

# Legislation Newsletter

## What is legislation?

Legislation is law made by a law-making body — but that proposition does not take matters far. What is a law making body?

Well, Parliament is a law-making body — it legislates. Regulations made under authority of an Act of Parliament (variously described as delegated legislation or subordinate legislation) are also legislation, so the Executive Government can be a law-making body. Local government (in Victoria) makes local laws. Court administrators would no doubt consider court rules to be legislation.

### *The Australian Legislative Instruments Act 2003*

In 2003 the Australian Parliament established a new concept of “instrument of a legislative character”. Under section 5 of the Australian *Legislative Instruments Act 2003* an instrument is of a legislative character if—

- it determines the law or alters the contents of the law, rather than applying the law in a particular case; and
- 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.

## “Rethinking legislation” — a continuation of earlier thinking

A familiar event in Australia is the release of a report recommending that there be more process to bring about less regulation: more to achieve less. The latest such report is *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*.

The report prepared by the Commonwealth *Taskforce on Reducing Regulatory Burdens on Business* certainly revisits familiar regulatory process issues, and generally its recommendations contain few surprises. Once again, law-making processes have been analysed from an economist's perspective and once again resulting recommendations centre on cost-benefit analysis.

The report sets out seven “principles of good regulatory process”. They include:

- the need to establish the nature of the problem and why additional actions are needed;
- assessment of feasible policy options;
- adoption only of the policy option with the greatest net benefit to the community;
- effective guidance to regulators and stakeholders about the policy intent of regulations and compliance requirements;
- mechanisms to ensure that regulations remain relevant over time;
- effective consultation at all stages of the regulatory cycle.

A commentator writing in The Age newspaper (Malcolm Maiden, 16 August 2006) noted that the key changes in the package are the most complicated and the most process heavy. The changes “will come at a cost to the public ledger, but the benefit for business in time and money should be greater”. Unsurprisingly, the report appears in the business section of the newspaper.

Government administrators would, no doubt, have considered a particularly “process heavy” recommendation to be recommendation 7.26 – that the *Legislative Instruments Act* be amended to provide for a five year, rather than ten year, sunset clause for subordinate legislation. This would force administrators to go through the process requirements for making new regulations every five years – for *all* regulations.

### ***The Government response***

The Australian Government’s “final response” to the report was issued in August 2006. In the response it committed to action in specific areas, including:

- tougher rules for making new regulations, including cost-benefit analysis;
- screening of all regulations at least every five years;
- work in specified areas, including harmonisation of conveyancing laws and mutual recognition of occupational licensing.

As for recommendation 7.26 (the five year sunset) The Australian Financial Review (Verona Burgess, 18 August 2006) asked in response to the report recommendations, “Can the government seriously be suggesting it has the capacity to review the bulk of its regulations every five years?”. The Government “final response” was, “no”:

“The Australian Government does not agree to the recommendation.

The substantive provisions of the *Legislative Instruments Act 2003* only commenced relatively recently, on 1 January 2005. It is considered preferable

to allow time to monitor the effectiveness of the current provisions, including the ten-year sunset provisions, before considering [amending] them.”

The Government’s “final response” is available online at

[http://www.treasury.gov.au/documents/1141/PDF/Reducing\\_Regulatory\\_Burdens\\_on\\_Business\\_Final\\_Government\\_Response.pdf](http://www.treasury.gov.au/documents/1141/PDF/Reducing_Regulatory_Burdens_on_Business_Final_Government_Response.pdf)

*Legislation Newsletter is produced by Legislation Services, a Melbourne (Australia)-based consultancy. Our principal is Campbell Duncan.*

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