PUBLIC PARTICIPATION AND RULE MAKING: REG - NEG, THE USA EXPERIENCE

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I had the fortunate experience of spending approximately 18 months in the USA from July 1991. I was first introduced to the concept of 'Reg-Neg' in a *Separation of Powers* course at Harvard which eventually lead me to contact the Administrative Conference of the US ('ACUS'), the equivalent body to the ARC. I was a legal intern with ACUS in 1992. During that time I did some work on the Reg-Neg project and it is that work, and my studies in the US that I draw upon for the purpose of today's address. When I say Reg-Neg I am referring to the process of Negotiated Rule making within US government agencies.

US System of Rulemaking

It is important to begin by explaining the different nature of federal rulemaking in the US. It is governed by s 553 of the Administrative Procedure Act (APA) which requires that notice of the proposed rule making be placed in the Federal Register. The Federal Register is the equivalent of our Government Gazette. This must be followed by some level of participation by interested persons (usually either by written submissions or oral presentation) and finally publication of the rule at least 30 day before it becomes effective. Rules can be challenged in the courts, also under the APA.

The idea for Reg-Neg

In 1991 Judge Wald of the US Court of Appeals for the District of Columbia Circuit stated that 80% of all rules were being appealed through judicial review.

Interested parties who did not support the proposed or settled rule would challenge the legal validity of the rule in the courts. This could often be tactical measure - for instance the rule might involve a certain monetary cost to the company, which may have outweighed the cost of litigation in challenging the rule. Therefore in some circumstances the cost of litigation would have been less than the anticipated cost of the rule. This is just one of the reasons for the high level of litigation over rules. The high degree of litigation is therefore problematic in the proper administration of agencies responsible for the rules.

In order to avoid this costly process, both in time and money, the concept of negotiated rule-making was developed. The basic idea is that a regulatory agency which is considering drafting a rule brings together representatives of the various interest groups or affected persons, for face to face negotiations, with the aim of achieving consensus on the proposed text.

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The Negotiated Rulemaking Act of 1990 sets out findings that Congress made which include:

> Adversarial rule making deprives the affected parties and the public of the benefit of face-to-face negotiations and cooperation in developing and reaching public agreement on a rule...
>
> Negotiated rulemaking can increase the acceptability and improve the substance of rules making it less likely that the affected parties will resist enforcement or challenge such rules in court.

An agency which is thinking of using reg-neg must first determine whether the rule concerned is one that is suitable for this approach. It would then ask a 'convenor', either outside contractors or government employees not normally involved in the area, to assess how well the proposed rule meets the reg-neg process. Then the make up of the reg-neg committee is determined, and the convenor and agency are responsible for making reasonable efforts to ensure that all relevant interest groups are aware of the proceedings. The goal of the committee is to reach consensus on a draft rule. The word 'consensus' is actually meant to mean that each interest represented concurs in the final rule - ie that there is unanimous approval. Once this is achieved the rule is published as a proposed rule in the Federal Register, as the normal rulemaking procedures provide. Negotiations that do not result in a consensus can still be very useful to the agency in that they narrow the issues in dispute and can identify issues that need to be resolved[1].

Reg-Neg in Practice

Most of the work in the area has been done within the Environmental Protection Authority (EPA). It has had much success in the formulation of rules through reg-neg. Other agencies that have used it include the Department of Transportation, Labour, Education and Agriculture, the Federal Trade Commission and the Nuclear Regulatory Commission. Most of the areas are highly technical. I sat in on one of the first meetings of a Hazardous Waste Reg-Neg session within the EPA. There were between 25 and 30 representatives, and they were having much difficulty in reaching a consensus.

Value in Australia

One may ask what value this has in Australia, where we do not have such a history of litigation over delegated legislation, nor do we have the same scope for such litigation within our constitutional and administrative law framework. I would suggest that its value is more fundamental in its approach to representative democracy. It is about the involvement of interested parties in the political process. If one thinks of classical democracy, this fits reasonably comfortably with the notion of grass roots participation. The people who are going to be most fundamentally affected are becoming involved in the process. Further, the harnessing of the expertise and 'know-how' that various interest groups possess is a further advantage that such a system offers. Our political representatives and the members of the government departments do not always have a monopoly on the necessary expertise in a particular area.

There are, however, potential problems in the system. How can you be sure that you have identified all

interested parties, and that all interested parties have a proper and/or equal voice? The US Act provides that the agency should provide resources for those groups that do not have the same resources as large corporations.

There are other legal questions about accountability. Ultimately the agency and Minister in Australia would be accountable for the rule, and would have the final say on the delegated legislation.

Endnote

1 See Administrative Conference of the US, *Negotiated Rulemaking Source Book* (1990).