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Legislation Newsletter

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Victoria's Subordinate Legislation Amendment Bill

A Bill with a name like Subordinate Legislation Amendment Bill does not promise much excitement. First impressions seem to be confirmed by its history. An exposure draft of the Bill was released for public consultation quite some time ago (in 2009 – see comments in our April 2010 *Legislation Newsletter*) but the public response was somewhat limited. Fifteen submissions were received, including one from the Cemeteries and Crematoria Association of Victoria expressing concern about new obligations to apply to the making of "cemetery trust instruments". Two others, from individual cemetery trusts, agreed. On our arithmetic, 20% of submissions thus related to cemetery trust instruments!

The State Parliament's Scrutiny of Acts and Regulations Committee lodged a submission, the "edited copy" of which includes five comments. One of these gives early notice of potential concern about its own workload ("It may be when the workload becomes more apparent both SARC and the Parliament will need to revisit the issue").

The submissions were "carefully considered". One upshot, according to the Minister (second reading speech, Legislative Assembly, 2 September 2010) is that an "important change" has been made to the Bill:

> "The trigger for the RIS [regulatory impact statement] requirements of the act will be revised from 'appreciable economic or social burden' to 'significant economic or social burden'."

Hmm. We think the SARC submission ("use of the word 'significant' rather than 'appreciable' will not unduly affect the scrutiny process") is a little on the bland side – we cannot see any difference of meaning at all, let alone any importance to the change. Perhaps we don't yet appreciate the significance of the change.

The Bill, although not exciting, does build on earlier work in two ways.

First, the Bill (if enacted in its current form) will extend the application of the *Subordinate Legislation Act* to a new class of instrument – legislative instruments. It is this issue that attracted the interest of the cemetery trusts.

Secondly, it will tighten the grounds for review of subordinate legislation. The existing grounds, while formidably impressive, are perhaps overblown. The new, more restricted, grounds are to be whether the proposed regulation or subordinate instrument:

- appears to exceed the power authorise by the enabling act or statutory rule;
- without clear authority in the enabling act or statutory rule, has retrospective effect, imposes penalties, shifts the burden of proof to an accused, or provides for sub-delegation of delegated powers;
- is incompatible with the charter of human rights; or

- has been prepared in substantial or material contravention of the act or the premier's guidelines."

That last category, with due respect to the authors, leaves the door open – just in case there is something important not covered by the earlier grounds. The "Premier's Guidelines" can later be amended: if that happens, the meaning of the Act will be automatically changed.

New Zealand's three-yearly revision programme

We commented in our June 2009 *Legislation Newsletter* that five yearly review of regulations would be considered by the Australian Government to be "process heavy". At first sight, something rather more onerous appears now to be proposed in New Zealand. The *Legislation Bill* (introduced into the New Zealand Parliament in 2010) includes a provision (clause 30) under which the Attorney-General must prepare a draft three-yearly revision programme for each new Parliament. The Chief Parliamentary Counsel is to be required to prepare revision Bills in accordance with the current revision programme.

The objective, however, of this reform is rather more limited than first appears. Under proposed section 31(3):

> "A revision Bill must not change the effect of the law, except as authorised [by one of two provisions]"

(The two provisions allowing for changes to the law refer to "minor amendments to clarify Parliament's intent, or reconcile inconsistencies between provisions" and updating of monetary amounts).

The exercise appears to be somewhat trivial, limiting revisions to changes which have no policy implications. We are not sure how this sits with the assertion on the New Zealand Parliamentary Counsel Office website that:

> "In practice, policy and drafting are not mutually exclusive but form a continuum".

Statutory objectives & criteria – what are we trying to achieve here?

Legislation is enacted for a reason, or for multiple reasons. It seems entirely sensible that the legislation contain, within its own provisions, an explicit statement of that reason, or those reasons. This is common, though the form of the statement varies (it might, for example, be in a preamble or in an early provision setting out the law's objectives).

Many statutes create organisations (often called statutory authorities), or confer functions on existing bodies. It is common for the organisation to be given objectives, which, if achieved, will help towards achievement of the objectives of the law. It is also common for individual decisions to be given criteria which, again, are consistent with the objectives of the Act.

It might seem that specific decisions should be based on narrow criteria which are easily measured, giving feedback on the quality of the decision. However, is possible for decision-making criteria to be set at quite a high level, even for quite specific decisions of limited scope. For example, under the UK *Highway Act* 1980 a seemingly mundane decision (creating a public path) is to be made having regard to high level concept (the needs of agriculture and conservation considerations).

For organisational performance objectives, similar options arise. It would be possible, for example, to set the road administrator the objective of poverty reduction. While transport investments generally benefit the poor as well as the non-poor, the nexus is not invariable – different investments have different poverty impacts. A road administrator given the objective of "poverty reduction", for example, would need to consider those impacts devising an investment strategy.

At one level lower, criteria might refer to one or more of the three main channels of poverty impact of roads (Gachassin et al 2010): the human capital channel (to facilitate provision of basic needs of the poor), the market access channel (to increase productivity by lowering transport costs) and the labour activities channel (to create employment). In rural Africa the application of such criteria may lead to the conclusion some roads should not be tarred (as

found by Gachassin et al 2010): a conclusion that would be difficult to reach if the road authority's measure of success is kilometres of tarred road.

The decision about how high decision-making criteria should be set is affected by the administrative and legal system in which the decision is to be made – in some jurisdictions legislation is expressed in very general terms. It also depends on law-makers' assessment of the honesty and competence of the decision-maker.

Indonesia's Local Law Scrapheap

We reported in the October 2008 *Legislation Newsletter* that some 29% of local laws in Indonesia are cancelled by the Central Government. This appears to be a high figure: but it merits closer examination.

Which local laws are cancelled?

Many of the local laws which were cancelled had imposed taxes and charges (*retribusi):* the issues they raised were revenue generation and access to funding sources (for local government) and asset protection and taxation policy (for the Central Government) — but not to any great extent the upholding of legal or constitutional principles. The sectors represented — transport, agriculture, industry and trade and forestry — do appear to be ones in which profitable businesses (likely targets for taxes and charges) operate.

The Ministry of Home Affairs has made available lists of local laws which have been cancelled, by year. For the year 2002, for example, the list provides the names 19 local laws which were cancelled. The names give some indication of the content. An example is:

> "Kuningan District Regulation No 6 regarding levies for Road Use Permit Dispensation."

(Kuningan is a regency in eastern West Java). The offending local law appears to have been a revenue measure, imposing *retribusi* on some road users. If, as it seems, the law was targeted at owners or drivers of overloaded trucks it is hardly surprising that the central government acted: the "dispensation" would have encouraged the use of illegally overweight vehicles on roads built and funded by the central government.

Draft local laws (*rancangan peraturan daerah*) never to have made it out of the starting stalls in recent years have included proposals in the public works and health sectors. Possibly these include some non-revenue laws.

Sharia-based local laws

But what of other local laws, said to be based on sharia (Islamic) law, which have been made and left untouched by the Central Government, despite their apparent inconsistency with the Constitution? Undoubtedly the Central Government has power to act against these laws, albeit for reasons other than revenue protection.

We commented in 2009 that the Central Government was at least starting to show some concern about the unconstitutionality of these local laws. We noted that the President of Indonesia, Susilo Bambang Yudhoyono, had been reported (*The Age*, Melbourne, 11 July 2009) as saying during a televised election debate that many regional regulations went too far in governing religious issues and that:

> "Hopefully, there will be no more bylaws that run against the Constitution."

It is difficult to say whether the flow of new local laws of this nature was affected by President's comments. But what of those that have been made and those which continue to be made in defiance of the President's wishes? Recent comment on the issue gives little cause for optimism. In October 2010, a leading Indonesian lawyer, Adnan Buyung Nasution, had occasion to comment on the issue in the Inaugural Professorial Lecture at Melbourne University Law School, "Towards Constitutional Democracy in Indonesia". Honorary Professor Nasution, a member of Indonesia's Presidential Advisory Commission, observed:

> "Unfortunately, the branches of state authority (executive, legislative and judicative) appear to have lost their grip, and are ineffectual in curbing fundamentalist aspirations. The Department of Internal Affairs, which should strike out regional regulations that contravene the principles of forming good laws, is obviously unable to do this in an effective manner."

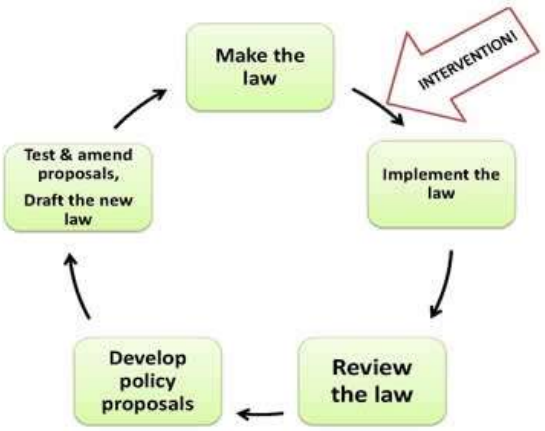
It appears that there is some performance discrepancy between those responsible for protecting Central Government revenue and creating an attractive investment climate and those who should be concerned to uphold constitutional principles.

Issues to be addressed

Whether the central government is unable or unwilling to act — and whether it is merely selective – can be debated, but there clearly are issues to be addressed:

- non-revenue laws — particularly laws based on sharia law — remain in force despite their apparent inconsistency with the Constitution;
- the number of laws cancelled (mainly revenue laws) is significant, creating uncertainty for Government and those affected by the laws. Reduction in the number of overlapping taxation laws is likely to improve the investment and business climate — but uncertainty is not;
- the criteria for intervention are ill-defined — the Central Government's actions (and inactions) could be better assessed if it there were transparent criteria for intervention.

The disallowance of local laws in Indonesia by the Central Government is an external intervention in the law-making process of local government, as indicated by the red arrow below—



Local Government in Indonesia is not unique in facing possible cancellation of laws soon after they are made - but the uncertainty this creates is not desirable, whether for Indonesia or any other jurisdiction.

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