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Legislative instruments – issues in design

This briefing sets out some of the more common issues that arise in trying to ensure that legislative instruments achieve their purpose, including when:

- **designing provisions that empower the making of legislative instruments**
- **drafting and making legislative instruments.**

Leo Hardiman
Deputy General Counsel
T *02 6253 7074*
leo.hardiman@ags.gov.au

Jenny Burnett
Deputy General Counsel
T *02 6253 7199*
jenny.burnett@ags.gov.au

Marlowe Thompson
Counsel
T *02 6253 7580*
marlowe.thompson@ags.gov.au

Introduction

Increasingly Acts confer powers to make legislative instruments to implement the schemes established by those Acts.

The term 'legislative instrument' is an umbrella term used to describe instruments in writing that are legislative rather than administrative in character and are made by exercising a power delegated by Parliament.[1]

While it is necessary to consider the nature of the instrument to determine whether it is a legislative instrument, regulations, by-laws, rules and ordinances generally make rules that are legislative in character and are legislative instruments. Many other types of instruments – such as directions, determinations, plans and notices – may also be legislative instruments. Collectively, legislative instruments are commonly referred to as delegated or subordinate legislation.

1 *Legislative Instruments Act 2003* (LIA), s 5(1). An instrument can be legislative even if it contains provisions of both legislative and administrative characters: s 5(4).

In this issue

This briefing should be read with Legal Briefing No 103, which discusses matters relating to the application of the *Legislative Instruments Act 2003* (LIA) and with the *Legislative instruments handbook* available on the Office of Parliamentary Counsel's website (www.opc.gov.au).

Statutory power to make a legislative instrument

The power to make a legislative instrument may be found in an Act of Parliament (an 'enabling Act') or, less commonly, in a legislative instrument made under an Act (for example, in a regulation). (For the purposes of simplicity, we will refer only to enabling Acts in this briefing.)

The nature and scope of the instrument-making power will depend on the terms of the provision that enables the legislative instrument to be made. To ensure that the legislative instrument is valid, the instrument must be made 'within power'. This means that the instrument:

- must generally be made when the enabling provision of the Act is in force
- must be made by the person to whom Parliament has given the power to make the instrument
- must deal only with the matters that Parliament has authorised the instrument to deal with
- must comply with any conditions that are imposed on the exercise of the power.

Invalidity of a legislative instrument can create significant legal and practical difficulties in relation to past actions of the Commonwealth and others. When drafting legislative instruments, careful regard must be had to the scope of the instrument-making power.

If a legislative instrument or part of it is invalid, the legislative instrument or relevant provisions never existed in law and actions taken under the legislative instrument are also invalid.

Invalidity might not be recognised until a court determines a challenge brought by a person affected to the validity of the instrument or to an act done under the instrument. This can create significant legal and practical difficulties in relation to past actions of the Commonwealth and others. When drafting legislative instruments, careful regard must be had to the scope of the instrument-making power.

When can a legislative instrument be made?

Where an Act confers power to make a legislative instrument, the power may be exercised when the Act commences operation. It may also usually be exercised in the period between the Act being enacted and the time that the Act starts to operate[2] so that any necessary instruments can be prepared ready to commence at the same time the Act commences.

Who has the power to make the legislative instrument?

The enabling Act will specify who has the power to make the legislative instrument. Traditionally, regulations are made by the Governor-General. Otherwise, enabling legislation may confer the power to make a legislative instrument on any person, including a body corporate.

Generally, the person who has been given the power to make the legislative instrument must exercise that power personally. However, sometimes the enabling Act may allow the person to give the power to make the legislative instrument, or to make a legislative

2 *Acts Interpretation Act 1901* (AIA), s 4(2).

instrument dealing with a particular issue, to another person (this is usually known as sub-delegation of legislative power and is discussed in more detail below).

Even where a person has been given the power to make the instrument, that person does not necessarily have to do all of the work required to prepare the proposed instrument; it just means that the person must ultimately make the instrument. Sometimes the enabling Act may expressly require or allow a particular person, agency or department to assist or give advice on making the instrument.

What is the scope of the power to make a legislative instrument?

The power to make a legislative instrument may be expressed broadly or may only relate to a minor aspect of a proposed legislative scheme. Determining the scope of the power to make a legislative instrument is ultimately a matter of statutory interpretation. Therefore, it will depend on the terms and purpose of the enabling provision and the context of the Act conferring the power.

General instrument-making power

Commonwealth Acts have traditionally contained a provision that authorises the Governor-General to make regulations setting out matters that are 'required or permitted' to be prescribed by the enabling Act or that are 'necessary or convenient' to be prescribed for carrying out or giving effect to the Act. More recently, Commonwealth Acts have tended to substitute an equivalent power for ministers to make legislative instruments known as 'rules'.

'Required or permitted'

The 'required or permitted' aspect of the power operates in conjunction with provisions in the enabling Act that provide for regulations or rules to be made (for example, a provision that will operate only if particular matters are prescribed). The scope of the 'required or permitted' aspect of the instrument-making power will depend on interpretation of the provision requiring or permitting a legislative instrument to be made.

Example: Section 8 of the *Census and Statistics Act 1905* provides for the Census to be taken in 1981 and every fifth year thereafter, and at other times as prescribed. Section 27 of that Act is the usual regulation-making power that authorises the Governor-General to make regulations, including those that prescribe all matters that are required or permitted to be prescribed under the Act, and therefore authorises regulations prescribing other times for the purposes of s 8.

'Necessary or convenient'

The 'necessary or convenient' aspect of the instrument-making power allows matters to be included in the legislative instrument that might not be 'required or permitted' by the rest of the enabling Act. However, it cannot be used to extend the scope or general operation of the Act. It is essentially a power to make a legislative instrument that is incidental or ancillary to the enabling Act. The power can be used to fill out the framework of the enabling Act and to support its effective operation, but it cannot be used to 'support attempts to widen [its] purposes … to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends'.[3] As the High Court has recognised on several occasions: '… in the absence of express statement to the contrary, you may complement, but you may not supplement, a granted power'.[4]

Generally, the less detail there is in the enabling Act (for example, where an Act merely sets out the skeleton of the proposed scheme), the more likely it is that a court will conclude that Parliament has left it to the rule-maker to fill in the detail and the more

3 *Shanahan v Scott* (1957) 96 CLR 245 at 250 per Dixon CJ, Williams, Webb and Fullagar JJ.

4 *Australian Boot Trade Employees' Federation v Whybrow & Co* (1910) 11 CLR 311 at 338 per Isaacs J, quoted in *Stemp v Australian Glass Manufacturers Co Ltd* (1917) 23 CLR 226 at 234 per Barton ACJ; *Carbines v Powell* (1925) 36 CLR 88 at 92 per Isaacs J.

widely the 'necessary or convenient' power is likely to be interpreted. Conversely, where the enabling Act deals with a particular matter in a detailed way, a court is more likely to conclude that there is a limited power to make a legislative instrument dealing with that matter.[5]

The 'necessary or convenient' instrument-making power can mislead by its apparent breadth, so care must be taken when relying on it.

Modern Commonwealth Acts anticipate the need for subordinate legislation and so generally contain specific legislative instrument-making powers. To a large extent, they remove the need to rely on, and the possibility of relying on, the 'necessary or convenient' instrument-making power.

Example: *The Migration Act 1958* contains extensive regulation-making powers, including the power to determine the criteria for making a valid visa application and to grant a visa application. The large number and, in many cases, specific nature of the regulation-making powers means that there is unlikely to be significant room for use of the 'necessary or convenient' regulation-making power in s 504 of the Migration Act.

Sometimes the general instrument-making power is expressed only to authorise the making of an instument that are 'not inconsistent with this Act'. Whether or not these additional words are included, generally a legislative instrument cannot be inconsistent with its enabling Act (or any other primary legislation).

In drafting a legislative instrument, it is important to take account of the whole scheme of the enabling Act to ensure that the legislative instrument is not inconsistent with that scheme.

Often the question of inconsistency with the enabling Act overlaps with the question whether the Act requires or permits the legislative instrument to be made or the legislative instrument is necessary or convenient for giving effect to the Act. Ultimately, the question is always whether the instrument-making power can be interpreted to extend to making the legislative instrument, having regard to the text and purpose of the power and the other provisions of the Act.

Example: In *Plaintiff M47/2012 v Director-General of Security*,[6] the High Court struck down a regulation made under the *Migration Act 1958* that prescribed the absence of an adverse security assessment by the Australian Security and Intelligence Organisation (ASIO) as a criterion for granting a protection visa on the basis of inconsistency with the Migration Act. The considerations that led the majority to consider the regulation to be beyond power included the following:

- The Migration Act itself disclosed an intention of dealing with the refusal of the protection visa on grounds of national security. The regulations could not deal with the same subject matter – and, in particular, they could not extend the scope to refuse an application on national security grounds, as this would be inconsistent with the scheme of the Act and would not be supported by the regulation-making power.[7]
- The power to refuse or cancel the relevant visa is reposed in the Minister or the Minister's delegate. A decision to refuse a protection visa on the basis of an adverse security assessment made by ASIO effectively reposed the power of determining the application for a protection visa in the hands of an officer of ASIO.[8]

5 *Morton v The Union Steamship Company of New Zealand Ltd* (1951) 83 CLR 402 at 410 per Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ.

6 (2012) 292 ALR 243.

7 (2012) 292 ALR 243 at [54] and [71] per French CJ and at [221] per Hayne J.

8 (2012) 292 ALR 243 at [71] per French CJ, at [396] per Crennan J and at [458] per Kiefel J.

- The criterion circumvents the special review provisions made by the Migration Act. If the prescription of that criterion were valid, the Migration Act provision that makes available merits review of decisions would be redundant.[9]

Example: The 'necessary or convenient' instrument-making power cannot be used to resolve ambiguity in the enabling Act. For example, an Act might provide for recognition of a medical certificate and not make it clear whether this extends to certificates issued by providers of ancillary medical services. The Act is nevertheless likely to have a correct legal meaning – even if it is difficult to discern. A legislative instrument that attempted to clarify the issue would be inconsistent with the Act, or be consistent with the Act but have no legal effect.

Interpretation of instrument-making power

The usual rules of statutory interpretation apply to interpretation of instrument-making powers. However, the courts will refuse to interpret a power as authorising some types of provisions unless the power clearly authorises those provisions. In drafting instrument-making powers, it is important to ensure that a policy intention to include any of these types of provisions is clearly expressed.

It is important to include in the enabling Act express power for the instrument to do things like impose a penalty or a fee or interfere with common law rights.

The main examples of this are:

- a provision with retrospective operation (discussed in detail below)
- a provision imposing a penalty
- a provision imposing civil liability
- a provision imposing a fee
- a provision conferring jurisdiction on a court
- a provision prohibiting conduct or an activity (in contrast with a provision authorising regulation of the conduct or activity)
- a provision interfering with a fundamental common law right – this has become known as the 'principle of legality' and applies equally to primary and delegated legislation

  Example: In *Evans v New South Wales*,[10] the Full Federal Court held that a power to make a regulation to regulate the conduct of the public on World Youth Day did not support a regulation empowering an authorised person to direct a person to stop engaging in conduct that 'caused annoyance' to participants in a World Youth Day event. The regulation-making power was not to be read to override the rights to personal liberty and free speech without unambiguous words.

- a 'Henry VIII clause' – this is the common name given to a provision in an Act that confers on the rule-maker a power to override or modify the effect of the enabling Act or some other primary legislation, usually by making a regulation.

  Example: Section 926B(1)(c) of the *Corporations Act 2001* and s 110(c) of the *National Consumer Credit Protection Act 2009* are examples of 'Henry VIII clauses'. Both of these sections permit regulations to be made that have the effect that a relevant Part of these Acts applies in some instances 'as if specified provisions were omitted, modified or varied as specified in the regulations'.

9 (2012) 292 ALR 243 at [181] and [206] per Hayne J.

10 (2008) 168 FCR 576.

Conditions on the exercise of the power to make the legislative instrument

An enabling Act may specify that certain conditions must be met before a legislative instrument may be made – for example, that particular facts or circumstances must exist or that certain processes must be followed. This could include a requirement to consult with affected parties or a requirement to take certain matters into account before making the legislative instrument. There may also be requirements for processes to be completed within defined time frames.

Non-compliance with a condition on the exercise of the instrument-making power will be unlawful and could result in invalidity of the instrument.

Failure to comply with these conditions may mean that the legislative instrument is made outside of the instrument-making power and is unlawfully made. The instrument may be invalid on that basis or, even if not invalid (in the sense that it may have some legal effect), the courts could restrain certain action under the instrument on the basis of the unlawfulness.

The leading High Court case on this issue is *Project Blue Sky Inc v Australian Broadcasting Authority (Project Blue Sky)*.[11] In that case, McHugh, Gummow, Kirby and Hayne JJ said at 388–389 (citations omitted):

> An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.

In determining whether breach of the condition produced invalidity, the High Court had particular regard to the following factors:

- the nature of the obligation imposed and whether or not the obligation had a rule-like quality
- whether the statutory requirement regulated the exercise of functions already conferred on the Australian Broadcasting Authority (ABA) or imposed essential preliminaries to the exercise of its functions
- the public inconvenience of invalidity.

Example: In *Project Blue Sky*, the ABA made an Australian Content Standard in breach of a statutory requirement to 'perform its functions in a manner consistent with Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country'. The High Court held that the Standard was not invalid but held that it was unlawful and, in an appropriate case, an injunction could be obtained to restrain the ABA from taking any further action based on the unlawful action.

In contrast, in the recent case of *Kutlu v Director of Professional Services Review (Kutlu)*,[12] the Full Federal Court held that breach of a similar requirement in the *Health Insurance Act 1973* resulted in invalidity.

11 (1998) 194 CLR 355.

12 (2011) 197 FCR 177.

> The critical difference between the 2 statutory schemes was that the scheme in *Kutlu* provided expressly that the conditions 'impose essential preliminaries or preconditions to the exercise of the Minister's power'.[13]

Of course, the question of invalidity arises only if the condition is breached and the condition itself may give rise to difficult questions of statutory interpretation.

Example: Under the *Environment Protection and Biodiversity Conservation Act 1999*, the Minister maintained a list of specimens suitable for live import into Australia. The Minister had the power to amend the list by legislative instrument. Before amending the list to include an item, the Minister was required to consider a relevant report. There was no such requirement when the Minister amended the list to delete an item. The Minister made a legislative instrument that deleted the domestic cat (*Felis catus*) from the list and then included on the list *Felis catus* excluding specimens that had been crossbred with the savannah cat.

In *Parker v Minister for Sustainability, Environment, Water, Population and Communities*,[14] the plaintiffs, who wanted to import savannah cats, challenged the instrument on the basis that the process for including an item on the list had not been followed. The Full Federal Court held that the Minister had not amended the list by inclusion. Although the legislative instrument itself was expressed as deleting an item and then including another item, the Court found that the instrument in substance amounted to a deletion from the list and the deletion provision applied so that no report was required. This accorded with the purpose of provisions: the report was to ensure that the potential environmental effects were considered when a species was permitted to be imported to Australia and there was no need for such a report when a species was in substance being removed from the list.

Where the condition involves the rule-maker being satisfied on policy or subjective matters, it is less likely that the condition will be breached.

Example: The Australian Communications and Media Authority (ACMA) had power under the *Broadcasting Services Act 1992* to make a program standard if it was satisfied that there was convincing evidence that an industry code of practice was not operating to provide appropriate community safeguards and if it was satisfied that it should determine a standard in relation to that matter.

In *Harbour Radio Pty Ltd v Australian Communications and Media Authority*,[15] the applicants challenged a standard made by ACMA concerning the disclosure of commercial agreements on the basis that the conditions for making the standard had not been satisfied. In particular, the applicants argued that there was no convincing evidence that the industry code did not protect community standards.

The Federal Court found that all that was required was for ACMA to be satisfied that there was convincing evidence that the industry code did not protect community standards. It did not separately require there to be convincing evidence. The text of the provision, the subjective nature of the assessment of whether the code was providing appropriate community safeguards, the role of ACMA as a specialist regulatory body and other safeguards (such as the need for public consultation before making a standard and provision for parliamentary amendment of standards) suggested that ACMA could decide whether there was convincing evidence. ACMA's state of mind was the condition precedent to be met. Once ACMA had reached that state of satisfaction, its correctness was not a matter for the courts.

13 (2011) 197 FCR 177 at [27] per Rares and Katzmann JJ.

14 (2012) 205 FCR 415.

15 (2012) 202 FCR 525.

Constitutional power

Generally, an instrument-making power in an Act will be supported by the head or heads of Commonwealth legislative power that support the rest of the Act, and a legislative instrument made within the confines of the instrument-making power will also be supported by that power.

However, care still needs to be taken that the instrument-making power is not exercised in a way that infringes a constitutional limitation such as the implied freedom of political communication or the limitation on giving preference, in laws of trade, commerce or revenue, to a State or part of a State (s 99 of the Constitution).

It is important to check that the constitutional powers supporting the enabling Act also support the legislative instrument and to have regard to constitutional limitations.

Reading down clauses

Where a provision of a legislative instrument is invalid, it will be necessary to remake the legislative instrument so that it is within power (if this is possible) unless the instrument can be read down (ie interpreted more narrowly) to operate within power.

Section 13(2) of the LIA is a reading down clause. It provides that a legislative instrument is to be taken to be valid to the extent that it is not in excess of the rule-maker's power. In addition, s 13(1)(a) of the LIA applies s 15A of the *Acts Interpretation Act 1901* (AIA) – a constitutional reading down clause – to a legislative instrument.

These clauses will operate where it is possible to sever the invalid part of the legislative instrument from the valid part (for example, where a discrete part of the instrument is invalid) or to read down the words of the legislative instrument within power.

If there is any possibility of invalidity of the legislative instrument (especially constitutional invalidity), it will be useful to consider whether a reading down provision in the instrument could save the valid part of the instrument.

However, in some cases, it may be desirable to include a more specific reading down clause in the instrument itself where it is foreseeable that a provision in the instrument may be found to be invalid. A reading down clause will essentially set out a rule of construction to be followed in circumstances where an aspect of the legislative instrument is found to be beyond power. This is most likely to arise where there is some possibility of constitutional invalidity of a provision of the instrument.

Limitations on power to make legislative instruments

A number of limitations on the power to make legislative instruments can be expressed as general limitations applying to all instrument-making powers. However, in Australia the courts have tended not to treat the common law limitations (such as the limitations on sub-delegation and on uncertainty) as freestanding limitations on the exercise of the instrument-making power. Instead, the courts treat their task as one of interpreting the instrument-making power to determine whether it authorises the legislative instrument despite, for instance, the alleged sub-delegation or uncertainty.

There are also some statutory limitations (such as the limitation on incorporating material by reference) that apply generally to all legislative instruments, although those limitations are themselves subject to a contrary intention in the enabling Act.

Sub-delegation of delegated legislative power

It can be difficult to identify permissible sub-delegation of a legislative power and care needs to be taken wherever a legislative instrument proposes to give powers or functions to a person other than the instrument-maker.

A general principle of law is that, if Parliament has delegated a power to a person, that person cannot delegate it to another person. However, this is subject to a contrary statutory intention (the clearest example of which is express authority to delegate a delegated power) and this is why the question is ultimately one of statutory interpretation.

Determining whether a power has been impermissibly sub-delegated requires a consideration of 'whether the power has been exercised by the person upon whom it has been conferred and whether it has been exercised in the manner and within the limits laid down by the statute conferring the power'.[16]

Generally, if a legislative instrument vests the whole of the legislative power in another, the maker of the legislative instrument will have impermissibly delegated the legislative power to another.

Example: In *Turner v Owen*,[17] a power was conferred on the Governor-General to list certain prohibited goods by regulation. The regulation defined prohibited goods as 'goods which, in the opinion of the Minister, are of a dangerous character and a menace to the community'. The regulation was found to be invalid, as it resulted in the Minister, rather than the Governor-General by way of regulation, determining what is a prohibited good.

However, the sub-delegation is more likely to be authorised by the instrument-making power if it confers an administrative (as opposed to a legislative) power on another person or body.[18] The courts have upheld instruments that confer on an official the power to make decisions and exercise discretionary powers within the limits prescribed by the instruments on the basis that the legislative power itself had not been delegated.[19]

At its heart, the distinction is between the 'creation or formulation of new rules of law having general application and the application of those general rules to particular cases'.[20] Pearce and Argument give the following guidance:

> The wider the field of operation left to the subdelegate, the more likely it is that the court will take the view there has been a subdelegation of legislative power. Where, on the other hand, the matters left to be carried out by the subdelegate are questions of detail which merely fill the gaps left in the legislation itself, or which are to be carried out in accordance with guidelines laid down in the legislation, the more likely it will be that the courts will determine the subdelegate is exercising administrative powers only, and the subdelegation will be valid.[21]

Example: *Hookings v Director of Civil Aviation*[22] involved a power to make regulations for the regulation of civil aviation, including to secure the safety, efficiency and regularity of air traffic. Turner J of the New Zealand Supreme Court held valid a regulation that prohibited the use of an aircraft to tow any other aircraft without the permission of the Director of Civil Aviation. Turner J held that the power given to the Director did not delegate the whole of the legislative power and enabled the true purposes of the regulations to be more efficiently carried into effect. It involved mere administration of regulations and not an exercise of legislative power.

16 *Dainford Ltd v Smith* (1985) 155 CLR 342 at 349 per Gibbs CJ.

17 (1990) 26 FCR 366.

18 Pearce, D and Argument, S 2012, *Delegated legislation in Australia*, 4th edn, LexisNexis Butterworths, Sydney, [23.13].

19 *Dainford Ltd v Smith* (1985) 155 CLR 342 at 357 per Wilson J, citing *Hawke's Bay Raw Milk Producers Co-operative Co Ltd v New Zealand Milk Board* [1961] NZLR 218 at 233.

20 *Minister for Industry and Commerce v Tooheys Ltd* (1982) 60 FLR 325 at 331 per Bowen CJ, Northrop and Lockhart JJ; *Commonwealth v Grunseit* (1943) 67 CLR 58; *Hamblin v Duffy (No 2)* (1981) 50 FLR 308.

21 Pearce, D and Argument, S 2012, *Delegated legislation in Australia*, 4th edn, LexisNexis Butterworths, Sydney, [23.17].

22 [1957] NZLR 929.

Uncertainty

In Australia, uncertainty is not a freestanding criterion of invalidity of an instrument. Courts will always try to give meaning to a legislative instrument by applying all available methods and principles of statutory construction. However if, on a true construction of the instrument, there is inadequate information to enable people who are required to comply with the instrument to determine their obligations, the legislative instrument may be found to be invalid because it is not authorised by the enabling Act.

It is important to ensure that an instrument is sufficiently certain that the people to whom it applies can ascertain what they need to do.

Example: In *King Gee Clothing Co Pty Ltd v Commonwealth*,[23] the High Court held that a power to fix a maximum price at which certain goods could be sold was invalidly exercised where the regulation attempted to fix a price using a calculation that involved estimating costs and apportioning expenditure based on judgment and experience. Dixon J held that, although there is no separate test of certainty that delegated legislation must satisfy, delegated legislation may be held invalid if it is meant to declare or prescribe a matter but does not do so by means of an objective standard. Dixon J explained (at 197):

> it is another matter when the basis of the price, however clearly described, involves some matter which is not an ascertainable fact or figure but a matter of estimate, assessment, discretionary allocation, or apportionment, resulting in the attribution of an amount or figure as a matter of judgment. When that is done no certain objective standard is prescribed; it is not a calculation and the result is not a price fixed or a fixed price. That, I think, means that the power has not been pursued and is not well exercised.[24]

Example: In *Comcare v Lilley*,[25] the Full Federal Court held that the legislative instrument determining Mr Lilley's entitlement to Commonwealth workers' compensation for permanent impairment arising from an injury (the approved Guide) was valid. A single judge of the Federal Court had held that relevant provisions of the Guide were invalid because of uncertainty.

The Full Federal Court accepted that the drafting and expression of the Guide was flawed. However, the Full Federal Court held that the Guide was designed for practical application by Comcare and the Administrative Appeals Tribunal. The 'practical' nature of the Guide meant that it needed to be interpreted 'pragmatically' having regard to an injury's effect on someone's functional capacity, including activities of daily living. The purpose of the power to make the Guide was to provide practical guidance and the power was not confined in a way that required a high level of precision.

Improper purpose

The exercise of a power to make a legislative instrument in a way that is corrupt, or for a purpose personal to the delegate or not bona fide, is likely to result in the instrument being invalid on the basis that it was exercised for an improper purpose.[26]

In other cases where a power to make a legislative instrument is conferred for a particular purpose but is then exercised for another purpose, it is also possible for the instrument to be beyond the power conferred by Parliament and invalid.[27]

23 (1945) 71 CLR 184.

24 (1945) 71 CLR 184 at 197. See also Rich J at 190 ('Their operation depends on uncertain matters of estimate and not of calculation') and Starke J at 193 ('the subject cannot certainly ascertain the price that is fixed').

25 (2013) 61 AAR 360.

26 *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 12 per Stephen J.

27 *Arthur Yates & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37 at 67–68 per Latham CJ and 82 per Dixon J; *Re Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 192 per Gibbs J, 264–265 per Aickin J.

In circumstances where the power is not expressly purposive – for example, a general regulation-making power – this ground of review is probably also available because the scope of the power can be discerned from the subject matter, scope and objects of the enabling legislation.[28] However, the more generally a power is expressed, the more difficult it is likely to be for a court to identify a purpose as improper.

Generally, it will not be improper for the maker of the instrument to take into account political considerations.[29] Moreover, the approach adopted in an instrument (that is, whether it is the most appropriate or best available) is not usually relevant to determining whether the power has been exercised for a proper purpose.[30]

Unreasonableness and lack of proportionality

A legislative instrument may be invalid because it may operate in a way that is not reasonable in the sense that this operation could not have been within the contemplation of Parliament when the power was enacted and it therefore exceeds the instrument-making power.[31] The instrument would be invalid if it was manifestly unjust, illogical, arbitrary or capricious.

Another ground of invalidity of a legislative instrument is that it is not proportionate to the achievement of its intended purpose and therefore exceeds the instrument-making power.[32] The relationship between the reasonableness and proportionality grounds is not entirely clear.[33]

In any case, unreasonableness and lack of proportionality have been argued frequently as grounds for invalidating delegated legislation but 'without particular success'.[34]

Retrospective operation

As noted above, the general rule when interpreting legislation is that, unless there is a clear statement to the contrary, the legislation does not operate retrospectively.[35]

When a legislative instrument can be retrospective

In Australian law, there is no constitutional bar to retrospective legislation, although caution needs to be exercised where the law imposes or affects criminal liability. For Commonwealth legislative instruments, the issue is dealt with in s 12 of the LIA, which covers the commencement of such instruments. Under s 12(1), an instrument, or a provision of an instrument, can take effect at a time specified in the instrument and this may be before the date of registration of the instrument. However, under s 12(2), the retrospective provision has no effect if it would detrimentally affect a person other than the Commonwealth or a Commonwealth agency by affecting the person's rights disadvantageously or by imposing liabilities on the person in respect of anything done or omitted to be done before the date of registration.

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28 See Pearce, D and Argument, S 2012, *Delegated legislation in Australia*, 4th edn, LexisNexis Butterworths, Sydney, [20.8]–[20.9]; *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757–758 per Dixon J.

29 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at [78], [101]–[102] per Gleeson CJ and Gummow J; *Botany Bay City Council v Minister of State for Transport and Regional Development* (1996) 66 FCR 537 at 557–561 per Lehane J; *South Australian River Fishery Association Inc v South Australia* (2003) 85 SASR 373 at 392–393, [116] per Doyle CJ.

30 *Davids Holdings Pty Ltd v NSW Dairy Corp* (1988) 15 ALD 745 at 746–747.

31 *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 155 per Dixon J; *South Australia v Tanner* (1989) 166 CLR 161 at 165, 167–168 per Wilson, Dawson, Toohey and Gaudron JJ and 178–179 per Brennan J.

32 *South Australia v Tanner* (1989) 166 CLR 161. There the majority said at 167–168: '[T]he test of validity is whether the regulation is capable of being considered to be reasonably proportionate to the end to be achieved … It is not enough that the court itself thinks the regulation inexpedient or misguided. It must be so lacking in reasonable proportionality as not to be a real exercise of the power'.

33 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197 and Pearce, D and Argument, S 2012, Delegated Legislation in Australia, 4th edn, LexisNexis Butterworths, Sydney, [21.16].

34 Pearce, D and Argument, S 2012, *Delegated legislation in Australia*, 4th edn, LexisNexis Butterworths, Sydney, [21.15]. See also [21.9].

35 *Maxwell v Murphy* (1957) 96 CLR 261 at 267 per Dixon J.

Retrospective commencement is often used to correct errors or anomalies where the result is to benefit non-Commonwealth parties. However, even if the purpose is benevolent, the power needs to be used with care. The criterion for a valid retrospective commencement is that no person will suffer as a result. This is a question of fact. If the provision changes the law in a way that benefits a large group of people but causes detriment to one individual, the provision is invalid:

- in relation to everyone, including those who would have benefited
- for all time, not just for the period of retrospectivity.

In addition, it is not enough to have a set of provisions that is collectively beneficial if individual provisions can be detrimental.

Careful drafting can get around these problems by providing, in effect, that the provisions do not apply to an individual who would suffer a detriment of a kind referred to in s 12(2).

The enabling Act for a legislative instrument may give a broader power to make detrimental retrospective instruments, but this is rare.

Dangers of retrospective commencement

Retrospective commencements are often seen as an attractive way to deal with mistakes because it is easy to simply backdate the commencement of the new provisions. However, they can cause confusion, especially when used in an amendment of another instrument. A high proportion of invalid amendments of instruments result from attempts at retrospective commencements.

Most errors in instruments can be dealt with effectively by prospective provisions. These may need to be more detailed, as they may need to provide for validation of past actions or reversal of the effect of past actions.

Procedural issues

If a legislative instrument is to take effect retrospectively in accordance with s 12(2) of the LIA then the following points should be borne in mind:

- In the case of an instrument to be made by the Governor-General:
  - the explanatory memorandum that accompanies the instrument must explain why retrospective commencement is appropriate and include an assurance that it does not breach s 12(2) of the LIA.
  - the Office of Parliamentary Counsel or AGS must provide the Executive Council Secretariat with written certification that the Governor-General has the power to make such an instrument.
- For any legislative instrument, the explanatory statement must explain why retrospective commencement is appropriate and include an assurance that it does not breach s 12(2) of the LIA.[36]

Incorporation of material by reference

Section 14 of the LIA sets out special rules about the circumstances in which an instrument may prescribe matters by reference to other instruments. The provision essentially ensures that Parliament is given the opportunity to know the whole content of a legislative instrument at the time it is tabled. Importantly, and subject to a contrary intention being expressed by Parliament, s 14 has the following operation:

- A legislative instrument may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing at the time the legislative instrument 'takes effect'.[37]

36 Office of Parliamentary Counsel, *Legislative instruments handbook*, Exposure draft, January 2014, [48].

37 LIA, s 14(1)(b).

- However, a legislative instrument cannot make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing (other than a Commonwealth Act or a disallowable legislative instrument) as in force or existing 'from time to time'.[38]

The general prohibition on the incorporation of material as in force or existing 'from time to time' operates to enable Parliament to control the content of the legislative instrument that incorporates material from another instrument (and, by implication, the content of the law). It ensures that that law will not be changed by a change in the legislative instrument or other writing that was applied, adopted or incorporated into a legislative instrument.

The rules in s 14 apply subject to a contrary intention in another Act.[39] In some circumstances, it may be possible to discern an intention from the power to make the legislative instrument that material may be incorporated as in force or existing from time to time (for example, if it is clearly not possible to give effect to the intended operation of the Act without incorporating material as in force or existing from time to time). However, if this is not the case, it will generally be necessary to amend the legislative instrument from time to time so that it can apply, adopt or incorporate updated material. Otherwise, it may be necessary to amend the Act to provide expressly that the instrument may apply, adopt or incorporate material that exists from time to time.

Person may seek a remedy alleging legislative instrument is invalid

A person alleging that a legislative instrument is invalid on one or more grounds may seek an appropriate remedy from a court.

Whether a person could be compelled to make a legislative instrument in a particular case or more broadly raises complex questions about whether there is a duty to make the instrument and includes consideration of whether the whole legislative scheme relies on the legislative instrument.

Revoking, repealing, varying and amending legislative instruments

Sometimes it may be necessary to revoke, repeal, vary or amend a legislative instrument. Where an Act confers express power to do this, the conditions or processes set out in the Act must be followed. Where an Act does not have an express power to do this, it is often possible to rely on s 33(3) of the AIA. Section 33(3) provides that:

> Where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

The requirement for the power to be exercised 'in the like manner and subject to the like conditions' means that, if the enabling Act contains conditions on exercising the power to make the instrument, these conditions must also be fulfilled when repealing or varying the instrument. This requires consideration of the terms of the power relied

38 LIA, s 14(1)(a), 14(2).

39 AIA, s 2(2).

upon to make the legislative instrument in the first instance. Depending on the terms of the enabling Act, it may be necessary, for example, to consider certain matters and undertake certain consultation before making the legislative instrument that revokes, repeals, varies or amends the original instrument.

When an empowering provision is repealed, subject to a contrary intention, a legislative instrument made under the provision will also be repealed.[40] A contrary intention may exist if other provisions that have not been repealed operate on an assumption that the legislative instrument continues to operate or if a transitional provision expressly preserves the legislative instrument.

Parliamentary scrutiny of legislative instruments

Most legislative instruments may be disallowed by either House of Parliament (the House of Representatives or the Senate). The process is governed by Pt 5 of the LIA. If an instrument or a provision of the instrument is disallowed, the legislative instrument or provision ceases to have effect at that time.[41]

A legislative instrument can be disallowed on any ground. However, to limit the possibility of disallowance, the rule-maker should have regard to the grounds on which all legislative instruments are scrutinised during the parliamentary process and include material in the explanatory statement accompanying the instrument to address any potential concerns. Those potential concerns sometimes overlap with the validity and interpretation issues dealt with above (for example, compliance with the instrument-making power and retrospectivity).

Senate Standing Committee on Regulations and Ordinances

All legislative instruments are referred to the Senate Standing Committee on Regulations and Ordinances (the SSCRO).[42] The SSCRO scrutinises each instrument to ensure that:

- it is in accordance with the enabling Act
- it does not trespass unduly on personal rights and liberties
- it does not unduly make the rights and liberties of citizens dependent upon administrative decisions that are not subject to merits review by a judicial or other independent tribunal
- it does not contain matter more appropriate for parliamentary enactment.

The SSCRO considers each legislative instrument in light of these principles. A failure to adhere to these principles could lead to a legislative instrument being disallowed.

Human rights issues

The *Human Rights (Parliamentary Scrutiny) Act 2011* requires all disallowable legislative instruments to be accompanied by a statement of compatibility. These statements must contain an assessment of the instrument's compatibility with the rights and freedoms recognised in the 7 core international human rights treaties that Australia has ratified. These statements are intended to inform parliamentary debate and, potentially, the subsequent interpretation of the legislation by courts and tribunals. For more information, see Legal Briefing 100, *Human rights in Commonwealth policy development and decision-making*, and the material relating to this Act available on the Attorney-General's Department website (www.ag.gov.au).

40 *Watson v Winch* [1916] 1 KB 688 at 690 per Lord Reading CJ, 690 per Sankey J; *Bird v John Sharp & Sons Pty Ltd* (1942) 66 CLR 233 at 239 per Latham CJ.

41 LIA, s 42.

42 Australia, Senate 2009, *Standing Orders and other orders of the Senate*, Canberra, order 23.

Further references

Douglas, R 2009, *Douglas and Jones's Administrative law*, 6th edn, The Federation Press, Sydney.

Emry, M 2011, *Delegated legislation – what can and cannot be done*, Australian Drafting Conference, Adelaide.

Pearce, D and Argument, S 2012, *Delegated legislation in Australia*, 4th edn, LexisNexis Butterworths, Sydney.

Sykes, EL, Lanham, DJ, Tracey, RRS and Esser, KW 1997, *General principles of administrative law*, 4th edn, Butterworths, Sydney.

This briefing was prepared by Leo Hardiman, Jenny Burnett and Marlowe Thompson with assistance from Mark Molloy, Damian Page, Tara McNeilly, Jenny Francis, Michael O'Rourke, Kim Pham and Lisa Redman.

Leo Hardiman *is National Group Leader of the Office of General Counsel and has extensive experience in advising government about the development and interpretation of Commonwealth laws. He has specialist knowledge in statutory interpretation, the machinery of government, constitutional law, Commonwealth financial law and Commonwealth taxation law.*

Jenny Burnett *provides advice on constitutional law, statutory interpretation, employment and workplace relations law and clean energy law. She provided constitutional, statutory interpretation and drafting advice in the development and implementation of the Work Choices and Fair Work legislation and, more recently, the carbon pricing legislation and its repeal.*

Marlowe Thompson *provides advice to government departments and agencies on administrative law, constitutional law, statutory interpretation, water law and electoral law. He drafts legislative instruments and was a member of the team that drafted the Murray–Darling Basin Plan.*

AGS contacts

AGS has a national team of lawyers specialising in statutory interpretation and drafting issues.

Leo Hardiman
Deputy General Counsel
Office of General Counsel
T 02 6253 7074
leo.hardiman@ags.gov.au

Jenny Burnett
Deputy General Counsel
Office of General Counsel
T 02 6253 7199
jenny.burnett@ags.gov.au

Mark Molloy
Senior General Counsel
Office of General Counsel
T 02 6253 7421
mark.molloy@ags.gov.au

Damian Page
Senior General Counsel
Office of General Counsel
T 02 6253 7053
damian.page@ags.gov.au

Kim Pham
Counsel
Office of General Counsel
T 02 6253 7473
kim.pham@ags.gov.au

Jenny Francis
Senior General Counsel
Office of General Counsel
T 02 6253 7108
jenny.francis@ags.gov.au

Tara McNeilly
Senior General Counsel
Office of General Counsel
T 02 6253 7374
tara.mcneilly@ags.gov.au

Charles Beltz
Counsel
Office of General Counsel
T 02 6253 7499
charles.beltz@ags.gov.au

DRAFTING TEAM

James Graham
Senior Consultant Legislative Drafter
Office of General Counsel
T 02 6253 7295
james.graham@ags.gov.au

Marlowe Thompson
Counsel
Office of General Counsel
T 02 6253 7580
marlowe.thompson@ags.gov.au

Andrew Chapman
Counsel
Office of General Counsel
T 02 6253 7206
andrew.chapman@ags.gov.au

Sonali Rajanayagam
Senior General Counsel
Office of General Counsel
T 02 6253 7353
sonali.rajanayagam@ags.gov.au

Michael O'Rourke
Counsel
Office of General Counsel
T 02 6253 7516
michael.o'rourke@ags.gov.au

Anna Lehane
Counsel
Office of General Counsel
T 02 6253 7330
anna.lehane@ags.gov.au

Offices

Canberra	*4 National Circuit, Barton ACT 2600*
Sydney	*Level 42, 19 Martin Place, Sydney NSW 2000*
Melbourne	*Level 21, 200 Queen Street, Melbourne VIC 3000*
Brisbane	*Level 12, 340 Adelaide Street, Brisbane QLD 4000*
Perth	*Level 19, 2 The Esplanade, Perth WA 6000*
Adelaide	*Level 18, 25 Grenfell Street, Adelaide SA 5000*
Hobart	*Level 8, 188 Collins Street, Hobart TAS 7000*
Darwin	*Level 9, 9–11 Cavenagh Street, Darwin NT 0800*

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