

# THE TASMANIAN SUBORDINATE LEGISLATION COMMITTEE— LIFTING THE SCRUTINY VEIL BY DEGREES

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*Regulations are the sinews of modern government, the legal instruments that connect abstract government policies with the day-to-day activities of commerce and private life. To put it more precisely, regulations make government decisions operational, and hence perform a key role in the governing process.<sup>1</sup>*

## I INTRODUCTION

Parliamentary Scrutiny Committees for delegated legislation are now an established part of the legislative process in all Australian jurisdictions. The meandering journey that led to these committees occupying such a comfortable institutional niche has been told elsewhere.<sup>2</sup> Academic attention devoted to the area of delegated or subordinate legislation has ebbed and waned over different generations. A survey of administrative law textbooks of different eras reveals the appearance and disappearance of delegated legislation as a subject worthy of serious attention.<sup>3</sup> The 20 year

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<sup>1</sup> John F Morrall quoted in W T Stanbury, *Reforming the Federal Regulatory Process in Canada 1971-1992*, Minutes and Proceedings and Evidence of the Sub-Committee on Regulations and Competitiveness—House of Commons Issue No.23, December 1992, 10.

<sup>2</sup> Dennis C Pearce, *Delegated Legislation in Australia and New Zealand* (1977). This has now been superseded by Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (2<sup>nd</sup> ed, 1999).

<sup>3</sup> See David G Benjafield and Harry Whitmore, *Principles of Australian Administrative Law* (3<sup>rd</sup> ed, 1966), chap 6 'Delegated Legislation'. By the time of Harry Whitmore and Mark Aronson's *Review of Administrative Action* (1978), delegated legislation had become a secondary topic of 'Ultra Vires'. In the

uncontested reign of Dennis Pearce's text *Delegated Legislation* epitomized the marginal position of the topic.

Paradoxically, the day to day occupation of administrative lawyers often takes place in the murky and often incomprehensible twilight zone of delegated legislation. A typical offence by a fisherman client would more likely be a breach or infringement of a much amended, arbitrary and confusing fishing regulation than a classical academic case study of natural justice or jurisdictional error. Geoffrey Palmer has called for a reform in the focus of public law teaching.<sup>4</sup> This reform would encourage lawyers to learn, as students and later as professionals, to navigate the operations of parliamentary scrutiny committees and to gain an appreciation for the value of pre-emptive intervention in the rule-making processes to avoid potential problems for clients. The desire for national scheme legislation has also highlighted the important need to analyse and evaluate the role and efficacy of scrutiny committees in supervising delegated legislation.

In recent years innovations, in the practices and processes relating to the formulation and operation of delegated legislation in many jurisdictions, have justified a closer examination of this area of administrative law. Any study in this area is confronted by the difficulty that terminology can be confusing and perplexingly different across jurisdictions.<sup>5</sup> As David Hamer notes, the study of delegated legislation or regulatory process reform will never become the rallying cry of a mass movement:

It would be idle to pretend that parliamentary control of delegated legislation is a burning issue in the community or that most voters would even know what delegated legislation is, and for these reasons it is difficult to find members of any of the parliaments prepared to take much interest in the matter. Nevertheless it is of great importance; uncontrolled delegated legislation offers a fertile field for executive despotism and bossy interference by bureaucrats. Delegated laws often have much more impact on the lives of ordinary citizens than do most acts of parliament.<sup>6</sup>

This paper examines the operations of the Tasmanian Subordinate Legislation Committee and attempts to provide a research baseline for future studies. The study is an initial exploration of the operational and legislative restraints on an Australian

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1990s text books started including sections on delegated legislation under a series of different topics—see Margaret Allars, *Introduction to Australian Administrative Law* (1990). One of the best examples is the transition of delegated legislation in Roger Douglas and Melinda Jones' *Administrative Law: Cases and Materials* from a topical coverage akin to Allars' in the 1993 edition to the allocation of a separate chapter on delegated legislation (Chapter 8) in the 1996 edition.

<sup>4</sup> Sir Geoffrey Palmer, *New Zealand's Constitution in Crisis: Reforming our Political System* (1992) 31-3.

<sup>5</sup> Stanbury, above n 1, 11-12. See also Stephen Argument, 'Parliamentary Scrutiny of Quasi-legislation,' *Papers on Parliament* No 15, Department of the Senate, Canberra, May 1992.

<sup>6</sup> David Hamer, *Can Responsible Government Survive in Australia?* (1994) 148.

scrutiny committee performing its supervisory role within the legislative process in the late 1990s.<sup>7</sup>

Stephen Argument has highlighted the lack of research into Australian delegated legislation committees and the absence of comparative assessment of the work of these various scrutiny committees.<sup>8</sup> He also concludes that because the committees are so different from each other in terms of operation and approach qualitative comparison is difficult.<sup>9</sup>

In line with Argument's thesis that the last 20 years has produced fundamental changes in the operating environment of Australian delegated legislation committees,<sup>10</sup> this paper concludes that the Tasmanian Committee has failed in a number of ways to respond effectively to these changes. This failure is not unique to the Tasmanian Committee nor is the failure total in all aspects of its operations.

The Tasmanian Committee was presented with an ideal opportunity with the passage of the *Subordinate Legislation Act 1992* to be the leader in parliamentary oversight and monitoring of delegated legislation. On the eve of the Hilmer reforms<sup>11</sup> and moves towards setting in place principles for scrutiny of national scheme legislation, the 1992 reforms equipped the Tasmanian Committee with the powers and framework to be an effective scrutiny committee. This paper details how an internal agency agenda, especially by Treasury and the Hydro Electricity Corporation, and the advent of the Hilmer competition reforms, however, led to a severe modification of the powers and framework originally set out in the 1992 legislation. Treasury, and in particular its Regulatory Review Unit, has become the gatekeeper for determining the necessity, shape, content and requirements for delegated legislation. The Tasmanian Committee has been shunted to a secondary and more perfunctory role.

A key component of this paper is its reliance on research and findings made by undergraduate law students from the University of Tasmania, who have been involved in the innovative Public Law Active Research Project.<sup>12</sup> The project, inspired by the writings of Geoffrey Palmer<sup>13</sup> and John Goldring,<sup>14</sup> is an experiment

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<sup>7</sup> Note that chap 10, 'Parliamentary Review: Tasmania' in Dennis Pearce, *Delegated Legislation in Australia and New Zealand* (1977) 66 was the last systematic and extensive study published about the Tasmanian committee.

<sup>8</sup> Stephen Argument, 'Apples and Oranges—A Comparison of the Work of Various Australian Delegated Legislation Committees' (1999) 21 *AIAL Forum* 34.

<sup>9</sup> *Ibid* 41.

<sup>10</sup> Pearce and Argument, above n 2, 87.

<sup>11</sup> Report by the Independent Committee of Inquiry into a National Competition Policy (the 'Hilmer Report').

<sup>12</sup> Details of this project are outlined in Rick Snell, 'The First Steps in Understanding the Impact of Administrative Law on Public Administration at the State Level: The Tasmanian Story' in Linda Pearson (ed) *Administrative Law: Setting the Pace or Being Left Behind?* (1997) 237. Further details of the Public Law Active Research Project can be found at the following websites: University of Tasmania, <<http://www.comlaw.utas.edu.au/users/rsnell/Teaching/portfolio/project.html>> and <<http://www.comlaw.utas.edu.au/law/active/>>.

<sup>13</sup> See Palmer, above n 4

in administrative law teaching practice in Australia. The project applies the ideas of deep learning, action learning and action research across a group of undergraduate and postgraduate units. The key to the Public Law Active Research Project is that it provides students with an opportunity to mix field research with classroom and library learning. Students are encouraged to formulate a research project that involves direct contact with legally qualified and non-legally qualified public sector participants. Throughout the research process students are encouraged to work together, to collaborate with or rely upon the research of previous students (kept in a special research collection) and via a series of formal and informal, compulsory and optional mechanisms to seek feedback from teaching staff.

This paper draws on the research and findings of several of these papers that have examined various aspects of the operations of the Tasmanian Subordinate Legislation Committee between 1993-1998. Some of the results were obtained by interviews conducted with Committee members, Parliamentary officers, lobbyists, public servants and observations of the Committee in operation. Throughout this period the findings of the research papers were circulated to those interviewed and reexamined by students in subsequent years. Whilst the research was undertaken by undergraduate students, the research methodology, supervision and approach more accurately resembled a postgraduate research process.<sup>14</sup>

The student research papers provide a rough snapshot of the operations of an Australian delegated legislation committee in the mid 1990s. They thus contribute to the limited existing knowledge about these core parliamentary scrutiny committees. Whilst the criteria against which the performance of the Committee was examined are not sharply defined or universally accepted, the use of these findings does allow for a higher degree of performance assessment than previously available.

The paper then looks briefly at a case study involving the deregulation of the aerial spraying industry in Tasmania. It demonstrates how difficult it is for the Committee to resist an agency determined to implement national competition reforms via regulations. Furthermore the study depicts how the combination of restricted resources, membership uncertainty about the Committee's roles and functions and manipulation by agencies of the timing of Gazette notices can restrict effective scrutiny of delegated legislation.

This paper uses the terms 'reform of the regulatory process' or 'process reform' to identify the changes in the process by which subordinate legislation, or regulations, are made, amended, modified and existing regulatory schemes updated or replaced. The Tasmanian reforms covered in paper have largely consisted of efforts to improve the quality of new regulations as opposed to any efforts to 'modify the sub-

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<sup>14</sup> See John Goldring, 'Administrative Law Teaching and Practice' (1986) 15 *Melbourne University Law Review* 486.

<sup>15</sup> The student research projects referred to in this paper were of a high standard for undergraduate papers and received marks of 70 per cent or better. The projects have been directly referred to in this paper as the authors believe it is important and necessary to directly acknowledge the insights and analysis developed by the student researchers.

stantive effect of existing regulatory regimes.<sup>16</sup> As Stanbury eloquently acknowledges:

The phrase regulatory reform is both wonderfully evocative and highly elastic. It is not hard to find several rather different uses of the term ... the liberalization of economic or industry-specific regulation ... so as to rely more on competition. ... The phrase also includes total deregulation, which means that virtually all of the state mandated economic controls (notably price, entry, exit, conditions of service) are removed and social control is effected through competition. ... Others have used the term to refer to actions strengthening existing regulatory regimes. ... Last, but not least, the phrase regulatory reform has been used to refer to change in the regulatory process.<sup>17</sup>

Whilst this paper traverses some of the same terrain as that canvassed by the trail-blazing Victorian Law Reform Committee report on Regulatory Efficiency Legislation it does not seek to address the issue of alternative compliance mechanisms.<sup>18</sup>

The initial interest of Peter O'Keefe<sup>19</sup> and Stephen Argument,<sup>20</sup> supplemented by the work of the Administrative Review Council<sup>21</sup> and the effort by successive Commonwealth governments towards implementing a series of reforms involving legislative instruments have complemented developments at state level around Australia.<sup>22</sup> Yet despite these endeavours, the process and understanding of the regulatory process remains almost invisible. As Stanbury observed in relation to the position in Canada:

Regulation is one of the most important governing instruments in the arsenal of means by which government of all types seek to implement public policy. Yet, despite the briefly-visible efforts under the banner of 'regulatory reform' or 'deregulation' in the second half of the 1980s, the regulation-making process remains obscure to virtually all Canadians. Efforts to improve this process have also been little noticed. Its visibility stands in sharp contrast to the processes by which the federal government creates and enacts its expenditure budget and to the process by which it makes into law hundreds of pieces of subordinate legislation some of which imposes huge costs on society.<sup>23</sup>

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<sup>16</sup> Stanbury, above n 1, 14.

<sup>17</sup> Ibid 13.

<sup>18</sup> See Law Reform Committee, Victorian Parliament, *Regulatory Efficiency Legislation*, Report October 1987 and Discussion Paper May 1997.

<sup>19</sup> Peter O'Keefe, Commonwealth of Australia, *Spoilt for a Ha'p'worth of Tar: How Bureaucratic Law-making can Undermine the Ideals of Civil Liberty*. Papers on Parliament No.1, Department of the Senate, Canberra, April 1988.

<sup>20</sup> Argument, above n 5.

<sup>21</sup> Administrative Review Council, *Rule-making by Commonwealth Agencies*, Report 35 1992.

<sup>22</sup> For a good coverage of this reform process in one state see Western Australia, Joint Standing Committee on Delegated Legislation, *The Subordinate Legislation Framework in Western Australia*, Parl Paper 16 (1995).

<sup>23</sup> Stanbury, above n 1, 10.

## II SUBORDINATE LEGISLATION IN TASMANIA

### A Background

The Tasmanian Subordinate Legislation Committee (the Committee) was established, towards the end of a long and slow Australian reform process (see Table 1), by the *Subordinate Legislation Committee Act 1969* as a joint committee comprising three members each from the Legislative Council and the House of Assembly. The Committee's operations largely reflect an attitudinal approach anchored in the parliamentary operations of the 1960s—namely, a treatment of the scrutiny task as serious but with little attention to the resources and features needed to create an effective scrutiny environment.

Table 1: Establishment of Australian Scrutiny Committees

Jurisdiction	Year
Commonwealth	1931
South Australia	1938
Victoria	1956
New South Wales	1960
Tasmania	1969
Northern Territory	1969
Queensland	1975
Western Australia version 1 <sup>24</sup>	1976
Western Australia version 2	1987

The Committee's function is to examine regulations (defined in s 2 as 'a regulation, rule or by-law that is made under an Act and is required by law to be laid before both Houses of Parliament, but does not include rules of court made by the judges, or by a majority of them, under the authority of an Act'). Section 8 of the Committee Act provides that the functions of the Committee are:

(1)(a) to examine the provisions of every regulation, with special reference to the question whether or not:

<sup>24</sup> In 1976 the Western Australian Parliament set up a statutory committee, the Legislative Review and Advisory Committee, charged with scrutiny of subordinate legislation—see *Legislative Review and Advisory Committee Act 1976*. In 1987 the Western Australian Parliament established a parliamentary committee—the Joint Standing Committee on Delegated Legislation.

- (i) the regulation appears to be within the regulation-making power conferred by, or in accord with the general objects of, the Act pursuant to which it is made;
  - (ii) the form or purport of the regulation calls for elucidation;
  - (iii) the regulation unduly trespasses on personal rights and liberties;
  - (iv) the regulation unduly makes rights dependent on administrative decisions and not on judicial decisions; or
  - (v) the regulation contains matters that, in the opinion of the Committee, should properly be dealt with by an Act and not by regulation;
- (ab) to examine whether the requirements of the Subordinate Legislation Act 1992 have been met<sup>25</sup>; and
- (b) to make such reports and recommendations to the Legislative Council and the House of Assembly as it thinks desirable as the result of any such examination.

The Committee has the normal power of such a committee to recommend disallowance of a regulation. The Tasmanian Parliament has chosen, like most Australian parliaments, a negative resolution procedure. This means that delegated legislation becomes operational from the time of its appearance in the Gazette and has to be disallowed by one of the houses of parliament within 15 sitting days rather than requiring a scrutiny committee to recommend that delegated legislation become operational.

However, when Parliament is not sitting, the Committee has additional powers (under s 9) to prevent the continued operation of any regulations which it considers undesirable prior to both Houses' consideration of its report. In this situation the Committee corresponds directly with the agency responsible for the regulation. On receipt of a copy of the Committee's report on a particular regulation, the agency must amend or rescind the regulation as recommended by the Committee. The Committee has the power to suspend the operation of the regulation if the agency refuses to comply with its recommendation. The suspension operates until both Houses of Parliament have considered the Committee's report. Pearce noted the uniqueness of this provision in his 1977 study.<sup>26</sup>

The Committee automatically receives copies of regulations and other material relevant to its deliberations. It receives copies of regulations directly from the Government Printer after gazettal. Where a Regulatory Impact Statement (RIS) has

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<sup>25</sup> The Act contains mandatory consultation and sunset provisions. Agencies must prepare a Regulatory Impact Statement ('RIS') for legislation likely to have a significant impact on the public (s 5). Section 11 provides for a staged automatic repeal of all existing regulations over a 10 year period. Agencies are required to comply with the RIS process when remaking sunsetted regulations.

<sup>26</sup> Pearce, above n 7, 72.