

# ***Submission to the Northern Territory Legal and Constitutional Affairs Committee in relation to its Inquiry into the Review of Historical Regulations***

Stephen Argument\*

## **Introduction**

It may assist if I begin by outlining the background and experience that informs my submission.

I am co-author of the 2<sup>nd</sup> to 6<sup>th</sup> editions of Professor Dennis Pearce's text, *Delegated Legislation in Australia*,<sup>1</sup> and am currently working on a new edition.

I have been Legal Adviser, Subordinate Legislation, to the ACT Legislative Assembly's Legal Affairs Committee (Legislative Scrutiny Role), since 2005.

I was the Legal Adviser to the Senate Standing Committee on Regulations and Ordinances (as it then was) from 2013 to 2018.

I was a Legislative Drafter in the Commonwealth Office of Legislative Drafting and Publishing (as it then was) (**OLDP**) from 2007 to 2013. While working at OLDP, in addition to gaining drafting experience, I advised on the operation of the "backcapturing" requirements of the *Legislative Instruments Act 2003* (**LIA**) (as enacted).<sup>2</sup> In short, "backcapturing" involved a requirement that instruments existing prior to the LIA that, under the definition set out in the LIA, were "legislative in effect", be registered, if they were to continue to have effect. This involved me measuring hundreds of existing instruments against the definition.

Later, I headed a small, informal team at OLDP that examined bills drafted by the Commonwealth Office of Parliamentary Counsel (**OPC**), to assess whether instruments provided for by bills were properly designated as "legislative" or "non-legislative". Again, this involved application of the definition.

---

\* BA/LLB/MPubL (ANU), Legal Adviser (Subordinate Legislation), ACT Standing Committee on Legal Affairs (Legislative Scrutiny Role). Any views expressed in the paper are views of the author and not those of the Committee.

<sup>1</sup> In this submission, references to "Pearce and Argument", unless otherwise indicated, are references to Pearce, DC and Argument, S, *Delegated Legislation in Australia* (6<sup>th</sup> edition), 2023, LexisNexis, Australia).

<sup>2</sup> See Pearce and Argument, 4<sup>th</sup> edition, at para 2.11. See, also, Argument, S, "Deadline for backcapturing legislative instruments extended to 30 September 2006", *Australian Administrative Law Bulletin* No 243 (January 2006).

I was Secretary to the Senate Standing Committee for the Scrutiny of Bills between 1990 and 1993.

I have extensive experience, in Commonwealth agencies, in giving drafting instructions for legislation and managing the legislative process.

I have written extensively on issues relating to parliamentary scrutiny of legislation.

With that background and experience, I address the Committee's terms of reference, which I note is to ...

... inquire into and report on historical Regulations made before 1990, including making recommendations for the repeal of redundant Regulations and remaking of outdated legislation and recommendations for improving agency stewardship of their historical Regulations.

#### The "Rolls Royce" option

In my view, the optimal approach for the NT would be to follow the approach taken by the Commonwealth, with the enactment of the LIA (as originally enacted). This would, in my view, be the "Rolls Royce" option, in that it would involve a vast amount of time and resources.

The focus of the LIA was delegated legislation.

In this submission, the term "delegated legislation" is used, in preference to "subordinate legislation" or "secondary legislation", terms that are also routinely used to describe the legislative emanations of executive law making. While, clearly, delegated legislation is subordinate to primary legislation (ie Acts), the term "delegated" legislation is preferred for presentational reasons. This reflects a point recently made by the Hansard Society (UK), in its 2014 report, *The Devil is in the Detail: Parliament and Delegated Legislation*.<sup>3</sup> The first footnote to the report states (in part):

Throughout this report, for the purposes of simplicity, and in order to avoid confusion, we have chosen to use the term 'delegated' legislation (with 'secondary' legislation used when seeking to distinguish the balance with primary legislation). We do not use the term 'subordinate' legislation as such nomenclature might convey to the general reader that it is of lesser importance than primary legislation, a view this report seeks to dispel. However, we recognise that it is commonly used in a legal context ...<sup>4</sup>

In a 1992 sub-thesis, I identified issues arising from the proliferation in volume and nomenclature of instruments, beyond the "traditional" categories of regulations, ordinances, by-laws, etc. I concluded:

The bottom line must be that *all* instruments, whether they be legislative or quasi-legislative, must receive the *appropriate* scrutiny by

---

<sup>3</sup> Fox, R and Blackwell, J, *The Devil is in the Detail: Parliament and Delegated Legislation*, Hansard Society, London, 2014.

<sup>4</sup> *Ibid*, page 23.

Parliament. Anything less involves a derogation of the power of the Commonwealth Parliament as the supreme law making body in Australia.<sup>5</sup>

I formed the view that a significant part of the problem was that (in the Commonwealth) parliamentary scrutiny was based on what an instrument was *called*, rather than what it *did*.

This issue was addressed (in the Commonwealth) by the passage (after a long and tortured gestation) of the *Legislative Instruments Act 2003*. In a 2007 book chapter, I stated:

With the enactment of the [Legislative Instruments Act], the Commonwealth jurisdiction has gone to the cutting-edge of legislative scrutiny, by implementing a scrutiny trigger that operates by reference to what legislative instruments do, rather than by what they are called. In so doing, the Commonwealth Parliament has set an example that other jurisdictions would do well to follow.<sup>6</sup>

As the Committee would be aware, a key concept in the LIA, was the concept of a “legislative instrument”, in section 5, being instruments in writing, made in the exercise of a power delegated by the Parliament and “of a legislative character”. Subsection 5(2) of the LIA provided that an instrument was taken to be “of a legislative character” if:

- it determined the law or altered the content of the law, rather than applying the law in a particular case; and
- it had 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.

As I stated in my introduction, at OLDP, I had extensive experience in working with this definition and, while difficult judgments sometimes had to be made (with which not everyone agreed), I found it to be eminently sensible and workable.

The definition was subject to extensive review, provided for by the LIA, after 3 years of operation. The review resulted in a report, titled *2008 Review of the Legislative Instruments Act 2003*.<sup>7</sup> The report stated (at para 1.3.1):

The Committee is of the view that the present definition of legislative instrument is workable, but that improvements should be made. There

---

<sup>5</sup> Argument, S, “Parliamentary Scrutiny of Quasi-legislation”, *Papers on Parliament No. 15*, May 1992 (available at <https://www.aph.gov.au/binaries/senate/pubs/pops/pop15/pop15.pdf>), at page 26.

<sup>6</sup> Argument, S, chapter on “Delegated Legislation”, in Groves, M and Lee, HP, (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines*, Cambridge University Press, Port Melbourne, 2007, at page 142.

<sup>7</sup> Available at <https://www.ag.gov.au/legal-system/publications/2008-review-legislative-instruments-act-2003>.

are three problems with the present definition: its circularity; uncertainty about the scope of the phrase “applying the law in a particular case” in paragraph 5(2)(a); and the inappropriate exclusion of instruments that are reviewable under the ADJR Act. The first two of those problems are taken up in this section; the third is taken up in the next section.

I leave it to the Committee to assess the analysis in the report. My own view is that the “circularity” argument is over-stated.

The review recommended that subsections 5(1) and (2) of the LIA be amended.

The perceived deficiencies of the section 5 definition were addressed with the introduction and passage of the *Acts and Instruments (Framework Reform) Act 2015* (Cth). This Act re-named the LIA as the *Legislation Act 2003* (**Legislation Act**). Section 5 of the LIA was replaced with section 8 of the Legislation Act, which provides (in subsection 8(3)) that any instrument made under a power delegated by the Parliament and registered on the Federal Register of Legislation as a legislative instrument is a legislative instrument. This applies whether or not the instrument is legislative in character. Indeed, the concept of “legislative in character” no longer appears in the Legislation Act (though the concept of “of legislative character” appears in section 9). A note to subsection 8(3) states that an instrument made under a power delegated by the parliament may be a legislative instrument because it is registered as one, regardless of whether it is a legislative instrument or not under another provision of section 8.

The explanatory memorandum for the amending legislation states that subsection 8(4) of the Legislation Act “preserves the rule in ... s 5(4) [of the Legislative Instruments Act]”, providing that an instrument is a legislative instrument if the instrument is made in the exercise of a power delegated by the parliament and any provision of that instrument:

- determines or alters the content of the law, rather than determining cases or particular circumstances in relation to which the law, as set out in an Act or another legislative instrument or provision, is to apply; and
- 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.

I was disappointed by the removal of the “legislative in effect” concept, which fundamentally addressed the issues that I had identified (and whined about) in the 1990s.<sup>8</sup> The changes involving the definition of “legislative in effect” have

---

<sup>8</sup> See, eg, Argument, S, “Legislative Instruments Bill 2003”, *Australian Administrative Law Bulletin* No 213 (July 2003), “The Legislative Instruments Bill: Lazarus with a triple by-pass?” 2003 (39) *AIAL Forum* 44, “The Legislative Instruments Bill lives!”, 2004 (40) *AIAL Forum* 17, “The Legislative Instruments Act 2003”, (2005) 16 *Public Law Review* 173, “The Legislative Instruments Act 2004 - Is it the cherry on the top of the legislative scrutiny cake?”, 2006 (48) *AIAL Forum* 35.

not gone without question as to their effect. In a submission to a 2020 inquiry by the Senate Standing Committee for the Scrutiny of Delegated Legislation into “Exemption of delegated legislation from parliamentary oversight”, Dr Jacinta Dharmananda suggested that “legislative developments of the past 2 decades” had ‘arguably diluted’ the rationale behind the original definition. Dr Dharmananda suggested that:

... [a] legislative instrument under ... the new s 8, was no longer necessarily focussed on or linked to being an instrument “legislative in character.”<sup>9</sup>

This point was not addressed in either the Interim Report or the Final Report of the Senate Committee.

The Commonwealth situation was also further confused by the (ill-considered) introduction of “legislative rules”.<sup>10</sup> This is a matter for another time.

A key element of the LIA was the concept of “backcapturing”. In short, “backcapturing” involved a requirement that instruments existing prior to the LIA that, under the definition set out in the LIA, were “legislative in effect”, be registered, if they were to continue to have effect.<sup>11</sup> This involved an assessment of thousands of existing instruments against the definition.<sup>12</sup>

Clearly, to implement such a regime in the NT would involve a massive commitment of time and resources.

Another element of the Commonwealth regime that the NT might consider is the concept of “sunsetting”, provided for by Part 4 of the Legislation Act. Under those provisions, there is an assumption that instruments “sunset” (ie are automatically repealed), after 10 years.<sup>13</sup>

### Other options

I leave it to the Committee to assess whether the approaches in other jurisdictions have anything to recommend them. In my experience, the ACT is well-served by the *Legislation Act 2001* (ACT) (**ACT Legislation Act**). However, the ACT Legislation Act does not involve the concept of “legislative in character”. Nor is there any backcapturing or sunseting. On the positive side, section 46 of the ACT Legislation Act deals with the incorporation of

---

<sup>9</sup> Submission no 25, available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Exemptfromoversight/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Submissions), at page 2.

<sup>10</sup> See Argument, S, “The use of ‘legislative rules’ in preference to regulations: A ‘novel’ approach?”, (2015) 26 *Public Law Review* 4.

<sup>11</sup> See sections 28-30 of the LIA, as originally enacted <https://www.legislation.gov.au/C2004A01224/asmade/text>.

<sup>12</sup> See Pearce and Argument, 4th edition, at para 2.11. See, also, Argument, S, “Deadline for backcapturing legislative instruments extended to 30 September 2006”, *Australian Administrative Law Bulletin* No 243 (January 2006).

<sup>13</sup> For commentary on some of the issues with sunseting, see Argument, S, “Is ‘sunseting’ limping off into the sunset?: Recent developments in the regime for sunseting of Commonwealth delegated legislation”, (2019) 95 *AIAL Forum* 37.

extrinsic material by reference, requiring that any extrinsic material relied upon be published on the ACT Legislation Register, as a “notifiable instrument”. Note, however, that the requirement is routinely disapplied.<sup>14</sup>

### Parliamentary scrutiny of legislation

If the Committee is considering possible improvements to the scrutiny of delegated legislation in the Northern Territory, there are some obvious potential models. Again, the “Rolls Royce” option would be to adopt the Commonwealth model, with separate parliamentary committees scrutinising bills and delegated legislation, with a further committee scrutinising all legislation for human rights issues.<sup>15</sup> Each Committee has its own legal advisers and share a well-resourced secretariat.

Another model is the ACT, where the Standing Committee on Legal Affairs (Legislative Scrutiny Role) scrutinises bills and delegated legislation, advised by a separate legal adviser for each.<sup>16</sup>

Similarly, in Victoria, the Scrutiny of Acts and Regulations Committee scrutinises bills and delegated legislation, advised by separate legal advisers (some part of the secretariat) for each.<sup>17</sup>

In the Queensland Parliament, scrutiny of legislation is undertaken by subject matter committees, backed by a “Technical Scrutiny Secretariat”, rather than by a dedicated scrutiny committee.<sup>18</sup>

For the situation in South Australia, Tasmania and Western Australia, I refer the Committee to Pearce and Argument.<sup>19</sup>

As the Committee would be aware, a parliamentary committee in NSW is currently undertaking a similar exercise to the NT.<sup>20</sup> I have made a submission to that committee, which has informed my work on this submission.<sup>21</sup> I refer the Committee to the discussion of the current situation in NSW in Pearce and Argument.<sup>22</sup>

---

<sup>14</sup> See, eg, *Scrutiny Report 13* (25 November 2025) (available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0012/2985699/Scrutiny-Report-13-Final-Updated.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0012/2985699/Scrutiny-Report-13-Final-Updated.pdf)) at page 5.

<sup>15</sup> See <https://navigatesenatecommittees.senate.gov.au/committee-reports/legislative-scrutiny> and [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights).

<sup>16</sup> See [https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees-11th-assembly/LA\\_Scrutiny#tab2622874-2id](https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees-11th-assembly/LA_Scrutiny#tab2622874-2id).

<sup>17</sup> <https://www.parliament.vic.gov.au/sarc>.

<sup>18</sup> See Pearce and Argument, paras 3.60-62.

<sup>19</sup> Paras 3.65-73, 3.76-82 and 3.92-98.

<sup>20</sup> <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=3103>.

<sup>21</sup>

<https://www.parliament.nsw.gov.au/lcdocs/submissions/94138/0010%20Mr%20Stephen%20OArgument.pdf>.

<sup>22</sup> Paras 3.37-49.

I am happy for this submission to be published by the Committee and am happy to appear as a witness, if that would assist.

**Stephen Argument**

1 April 2026