

Government by regulation: A case of democratic deficit?

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Government action in November 2003 to excise by regulation Melville Island and other off-shore islands from Australia's migration zone highlights deficiencies in the mechanisms for parliamentary scrutiny and control of delegated legislation.

The immediate purpose of the regulations¹ was to prevent 14 Turkish Kurds who had arrived at Melville Island on a twelve metre Indonesian fishing boat, the *Minasa Bone*, from claiming asylum under the procedures established by Australia's *Migration Act 1958*.

The *Migration Act* establishes a detailed legislative scheme for the processing of unauthorised arrivals, including a process for holding unauthorized arrivals in 'immigration detention', the making of asylum applications and a determination process, including access to merits review before the Refugee Review Tribunal. The original intention was that arrival at any place in Australia, whether at the mainland or at an offshore island, would trigger the operation of the *Migration Act* scheme, including compulsory 'immigration detention' and access to the refugee determination procedures.

The arrival of the *Tampa* at Christmas Island, in August 2001, led to a radical change in government policy. Rather than detaining asylum seekers who arrived by boat and processing them under the *Migration Act*, the Government's new objective was to deter unauthorized arrivals by preventing access to Australia's refugee determination procedures altogether. This was achieved by the legal device of excising Christmas

Island and other named islands from the migration zone. Power was conferred to exclude other islands by regulation.

This new device enabled the government to process people arriving at these places off-shore, the so-called 'Pacific solution'. In those parts of Australia which have been excised from the migration zone, provisions of the *Migration Act* which turn on entry into or presence in the migration zone have no operation.

The intended effect of the recent excision of Melville Island from the migration zone was therefore to prevent the Turkish Kurds from making asylum applications under the *Migration Act* or having such applications determined under the *Migration Act* procedures. An earlier attempt to excise Melville Island and other off-shore islands had been made in June 2002² but the regulations had been disallowed by the Senate.³

The recent regulations excising Melville and other islands from the migration zone were made on the same day that the *Minasa Bone* arrived at Melville Island but some hours after the vessel arrived. The *Minasa Bone* arrived at 12.24pm on Tuesday 4 November 2003. At that time, Melville Island was part of the migration zone and the ordinary *Migration Act* provisions applied. That afternoon, the Governor-General would have been at Flemington racecourse for the Melbourne Cup.

Press reports on Wednesday 5 November day refer to the regulations being made 'last night' but Wednesday's vice regal notice makes no reference to an Executive Council meeting the previous day. All the indications are that the regulations excising Melville Island from the migration zone were made late in the day, well after the boat landed. They were notified in a special *Gazette* dated that day.

The power to make regulations is ordinarily conferred on the Governor-General—in effect, on the executive government. Regulations do not require the approval of the Parliament. They must, however, be notified in the *Gazette*.⁴ A regulation has no effect if it would take effect before the date of notification and as a result rights would be adversely affected.

Regulations must also be laid before each House of the Parliament within 15 sitting days. Either House may disallow a regulation and the regulation thereupon ceases to have effect. Disallowance does not, however, affect operation of the regulation prior to disallowance. Where a regulation has been disallowed, no new regulation the same in substance as the disallowed regulation may be made for 6 months unless the disallowance motion is rescinded.

The procedure for tabling and disallowance, together with the restrictions on the remaking of regulations that have been disallowed, enable considerable parliamentary scrutiny of delegated legislation. There are, however, a number of weaknesses.

Having regard to parliamentary sitting patterns, the period allowed for tabling of regulations, 15 sitting days, may amount in practice to some months. Generally Parliament sits for eight days in a month and there are also very lengthy winter and summer recesses. A government seeking to minimize the risk of parliamentary scrutiny may choose to defer the tabling of the regulations till the last available day. In 2002 the government's excision regulations⁵ were made on 7 June. They were tabled (and disallowed) on 19 June, but only after an Opposition question asking why they had not been tabled.

Where the minister has not tabled regulations, any Senator may do so if the majority of the Senate agrees. Nevertheless, a Senator wishing to table newly made regulations and move for their disallowance may still face practical obstacles. For example, the regulations may not be available for tabling. This would apparently have been the case at the time the Indonesian vessel was towed away from Melville Island. Or the Senate may refuse leave on technical grounds unrelated to the substance of the regulations—as happened when Senator Brown sought leave to table the 2003 regulations. Or Parliament may not be sitting.

It follows that there remains considerable scope for the executive to secure significant operation for regulations before they become subject to disallowance.

The opportunities for parliamentary scrutiny would be improved if the time for tabling were substantially shortened. Why not require regulations to be tabled on the first sitting day after they have been made?

In the present case, the government remade regulations that had been disallowed in June 2002. Since more than 6 months had elapsed, this was technically permissible. There was no reason to assume, however, that the attitude of the Senate had changed. The remaking of regulations by government when parliamentary disallowance is almost certain may be seen as an abuse of executive power.

Arguably, parliamentary scrutiny would be enhanced if an affirmative resolution or rescission motion were required, before the remaking of a regulation the same in substance as one previously disallowed.

The present case also shows that the restriction on retrospective operation of regulations is not fully effective. The 2003 regulations were expressed to commence on gazettal, which occurred on 4 November 2003. Hence the amending regulation

came into operation immediately on the expiration of 3 November 2003— before the *Minasa Bone* landed!

In other words, any rights the Turkish Kurds had acquired by virtue of their entry into the migration zone were retrospectively defeated. The limitation on retrospectively disadvantaging rights does not apply to rights defeated by the operation of regulations on the actual day of gazettal. Now that we know that the executive can defeat rights retrospectively by this kind of prompt action, it seems the prohibition on retrospectivity needs to be expanded. At the same time, the nature of the rights that may not be defeated needs to be addressed.

The exercise by the Executive of the regulation making power in circumstances where regulations the same in substance have previously been disallowed and where there is every expectation that they will be disallowed again raises a wider question as to the scope and structure of regulation making powers. What is the democratic justification for operation of regulations prior to the opportunity for parliamentary scrutiny? Why should regulations be able to come into operation before the time available for disallowance has expired? There may be cases of genuine urgency. Such cases would seem, however, to be the minority. Democratic control of the regulation making powers conferred on the Executive would be enhanced if, in the absence of special provision to the contrary, regulations did not take effect until the time for disallowance had expired or affirmative resolutions were passed. The terms of reference of the Senate Standing Committee for the Scrutiny of Bills require the Committee to report, *inter alia*, whether bills ‘inappropriately delegate legislative power’. Those terms of reference would therefore enable the Committee to report whether any departure from the new standard was ‘inappropriate’.

Summary of recommendations

- Shorten the time within which regulations must be tabled

- Provide that the remaking of a regulation the same in substance as a regulation previously disallowed requires an affirmative resolution or rescission of the earlier disallowance motion
- Expand the prohibition on retrospective operation of regulations.
- Amend the *Acts Interpretation Act 1901* to provide that in the absence of special provision to the contrary regulations do not come into operation until the time for disallowance has expired in both Houses or both Houses approve the regulations.

¹ *Migration Amendment Regulations 2003 (No. 8)*

² *Migration Amendment Regulations 2002 (No 4)*

³ Senate Hansard, 19 June 2002, 2178

⁴ The essential provisions relating to the making of regulations are found in s 48 of the *Acts Interpretation Act 1901*

⁵ *Migration Amendment Regulations 2002 (No 4)*