

1. **Question on Notice from Ms Abigail Boyd** on Monday 27 July 2020

Question from Ms Abigail Boyd: Are there any statistics or any experience you can speak about some of these instruments that have not been drafted by the Parliamentary Counsel's Office, being then the subject of a court discussion or some kind of legal dispute?

Answer from Parliamentary Counsel's Office:

This office does not keep any statistics on statutory instruments not drafted by this office and unfortunately I do not know of any other source for these statistics. However, some of these statutory instruments are published by the office on the New South Wales legislation website at the request of the administering agency. For example, watering sharing plans made under section 50 of the *Water Management Act 2000*.

I am aware that courts and tribunals have taken into account whether an instrument has been drafted by parliamentary counsel in interpreting the instrument.

In *Day v Harness Racing New South Wales* [2014] NSWCA 423 Leeming JA said that "It is important to appreciate that the Local Rule was not drafted by Parliamentary Counsel, nor scrutinised in the way that tends to occur of a bill as it passes through Parliament and receives assent. It is legitimate to have regard to the fact that regulations are less carefully drafted, and less keenly scrutinised, than primary legislation... It is equally legitimate to have regard to the fact that Local Rule 188A(2) was drafted by Mr Sanders, and adopted by the five members of HRNSW. I mean no disrespect, but none of those men would profess to expertise in legal drafting. Their rules should be construed bearing as much in mind."

There have been problems in the past with the quality of statutory instruments that have not been drafted by this office. As a result, the types of statutory instruments the office has been asked to draft has increased over the years and the office is currently in discussion with a number of agencies about taking on responsibility for drafting instruments that are legislative, rather than administrative, in character as problems with the instruments have become apparent.

The problems have related to both legality and accessibility. For example, before the commencement of the *Subordinate Legislation (Repeal) Act 1985* it was unclear as to which regulations, rules, by-laws or ordinances were in force. That Act dealt with the problem by repealing all those types of instrument except the instruments listed in a Schedule. Similar problems exist today with other statutory instruments as it is often unclear what instruments have been made under a provision. Statutory instruments that are not drafted by this office often neglect to consider the statute book as a whole or contain procedural errors, including neglecting to repeal earlier instruments made under the same provision or are drafted in a way that makes it impossible to incorporate amendments into the principal instrument.

A related problem is that some statutory instruments that are drafted by Departmental officers are published on Departmental websites which do not hold all historical versions of the instrument. This means that the current instrument is available but when a court is dealing with a historical matter it is unclear what instrument applied on the relevant day.

2. **Question from the Chair, the Hon. Mick Veitch:** I ask this on behalf of the secretariat, essentially: Is it possible for the Committee to be supplied with a list of all Acts which exempt legislation from disallowance? Is that a possibility?

Answer from Parliamentary Counsel's Office:

Under section 41(1) of the *Interpretation Act 1987* either House of Parliament may pass a resolution disallowing a statutory rule. Section 21 of the *Interpretation Act* defines a statutory rule to mean:

- (a) a regulation, by-law, rule or ordinance-
 - (i) that is made by the Governor, or
 - (ii) that is made by a person or body other than the Governor, but is required by law to be approved or confirmed by the Governor, or
- (b) a rule of court.

A search of the NSW statute book has been conducted to see whether any Acts exempt statutory rules from disallowance. The search did not reveal any provisions that provided for an exemption of a statutory rule from disallowance. It should be noted that section 41(7) of the *Interpretation Act* specifically provides that a provision of an Act that relates to the disallowance of statutory rules made under the Act is of no effect.

Of course, not all statutory instruments are statutory rules and therefore are not subject to parliamentary scrutiny or disallowance procedures. Examples would include orders made under many Acts – the most topical at present being orders made by the Minister for Health under section 7 of the *Public Health Act 2010* – but also other instruments such as water sharing plans.

It should be noted that in a very limited category of legislation specific provision is made for the disallowance of statutory instruments that are not statutory rules and therefore would not otherwise be subject to the disallowance procedures in the *Interpretation Act*. See, for example, section 188(3) of the *District Court Act 1973*, section 24(8) of the *Supreme Court Act 1970* and section 16(4) of the *Gaming Machine Tax Act 2001*.