LEGISLATION Services

Level 4, 443 Little CollinsStreet
Melbourne Australia

PO Box 4
Collins Street West
Victoria 8007 Australia

Telephone [+ 61 3] 9602 5226

E-mail: campbell@legislationservices.com

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Infrastructure and its regulatory framework

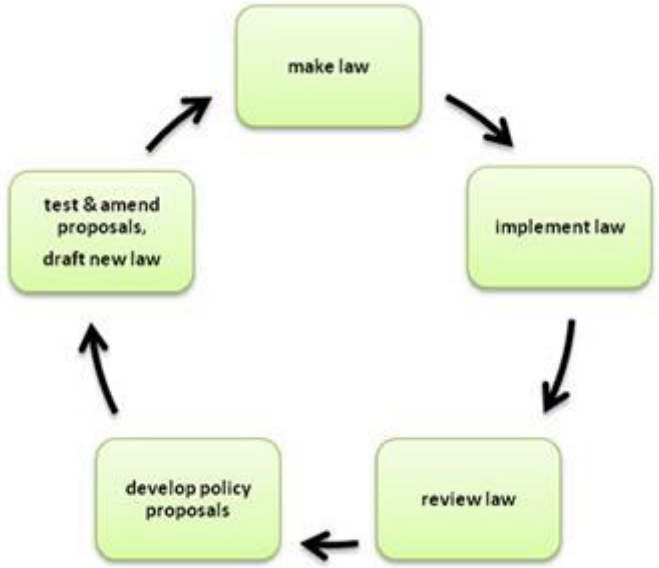
Regulation imposes costs, giving rise to the expression "less is better". It can be useful, therefore, to ask – why regulation?

The answer often depends on the identity of service providers and the nature of the market they operate in. It can be expected that a 2008 ADB *Law and Policy Reform Brief* about delivery of basic services by the private sector[1] will emphasise the importance of the regulatory context in which services are provided. Well, it does. It refers both to the need for an effective regulatory framework and to the quality of the governance decisions made in that framework:

"Improved infrastructure and utility services are important for economic growth and can contribute to a better quality of life for the poor. The development of quality infrastructure and utility services needs an effective well-governed regulatory framework. [...]"

UK Guidance on Regulation

The process of making, implementing and reviewing legislation can be seen as a cycle, as depicted in the following diagram:



The phase *after* a law is made is important for two reasons:

- the implementation process commences;
- the law is reviewed. In some cases (such as subordinate legislation in Australia or local laws in Indonesia) the review can lead to the legislation being cancelled after it has been in operation for only a very short time. In any jurisdiction the review process can commence very soon after implementation, so that the implementation and review processes run concurrently. The review process should lead, in time, to revisions or replacement legislation being prepared.

[1] *Effective Regulation of Water and Energy Infrastructure Services*, ADB, Brief No. 2 August 2008.

The implementation process is important to the success of legislation – a law which is disregarded is worse than no law at all (as it adds to the complexity of the statute book and uncertainty as to people's obligations).

In Indonesia the implementation phase is called socialisation (*sosialisasi*). In the United Kingdom, the term *guidance* is given to the process of explaining to stakeholders the obligations in a new law and how to comply with it. The UK Government has recently issued a revised Code setting out good practice for what guidance should be. The 2009 Code of Practice on Guidance on Regulation sets out eight "Golden Rules" of good guidance: these assert to "business and the third sector" that the guidance which they will receive will be:

1. based on good understanding of users (the "target audience");
2. designed with input from users and their representative bodies (the early involvement of end-users could be through a "stakeholder panel" or user-testing. Representative groups, such as trade organisations, can be useful sources of knowledge and advice);
3. organised around the user's way of working;
4. easy for the intended user to understand (it is to be jargon-free);
5. designed to provide users with confidence in how to comply with the law;
6. issued in good time;
7. easy to access (which is more than we can say for the Code itself, which can be difficult to download);
8. reviewed and improved.

We have the impression that the Code is intended for Government agencies rather than end-users. To get into the swing of things here, the target audience appears to be Government agencies. We cannot say whether the Code has been organised around agencies' ways of working, or whether it was issued to agencies in good time.

Legislation as the framework for regulatory decisions

Legislation contains many restrictions on people's behaviour. A would-be taxi operator in Victoria might consider a provision such as section 131 of the Victorian *Transport Act* 1983 to be something of an impediment to his or her plans:

"The operator of a taxi-cab must not operate the taxi-cab, or permit the taxi-cab to be operated, unless the operator is accredited under this Division as a taxi-cab operator."

This provision looks regulatory to us: it regulates the behaviour of people who operate (or would otherwise operate) taxis. But maybe not. On one analysis it is merely part of a legal framework known as "regulatory governance", providing the context for regulatory decisions.

A 2006 World Bank publication, Handbook for Evaluating Infrastructure Regulatory Systems, [Brown, Ashley et al, 2006. *Handbook for Evaluating Infrastructure Regulatory Systems.* Washington, DC: The World Bank] discusses fundamental concepts of regulation, using terms such as regulation, regulatory governance and regulatory substance. The Handbook was written with reference to industry regulation, and should be read in that context. According to the Handbook a regulatory system has two "basic dimensions": *regulatory governance* and *regulatory substance.* Regulatory governance, according to the Handbook (at page 5):

"refers to the institutional and legal design of the regulatory system and the framework within which decisions are made."

Regulatory substance:

"is the content of regulation. It is the actual decisions, whether explicit or implicit, made by the specified regulatory entity or other entities within the government, along with the rationale for the decisions."

It seems to be an odd conclusion that a provision such as section 131 of the *Transport Act* merely forms part of the institutional and legal design of a regulatory system. As lawyers, we cannot help but notice that someone who chooses to disregard it commits an offence and is liable to a substantial penalty.

That penalty, we think, gives the provision substance, whether or not regulatory decisions are made under it.

There is another sense, too, in which legislation does more than just provide a framework within which decisions are made. Regulatory decisions should be made taking into account relevant considerations, and disregarding irrelevant considerations. If a statute specifies the objectives of a regulatory process any decision made under that statute should be made in pursuit of those objectives. The legislation sets the direction for all discretionary decisions made under it.

Law making in Victoria

The law making process at the State level in Victoria, Australia has undergone many changes in recent years, and more are in prospect.

The most striking changes relate to the analysis and consultation which is required to occur before a law is made:

- consideration must be given to any human rights implications of the proposal. Cabinet submissions must contain sufficient information to demonstrate that any human rights implications have been (or will be) identified, assessed and addressed. Almost inevitably, this requires at least internal Government consultation. The key requirements are set out in the *Charter of Human Rights and Responsibilities Act* 2006;
- when regulations providing for infringement notices are being prepared there must be consultation with the Department of Justice. This is to be verified by a "certificate of consultation". The key requirements are set out in section 6A of the *Subordinate Legislation Act* 1994;
- a regulatory impact statement must be prepared for a statutory rule (with some exceptions). If this occurs, the Minister must ensure that the proposal is publicised and that public comment is invited. The key requirements are set out in section 11 of the *Subordinate Legislation Act* 1994.

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

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