THE COMMENCEMENT AND OPERATION OF STATUTORY RULES IN VICTORIA

By E. P. A. Moran*

[*Whether the publication and availability for sale of statutory rules in Victoria is a pre-condition of the commencement or operation of and the liability of persons under such rules has been in doubt for some time. In this article Mr Moran examines changes made in 1980 to the Subordinate Legislation Act 1962 which were designed to bring a measure of certainty to this situation. He also analyses certain technical deficiencies in the amendments and considers their effect on the retrospective application of statutory rules.*]

The volume of subordinate legislation in force in Victoria is constantly on the increase. The trend towards more and more regulation of human activities seems irreversible. The more important types of subordinate legislation are statutory rules within the meaning of the Subordinate Legislation Act 1962.[1] That Act controls and governs the making, publication and scrutiny by Parliament of statutory rules. Fundamental amendments to that Act were recently made by the Subordinate Legislation (Amendment) Act 1980[2] which came into operation on 23 December 1980.[3] The object of this article is to examine the amendments made by the recent Act in so far as they relate to the commencement and operation of statutory rules.

What are statutory rules?

Section 2(1) of the Subordinate Legislation Act 1962 defines the expression 'statutory rule' as meaning:

(a) any regulation or rule made by the Governor in Council;

(b) any regulation made by any body corporate or unincorporate the making of which is subject to the consent or approval of, or subject to being disallowed by, the Governor in Council;

(c) any rule order form scale or regulation which relates to any court or to the procedure practice or costs of any court; and

(d) any instrument of a legislative character made pursuant to the provisions of any Act which is an instrument of a class which has been declared by notice in writing under the hand of the Attorney-General published in the *Government Gazette* to be statutory rules —

but does not include any regulation or rule that is made by a local authority or by a person or body of persons having jurisdiction limited to a district or locality unless it is a statutory rule by virtue of the operation of paragraph (d) of this sub-section.

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[1] Act No. 6886.

[2] Act No. 9486.

[3] *Ibid.* s. 1(3).

PRE-DECEMBER 1980: DOUBTS AS TO THE VALIDITY AND COMMENCEMENT OF STATUTORY RULES

Prior to 23 December 1980 s. 4 of the Subordinate Legislation Act 1962 provided as follows:

> 4. (1) All statutory rules made on or after the commencement of this Act shall forthwith after they are made be numbered printed and published by the Government Printer.
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> (2) A notice of the making of a statutory rule and of the place where copies of the rule can be obtained shall be published in the *Government Gazette* forthwith on the making of the statutory rule.
>
> (3) Where by or under an Act any statutory rule is required to be published in the *Government Gazette* a notice in the *Government Gazette* that the statutory rule has been made and of the place where copies of the rule can be obtained shall be a sufficient compliance with that requirement.

It is to be noted that s. 4(2) of the Act required the publication in the Government Gazette of a notice of the making of a statutory rule and of 'the place where copies of the rule can be obtained'. Did s. 4(2) require that copies of the statutory rule must be available at the place nominated in the notice published pursuant to that section on the day on which that notice was published?

In *Watson v. Lee*[4] the High Court had to consider s. 5(3) of the Rules Publication Act 1903 (Cth) which provided for the publication in the Gazette of a notice in relation to statutory rules 'of the place where copies of them can be purchased'. Stephen J., with whom Aickin J. was 'in complete agreement',[5] stated that 'the phrase "can be purchased" speaks as of the present time, the date of gazettal, and a notice which names a place at which at that time date copies *cannot* be purchased is simply not such a notice as the section requires'.[6]

Barwick C.J. stated that the provision

> means that copies of the regulation must be available at the place nominated in the *Gazette* on the date of the publication of the notice in the *Gazette*. If a subsequent date for the operation of the regulation is specified, it may well be sufficient that copies are available at the nominated place on or before that date. But, however that may be, it seems to me a most unjust construction to say that s. 5(3) means that the notification of the regulation will be complete . . . if the regulation-making authority notifies a place where, though copies of the regulation are said to be available, in fact they are not.[7]

The other two judges, Gibbs and Mason JJ., rejected the necessity for simultaneous availability of copies.[8]

Authority may thus be found in *Watson v. Lee* for the proposition that copies of a statutory rule were required to be available at the relevant place on the day on which the notice under s. 4(2) of the Victorian Act was published in the Government Gazette. What was the effect if copies of a

[4] (1979) 26 A.L.R. 461.
[5] *Ibid.* 491.
[6] *Ibid.* 474.
[7] *Ibid.* 465-6.
[8] *Ibid.* 470 *per* Gibbs J. and 488 *per* Mason J.

statutory rule were not so available? The answer to that question depends on whether the requirement was mandatory or directory. If the former, the result of non-compliance would be that the relevant statutory rule was invalid. If the latter, non-compliance would have no effect on validity.

The use of the word 'shall' in s. 4(2) would seem to indicate a mandatory requirement. However, there 'is no general rule as to whether enactments should be considered as obligatory or directory; the question is one of construction, the aim being to discover "the real intention of the legislature" '.[9] In *Watson v. Lee* the High Court had to consider whether s. 48(1)(a) of the Acts Interpretation Act 1901 (Cth) (which provides that regulations 'shall be notified in the *Gazette*') as affected by s. 5(3) of the Rules Publication Act 1903 (Cth) (which provides that s. 48(1)(a) shall be sufficiently complied with if a notice is published in the Gazette of the making of the regulations and of the place where copies of them can be purchased) should be regarded as mandatory or merely directory. Two of the judges (Gibbs and Mason JJ.) construed the requirement as directory only[10] while Stephen and Aickin JJ. regarded it as mandatory.[11] Barwick C.J. relied on the presumption of regularity to determine the issue before the court and did not state a definite opinion as to whether the requirement was mandatory or directory though it is strongly arguable from the terms of his judgment that on this matter he is to be regarded as being in agreement with Stephen and Aickin JJ. It is submitted that the statutory requirement before the court in *Watson v. Lee* is not dissimilar in effect to that contained in s. 4(2) of the Victorian Act.

Accordingly, it may be argued that s. 4(2) of the Subordinate Legislation Act 1962 contained a mandatory requirement, failure to comply with which rendered a statutory rule invalid. If the requirement was not mandatory then some authority may be found in *Watson v. Lee* for the proposition that if a notice under s. 4(2) was published at a time when copies of the statutory rule to which it related were not available, the statutory rule would not commence to operate until copies were in fact available.[12]

Prior to 23 December 1980 the Subordinate Legislation Act 1962 did not make any specific provision as to when statutory rules came into operation. Indeed the only general statutory provision in Victoria relating to the time of commencement of subordinate legislation was contained in s. 4(2) of the Acts Interpretation Act 1958[13] which provides that where any Order in Council, order, warrant, scheme, letters patent, rule, regulation or by-law which is made, granted or issued under a power conferred

[9] *Watson v. Lee* (1979) 26 A.L.R. 461, 469 *per* Gibbs J. In *Dignan v. Australian Steamships Pty Ltd* (1931) 45 C.L.R. 188 a provision that regulations 'shall' be laid before Parliament within a specified period was held to be directory only.

[10] (1979) 26 A.L.R. 461, 469-70 *per* Gibbs J. and 486-8 *per* Mason J.

[11] *Ibid.* 478-80 *per* Stephen J. and 491 *per* Aickin J.

[12] *Ibid.* 467 *per* Barwick C.J. and 470 *per* Gibbs J.

[13] Act No. 6189.

by an Act passed on or after 1 August 1890 is 'expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day'. However, that provision does not state when such classes of subordinate legislation come into operation if no commencement date is specified therein.

In *Johnson v. Sargant & Sons*[14] it was held that an Order only came into operation when it became known to the public. In that case the relevant Order, called the Beans, Peas and Pulse (Requisition) Order 1917, was made on 16 May 1917 and its general effect was published in newspapers on 17 May 1917. Bailhache J. stated as follows:

> While I agree that the rule is that a statute takes effect on the earliest moment of the day on which it is passed or on which it is declared to come into operation, there is about statutes a publicity even before they come into operation which is absent in the case of many Orders such as that with which we are now dealing; indeed, if certain Orders are to be effective at all, it is essential that they should not be known until they are actually published. In the absence of authority upon the point I am unable to hold that this Order came into operation before it was known, and, as I have said, it was not known until the morning of May 17.[15]

In *R. v. Ross*[16] Harrison C.C.J. commented also on the absence of advance publicity of the making of subordinate legislation in the following terms:

> [B]efore a public Act can receive the Royal assent and become law it must first, in the form of a bill, be presented to and deliberated upon and conveyed or passed, through its different stages at different times and on different days, by the action of the members of the Legislative Assembly in concourse duly assembled in the proper place designated for that purpose, at which the public, including representatives of the press, are generally permitted to be present. Therefore the proceedings necessary to enact and bring into force an Act or law binding upon the public give to it a certain measure of publicity, and it is not difficult to understand why it is a general rule of law that one cannot successfully plead ignorance of such an Act or law.
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> But, on the other hand, an order made by a Minister, such as the one under discussion, is on a different footing than is an Act of the Legislature. The making of such an order is at the discretion of the Minister himself, . . . and is drawn up and signed in his private office or some other private place, as I assume was the case with the order in question. . . .
>
> I think it hardly compatible with justice that a person may be convicted and penalized, and perhaps lose his personal liberty by being committed to jail in default of payment of any fine imposed, for the violation of an order of which he had no knowledge or notice at any material time.
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> I think this view of the matter, without the necessity of further enlargement, is fairly in accord with the decisions rendered, respectively, in *Johnson v. Sargant & Sons* [1918] 1 K.B. 101, 87 L.J.K.B. 122, and *Brightman & Co. Ltd v. Tate* [1919] 1 K.B. 463, 88 L.J.K.B. 921, 35 T.L.R. 209.[17]

In *Watson v. Lee*[18] Mason J. referred to 'the common law principle enunciated in *Johnson v. Sargant & Sons*' that subordinate legislation does not come into operation before the date on which it is published or becomes known. In that case Barwick C.J. stated:

[14] [1918] I K.B. 101.
[15] *Ibid.* 103.
[16] [1945] 1 W.W.R. 590 (British Columbia).
[17] *Ibid.* 592-3.
[18] (1979) 26 A.L.R. 461, 487.

> To bind the citizen by a law, the terms of which he has no means of knowing, would be a mark of tyranny. . . . I regard the availability of the terms of the law to the citizen of paramount importance. No inconvenience in government administration can, in my opinion, be allowed to displace adherence to the principle that a citizen should not be bound by a law the terms of which he has no means of knowing.[19]

In New Zealand the Supreme Court has held that certain regulations came 'into force on the day they were made under the authority of the statutory provision which gives them the force of law, whether they were gazetted on that day or not'.[20] No authority was cited for that proposition. It is submitted that the better view is that, at common law, subordinate legislation which does not itself specify a commencement date does not come into operation until it is published. Indeed Lanham argues that *Johnson v. Sargant & Sons* is authority for the proposition that 'a piece of delegated legislation which states that it is to come into effect on a certain date but which is not published until a later date does not come into force until it is published'.[21] However, it is strongly arguable that the provisions of s. 4(2) of the Acts Interpretation Act 1958 override that extended common law principle.[22]

Prior to the passing of the Subordinate Legislation (Amendment) Act 1980 it is submitted that the position with respect to the commencement of statutory rules in Victoria might be summarized as follows:

1. A statutory rule not specifying a commencement date did not commence to operate until it had been published.
2. If at the date on which the notice under s. 4(2) of the Subordinate Legislation Act 1962 with respect to a statutory rule was published in the *Government Gazette* copies of the rule were not available at the place nominated in the notice then —
   (a) the rule may have been invalid on the ground that there had been a failure to comply with a mandatory statutory requirement; or
   (b) assuming that the requirement was directory only, the rule (if it did not specify a commencement date) did not commence to operate until copies of it were available at the nominated place.

The result was an administrative nightmare. It was unclear when certain statutory rules commenced (if ever) to operate. On 6 May 1980 the Subordinate Legislation Committee of the Victorian Parliament recommended that two sets of regulations be disallowed on the ground, *inter alia*, that copies of the regulations were not available at the time their making was notified in the *Government Gazette*.[23] A solution to the problem had to be found.

[19] *Ibid.* 465-7.
[20] *Scott v. Bank of New South Wales* [1940] N.Z.L.R. 922, 932-3 (Smith J.).
[21] Lanham D. J., 'Delegated Legislation and Publication' (1974) 37 *Modern Law Review* 510, 513.
[22] *Supra.*
[23] Report of the Subordinate Legislation Committee No. S.L. 3/1980.

THE 1980 ACT: A PRAGMATIC SOLUTION

On 11 November 1980 the Subordinate Legislation Committee recommended the enactment of legislation designed to give effect to the following principles:

(a) Many regulations do not create offences or impose liabilities on the public but are of a purely administrative nature or are facultative. In fact, many confer benefits of some sort. It would be unfair in these cases to penalise persons likely to benefit by enforcing requirements as to publication and tabling which could have the effect of delaying operation or could lead to disallowance and the necessity for re-promulgation;

(b) Insofar as regulations prejudicially affect anyone they should remain inoperative until published — penalties should not be imposed and offences should not be created under regulations until such time as the regulations are published and freely available (or their effects have been well publicised). However, legislative requirements as to tabling and publication should not be so harsh as to lead to the disallowance of regulations which are in all other ways satisfactory;

(c) The publication of regulations is in the public interest whereas legislative requirements as to tabling are machinery matters and are of lesser significance; and

(d) Some allowance should be made to cater for emergency situations when it may not be possible to produce printed copies of regulations within a reasonable time but urgent action is required.[24]

The recommendations of the Subordinate Legislation Committee were implemented by the Subordinate Legislation (Amendment) Act 1980. Section 2 of that Act inserted a new s. 3 into the Subordinate Legislation Act 1962 providing as follows:

> 3. (1) Subject to section 4(3) of the *Acts Interpretation Act 1958* a statutory rule shall come into operation on the day that it is made or on such later day as is expressed in the rule as the day on which the rule shall come into operation.
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> (2) Notwithstanding the coming into operation of a statutory rule, a person shall not —
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> (a) be convicted of an offence consisting of a contravention of the statutory rule; or
>
> (b) be prejudicially affected or made subject to any liability by the rule —
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> where it is proved that the statutory rule had not been printed and published by the Government Printer or notice of the making of the rule had not been published in the *Government Gazette* at the relevant time unless it is proved that at that time reasonable steps had been taken for the purpose of bringing the purport of the statutory rule to the notice of the public or of persons likely to be affected by it or of the person charged.

The effect of the new s. 3 of the Subordinate Legislation Act 1962 might be summarized as follows:

1. Sub-section (1) abrogates the former common law rule relating to the commencement of statutory rules that do not themselves specify a commencement date.
2. Sub-section (2) in effect continues the operation of that common law rule in relation to statutory rules that purport to impose criminal or civil liability. In fact sub-section (2) affords protection wider than the

[24] Progress Report upon a General Inquiry into Subordinate Legislation (Publication, Tabling and Disallowance) 4.

common law rule did in that the sub-section clearly relates not only to statutory rules which do not specify a commencement date but also to those that do.

The result is that administrative certainty and convenience has been achieved. There is no possibility of doubt as to when a statutory rule will come or has come into operation. At the same time the citizen is protected from being prejudicially affected by an unpublished statutory rule. This protection stems from the fact that statutory rules imposing criminal or civil liability have been rendered inoperative until published.

What effect does the new s. 3 have on the publication requirements imposed on the Government Printer by s. 4 of the Subordinate Legislation Act 1962? Is it still possible to argue that those requirements are mandatory? Assistance in answering that question may be obtained by having regard to the manner in which courts in the United Kingdom have interpreted a statutory provision somewhat similar to s. 3(2) of the Victorian Act.

In the United Kingdom s. 3(2) of the Statutory Instruments Act, 1946 (Eng.) provides as follows:

> (2) In any proceedings against any person for an offence consisting of a contravention of any . . . statutory instrument, it shall be a defence to prove that the instrument had not been issued by His Majesty's Stationery Office at the date of the alleged contravention unless it is proved that at that date reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged.

It has been held that under that provision due issue is not a condition precedent to the validity of a statutory instrument. In *R. v. Sheer Metalcraft, Ltd*[25] Streatfield J. held that after a statutory instrument is made it becomes a valid statutory instrument and that the statutory requirements in regard to the printing, publishing and issue of the instrument were merely matters of procedure and thus did not affect the validity of the instrument. He stated:

> If those provisions were not matters of procedure, but were stages in the perfection of a valid statutory instrument, . . . I cannot see that s. 3(2) of the Act of 1946 would be necessary, because there could be no infringement of a statutory instrument which was invalid, and, therefore, it would be unnecessary to provide that it would be a defence to a person charged with an offence consisting of a contravention of any such statutory instrument to show that it had not been issued at the date of the alleged contravention. In my view, the very fact that s. 3(2) refers to a defence that the instrument has not been issued postulates that the instrument must have been validly made and contravened.[26]

Thus in that case Streatfield J. held that the only effect of proving that a statutory instrument had not been duly issued at the date of an alleged contravention is to lay 'the burden on the Crown . . . of proving that at the date of the alleged contraventions reasonable steps had been taken for

[25] [1954] 1 All E.R. 542.
[26] *Ibid.* 545.

the purpose of bringing the instrument . . . to the notice of the public or of persons likely to be affected by it'.[27]

A similar argument is clearly applicable in relation to the new Victorian provision. If the failure of the Government Printer to carry out the duty imposed on him of printing and publishing a statutory rule and of publishing in the *Government Gazette* a notice of the making of the rule and of the place where copies of the rule can be obtained prevented a statutory rule from commencing to operate, either at all or until the duty has been carried out, there would have been absolutely no need to provide the protection against the prejudicial effects of unpublished statutory rules that is provided by s. 3(2) of the Victorian Act. This conclusion is strengthened when regard is had to the first nine words of s. 3(2) which are 'Notwithstanding the coming into operation of a statutory rule'. Thus it is now clear that the requirements imposed on the Government Printer are merely procedural and do not affect the validity or commencement date of a statutory rule.

It is to be noted that s. 3(2) of the Victorian Act is wider in ambit than s. 3(2) of the Statutory Instruments Act, 1946 (Eng.) in that it affords protection in civil as well as in criminal matters. The United Kingdom provision does not prevent a person from being 'prejudicially affected or made subject to any liability' by an unpublished statutory instrument. It merely prevents him from being convicted of an offence consisting of a contravention of such an instrument.

The solution to the statutory rule problem adopted by the Subordinate Legislation (Amendment) Act 1980 'applies to and in relation to statutory rules whether made before or after the commencement' of the 1980 Act.[28] This element of retrospectivity was recommended by the Subordinate Legislation Committee as in the opinion of that Committee 'it would be virtually impossible to determine the extent to which other regulations have not been published in accordance with the existing legislative requirements'.[29] Thus the cloud over the validity of past statutory rules has been lifted.

A LOOK AT SOME POINTS RAISED BY THE 1980 ACT

The amendments made to the Subordinate Legislation Act by the Act of 1980 clearly represent a sensible, practical and just solution to the problem which had arisen concerning the validity and commencement of statutory rules. It is submitted, however, that the new s. 3 of the Subordinate Legislation Act 1962 contains some technical deficiencies and that its effect on retrospective statutory rules is unclear. Further, the presumption of regularity

[27] *Ibid.*
[28] Act No. 9486 s. 4.
[29] Progress Report upon a General Inquiry into Subordinate Legislation (Publication, Tabling and Disallowance) 7.

applied by the courts may severely curtail the availability of the protection afforded by the section.

Technical deficiencies

1. The new s. 3(1) does not cater for the situation where different provisions contained in a statutory rule are expressed as coming into operation on different days.[30] It merely relates to the situation where the whole statutory rule is to come into operation on the day that it is made or on some other day specified in the rule.

2. The use of the expression 'at the relevant time' in the new s. 3(2) is confusing. The expression would appear to have a different meaning depending on whether one is concerned with a person being convicted of an offence consisting of a contravention of a statutory rule or with a person being prejudicially affected or made subject to any liability by the rule. In relation to the former the relevant time would appear to be the date of the alleged contravention (a point made clear in the United Kingdom by s. 3(2) of the Statutory Instruments Act, 1946[31]) and in relation to the latter the relevant time would appear to be any time (being a time prior to the time at which the printing and publication of the statutory rule and the publication in the Government Gazette of the notice of the making of the rule has been achieved by the Government Printer) at which it is necessary to determine a person's rights or liabilities.

3. It is difficult to see why the new s. 3(1) has been expressed as being subject to s. 4(3) of the Acts Interpretation Act 1958. That section provides as follows:

> (3) Where an Act passed after the commencement of the *Acts Interpretation (Commencement) Act* 1964 provides that the Act or any provision of the Act shall come into operation on a day to be fixed by proclamation or other instrument published in the *Government Gazette* or otherwise —
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> (a) the publication of the proclamation or instrument in the manner prescribed by the Act shall be a condition precedent to the coming into operation of the Act or provision in question; but
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> (b) if the proclamation or instrument is made before the day fixed therein and is not published until after that day, the proclamation or instrument shall not wholly fail, but the Act or provision in question shall come into operation on the day of the publication of the proclamation or instrument.

Section 4(3) was inserted in the Acts Interpretation Act 1958 by the Acts Interpretation (Commencement) Act 1964.[32] The latter Act was enacted to clarify the effect where a proclamation fixing a prospective day for the commencement of an Act or of a provision of an Act is not in fact published in the *Government Gazette* until after the day so fixed. Mr Rylah, the then Attorney-General, in moving the second reading of the Bill that became the Act of 1964 stated that the Bill would enact a new rule of

[30] For example, Wildlife (General) Regulations 1980: S.R. 165/1980.
[31] *Supra.*
[32] Act No. 7146 s. 2.

interpretation to the effect that a clause empowering the making of a proclamation fixing a commencement date 'will call for publication of the proclamation as a condition precedent to the commencement of the Act, but that a late publication will not be wholly abortive but will bring the Act into operation on the day of publication'.[33]

Where an Act empowers the making of statutory rules that power may, unless the Act otherwise provides, be exercised at any time after the passing of the empowering Act (whether or not that Act is in operation at the time of the exercise). However, a statutory rule made before the coming into operation of the empowering Act cannot confer any rights or impose any obligations prior to the coming into operation of the empowering Act except in so far as is necessary or expedient for the purpose of making the empowering Act fully effective upon its coming into operation.[34] Subject to that restriction a statutory rule may come into operation before the commencement of the Act under which it is made.

Presumably in making the new s. 3(1) of the Subordinate Legislation Act 1962 subject to s. 4(3) of the Acts Interpretation Act 1958 the legislature was adverting to the situation where a statutory rule is made under an Act which has been passed but is not yet in operation and the proclamation fixing the date of commencement of that Act is not published in the *Government Gazette* until after the date so fixed. In those circumstances, by virtue of s. 4(3) of the Acts Interpretation Act 1958, the empowering Act would not come into operation until the day of publication of the proclamation in the *Government Gazette*. However, this delay would not by itself affect the date of the coming into operation of a statutory rule already made under the Act concerned but the restriction referred to in the preceding paragraph on any such statutory rule conferring rights or imposing obligations would continue in existence beyond the date fixed for the commencement of the Act until the day of publication of the proclamation. It is thus difficult to see why the new s. 3(1) of the Subordinate Legislation Act 1962 has been made expressly subject to s. 4(3) of the Acts Interpretation Act 1958. The latter provision has no effect on the date of commencement of statutory rules.

Presumption of regularity

In order to raise the defence provided by the new s. 3(2) of the Subordinate Legislation Act 1962 it is necessary to establish that at the relevant time either the statutory rule had not been printed and published by the Government Printer or that notice of the making of the statutory rule had not been published in the *Government Gazette*. While it will obviously be easy to establish whether or not at the relevant time notice of the making of the statutory rule had been published in the *Government Gazette* it will

[33] Victoria, *Parliamentary Debates*, Legislative Assembly, 3 March 1964, 3098.
[34] Acts Interpretation Act 1958 s. 5(1).

probably be difficult to prove that at the relevant time the statutory rule had not been printed and published by the Government Printer. This task is not made any easier by the presumption of regularity applied by the courts. Thus in *Watson v. Lee* Barwick C.J. stated:

> There remains the question of proof of the availability of the copies of the regulations. It is quite possible to take the view that the availability of the copies of the regulations is an indispensable part of the proof of their operation and therefore on the Crown if it is seeking to enforce the regulations. That ought not to place a very great burden on the Crown because presumably proper records are kept of the delivery of copies of the regulations by the government printer to the various sub-treasuries or other places where it is said that they will be available for purchase. But, in my opinion, at least prima facie, the presumption of regularity will satisfy any such onus. If availability for purchase at the place notified is challenged, it seems to me that, having regard to the presumption of regularity, the onus of establishing that they were not is upon the person raising the question. In this case, the plaintiffs accepted the task of establishing that on the date of notification copies of the relevant regulations were not available at the place specified. In my opinion, they have failed to do so. The highest point to which proof rose was that it was not known whether or not they were so available. That, it seems to me, left the presumption to work and satisfy the obligation of the Crown to establish the availability of the regulations.[35]

By way of contrast it is to be noted that in the United Kingdom s. 3(1) of the Statutory Instruments Act, 1946 provides as follows:

> (1) Regulations made for the purposes of this Act shall make provision for the publication by His Majesty's Stationery Office of lists showing the date upon which every statutory instrument printed and sold by the King's printer of Acts of Parliament was first issued by that office; and in any legal proceedings a copy of any list so published purporting to bear the imprint of the King's printer shall be received in evidence as a true copy, and an entry therein shall be conclusive evidence of the date on which any statutory instrument was first issued by His Majesty's Stationery Office.

It would seem desirable for the Victorian legislature to have enacted a similar provision.

The back-dating of statutory rules and the issue of retrospectivity

The new s. 3(1) of the Subordinate Legislation Act 1962 clearly prohibits the fixing of a date for the commencement of a statutory rule prior to the date on which the statutory rule was made. This prohibition extends even to statutory rules conferring a benefit. However, the mere inability to backdate statutory rules does not prevent the making of statutory rules that have retrospective operation. Driedger has commented as follows in relation to this matter:

> What is a retrospective or a retroactive statute? These words are derived from Latin root words meaning 'looking' or 'operating', and 'backwards'. A retrospective statute must therefore be one that is operative with respect to a time prior to its enactment. A statute or a provision thereof may be made retrospective in one of two ways: either it is stated that it shall be deemed to have come into force at a time prior to its enactment; or it is expressed to be operative with respect to past transactions *as of a past time*. . . . Unless, therefore, a statute alters a right as of a prior time it cannot correctly be called retrospective within the normal meaning of that word. . . .[36]

[35] (1979) 26 A.L.R. 461, 467.
[36] Driedger E. A., *The Construction of Statutes* (1974) 140.

It is submitted that s. 3(1) of the Victorian Act prohibits the first way in which Driedger states that a statute may be made retrospective but not the second. There is nothing in s. 3(1) to prevent the making of a statutory rule which is operative with respect to past transactions as of a past time.

The way in which a regulation not expressly backdated may purport to have effect prior to its commencement is illustrated by *Toowoomba Foundry Pty Ltd v. The Commonwealth*.[37] That case involved consideration of the effect of s. 48 of the Acts Interpretation Act 1901-1941 (Cth) which provided as follows:

> 48. (1) Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations made accordingly —
>
> (a) shall be notified in the *Gazette*;
>
> (b) shall, subject to this section, take effect from the date of notification, or, where another date is specified in the regulations, from the date specified; . . .
>
> (2) Regulations shall not be expressed to take effect from a date before the date of notification in any case where, if the regulations so took effect —
>
> (a) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) existing at the date of notification, would be affected in a manner prejudicial to that person; or
>
> (b) liabilities would be imposed on any person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification,
>
> and where, in any regulations, any provision is made in contravention of this sub-section, that provision shall be void and of no effect.

Consideration of s. 48 arose in *Toowoomba Foundry Pty Ltd v. The Commonwealth* because a statutory rule made on 11 October 1944 purported to validate all past decisions of the Women's Employment Board 'according to their tenor'. The decision of the Board with which the High Court was concerned was made on 30 May 1944. That decision specified that the rates of payment fixed by it for work done by females covered by the decision were applicable as on and from the commencement of the first pay period after 1 July 1943. Latham C.J., with whom McTiernan J. concurred,[38] referred to s. 48(2) of the Acts Interpretation Act 1901-1941 (Cth) and stated:

> This provision was considered in *Australian Coal and Shale Employees' Federation v. Aberfield Coal Mining Co. Ltd.*[39] where it was held that the section did not avoid a provision in a regulation merely because it affected existing rights prejudicially; a regulation which was not expressed to take effect from a prior date was not affected by the section, even though it deprived a person of existing rights — or, by parity of reasoning, though it imposed new liabilities upon him in respect of past acts or omissions. In that case, it was held that a regulation which terminated a right of appeal as from a particular date took effect only as from that date, and did not take effect at any past date. Nothing can alter the past, but a law may be said to take effect from a past date if the operation of the law is such as to destroy as at a past date rights which then existed or to impose as at a past date liabilities which did not then exist. In the *Aberfield Case*, the regulation in question did neither of these things. In the present case, however, the position is different. The decisions are given legislative effect by the regulation 'according to their

[37] (1945) 71 C.L.R. 545.
[38] *Ibid.* 578.
[39] (1942) 66 C.L.R. 161.

> tenor'. A meaning should be ascribed to the words 'according to their tenor'. In the case of the decision now under consideration, the effect of the regulation is to provide that the decision shall take effect as from 1st July 1943. In my opinion, it should be held that such a provision falls within s. 48(2) because the words of the regulation express an intention that it shall impose as at a past date liabilities which did not then exist. The effect of the regulation can be ascertained only when the actual terms of the past decisions to which it applies are read into it. When this particular decision is so read in, the regulation is seen to be a regulation which is expressed to take effect from a date (1st July 1943) before the date of notification of the regulation in the *Gazette* (12th October 1944).[40]

When considering that dictum the difference in wording between the Commonwealth and Victorian provisions must be borne in mind. Section 48(2) of the Acts Interpretation Act 1901 (Cth) is directed towards prohibiting in the circumstances there set out regulations from taking effect from a date before the date of notification. Section 3(1) of the Victorian Subordinate Legislation Act is directed towards prohibiting statutory rules from coming into operation before the day on which they are made. Once a statutory rule has come into operation in accordance with s. 3(1) of the Victorian Act it may purport to destroy, as at a date prior to its commencement, rights which then existed or to impose, as at a date prior to its commencement, liabilities which did not then exist. In other words, it may purport to take effect from a date prior to its commencement.

It must of course be borne in mind that a statutory rule may only operate retrospectively if to do so is within the power conferred by the enabling Act. While Parliament may authorize the making of retrospective subordinate legislation[41] there is a presumption that it has not conferred such authority. Somervell L.J. has commented:

> It has, of course, been laid down in the clearest possible terms that no statute or order is to be construed as having a retrospective operation unless such a construction appears very clearly or by necessary and distinct implication in the Act.[42]

The justification for the presumption against the retrospective operation of laws was expressed by Willes J. as follows:

> Retrospective laws are, no doubt, primâ facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. . . . Accordingly, the Court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature.[43]

Does the new s. 3(2) of the Subordinate Legislation Act 1962 have any effect on the retrospective operation of statutory rules? It is submitted that it does have in relation to statutory rules that purport to impose criminal liability with retrospective operation but that it does not in relation to statutory rules that purport to alter or destroy as at a past date civil rights

[40] (1945) 71 C.L.R. 568-9.
[41] Pearce D. C., *Delegated Legislation in Australia and New Zealand* (1977) 292-3.
[42] *Master Ladies Tailors Organization v. Minister of Labour and National Service* [1950] 2 All E.R. 525, 528.
[43] *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1, 23.

which then existed or to impose as at a past date civil liabilities which did not then exist.

Thus s. 3(2) provides that a person cannot be convicted of an offence consisting of a contravention of a statutory rule if it is proved that at the relevant date (which it is submitted is the date of the alleged contravention[44]) the statutory rule had not been printed and published by the Government Printer or that notice of its making had not been published in the *Government Gazette* unless the Crown can prove that at that date reasonable steps had been taken for the purpose of bringing the purport of the statutory rule to the notice of the public or of persons likely to be affected by it or of the person charged. Obviously therefore a person can only be convicted of an offence under a statutory rule if the act or omission constituting the offence takes place or occurs after the making of the statutory rule. Thus so much of a statutory rule that makes 'unlawful a past action which was lawful when committed'[45] is unenforceable in criminal proceedings.

In relation to civil liability, s. 3(2) provides that a person shall not be prejudicially affected or made subject to any liability by a statutory rule if it is proved that at the relevant date (which it is submitted may be any time prior to the time at which the printing and publication of the statutory rule and the publication in the *Government Gazette* of the notice of the making of the rule has been achieved by the Government Printer[46]) the statutory rule had not been printed and published by the Government Printer, or that notice of its making had not been published in the *Government Gazette*, unless the Crown can prove that, at that date, reasonable steps had been taken for the purpose of bringing the purport of the statutory rule to the notice of the public or of persons likely to be affected by it or of the person charged. In other words only a statutory rule —

(a) which has been printed and published by the Government Printer and notice of the making of which has been published in the *Government Gazette*; or

(b) in relation to which reasonable steps have been taken for the purpose of bringing its purport to the notice of the public or of persons likely to be affected by it —

may prejudicially affect any person or impose a liability on any person. However, s. 3(2) would not appear to prohibit a statutory rule in relation to which either paragraph (a) or (b) above has been complied with from prejudicially affecting or imposing a liability on a person as of a date prior to the date on which the compliance with paragraph (a) or (b) above occurred. The only effect of s. 3(2) is to render a statutory rule purporting

[44] *Supra.*
[45] *Staska v. General Motors-Holden's Pty Limited* (1972) 123 C.L.R. 673, 675 (Lord Pearson).
[46] *Supra.*

to prejudicially affect any person or to subject any person to a liability inoperative until after one of the above paragraphs has been complied with.

CONCLUSION

The Victorian Parliament in enacting the Subordinate Legislation (Amendment) Act 1980 has adopted a balanced and sensible approach to the problem of the commencement and operation of statutory rules. Administrative certainty and convenience has been achieved without subjecting citizens to liability under laws the existence of which they could not possibly have known. Doubts concerning the validity of past statutory rules in relation to which there had been a failure to comply with the provisions of the Subordinate Legislation Act 1962 have been removed. What deficiencies there are in the Act are not fatal to its effective operation. It is to be hoped that with the passing of this Act there will be in Victoria no more 'instances of subordinate legislators failing to observe the terms of those laws which control and govern their own power to legislate'.[47]

[47] *Watson v. Lee* (1979) 26 A.L.R. 461, 471 (Stephen J.).