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Introduction

It is a pleasure to be involved in the Senate Lecture Series again, speaking this time on the important question of executive law-making with my friend and colleague Stephen Argument. Executive law-making is a perennial issue, which has risen to prominence recently in Australia and elsewhere through some high-profile examples of its use. Stephen and I bring different perspectives to the topic. He speaks as an insider, in the sense that he has long and deep knowledge of the workings of the Senate in scrutinising legislative instruments. I am an outsider, who has studied the Australian constitutional system for a long time, in its own right and in the light of comparative experience. Together, it is our task to canvass some of the most important issues for the practice and principle of executive law-making in Australia as we see them.

The principles at stake

One of the most basic of all constitutional principles is that law is made by Parliament. It is so basic that it is simply assumed, by the Australian and most other Constitutions.

At one level, the principle can be understood in symbolic terms. The power of the state to change the rules by which the whole community is bound is extraordinary, even though we take it for granted. As the only elected institution in the Australian system of government, Parliament is the only body with sufficient legitimacy to exercise a power of this kind. If democracy is viewed in procedural terms, it is Parliament that embodies the promise of democratic process, through which decisions are made to which all Australians can submit, whether they approve of the incumbent government or particular decisions or not.

There is a deep ambiguity in all parliamentary systems that have derived from Westminster about how Parliaments are expected to exercise their authority. The ambiguity stems from the origins of Parliament as advisor to the Crown and its long evolution since, in the course of which Ministers with the confidence of the Parliament assumed the executive authority. The ambiguity goes to the extent to which Parliament can be expected to be deliberative and is entitled to insist on a view that differs from that of the executive branch. In England, from whence this style of Parliament derived, resolution of this question is complicated by the historic aura that surrounds the Parliament and its size and relative accessibility on the one hand and an unelected second chamber with power to delay rather than veto on the other. In Australia, at the Commonwealth level, the answer is affected

by different factors, including the entrenched federal Constitution providing for a powerful elected Senate. These make it clear that, on some matters at least, the will of the Parliament will differ from that of the executive and tip the balance in favour of a deliberative style.

While the problem nevertheless remains in play in Australia, it does not affect the principle that Parliament makes law. That principle rests not only on the arguments from symbolism to which I have referred but on functional logic as well. In both composition and mode of operation, Parliament is designed as the appropriate institution to carry out the high task of law-making. It comprises competing voices, representing diverse community views. It meets in public, requiring new laws to publically be justified in advance. The public proceedings of Parliament also enable voters to hold their representatives to account for the stance that they take on particular decisions. Relative care is devoted to the drafting of laws made by the Parliament, which are published in forms that are relatively accessible.

These principles and practices do not exist for the benefit of Parliament itself and the question of which organ of state should make law is not an inter-institutional game. The requirement for law to be made by Parliament, with all that flows from it, exists for the benefit of the people who will be subject to the law and from whom the authority to make new law derives. Without such a requirement, the rationales for respect for law fail. The law-making role of Parliament underpins legal doctrines as well, including the hierarchical ordering of common law and statute and the principles of statutory interpretation that courts recognise and apply.

The limits of executive law-making

Of course, it is trite that it is not practicable for every new legal rule to be made by Parliament directly. It has long been the case that a great deal of law is made by the executive branch, acting pursuant to circumscribed authority from Parliament. Classically, the executive branch for this purpose refers to the Governor-General in Council. This has the advantages of involving the highest level of executive government for the significant function of executive law-making and doing so in a way that engages the collective responsibility of Ministers who are accountable to the legislature. Constitutional proprieties also are preserved by the formal capacity of Parliament to repeal the enabling legislation and by procedures for ex post facto parliamentary scrutiny of the exercise of its delegated authority. However good these are, they cannot capture the properties of law-making by Parliament itself; hence the need to keep the practice of delegation within bounds.

Delegation of law-making power to the executive might be justified by reference to substance or by reference to purpose. The two overlap to a considerable degree. In terms of substance, the principal

guideline must be the significance of a proposed new rule, in the sense that matters of any import are left to primary legislation. In one way or another, this consideration underlies most of the matters listed in the current Legislation Handbook as requiring primary legislation, including the catch-all reference in para (b) to 'significant questions of policy'.¹ While this is a standard that can lend itself to differing interpretations in marginal cases, requiring resort to purpose, its exemplifications are more concrete. These range over proposed laws that affect rights, impose obligations, appropriate funds, create offences and tax, to take only a selection. The need for amendment of Acts of Parliament to be done by primary legislation rather than executive law-making in the manner historically associated with Henry VIII is referable both to the status of Parliament and to the intelligibility of statute.

In terms of purpose, it may be accepted that delegation of legislative power to the executive branch is useful to keep unnecessary detail out of primary legislation; to deal with at least some matters that are transitory; and to make optimal use of the time of Parliament and its members by these means. Matters for which Parliament is the appropriate forum on account of its design characteristics, however, should be the stuff of primary legislation. Claims that matter is too complex for Parliament; that there was not enough time to include some matters in the principal legislation; or, even that 'the necessary policy decisions were not made' when the time came for introduction of the Bill are unacceptable reasons for leaving to the executive law-making authority that should be exercised by Parliament itself.²

It is received wisdom that there are effectively no enforceable constitutional limits on the extent of the law-making authority that can be delegated to the executive government by the Commonwealth Parliament. This assessment stems from the 1931 decision of the High Court of Australia in *Dignan* and the lack of any significant case law to the contrary since, despite sometimes extravagant delegations.³ Without being too heretical, let me draw attention to some of the limits that were expressed or implied in *Dignan*, which could become relevant in an appropriate case, informed by other developments in understanding of the constitutional separation of powers over the intervening 85 years. One to which reference often is made is the warning in the judgement of Dixon J that it must be possible to characterise the law delegating authority to the executive as one that is supported by a head of legislative power. This warning goes both to the 'width' and the certainty of

¹ Department of the Prime Minister and Cabinet, *Legislation Handbook* (Commonwealth of Australia, 1999, incorporating changes in 2000), <https://www.dpmc.gov.au/pmc/publication/legislation-handbook>.

² The Administrative Review Council reported these as some of the reasons given by OPC for the inclusion of substantive matters in delegated legislation in 1991: Administrative Review Council, *Rule Making by Commonwealth Agencies*, 1992, 2.13.

³ *Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan* (1931) 46 CLR 73

the scope of the power that is delegated. Evatt J was broadly in agreement, but drew a difficult distinction between laws with respect to legislative power and laws with respect to a head of power. In the course of this he suggested that the repository of the law-making power and in particular the extent to which the rule maker was 'removed...from continuous contact with Parliament' might affect the validity of a delegation in some (admittedly extreme) circumstances. Underlying both sets of reasons was the difficulty of overturning then established practice, with its advantages for the operations of government, coupled with assumptions drawn from the principle of parliamentary sovereignty and the practices of responsible government, both of which were inherited from the United Kingdom. Both Justices qualified the implications that might be drawn from these inherited practices by reference to the context of the Commonwealth Constitution, a technique that has since become considerably more refined. *Dignan* also confirms the constitutional separation of legislative and executive power, while denying its application in this context and acknowledging consequential 'asymmetry'.

Judicial review has more bite once delegated legislative power is exercised. Executive law-making is just another form of executive action. It falls to the judicial power, in the last resort, to ensure that it is exercised within lawful bounds. The respect due to Acts of the elected Parliament does not apply here, except at one remove. In the words of Dixon J in *Dignan*, the 'statute is conceived to be...the expression of the continuing will of the Legislature' while 'subordinate legislation' lacks 'the independent and unqualified authority which is an attribute of true legislative power'. The standard terms for conferring regulation –making power on the Governor-General has some inbuilt flexibility in the 'necessary or convenient' formulation. This cannot, however, 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'.⁴ Thus, for example, in 2012, a regulation that added an adverse security assessment to the criteria for granting a protection visa was held to be 'inconsistent' with the scheme in the principal Act and beyond the law-making power conferred.⁵ An AGS Briefing notes with some justification that the risk of invalidity on these grounds is greater in detailed legislation than (for example) in legislation that 'merely sets out the skeleton of the proposed scheme'.⁶ The latter is clearly contrary to constitutional principle, however, and runs a greater risk of invalidity on constitutional grounds, however remote the possibility might presently appear to be.

⁴ *Shanahan v Scott* (1957) 96 CLR 245, 250, cited in *Legislative Instruments – Issues in Design*, AGS Legal Briefing, No 102, February 2014, 3.

⁵ *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46, [71]

⁶ *Op.cit*, 3

Whether in the absence of judicial constraints or as a complement to them, it falls to the legislature itself to scrutinise the practice of executive law-making and to keep it in appropriate bounds. The composition and powers of the Senate have been critical in this respect, given the impact of responsible government on the willingness of a majority in the House of Representatives to publically oppose any decision attributable to Ministers, no matter how principled the cause. The regime that applies at the Commonwealth level, for the publication, tabling, and disallowance of legislative instruments by either House derives its principal effect from the activities of the two Senate Scrutiny Committees and from the willingness of the Senate to take action to disallow. I agree with Stephen that in these respects, scrutiny of executive law-making in the Commonwealth sphere has an edge over many other comparable jurisdictions. As I will argue later, however, the delicate path that the Senate Committees tread, between commenting on procedures and avoiding policy questions, in order to foster the consensual approach on which they rely, becomes less effective if and when executive law-making expands into policy areas. The history of scrutiny of executive law-making in Australia suggests that the system cannot rest on its laurels, but needs to take stock from time to time.

Keeping the balance

In any Westminster-style parliamentary system there are incentives to expand the reach of executive law-making. The very attributes that make Parliament the appropriate law-making body also make it something of a nuisance from the standpoint of executive government. Ministers, their advisors and their departments are not naturally programmed to spell out policies in detail in public in advance of their application, to debate them with Opposition members, to make changes on contentious points and to delay implementation while all this occurs. Consistently with the functional attributes of the executive branch, their typical modus operandi is the opposite: to work quickly and confidentially in an environment in which everyone is broadly on the same page, all going well. It is natural enough, in these circumstances, to try to minimise the exposure of government policy to Parliament, if that can be done. In Australia, the problem is exacerbated by uncertainty about outcomes in the Senate. The underlying ambiguity about the role of Parliament, to which I referred at the outset, fuels the situation as well. Ministers who take the view that a government has the right to have its policies given effect by Parliament may be less concerned about the means than the end, when faced with a Senate in which the government lacks a majority.

I am not seeking to be cynical here. Government is no easy task. There is a genuine tension between the roles of Parliament and executive government in our system. These contribute to the checks and balances of which in other circumstances we are proud, but they nevertheless need to be managed

in particular instances. In some respects this also is, or can be portrayed, as a tension between values: openness and inclusion on the one hand and speed and efficiency on the other. A balance is needed here too. Wherever it is struck, however, it needs to preserve the constitutional essentials, including the principle that Parliaments make law.

One relatively recent occasion on which there was a comprehensive review of the practice of executive law-making in the Commonwealth sphere was the report of the Administrative Review Council (ARC) in 1992⁷ that led ultimately to the enactment of the Legislative Instruments Act 2003 (Cth). That Act in turn was reviewed in 2008, in compliance with the statutory requirement in section 59.⁸ Some of the recommendations of the 2008 review were incorporated into the Acts and Instruments (Framework Reform) Act 2015, which came into effect on 5 March, renaming the principal Act the Legislation Act 2003 (Cth).

I was President of the ARC in 1992 and was impressed by the value of the exercise of taking stock of a practice that inevitably drifts in different ways over time, although generally in one direction. By 1992, many of the elements of the current system were in place. Executive law-making, in the form of regulations made by the Governor-General had been a common practice since 1901. These were published in a systemic way under a Statutory Rules Publication Act 1903 (Cth) and were subject to tabling and disallowance under the Acts Interpretation Act 1901 (Cth). The Senate Standing Committee on Regulations and Ordinances had been in operation since 1932. The Senate Standing Committee for the Scrutiny of Bills had been established more recently, in 1982, but nevertheless had now been in operation for 10 years.

The immediate catalyst for the ARC review was reflection on whether and, if so, to what extent, executive law-making should be brought under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act). Executive law-making is executive action that must be kept within the lawful bounds of the authority conferred and is subject to many of the grounds of judicial review including, for example, improper purpose. It was and is excluded from the ADJR by the threshold requirement for action to which the Act applies to be of an 'administrative' character. On one view, there was much to be gained by bringing all executive action under the umbrella of the same judicial review legislation. In the end, the ARC decided against that path, because not all the provisions of the ADJR Act would apply to executive law-making, at least in the same way. By way of obvious example, the requirements of procedural fairness are well-adapted to administrative actions affecting particular

⁷ Administrative Review Council, *Rule Making by Commonwealth Agencies* Report No 35, 1992

⁸ Legislative Instruments Act Review Committee, *2008 Review of the Legislative Instruments Act 2003*, March 2009

individuals or groups but arguably are less suited to action of a legislative kind, which need fair procedures of their own.

The ARC therefore embarked on a project to examine the need for an Act dealing with executive law-making that would complement the ADJR Act. To this end, it had to examine the contemporary practice of executive law-making and the suitability of the existing legal and political framework for it. The findings were instructive for present purposes. Some of the most striking were the following:

- The traditional form of executive law-making, through regulations or 'statutory rules', on which the current legislative framework was predicated, were now the tip of the iceberg.
- In addition to these, there were more than 115 other rules of a legislative kind, with a variety of names, made by a variety of persons and bodies in the executive branch.
- By 1990-91, the number of these other legislative instruments more than doubled the number of statutory rules and were solely responsible for a huge growth in executive law-making over the previous decade.
- The Senate Committees had, of course, picked up on this phenomenon during the legislative scrutiny process. One consequence was that many enabling statutes now required the legislative instruments that they authorised to be made to be subject to the statutory regimes for tabling and disallowance, notification and purchase.
- This was an ad hoc arrangement, however. No-one knew how many other such instruments there were, which had so far escaped the scrutiny process altogether. Nor were there systematic procedures for publishing (and therefore ensuring public access to) these other categories of 'disallowable instruments'.
- In other matters, the Council reported 'considerable discrepancies' between official guidelines on the matters appropriate for executive law-making and the practice that actually was followed.⁹
- Drafting quality was variable: certainly for disallowable instruments and to some extent also for statutory rules.
- There was no general requirement for consultation or regulatory impact statements before rules were made, in contrast to the position in some States.
- Nor was there a requirement for sun-setting of legislative instruments, at least some of which by definition have a finite purpose; again, contrary to the practice in some States.

⁹ Administrative Review Council, op.cit, 2.10

The outcome of the ARC review will be familiar to many and I will not canvass the details here. Implementation took more than a decade. Many of the recommendations of the ARC were watered down along the way, at cost to the simplicity and effectiveness of the new regime. Even so, however, the outcome was a considerable improvement over what had existed before. A single Legislative Instruments Act applied the same procedures for tabling, disallowance, consultation, sun-setting and publication on a single Federal Register to (almost) all executive law-making. A better attempt was made in the Legislation Handbook to identify the appropriate border between primary and delegated legislation, drawing on the ARC's criteria. And administrative reorganisation sought to ensure that a single Office of Legislative Drafting (OLD) based in the Attorney-General's Department had responsibility to oversee the quality of the drafting of legislative instruments, whether this happened in OLD or in agencies elsewhere.

Current challenges

If we were now to conduct a comprehensive review of the practice of executive law-making, taking up the issues of our time, what would we find and what might be done about it?

This is not such a review, but let me suggest what we might find amongst the principal points.

First, the amount of executive law-making remains vast. It may not be proliferating at the same rate, however. Stephen's paper notes that 1828 instruments were scrutinised by the Regulations and Ordinances Committee in 2015. The comparable number in 1990-91, according to the ARC report was 1645, which did not catch all the instruments of a legislative character that at that stage were not subject to disallowance.

Secondly, at least some executive law-making seems to be being used for matters more appropriate for primary legislation. More work needs to be done on the extent to which this is so, whether the practice is increasing and how serious the infringements are. The following are indicators of the trend, however.

- Rather alarmingly, 'skeleton legislation' seems to have become a term of art.
- Recent reports of the Senate Standing Committee for the Scrutiny of Bills regularly draw attention to proposed laws that delegate matters that 'may be considered more suitable for Parliamentary enactment'; in some instances in relation to matters that are 'central elements' of the legislative scheme'.¹⁰

¹⁰ Senate Standing Committee on Scrutiny of Bills, Third Report of 2016, 187,188, Comment on the Social Security Amendment (Community Development Program) Bill 2015

- And the regulations made to give parliamentary cover to the host of Commonwealth spending schemes in the wake of the first High Court decision in *Williams v Commonwealth*¹¹ clearly provide for important policy initiatives, inconsistently with the appropriate scope for delegated legislation, as well as being drafted in very odd form.

These unusual instruments responding to *Williams* might have brought the separation of powers issue to a head, had the High Court not invalidated the challenged regulation for the lack of a head of power in the second round of proceedings in *Williams*.¹² This said, the involvement of the Parliament in decisions about spending schemes, even in such an unsatisfactory way, is an advance on previous arrangements, which relied on inherent executive power alone. By way of example, as Stephen notes in his paper, as the Regulations and Ordinances Committee has handled these instruments, Ministers now are obliged to identify the constitutional power on which the new regulation purports to rely and to publically take responsibility for the claim.¹³

There is at least one other recent development that appears to be a further indication of a trend to broaden the scope of executive law-making. This is the emerging practice to which Stephen draws attention of implementing significant new policy initiatives through executive law-making in anticipation of the enactment of legislation by the Parliament. There is likely to be a question in these circumstances about whether the executive action is lawful at all, as an exercise of delegated legislative authority. In any event it usurps Parliament's law making role; not least by second guessing the form in which primary legislation ultimately may be passed.

A third point that would be likely to appear from a review of current executive law-making practice is the development of a new hierarchy of delegated legislation within the executive branch, setting up a new set of incentives. The most obvious manifestation of this on the public record is the creation of a category of 'legislative rules' in empowering legislation from 2013.¹⁴ These appear to differ from the wide variety of categories of legislative instruments to which reference already has been made, in the sense that they are made by a Minister and are used in lieu of Regulations made by the Governor-General, with all that follows from this change, in procedural terms. One catalyst for the creation of the new category of Legislative Rules appears to have been a desire to rationalise

¹¹ [2012] HCA 23

¹² [2014] HCA 23, [36]

¹³ Cf Patrick Hodder, 'The *Williams* Decisions and the Implications for the Senate and its Scrutiny Committees', 143, 149. I take Hodder's point that one outcome of these changes may be to justify inclusion of expenditure for such programs in the Appropriation Bill that the Senate cannot amend. It appears that this already was occurring, however: the School Chaplains' program that was challenged in *Williams* is a case in point. As Hodder notes, these matters are difficult to monitor, given current, broad appropriation practice (at 150).

¹⁴ Stephen Argument, 'The use of "Legislative Rules" in preference to regulations: A "Novel" Approach?', (2015) 26 *Public Law Review* 12, 13.

the resources of the Office of Parliamentary Counsel for whom drafting Regulations is 'tied work'.¹⁵ The change also has caused a distinction to be drawn between the categories of matters appropriate to be handled in Regulations and Rules respectively, however, with more important matters left to the former.¹⁶ Vigilance may be required to ensure that recognition of a category of superior executive law-making, in this way, is not used to expand the scope of executive law-making itself.

A final piece of the current pattern of the practice of executive law-making concerns consultation. The ARC's original recommendations on consultation, as the form of procedural fairness most appropriate for decisions of a legislative character, were watered down in the *Legislative Instruments Act 2003*. The 2008 Review of the Act noted a significant shortfall in the adequacy of consultation practices and reporting to Parliament in relation to them, while also declining to make consultation mandatory or judicially enforceable.¹⁷ The provisions of the *Legislation Act 2003* remain extremely weak in this regard.¹⁸ It need hardly be said that the more important the matters dealt with through executive law-making, the more important are both consultation and the associated requirements for regulatory impact statements.

Two distinguished commentators have recently drawn attention to at least one other way in which expansion of the scope of executive law-making has implications for current practice.¹⁹ Avoidance of policy considerations by the Senate Scrutiny Committees has served Australia well in the past, in the sense that it has enabled the committees to establish a culture of bipartisanship. It constrains the effectiveness of the committees in other ways now, however, when executive-made laws deal with matters of significant policy concern. Objections raised by the committees on procedural grounds, drawing attention to the width of executive law-making, are too easily fobbed off by Ministers. Ironically, one frequent response to the Scrutiny of Bills Committee in this context is that the resulting instruments can always be disallowed, although presumably not on the basis of an analysis by the Regulations and Ordinances Committee.

It is by no means clear that there is a body now capable of conducting a comprehensive review of executive law-making in the Commonwealth sphere, by reference to both constitutional principle and contemporary governance needs. The capacity of the Administrative Review Council to offer independent insight into problems and innovative solutions was run down by successive governments to the point that, when the Council was abolished as a cost cutting measure last year,

¹⁵ Quoted in Argument, op.cit, 13

¹⁶ Ibid, 14.

¹⁷ Legislative Instruments Act Review Committee, op.cit, 39-42.

¹⁸ Sections 18, 19; which are combined, somewhat oddly, in a part of the Act dealing with drafting standards.

¹⁹ Dennis Pearce, 'Legislative Scrutiny: Are the ANZACS Still Leaders?' 2009; Mark Aronson, 'Subordinate Legislation: Lively Scrutiny or Politics in Seclusion', (2011) 26 *Australasian Parliamentary Review*, 4

few voices were raised in its defence. The ARC became yet another casualty of the 'decline in the quality of advice and...erosion of capability' to which Dr Parkinson has referred, and Australia is poorer for it.²⁰ In this connection I note that the treatment of delegated legislation in the recent report of the Australian Law Reform Commission was inconclusive and disappointing, although this may have been inevitable, given the scope of the Commission's task.²¹

It is worth considering, nevertheless, what the responses might be, on the assumption that the obvious signs of expansion of the scope of executive law-making are confirmed. It might be too late to return the entire genie to the bottle. It is not too late, however, for a frank, honest and informed discussion of how we want the laws under which we live to be made. Even if the result were to shift the boundaries between primary and executive law-making in particular respects, it should also have the advantage of settling them more firmly, thus stemming, at least for the moment, executive law-making creep. On the assumption that new criteria recognised some role for executive law-making on matters of substance, new procedures would be needed at least for instruments in this category. These might include, for example, mandatory consultation requirements along notice and comment lines, subject to judicial review; an affirmative resolution procedure; and a role for the scrutiny committees in drawing policy issues to the attention of Senators, without necessarily becoming embroiled in the merits of the issues themselves. These possibilities are not mutually exclusive; nor are they exhaustive. But if the scope of executive law-making expands, the case for enhanced procedures is irrefutable, in order to realise a little more fully the values that the assignment of the law-making function to Parliaments assumes, when that function is entrusted to the executive branch.

²⁰ Quoted in Laura Tingell, *Political Amnesia: How We Forgot to Govern*, Quarterly Essay 60

²¹ Australian Law Reform Commission, *Traditional Rights and Freedoms- Encroachments by Commonwealth Laws*, 2016, chapter 17.