

Legislation Newsletter

The distinction between laws and their administration

Well-drafted legislation should itself have a considerable influence on how it is administered. It should set out its policy objectives and the requirements it imposes should be necessary for the achievement of those objectives. Statutory discretions should be given to administrators, certainly – but the administrators themselves should have objectives and functions which give guidance as to how the legislation should be administered.

Of course things can go wrong – legislation might be just words on paper in one jurisdiction but the justification for over active regulatory activity in another.

It is interesting, therefore, to consider the scope of the current VCEC¹ Inquiry into Streamlining Local Government Regulation. The inquiry is to consider options for harmonising regulations administered by local government and their administration. However:

“The emphasis in the inquiry should be on administration of regulations by local government rather than on a direct evaluation of legislative frameworks themselves.”

¹ Victorian Competition and Efficiency Commission

We wish VCEC well. Its task is like evaluating the performance of a horse in the Melbourne Cup without evaluating the horse itself.

Legislation implements policy – say so!

There are *always* policy objectives underlying legislation. Law makers are always trying to achieve something when they make laws. A law might require persons to comply with new requirements (such as use of safety equipment when carrying out specified activities), but *why* is this being done? What is the public benefit which will result? How important is it to achieve high compliance levels? Do the answers to these questions depend on the circumstances in which the activity is being carried out?

The articulation of a law's policy objectives will assist law makers, administrators and enforcement officials (among others) to make important decisions about the form and content of the law, as well as its administration and enforcement.

So, articulation of policy objectives is good in principle. There are other reasons too:

- if a regulatory impact statement is required, a statement of policy objectives is likely also to be needed (in Victoria, see section 11(2) of the *Subordinate Legislation Act 1994*).

This requirement is imposed so that the need for the proposed law in order to achieve those policy objectives can be assessed;

- the scope of the power to make subordinate legislation is often controlled by the purposes of the Act — there is power to make regulations for the purposes of the Act. If so, in order to know what power there is it is necessary to know what the purposes of the Act are;
- when the law is reviewed (later in the legislative cycle) its effectiveness should be assessed against its policy objectives.

Consultation, at all phases of the legislation cycle

Where do they come from, laws? Laws made by Parliament come from Bills (in Indonesia, *Rancangan Undang Undang*). But where do *they* come from?

Ultimately, they come from someone's pen (or computer). But it is the journey from pen (or computer) to law-maker that is now attracting a great deal of interest from law reformers. At this stage of the law-making process much of the structure and content of a law is settled. Before this stage there is government policy, often expressed only in general terms. After this stage is a draft law which, often, is little altered before it becomes binding law.

It is at this formative stage that consultation is a key issue. At this stage there is a proposal about which to consult, and there is the opportunity to shape the proposal. The Australian Government 2006 report *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* uses the concept of “developing regulation” (recommendation 7.5):

There should be a whole-of-Government policy on consultation requirements, setting out best practice principles that need to be followed by

all agencies when developing regulation.

The policy should be applied rigorously to all major initiatives, and cover all aspects of developing regulation, from the policy proposals/‘ideas’ stage through to post-implementation reviews. Where consultation requirements are not followed, reasons should be given.

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

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