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Legislation Newsletter

Number 7: December 2011

Scrapping of local laws – the morning after

We have commented in the past (in the October 2008 and January 2011 issues of Legislation Newsletter) about cancellation of local laws by the Indonesian Central Government. The number of local laws consigned to the scrapheap is high: in 2009 406 were cancelled. As ever, many of these appear to have been revenue measures. It seems, also, that the process does not move quickly: the 2009 list includes local laws made many years earlier, including several from the 1990's.

It can be expected that taxpayers and the central government would generally be pleased to see most of these laws disappear, never to be seen again. However, the question must sometimes arise — does the cancellation of a law leave a "gap", and should there be some way of filling that gap?

In a sense, the cancellation of local laws is a constitutional issue, as one government is intervening in the affairs of another. In that sense, the power of cancellation properly belongs in regional autonomy laws, which deal with allocation of functions between central and local governments. This is the present situation in Indonesia, where the central government is empowered by regional autonomy law to cancel local laws which are "contradictory to public interest or higher laws and/or other laws".

In another sense, however, the creation and termination of laws is an issue which should be addressed in a Law on Making Laws. A law of this type might deal with issues such as rights and responsibilities of persons who were affected by laws which have been cancelled. For example, should a person who paid tax under a cancelled law receive a refund? Should a person who incurred a tax liability under a repealed law still be required to pay that tax after the law has been cancelled?

Public participation in the making of primary legislation

Legislation can be categorised in many ways. One useful distinction is between *primary* legislation (made by Parliament) and *secondary* legislation (made by other persons or bodies, under the authority of primary legislation).

The differences between the two are apparent in several respects, one of which is the process for public consultation at the time of making or review. Requirements for public consultation in the making or review of *primary* legislation are not common, and certainly are much less common than for *secondary* legislation.

One reason for this, we think, is that economists have not become involved. Much of the process applying to *secondary* legislation, by contrast, is related to identification of costs, benefits and alternatives. This is for the purposes of regulatory impact analysis, intended to bring about a reduction of the regulatory burden imposed on businesses and others.

Why should consultation be limited to secondary legislation? Primary legislation also imposes regulatory burden. Certainly, primary legislation implements policy initiatives, but then so too does much secondary legislation. (We will be writing more about the distinction between primary and secondary legislation is a

future newsletter – and also about the concept of deliberative democracy.)

Further reforms in Indonesia

One procedural requirement that applied to primary legislation was section 53 of the Indonesian *Law on Making Laws* 2004, which provided—

> "The public has the right to make submissions, orally or in writing, in the preparation of Bills for the Central Government and Local Government."

This is an important statement of principle. Certainly the provision lacks detail, but it is to be remembered that Indonesian Acts are often expressed at a quite conceptual level.

Provision for dealing with the outcome of public consultation was made in Presidential Regulation 68 of 2005, which stipulated that the results of public consultation were to be considered by an interdepartmental committee (article 13). If government agencies participating in the committee process could not come to an agreement for the finalisation of the Bill the issue was to be referred to the President for decision (article 17).

The 2011 Act

The Indonesian National Parliament (DPR) has recently enacted a replacement *Law on Making Laws,* 2011. As with the 2004 Act it contains the principle of public participation in making national Acts, but it incorporates a number of changes (section 96 of the 2011 Act)—

- it contains a listing of forums in which public submissions are to be considered (public hearings, working parties, seminars and discussions). The opportunity has not been taken, however, to make provision for how consultation is to take place, for example setting out the circumstances in which one forum might be suitable and another not, nor is there any indication of *who* is to conduct the process and *when* it should occur. These issues are interrelated — some forms of consultation are often appropriate at an early stage (when options are being canvassed), while other forms are appropriate at a later stage when consensus is being developed around a proposal. The generality of this provision contrasts with specific requirements which are often imposed in relation to regulatory impact analysis for secondary legislation;
- it elaborates on the concept of the "public" (sub-section (3)) by specifying that persons and groups falling within the concept of the public are stakeholders – those who have an interest in the proposal. The explanatory memorandum to the Act comments that the persons referred to in sub-section (3) include community and professional organisations, government organisations and indigenous people;
- it provides that, to facilitate public participation, Bills should be made accessible to members of the public.

As with any legislative reform, there are areas in which more could be done. Still, it is pleasing to see that the principle of public participation has been retained. It is also pleasing to see statutory recognition of the stakeholder concept, in preference to reliance on opinion leaders and technical experts.

Maintenance of utility infrastructure in road reserves

Some problems, it seem, are not new, although it should not be assumed that solutions have been found in the past. A letter to the editor of the UK *Daily Telegraph* (25 April 2011, from Murray Brazier) took up the issue of holes in the road created by utility companies, suggesting that concerns expressed by the UK Local Government Association were not new—

> "Legislation to control activities of public utility companies on the public highways was not enacted until the *Public Utilities Street Works Act* of 1950. This was no real remedy, due in part to the varying specifications of highway authorities.
>
> In the 1980s, Professor Michael Horne's report set down a system of how, why, when and where reinstatement of openings made in the public highways should be made.

> There were many public meetings between highway authorities and public utilities but to no real avail. Another Act was passed in 1981, with no resolution of the problem."

We note the writer's use of the term "public utilities". Our comment is that many entities which seek to make use of road reserves are not publicly owned and are seeking to provide commercial services to customers. The proliferation of entities seeking to use this land suggests that the problem has become more complex than it was 60 years ago, and may require a more nuanced approach than is found in much legislation.

Road encroachments — an ongoing issue

Correspondent Murray Brazier was, of course, quite correct: problems associated with road administration are not new. Road encroachments were a problem in ancient Nineveh, it seems. A stele (inscripted stone marker) on display at the Istanbul Archaeological Museum shows that the problem was encountered four millennia ago. The approach taken by the King of Nineveh, although simple, was rather more drastic than would be acceptable today — the relevant part of the stele reads:

> "In days to come, that there might be no narrowing of the royal road, I [therefore] had stelae made which stand facing each other. Fifty two great cubits I measured the width of the royal road, up to the Park Gates.
>
> If ever [any of] the people who dwell in that city demolishes his old house and builds a new one, and the foundation of the new house encroaches upon the royal road, they shall hang him upon a stake over his house".

Today, we feel, an infringement notice, and possibly – with proper notice – removal of the offending structure, is an appropriate response to road encroachment: hanging home owners on a stake over their houses seems to be excessive. We cannot comment on whether a width of 52 great cubits is appropriate for a road carriageway, or a road reserve, or either.

The King of Nineveh's stele on display at the Istanbul Archaeological Museum.

Regulatory burden?

The legal profession is a regulated industry in Victoria (Australia), as elsewhere. The writer has a particular interest in this particular form of industry regulation – he was first registered as a legal practitioner in Victoria in 1977. Yes, it has been a few decades.

So, we were interested by a letter dated 11 March 2011 from the industry regulator, the Legal Services Board. In part, it advised:

> **"Practising certificate renewals for 2011/2012 - change of process**
>
> I am writing to notify you of an anticipated amendment to the *Legal Profession Act* 2004 that will affect the process for the renewal of your practising certificate for 2011/2012.
>
> The amendment, if approved, will remove the requirement for you to complete a statutory declaration confirming that the information provided on your renewal form is true and correct. When the law comes into effect you will still be required to declare that the information is true, however it does not need to be a statutory declaration. This therefore reduces the regulatory burden and matches interstate arrangements."

The offending provision was section 2.4.9 of the *Legal Profession Act* 2004, which specified that an application for renewal of a practising certificate (read – renewal of accreditation) was to be accompanied by "a statutory declaration in the form approved by the Board".

This provision was in force for around seven years, which makes it around seven times that the writer went hunting for an approved person to witness his renewal application. So, why, only in March 2011, was there concern about the burden it imposed, welcome though that concern was? We thought of several possibilities:

1. the Legal Services Board developed an interest in reducing the cost to itself of checking on compliance by each of the thousands of legal practitioners who post in their forms each year;

2. someone noticed that the requirement for accredited lawyers ("legal practitioners") to expose themselves to liability for perjury each year (in the event of making a false declaration) is rather heavy-handed;

3. someone in Government – or in the Legal Services Board – wanted to reduce the regulatory burden imposed by this legislation.

This third possibility is the most interesting, for two reasons:

- The regulatory burden referred to was in an Act, not in subordinate legislation. Subordinate legislation, in Victoria, has a life of ten years - after which there must be regulatory impact analysis by means of a regulatory impact statement. Acts, however, last forever, unless Parliament decides otherwise. There is no routine process designed to locate regulatory burdens of this type in Acts;

- "Regulatory burden" is a term often associated with *regulatory impact statements* — which are made with reference to subordinate legislation, not Acts. Possibly a *business impact statement* was prepared as part of the process for obtaining Cabinet approval for an amending Act — but such a document is generated and read only behind closed doors.

With the benefit of hindsight, we can reduce the possibilities to the first or the third: from 2012 it has been possible for lawyers to renew their accreditation online, using their computer mouses to click rather than their fountain pens to sign. The reform, it seems, has benefited everyone.

Road administration: identifying the stakeholders

Many road administration decisions should be made only after the decision-maker has consulted with stakeholders – people, organisations and groups who will be specially affected by the decision. Different decisions will affect different people, so it is not possible to identify stakeholders unless the nature of the decision to be made is also known.

The potential list of stakeholders for a road administration decision is large, due to diversity in the uses made of road. Some, but not all, of these are transport uses. It is not hard to understand why roads are used for a variety of purposes. Roads are easily accessible and are mostly in public ownership and control, so it can be relatively cheap and easy to place infrastructure on roads and to maintain it. Roads are frequented by the public, so uses (such as commercial uses) which benefit from public participation are attracted to roads. Roads are linear, so some uses, such as railway services along rail lines, unavoidably intersect with roads, at which point (for example, at railway crossings) there are two distinct uses of the one area of land.

A full discussion of these issues is to be found in a paper presented by Campbell Duncan to the 2010 World Conference on Transport Research in Lisbon.

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

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