Primary and Secondary Legislation:
A Functional Difference, or Just the Outcome of Process?

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Abstract—This article considers whether there is a coherent theoretical or functional explanation for the division of content between primary and secondary legislation within a given legislative scheme. It is suggested that the allocation of provisions is largely driven by cost-benefit considerations, including financial cost, delay, risk and political reward. Some considerations tend to pull legislative provisions towards a location, either upwards to primary legislation or downwards to secondary legislation. Other considerations operate to push provisions upwards or downwards, by making one location or other less attractive. Accordingly, the placement of legislative material in primary or secondary legislation is more pragmatic and less principled or systematic than is commonly assumed.

Keywords—legislation, primary legislation, secondary legislation, process legislation, sectoral legislation, interpretation legislation, legislative cluster, regulatory impact analysis, division of powers.

I. INTRODUCTION

An Act of Parliament is a splendidly physical thing: it is likely to bear a coat of arms or the signature of important people. Its printed form, one feels, is a reproduction of an original document bearing signatures and stamps kept in an official repository. The modern electronic form of an Act to be found on a government internet site lacks physicality, but retains much of the aura of an official government document. Secondary legislation [1], such as regulations, is perhaps less impressive, but it also carries a degree of authority from its appearance and structure. It looks official.

It seems unnecessary to ask, what is legislation? The answer seems obvious – it is a document which has been created by Parliament (an Act) or under authority of an Act (secondary legislation) in accordance with a constitutional process. However, many things are created by Parliament or under the authority of an Act, so as a definition this seems to require more, at least that the document be self-described as legislation.

It is also possible to describe legislation as being a structure made up of building blocks – its legislative provisions. A legislative provision typically regulates or prohibits behavior (with sanctions of various kinds), allocates funding, confers powers, creates or alters legal structures or authorizes behavior which would otherwise not be lawful. An Act will, typically, have a variety of these, although not all types are present in all legislation – some Acts contain no sanctions, and many make no allocation of funding. However, to say that an Act is a set of provisions grouped together is as useful as saying that a human body is a set of bones and organs grouped together.

A less formal definition adds a functional component, requiring that, for a document to be legislation, it have some independent operative effect. [2].

It can be helpful also to consider legislation being a component of a country’s positive law, the other (in common law countries) being law created by judicial decisions. Viewed in this way, it is distinctive. In form, it is neat, arranged in indexed volumes, topic by topic: by comparison common law appears chaotic, developed through a process which appears to be unsystematic (being dependent on the vagaries of litigation, tactical decisions of litigants and the competence of advocates) from judicial statements of reason for decisions in myriad cases decided in many jurisdictions, at many levels and over many years. More importantly, common law is declaratory and backward looking, applying principles from court decisions of the past to contemporary inter partes disputes: legislation in contrast is intended to bring about change and in that sense is forward looking [3]. Legislators are intentionally and explicitly agents of change.

It is this last characteristic – the intentional creation of change – which gives most insight into the essential nature of legislation. However it is created, whatever its form and however it is structured, the purpose of legislation is always to give expression and effect to government policy. Other instruments, from media releases to contractual agreements, also give expression to government policy: legislation occupies a special place in the tool kit of government as it gives operative effect to policy [4].

In the past, legislation was drafted in a spare style, giving few indications of the law makers’ policy objectives – nor did the courts of Australia and other common law countries show much interest in identifying that policy if a literal to the words of the legislation could be found and applied. This somewhat constrained expression of the nature of statutory interpretation was perhaps influenced by the work of the courts themselves, which is case-specific and problem-solving, being a response to civil or criminal misbehavior for which the courts offer redress.
Modern legislation is more helpful. Introductory provisions frequently set out, expressly, the policy which it is intended to implement, usually in the form of an objects clause. These moves have been supported by amendments to interpretation legislation. Section 15AA of the Australian Acts Interpretation Act 1901 now provides that:

“In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.”

At the heart of interpretation provisions such as this is the assumption that legislation has a “purpose or object” which can be identified. This proposition now seems unexceptional, although it has been observed that section 15AA had a “lukewarm” reception on its introduction [5].

The purposive approach to interpretation does not assume that legislation has just one purpose (in interpretation legislation, the singular “purpose” includes the plural). A short Act establishing a criminal offence, for example, might very well be intended to proscribe an unwanted form of behavior. However, the likely effect – and therefore the apparent purpose – of such an Act, however, would be multi-layered. The Act would have the predominant purpose of reducing or eliminating occurrences of the prohibited behavior, but it would have other implications. There would be resource allocation implications, assuming that executive government will act to implement it, and inevitably other implications as well. The structure of the offence provisions, if they reverse the onus of proof, would be an expression of the government’s policy on civil rights. The penalty regime for the new offence would be an indication of the government’s policy that offences of that type (for example, white collar crimes or crimes of violence) are to be sanctioned more harshly (or less harshly) than previously. Further, there are likely to be policy implications in the Act’s consequential and transitional provisions.

For other legislation, for example Acts which create statutory corporations, allocate funding or impose taxes, there are likely to be very many purposes and objects – and possibly no prohibition or sanction.

The complexity of purpose is often matched by complexity of structure. The Act itself might specify how its objectives are to be achieved, whether directly by the Act or by secondary legislation which is closely defined in the Act, or it might leave some or all of this to be determined later, by executive government – either by administrative action or in devising secondary legislation where there is latitude left by the Act for decisions of this type.

A simple offence provision may require supporting definitions and penalties, and possibly procedural and jurisdictional provisions. Few Acts are simple in structure, being commonly divided into Parts, Divisions and Schedules. Many spill over into secondary legislation. A simple (hypothetical) spillover provision might specify that:

“An application to a responsible agency must be in the prescribed form”.

The provision means little to a user who does not refer to secondary legislation made under the Act, prescribing the form of the application. The secondary legislation is likely to contain a provision with the following structure:

“An application to a responsible authority must be in the form in Schedule 1.”

This provision has little meaning without reference to the primary legislation: it gives effect to a requirement of the Act under which it is made, and it uses a term (“responsible authority”) which obtains its meaning from that Act. Primary and secondary legislation in this way operate in reference to each other, forming a legislative cluster – two or more items of legislation which interact to achieve a common purpose.

II. WHOSE PURPOSE?

It might seem obvious that the purpose of legislation is to achieve the objectives of the entity which makes the legislation. For Acts, the seemingly obvious is indeed correct: Parliament, the legislature, makes laws to achieve Parliament’s objectives.

For secondary legislation, the seemingly obvious runs into a problem with the constitutional theory of the separation of powers. This theory stipulates that the legislature legislates, the judiciary judges and the executive administers, but says nothing about the executive legislating. As a result of an “encounter” between the democratic ideal that legislatures cannot delegate and the technocratic reality of the administrative state [6], it is now commonly accepted that the executive can legislate as delegate of the legislature, subject to constitutional safeguards. This “encounter” has produced the system of secondary legislation-making which operates in Australia and elsewhere. This system includes process requirements, although no line of demarcation between primary and secondary legislation. The legislative function of the executive, in short, is the product of compromise and offends constitutional theory. If it has any theoretical validity at all, it is that secondary legislation is made in the exercise of a delegated power, with the delegate standing in the shoes of the delegator. A delegate’s purposes are necessarily, by the nature of a delegation, the purposes of the delegator. Like troublesome children, executive law-makers are tolerated if they are seen but not heard, at least not on the subject of independent legislative purposes.

The separate identification of purposes also sits poorly with the interrelated nature of legislation. It seems inadequate to identify separate purposes of primary and secondary legislation if the two are serving a common purpose. Legislation which deals with an area – sector – of government activity (“sectoral legislation” [7]) is rooted in practicality. It is designed and made to achieve an outcome, and is not a vehicle for statements of constitutional theory. Nonetheless, it can be seen that statements in sectoral legislation of roles and responsibilities in the development and implementation of policy – who does what – are suggestive of a complex relationship and common purpose. To take a recent example, the Commonwealth
Tobacco Plain Packaging Act 2011(No 148, 2011, s. 3) identifies the objects of the Act using the following formulation:

“(1) The objects of this Act are:

(a) to improve public health by ...

This is followed by a list of high-level objectives: but whose objectives are they? An Act is inanimate and cannot have objectives, so the formulation seemingly is shorthand for “The objects of Parliament in enacting this Act are ...”. If this is what was intended it seems oddly indirect not to say so. If this is not what was intended, perhaps Parliament is expressing a shared objective, shared, that is, with executive government.

Modesty about Parliament’s importance continues in the following sub-section. In this Parliament expressly puts itself into a contributory role:

“(2) It is the intention of the Parliament to contribute to achieving the objects in subsection (1) by ...

This is followed by a list of specific measures contained in the Act. This seems to be topsy-turvy: Parliament is mentioned in relation to implementation measures but not in relation to high level policy. One might have expected the converse –high level objectives to be expressed as those of Parliament (and not of the Act), and the specific measures to be those which are to be implemented by others (executive government). If a topsy-turvy interpretation is to be avoided, this provision must be given another meaning – that Parliament and the executive have common purposes (those set out in s. 3 (1)) to which each contributes in its own way. Parliament’s contribution is enactment of the Act.

Continuing on with this example, the executive government has, indeed, acted to implement the legislated policies by making the Tobacco Packaging Regulations 2011 (SLI No. 263 of 2011), which rather prosaically, in a regulation headed “Purpose” (regulation 1.1.4), provide:

“These Regulations prescribe requirements for the retail packaging and appearance of tobacco products for Part 2 of Chapter 2 of the Act.”

This looks to be a contribution by the executive to the achievement of the Act’s objectives. The executive makes this contribution by making and then administering the regulations.

Interpretation legislation is similarly unassertive. Section 15AA of the Australian Acts Interpretation Act 1901 applies to primary legislation. It provides:

“In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.”.

It also is to be read “as if” it applies to secondary legislation, having been given this extended meaning by section 13 of the Australian Legislative Instruments Act 2003. This provides that the Acts Interpretation Act 1901 applies to secondary legislation made under an Act “as if it were an Act”. It is not apparent whether the authors of the Legislative Instruments Act 2003 had section 15AA in mind, or, if they did, whether anyone thought about whether provisions of legislation should be construed to promote the purposes of the secondary legislation or the purposes of the primary legislation under which it is made. The second possibility seems to follow from a direct application of the “as if” provision in section 13 of the Legislative Instruments Act 2003, under which only the first reference to an Act is read “as if” it is a reference to secondary legislation. If applied in this way, section 15AA should be read to mean:

In interpreting a provision of secondary legislation, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

This is not the approach which has been taken in Victoria. Under the Victorian Interpretation of Legislation Act 1984, in the interpretation of an Act or secondary legislation (“subordinate instrument”) (emphasis added):

“a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object.”

Identification of separate purposes is conceptually possible, despite constitutional theory, because sectoral legislation does not generally create a legislative straight-jacket, conferring power to make subordinate legislation that operates in ways which are not narrowly defined in the Act.

Neither interpretation provision specifies that secondary legislation should be interpreted so as to achieve the purpose of the legislative cluster of which it will form part, despite the interrelated nature of modern sectoral legislation such as the tobacco packaging legislative cluster discussed above. This approach would discard attempts to find the purpose of the primary legislation or the purpose of the secondary legislation, but instead look at purpose of the primary and secondary legislation, read together.

III. ENCOURAGING AN INTIMATE RELATIONSHIP

Even if primary legislation and secondary legislation are not to be read together for the purposes of interpretation, it is nevertheless clear that a sectoral Act and its secondary legislation have a close relationship. The means by which Parliament confers power to make secondary legislation is by provisions in a sectoral Act: secondary legislation is made “under” that Act, creating a one-to-one (or possibly a one-to multiple) relationship.

The power is commonly conferred in two distinct components. The first is a subject-matter description, often expressed in general terms. Section 312 of the Australian Clean Energy Act 2011, in a typical manner, provides power for secondary legislation to prescribe matters “required or permitted by this Act to be prescribed” or “necessary or convenient to be prescribed for carrying out or giving effect to
this Act”. This ties the subject-matter of the secondary legislation to the purposes of the sectoral Act.

The second component of empowering provisions commonly found in sectoral legislation is hazard removal – the clearance of common law or statutory mines which might otherwise be detonated. Section 310 of the Clean Energy Act 2011 is an example:

“The regulations may make provision in relation to a matter by conferring a power to make a decision of an administrative character on the Regulator.”

This provision clears the restriction on what is loosely described as the prohibition on sub-delegation – the practice of conferring wide discretionary powers on government officials. The underlying policy is that legislation should deal directly with issues rather than merely conferring on officials the power to deal with those issues. At common law, unauthorized sub-delegation can trigger a declaration of invalidity. Under process legislation an unauthorized sub-delegation can trigger Parliamentary revocation.

The annulment of secondary legislation in either manner is uncommon. One reason is that the risk is foreseen and defensive measures are taken - section 310 of the Clean Energy Act 2011 is such a defensive measure. Another reason is that the restrictions have a normative effect, encouraging proponents of the legislation to ensure that the legislation is structured so that it does not offend the underlying principles.

If process legislation did no more than create avoidable hazards for the proponents of legislation it would have only limited effect on the structure of legislative clusters. However, it does more than that: it also requires an intimate connection between a sectoral Act and the secondary legislation made under it. The underlying principle is that an intimate relationship is a proper one.

A typical process requirement of this type is to be found in cl. 23 of the Australian Parliament’s Senate’s Standing Orders. This provides for secondary legislation to be scrutinized to ensure “that it is in accordance with the statute” and “does not contain matter more appropriate for parliamentary enactment”.

In Victoria, a Parliamentary committee is directed by s. 21 of the Subordinate Legislation Act 1994 to consider whether secondary legislation “appears to be inconsistent with the general objectives of the authorising Act”, “makes unusual or unexpected use of the powers conferred by the authorising Act having regard to the general objectives of that Act” or contains principles “which should properly be dealt with by an Act” and not by secondary legislation. Similar tests apply elsewhere.

These provisions, although negatively expressed as grounds for disallowance, are normative. They work to ensure that legislative clusters are structured so that their components are in accordance and that the scope of secondary legislation is “appropriate” – a concept that largely obtains its meaning from the scope of the authorising sectoral Act. With the one possible exception of local government legislation, which constitutes a sphere of government rather than conferring power on executive government, the norm established by these provisions is that a sectoral Act and the secondary legislation must operate consistently and within the one policy sphere.

Within this sphere, generally there is scope for locating provisions in primary or secondary legislation. In the absence of a fixed functional boundary between primary and secondary legislation a proponent has great flexibility in the design of legislation. For a complex proposal, many structures can be devised, all defensible as being appropriate. Inevitably, in the maelstrom of public administration, design is based not on high principle but is determined according to practical considerations. If it is unappealing to a proponent to place provisions in one location or the other, there is considerable scope to relocate them, particularly at the design stage when it is possible to ensure that the sectoral Act provide the necessary authorization.

These practical considerations operate to make design options appealing or unappealing. A design option which is attractive pulls legislative provisions towards a location, whether primary or secondary legislation. A design option which is unattractive repels – pushes – provisions away from a potential location. The prospect of an adverse report by a parliamentary review committee, for example, is a push factor: provisions are repelled – pushed – away from secondary legislation. Those provisions may, but do not necessarily, relocate to primary legislation.

This push factor – the push of provisions away from secondary legislation to avoid adverse comment or action by a parliamentary committee – operates to shape the structure of legislative clusters. However, it is one factor among many.

IV. PUSH AND PULL DYNAMICS OF DESIGNING LEGISLATION

In a Westminster system, Parliament largely has to take what is served up to it by the executive government by means of a Government Bill. It can debate and shape the Bill, defer or reject it, but it is rare for a Bill to pass through Parliament and become law if it originates in any other way. The process by which a Bill comes into being is little known, largely because it occurs within executive government and has protection from public scrutiny [8]. The process for developing secondary legislation differs only in the end-game: a completed Bill is introduced into Parliament, whereas a developed proposal for secondary legislation in the form of draft legislation and accompanying cost-benefit analysis is exposed to public comment (unless an exemption applies) as a prelude to it being made.

The process within executive government for developing legislation typically is initiated by a proponent – usually a sectoral agency – which wishes to implement a bundle of policy proposals originating from the Minister responsible for its sector. The proponent then champions the proposal along a journey towards implementation. For a Bill it must obtain political-level approval (beyond that of just its Minister), usually through one or two cabinet approvals. The proposed legislation (if legislation is considered to be necessary) is drafted or reviewed, in Australia, by a central drafting office. Consultation occurs with other sectoral agencies and also with central agencies which are tasked with addressing specific issues such as business impact, penalty levels or human rights.

Along the way a policy proposal and the intended means of its implementation will be shaped by the pull and push of
attractive and unattractive considerations. Of the many possible means of implementing a proposal two are legislative options – that is, making primary legislation or making or secondary legislation. The outcome might be implementation entirely by primary legislation: or it might be implementation entirely by secondary legislation. Often the outcome is a mix of the two.

If the proponent of the policy initiative considers that an option – say, implementation by secondary legislation – carries a very heavy cost (in terms of time, money and uncertainty) then the primary legislation option is more likely to be chosen. The proposal will have been pushed upwards in the legislative hierarchy towards the primary legislation option. There are four directions in which a proposal or its components will potentially be pushed – out, in, up or down.

Correspondingly, process rewards (such as desirable publicity or speedy implementation) can pull a proposal towards an option – again, out, in, up or down. If the political issue of the day is the number of people killed or injured in industrial accidents, for example, political leaders may decide upon changes to workplace safety procedures. To implement those changes they will be attracted – pulled – to the primary legislation option by the process reward of the favorable publicity they expect from the parliamentary exposure given to the new legislation.

Some proposals, from the outset, appear not to require legislation: as they progress it is possible for these to be pulled into the legislative stream, but otherwise they remain outside it. Conversely, a proponent of a policy proposal might be encouraged to implement a non-legislative option in preference to a legislative one by the attraction of non-legislative (for example) the absence of unwanted publicity. The proposal will have been pulled out of the legislative stream.

The limited life of secondary legislation (in many places, ten years) will typically operate as a push factor – pushing proposals into non-legislative options or up into primary legislation to avoid the expense and disruption of making replacement secondary legislation. If proposals are abandoned or pushed into non-regulatory options a purpose of the ten year “sunset” may have been achieved – that is, deregulation.

A feature of the law making process in many jurisdictions is mandatory analysis of the “regulatory impact” of proposals. These requirements are typically imposed in respect of secondary legislation, apparently on the basis that much of the content of secondary legislation represents implementation of legislated policy – its costs thus being implementation costs. Regulatory impact analysis is premised on the proponent’s analytical ability (to identify a policy and its objects, and to consider option for achieving those objects) as well as the proponent’s ability to design, or more correctly, to redesign, a legislative proposal in response to that analysis.

Regulatory impact analysis, at its heart, requires cost-benefit analysis. It evaluates possible alternative regulatory and non-regulatory approaches with the overall aim of ensuring that the final selected approach provides the greatest net public benefit [9]. The evaluation is resource intensive, requiring preparation of a draft statement, clearance of the statement by an overseeing body and a process of advertising, consultation and revision.

It can be seen that regulatory impact analysis with its associated stakeholder consultation requirements has multiple effects. By requiring proponents to consider alternatives, including non-regulatory alternatives as well as restructured regulatory alternatives, it may lead proponents towards a solution which does not involve the making of the proposed legislation.

There are other effects. Regulatory impact analysis operates as something of a lubrication of the decision-making process in respect of proposed secondary legislation, but not of proposed non-regulatory options or, in general, primary legislation. It operates asymmetrically. It facilitates reconsideration of a proposal for secondary legislation – regulatory impact analysis is always the analysis of a developed proposal – the result of which may be that provisions will be pushed away from secondary legislation.

There is a third possible effect as well. The cost, delay and uncertainty caused by regulatory impact analysis and its associated procedural requirements may encourage proponents to select a cheaper or quicker legislative option, that is, one which does not require regulatory impact analysis. This does not seem to be an intended consequence of regulatory impact analysis requirements. This third effect operates as an upward push factor, moving provisions from secondary legislation to primary legislation. The desired outcome of regulatory impact analysis is reduction of the regulatory burden – however, this third effect is like squeezing a toothpaste tube with its cap on: the volume of material is not reduced, only relocated.

The “toothpaste tube” effect of regulatory impact analysis is not highly visible. Other factors, such as the risk of judicial review of secondary legislation based on the ultra vires principle – an upward push factor – are highly visible, but the underlying risk is small. Other effects such as the influence of parliamentary legislative scrutiny committees are visible, intended and important.

At the completion of the legislation making process it is these multiple pull and push factors, rather than any functional boundary, that will have determined the distribution of provisions between primary and secondary legislation within a legislation cluster.

V. SHOULD THE CARDS LIE WHERE THEY FALL?

The absence of a line of demarcation between primary and secondary legislation is the result of a failure of constitutional theory to accommodate changes to the nature of the modern state – the state changed but constitutional theory did not (and was therefore bypassed). It seems, therefore, harsh to criticize a system which, whatever its faults, is dynamic and adaptive.

Further, the task of defining a boundary would have difficulties. A simple, principle-based boundary line would be that primary legislation establishes policy and secondary legislation implements it. The tobacco packaging legislative cluster described above would conform to this demarcation. However, even so, there would be issues to be resolved. An
initial question would be whether the boundary limits the scope of both primary and secondary legislation, or only secondary legislation. If both, it would limit the legislature’s power to legislate on important issues. Some primary legislation, such as the process legislation discussed in this paper, deals in some detail with aspects of executive government administration. Other Acts can, and often do, directly operate on government administration. Parliament may wish to deal with the mechanism by which decisions are made [10], knowing that it will thereby achieve policy objectives.

Still, whatever its shortcomings, a principle of that nature would describe the allocation of provisions in very many legislative clusters, and it would sit comfortably with regulatory impact analysis, which applies to secondary legislation in an endeavor to find the least-cost method of implementing policy. Process based outcomes could still be achieved – but only if they did not cross the functional boundary.

[1] The term “secondary legislation” is useful to identify legislation which is made under authority of an Act. The term “delegated legislation” – that is, legislation made under power “delegated” by the legislature – is also in common usage.

[2] It seems to be insufficient that it be merely of a “legislative character”, which is the defining characteristic of a “legislative instrument”: s. 5 of the Legislative Instruments Act 2003 (Australia).


[7] The term “sectoral legislation” is used in contrast to “interpretation legislation” (which sets out principles for interpreting legislation) and “process legislation” (which mandates process for making, reviewing or repealing or revoking legislation).

[8] Employees of executive government are bound by non-disclosure requirements in their terms of employment. Freedom of information legislation invariably exempts from disclosure documents which have been submitted to cabinet, thereby exempting from disclosure documents submitted at the approval in principle stage and the bill at cabinet stage (including the draft Bill itself); see section 34 of the Australian Freedom of Information Act 1982 for an example.
