA Review Report at 29-30, recommendation 21.

The LIA departed from that approach by applying to every instrument that is a 'legislative instrument', defined in s 5 as follows:

> (1) [A] legislative instrument is an instrument in writing:
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> (a) that is of a legislative character; and
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> (b) that is or was made in the exercise of a power delegated by the Parliament.
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> (2) Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:
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> (a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and
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> (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

This definition marked an important departure from other schemes. The requirements of the Act 'operate in relation to what an instrument does, rather than what it is called'.[16] Better coverage was, however, at the expense of certainty. It is not always clear from one case to the next whether a particular instrument meets that definition, which is both general in nature and circular in definition. The decision to be made is nevertheless an important one, since the failure to register an instrument that should have been registered means that it is not enforceable and, if the instrument pre-dates the commencement of the LIA, is taken to have been repealed (ss 31, 32).

This conundrum is illustrated by the decision and outcome in *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee*.[17] In proceedings commenced under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR), the Federal Court held that a decision by the Drugs and Poisons Committee to amend the Poisons Standard was a decision of a legislative character, and as such was not challengeable under the ADJR Act that applies only to decisions of an administrative character.[18] While the Commonwealth won that judicial review battle, it suffered a greater loss, as the Poisons Standard had not been registered under the LIA. The result was that the Standard was unenforceable and deemed to be repealed.[19] A new Standard was required, as too was amendment of the enabling Act to retrospectively validate the former Standard.

This difficulty, of distinguishing legislative and administrative instruments, is illustrated by a large number of other cases in which courts have grappled with the distinction.[20] The High Court in *Griffith University v Tang*[21] referred recently to the 'instability' of the distinction. Courts have long rejected the idea that 'legislative' and 'administrative' are mutually exclusive categories, and have accepted that some rules can justifiably be classified under

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16 D Pearce & S Argument, *Delegated Legislation in Australia* (LexisNexis, 3rd ed, 2005) at 21.

17 (2007) 163 FCR 451.

18 Sections 3, 5 of the ADJR Act.

19 See D Pearce, 'The importance of being legislative: a reprise' (2008) 57 *AIAL Forum* 20.

20 The cases are collected in R Creyke & J McMillan, *Control of Government Action: Text, Cases & Commentary* (LexisNexis, 2nd ed, 2009) at [2.4.25]ff.

21 (2005) 221 CLR 99 at [63].

both headings.[22] Many submissions from government agencies to the LIA Review Committee also noted the difficulty agencies faced in deciding whether an instrument was legislative and required to be registered.[23]

This issue of uncertainty can be overcome by two practical measures.[24] Firstly, s 5(3) of the LIA provides that an instrument that is registered is taken to be a legislative instrument. The result is that many instruments have been registered that probably did not need to be registered. There has been a corresponding increase in the size of the Register and the scrutiny workload of the Senate Standing Committee on Regulations and Ordinances. Whether that is a good outcome, it has at least had the effect that a greater number and spread of executive instruments has been subjected to the extra rigour imposed by the LIA process.

Secondly, it is always open to Parliament to declare in an Act that an instrument made under that Act is or is not a legislative instrument for the purposes of all or some of the requirements of the LIA.[25] The LIA Review Committee noted that it is now common practice to include a declaration in an enabling Act. The Committee commended this practice as sensible and appropriate.[26] One suggestion raised with the LIA Review was in fact that the practice has superseded the need for a definition of 'legislative instrument' in the Act. The Committee did not accept this proposal, preferring to retain the definition for policy and practical reasons:

> [T]he definition provides important guidance to the courts, the public and to rule-makers about the intentions of the Parliament. It encourages careful assessment of each declaration against those intentions on a case-by-case basis. Without the guidance provided by a definition, there is a risk that a more conservative view will gradually be taken as to what is a legislative instrument and that inconsistent practices will develop.[27]

Three remaining problems arising from the definition were addressed by the Committee. First, the problem of uncertainty still arises when there is no declaration in an Act. This is more a problem for instruments made before the date of commencement of the LIA and that have not and cannot now be registered under the LIA. Like the Poisons Standard considered in *Roche*, an unregistered prior instrument faces a risk of later being found to be a legislative instrument and thereby unenforceable and deemed to be repealed. The only step that can now be taken, as recommended by the Committee, is for existing legislation to be reviewed to gauge the desirability of amendment to declare whether an instrument is or is not subject

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22 Eg, *McWilliam v Civil Aviation Safety Authority* (2004) 82 ALD 655.

23 The LIA provides some additional clarity by listing in s 7 and in the LIA regulations, categories of instruments that are not legislative instruments for the purposes of the Act.

24 A third measure, by which the Attorney-General can certify under s 10 whether an instrument is or is not a legislative instrument for the purposes of the LIA, has never been used. The Committee recommended repeal of s 10: LIA Review Report, recommendation 6.

25 This is not acknowledged in s 7(1)(b) of the LIA, as to instruments made after the commencement of the LIA that are declared not to be legislative instruments.

26 LIA Review Report at 14.

27 LIA Review Report at 14.

to the LIA.[28] A project along those lines was in fact undertaken a couple of years ago, but never brought to fruition. Implicitly, the Committee recommends that the project be resurrected.

Secondly, the existing definition of 'legislative instrument', if it is to be retained, could be improved. One problem is the unhelpful circularity in s 5(1) of the definition, declaring that 'a legislative instrument is … an instrument of a legislative character'. Another problem is the unclear distinction drawn in s 5(2)(a), between instruments that determine the law or alter the content of the law (a legislative action) and instruments 'applying the law in a particular case' (presumed to be an administrative action). The Committee proposed an alternative definition that, in its view, would offer clarity without substantively changing the operation of the Act.[29] The definition would read:

> (1) [A] legislative instrument is an instrument in writing that:
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> (a) is made in the exercise of a power delegated by the Parliament; and
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> (b) includes at least one provision that;
>
> (i) determines the law or alters the content of the law, rather than determining the cases or circumstances in relation to which the law set out in an Act or in another legislative instrument is to apply; and
>
> (ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

A third definitional problem arises from the *Legislative Instruments Regulations 2004*, which declare that an instrument is not a legislative instrument if it is reviewable under the ADJR Act. As noted, the ADJR Act applies to decisions of an administrative character. The Committee recommended that this provision be removed from the Regulations, as being 'confusing and unhelpful'.[30] It applies the problematic distinction between legislative and administrative actions, and wrongly assumes that the making of a legislative instrument is not judicially reviewable under the ADJR Act. In fact that could occur, if the instrument contains administrative as well as legislative provisions, or if the instrument creates an administrative power that can be can be challenged on the basis that the power rests for legal support upon a legislative instrument that is alleged to be invalid. The validity of a legislative instrument is also reviewable in the Federal Court under the parallel provisions of the *Judiciary Act 1903* (Cth) s 39B.

Legislative drafting

An objective of the LIA is to 'encourag[e] high standards in the drafting of legislative instruments to promote their legal effectiveness, their clarity and their intelligibility to anticipated users' (s 3(1)(c)). The responsibility of implementing that objective falls on the Secretary of the Attorney-General's Department (s 16).

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28 LIA Review Report, recommendation 3.

29 LIA Review Report at 16.

30 LIA Review Report at 17.

Submissions to the Committee painted a mixed picture. On the one hand, there was a view that drafting standards had improved, and there was special commendation of the drafting expertise of the Office of Legislative Drafting (OLD) located within the Attorney-General's Department. However, OLD has drafted only about 10% of instruments created since the LIA commenced operation (mainly regulations, proclamations and rules of court). On the other hand, examples were provided to the Committee of poor legislative drafting, together with the general assessment of many commentators that there is room for improvement.

The Committee's view was that more needs to be done by the Department to monitor drafting standards. Steps should also be taken to explore the possibility of developing further training options and providing guidance through manuals, templates and precedents.[31]

Interpretation of legislative instruments would also be assisted if the quality of explanatory statements was higher. The Committee quoted from a letter sent by the Senate Standing Committee on Regulations and Ordinances in March 2008 to Ministers, complaining that 'inadequate or incomplete explanatory material occupies a disproportionate amount' of the Senate Committee's time.[32] The reform recommended by the LIA Committee was an expanded treatment of this issue in the *Legislative Instruments Handbook.*

Consultation

One of the more contentious issues in the ten year parliamentary gestation of the LIA was that of public consultation in the formulation of legislative instruments.

Strong support for 'mandatory public consultation before any delegated legislative instrument is made' was first expressed by the Administrative Review Council.[33] The Council recommended that the exceptions to mandatory consultation be narrowly expressed – for example, to instruments that deal with minor machinery matters or impose a Budget fee, where consultation could give someone an unfair advantage, or the Attorney-General certifies that consultation would be contrary to the public interest. To bolster the consultation process, the ARC proposed a model consultation code, to include notification of a proposed instrument in the national media, publication of both the draft instrument and a 'rule making proposal', public hearings on controversial or sensitive proposals, and subsequent preparation of an agency memorandum explaining the consultation undertaken.

The ARC pointed to the multiple benefits of consultation.[34] It can lead to better instruments, it serves the public interest by allowing interested and competing views to be expressed, there is a strong tradition of public consultation in Australia, agencies could not be relied upon of their own initiative to develop appropriate consultation, and there is a risk of 'captured consultation' in which agencies consult only with known interest groups.

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31 LIA Review Report, recommendations 25, 26, 27.

32 LIA Review Report at 37.

33 ARC Report at 38.

34 ARC Report, Chapter 5.

The earlier versions of the LI Bill introduced into the Parliament reflected the ARC recommendations, but not so the final Bill introduced in 2003. The Democrats attempted during the parliamentary debate to strengthen the consultation mechanisms, but this did not succeed.[35]

A much less demanding provision was enacted in the LIA s 17. An agency's obligation is to be satisfied that it has undertaken consultation that it considers 'to be appropriate and that is reasonably appropriate to undertake'. This obligation applies to all instruments, though s 17 emphasises the importance of consultation on instruments that have an effect on business or that restrict competition. There is a further watering down in s 18, which lists circumstances that could be considered by a rule-maker to render consultation 'unnecessary or inappropriate'. These echo the list developed by the ARC, but go further, notably in s 18(2)(e), which applies if 'appropriate consultation has already been undertaken by someone other than the rule-maker'.

Unsurprisingly, the LIA Review Committee was not overwhelmed by evidence of a strong tradition of public consultation following the commencement of the LIA. Rather, there was muted acknowledgement by many agencies that consultation was not a prominent concern during the formulation of instruments and that there was room for improvement.

Implicit support for that assessment comes from a report in June 2007 of the Senate Standing Committee on Regulations and Ordinances, 'Consultation under the *Legislative Instruments Act 2003*'. The Committee examined compliance with s 4 of the LIA, which provides that the Explanatory Statement accompanying a legislative instrument is to contain a statement of the nature of any consultation that was undertaken, and an explanation if none occurred. The Committee was not satisfied with 134 of the 2100 Explanatory Statements made in 2005, nor 67 of 2200 made in 2006. Specific criticisms made by the Committee were that many departments and agencies were 'unaware … or seem only intermittently aware' of their s 4 obligation, that some of the consultation information was 'cursory, generic and unhelpful', some Statements 'almost tantalise with lack of detail', and that some Statements were based on the 'misconception' that consultation only applied to business instruments.[36]

The LIA Review Committee recommended that these problems be addressed by a mixture of legislative and administrative reforms. As to legislative reforms, s 17 should be amended to remove the emphasis on business consultation, and s 18 should be repealed to avoid the perception that the examples it contains are exemptions from consultation.[37] Administrative reform could be implemented with the Attorney-General reminding rule-makers of their consultation obligations under the LIA, and with the *Legislative Instruments Handbook* providing fuller guidance on consultation.

Since this debate on consultation was sparked by the ARC in 1992, other developments have occurred within government that have drawn attention to the importance of consultation. An Office of Best Practice Regulation has been established, with functions that

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35 Pearce & Argument, above note 16, at 14.

36 Senate Report at [27], [31], [32], [41].

37 LIA Review Report, recommendations 31,32.

include regulatory impact analysis and promoting business consultation on regulatory proposals.[38] The principles of effective consultation are outlined in a *Best Practice Regulation Handbook*. The Council of Australian Governments (COAG) has also published consultation guidelines. It is possible also that the new Office of the Information Commissioner to be established in 2010 will, as part of its broad role of assisting government to develop information policy, pay attention to this issue.

Review and sunsetting of legislative instruments

The next phase in the LIA process will be sunsetting, due to commence in 2015. This, too, is a declared object of the Act, 'to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed' (s 49; see also s 3(1)(f)).

In outline, an instrument will cease to be in force approximately ten years after it is made, unless the Parliament passes a resolution prior to the sunsetting date to allow the instrument to continue in force (s 53) or the Attorney-General issues a certificate extending the instrument's life for six or twelve months (s 51). The Attorney-General is to prepare a list of instruments that are due to sunset, eighteen months before a given sunsetting date (s 52). There will be a staged sunsetting, between 2016 and 2018, of the large bulk of instruments made prior to the commencement of the LIA.

The Committee endorsed this regime and did not see any need for change. For example, it rejected a proposal made in another government report, *Rethinking Regulation*, to reduce the sunsetting period to five years.[39] However, the Committee did express a general concern that agencies are not making adequate preparation for sunsetting to commence in 2015. The Committee noted that the sunsetting process could impose considerable demands on individual agencies, and overwhelm the drafting and registration process unless there is adequate preparation. The Committee's recommendation was that the Attorney-General take a lead in reminding agencies of the sunsetting provisions. Culling spent legislative instruments could begin much earlier.[40]

Exemptions from the LIA

Many categories of instruments are expressly exempted from the operation of some or all of the LIA provisions. Many of these exemptions are listed in s 7 of the LIA and in the LI Regulations; some at least are included for abundant caution to resolve any doubt as to whether the instrument is legislative or administrative. As to some other instruments that are clearly legislative in character, there is a special reason to explain the exemption – for example, a legislative instrument that is made jointly by the Commonwealth and State governments or by an intergovernmental body is not subject to disallowance by the Commonwealth Parliament (s 44).

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38 The LIA Review Committee noted the overlap in the OBPR role and the LIA as to consultation, but felt that no further integration of both systems was necessary: LIA Review Report at 41-42.

39 LIA Review Report, recommendation 39.

40 LIA Review Report, recommendations 37, 38.

The Committee had no disagreement in principle with the practice of exemption, noting that 'all exemptions must be scrutinised by the Parliament on a case-by-case basis'.[41] Nor, for that reason, did the Committee feel the need to review each of the exemptions (except the exemption for ADJR-reviewable instruments, noted earlier).

The Committee nevertheless noted that exemption from the LIA is a serious matter, and should receive formal and serious consideration. This is better done through an express declaration in the Act that authorises the making of an instrument.[42] It would also assist users of the Register to include on ComLaw a list of LIA exemptions and of other Acts with publication, tabling and disallowance provisions.[43] The *Legislative Instruments Handbook* should also contain expanded guidance on LIA requirements including exemptions.[44]

Other issues

- *Commencement of instruments:* The Committee endorsed the present provisions of the LIA, by which an instrument commences at the date and time specified in the instrument, or (by default) on the day following registration. Problems about inadequate notice, or compliance burdens imposed by an instrument, are better dealt with in other ways, for example, through the consultation process and better notification on the Register. In particular, the Committee recommended that the Register display the date an instrument is made and the date and time it comes into effect.[45]

- *Retrospectivity:* Absent a statement of contrary intention, a legislative instrument will be of no effect if it has a retrospective operation that adversely affects the rights or liabilities of a person other than the Commonwealth (s 12(2)). The Committee felt that this bar on retrospectivity was too broadly stated, and that the beneficial operation of a retrospective instrument should be preserved.[46]

- *Reproductions:* The Committee recommended that a reproduction of a legislative instrument (for example, by an agency or commercial publisher) should identify that it is a copy and that the authoritative version of the instrument is published on the Register.[47]

- *Supplementary registers:* Some instruments that are made in large numbers are used by specialist communities, such as Tariff Concession Orders and Airworthiness Directives. The Committee recognised that it may be appropriate for these to be maintained on a separate website by the responsible agency and linked to the Register.[48]

- *Preparation of documents for registration:* The efficiency of the registration process is currently impeded by the inconsistent and incomplete form in which documents are

41 LIA Review Report at 51.

42 LIA Review Report at 52-53, and recommendation 41.

43 LIA Review Report, recommendation 42.

44 LIA Review Report, recommendations 43, 44.

45 LIA Review Report, recommendations 8, 9.

46 LIA Review Report, recommendation 10.

47 LIA Review Report, recommendation 18.

48 LIA Review Report, recommendation 20.

presented for registration. Similarly, public access to registered instruments is more difficult if basic navigational tools such as paragraph numbering and tables of contents are not included. The Committee recommended that the Attorney-General's Department promulgate technical standards for registrable documents, and that agencies be required to meet the cost of adapting instruments that are not presented in compliance with those standards.[49]

- *Parliamentary tabling:* The Committee noted that the tabling process could be improved and streamlined by the introduction of electronic lodgement of instruments and explanatory statements with the Table Offices of the Parliament, and by not requiring lodgement of registered instruments that are not subject to disallowance.[50]

- *Disallowance provisions:* Disallowance provisions still exist in other Acts, in some instances using different terminology. The Committee recommended that all disallowance provisions be aligned with the LIA provisions.[51]

Conclusion

The Legislative Instruments Act has come out well from this first three year review. Experience to date confirms the expectation of many that the LIA would be a watershed reform to the Commonwealth statutory framework and would enhance public access to the law. The surprise, perhaps, is that Australian State jurisdictions have not shown greater interest in introducing similar legislation. In other areas of administrative law reform in Australia – judicial review, tribunals, ombudsman, freedom of information, privacy and whistleblower protection – there has been a tendency within the federation for all jurisdictions to follow the reforming lead of others. It may be that the LIA Review Committee Report will engender greater interest in and confidence in this new approach to regulating legislative instruments.

Three general lessons emerge from this review of the LIA Act. The first is that there is scope for legislative and administrative reforms that will enhance the operation of the LIA. The second is that stronger leadership by the Attorney-General's Department will be essential in better achieving all the objectives of the LIA, especially on drafting, public consultation, sunsetting, and preparation of instruments for registration. A revised *Legislative Instruments Handbook* can play an important part in providing better guidance to LIA users.

The third, and most important lesson, is that the LIA rests not only on a legislative and administrative platform, but on a technological platform. The core objectives of providing a comprehensive, authoritative and accessible repository of Commonwealth legislative instruments can never be realised if the electronic Register is inadequate. That is the immediate challenge that will define the next phase in the history of the LIA.

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49 LIA Review Report, recommendations 23, 24.

50 LIA Review Report, recommendations 34, 33.

51 LIA Review Report, recommendations 35, 36.