



DEPARTMENT
OF THE SENATE

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D20/21799

16 June 2020

Senator the Hon. C Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation

Dear Senator Fierravanti-Wells

Submission - Inquiry into the exemption of delegated legislation from parliamentary oversight

Thank you for your letter of 6 May 2020 inviting the Senate department to make a submission to the committee's inquiry on the exemption of delegated legislation from parliamentary oversight. The committee's inquiry is timely, as the response to the COVID-19 pandemic provides ample evidence of both the benefits and risks of delegated legislation. On the one hand, the flexibility provided by delegated legislation has enabled rapid and desirable legislative responses during an unpredictable emergency. However, the committee has also highlighted the risk involved, in the potential for legislative instruments to significantly intrude on the rights of citizens, possibly in unforeseen or unintended ways, and thus a heightened need for parliamentary scrutiny.

Importance of the power to disallow instruments

Even in more ordinary times, maintaining the capacity of parliamentary chambers to provide effective oversight of the exercise of delegated legislative powers can be challenging, particularly as the number, scope and technical nature of legislative instruments continues to expand.

Disallowance is the principal measure of control the Senate can exercise over delegated legislation. If a majority votes to disallow a regulation, it ceases to have effect. This is sometimes referred to as a 'blunt instrument', because regulations stand or fall on the vote and there is no opportunity to amend an instrument to resolve concerns. While that is technically the case, there is also a long tradition of the use of the disallowance power as a negotiating tool. Recent debates on motions to disallow instruments have illustrated how the possibility that an instrument may be disallowed can result in:

- amendments to the instrument;¹

¹ For example, two motions proposing to disallow the Quality of Care (Minimising the Use of Restraints) Principles 2019 were withdrawn on 28 November 2019, after the committees which had given them reported their satisfaction with amendments providing for a review after 12 months and an automatic repeal after 2 years: [Procedural Information Bulletin 338](#), p.2; and [Procedural Information Bulletin 339](#), p. 2.

- repeal of the instrument;² or
- administrative changes to address concerns that underpin the proposed disallowance.³

These examples demonstrate that the possibility that an instrument may be disallowed is an effective method of commanding the attention of responsible ministers and agencies when seeking improvements or clarifying the operation of legislative regimes. A motion to disallow an instrument gets a government's attention, while an undertaking to revisit or revise the instrument sees the motion withdrawn or not supported.

Protective disallowance notices

The effectiveness of the committee's work in relation to individual instruments is enhanced by its use of "protective" disallowance notices. As you know, the committee has a practice of lodging such protective notices where:

- it is unable to conclude its consideration of the instrument before the original disallowance period expires;
- the committee requires an undertaking to be implemented before it can conclude its consideration of an instrument; or
- it considers that the instrument raises serious, unresolved scrutiny concerns, and should be drawn to the Senate's attention or disallowed.

This practice not only extends the time available for negotiations but enables the committee and the government to refine their positions, and develop a considered body of precedents for dealing with matters that arise. This opportunity is lost in relation to instruments exempted from disallowance.

Standard of delegated legislation

More broadly, the very existence of a disallowance power has proven useful in improving the overall standard of delegated legislation. The work of the scrutiny committees – here and in other jurisdictions – has been underpinned by the development and publication of reasoned bases for the positions they take on the matters that come before them; what matters ought attract the possibility of disallowance. These have, in turn, influenced the processes for drafting and consulting on the development of instruments, and had a significant cumulative impact on the quality of legislative instruments and the explanatory statements accompanying them. As the First Parliamentary Counsel noted in his submission to the Regulations and Ordinances Committee 2019 inquiry into Parliamentary Scrutiny of Delegated Legislation, while the impact of comments on individual instruments is important:

...the broader impact of the Committee's work is much more important. We consider that the existence of the Committee and its work has a substantial influence on the content of instruments as they are developed and drafted. This is because policy officers and drafters are aware of the views that the Committee has on issues and work to ensure that, to the greatest extent possible, instruments are not in conflict with those views.

² For example, an unsuccessful motion to disallow the Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020 seemed to have a role in the government repealing the instrument to limit the period of its operation: *Journals of the Senate*, 14 May 2020, p. 1616; and Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020.

³ For example, debate on a motion to disallow the Aviation Transport Security Amendment (Security Controlled Airports) Regulations 2019: SD 13 May 2020, pp 108-115.

This is reflected in OPC's practice of referring to the role of the Committee, as well as matters that are likely to attract adverse comment from the Committee, in formal guidance materials, training materials and in day-to-day dealings with government agency clients. OPC's drafting practices also develop over time in response to scrutiny concerns of the Committee. This has contributed to greater consistency in the form and content of legislation.⁴

Thus disallowance, and the associated processes the committee has developed to scrutinise instruments and, where necessary, lodge a protective notice of motion for disallowance have a wider impact in establishing and maintaining standards for delegated legislation.

Impact of exempting instruments

Conversely, exempting delegated legislation from disallowance removes the chief mechanism through which the Parliament can, if necessary, restrain delegated legislative power being exercised in a manner that was not foreseen at the time the primary legislation was made or is otherwise determined to be undesirable.

This is not to ignore the practical difficulties associated with the uncertainty and disruption which can follow from an instrument coming into operation and then being subject to disallowance and disallowed. Of course, another way of avoiding those difficulties would be to provide that the instrument does not commence operation until the conclusion of the disallowance period, or the instrument is approved by a resolution of each House.

Nevertheless, there are no doubt circumstances where exempting an instrument, or a class of instruments, from disallowance represents the most practical approach. Arguably the blanket exemption of superannuation instruments is a case where the commercial uncertainty and financial impact on individuals that would result from the possibility of disallowance would be undesirable. At a minimum, though, such exemptions should be made on the basis of informed decisions of the Parliament.

An ongoing concern is the operation of legislative schemes that combine framework bills with complex delegated legislation. Often a draft of the proposed delegated legislation is not available when the bill which would authorise it is before the Parliament. As a result, the Parliament is effectively asked to sign a blank cheque for a legislative scheme where key elements of the legislation are not specified. If exemption from disallowance is coupled with a legislative scheme that established only a framework and a broad power to lay down the details of the scheme in delegated legislation, it might be thought that Parliament was largely abdicating its legislative role.

Exemption from disallowance by delegated legislation

Perhaps of chief concern to the committee, and the Senate, is the capacity of delegated legislation to be exempted from the disallowance provisions of the *Legislation Act 2003* by regulation. Paragraph 44(2)(b) of the *Legislation Act* allows legislative instruments to be exempted from the operation of section 42 by regulation. Pursuant to this provision, section 9 of the *Legislation (Exemptions and Other Matters) Regulation 2015* exempts several broad classes of instruments from the disallowance provisions of the Act, while section 10 of those regulations exempts specific instruments.

The Regulations and Ordinances Committee report on its inquiry into Parliamentary Scrutiny of Delegated Legislation recommended that the government:

⁴ Mr Peter Quiggin PSM, Office of Parliamentary Counsel, *Submission 3*, p. 2.

- (a) review existing provisions exempting legislative instruments from disallowance, to determine whether such exemptions remain appropriate, and amend the *Legislation Act 2003* to ensure all such exemptions are contained in primary legislation; and
- (b) publish guidance as to the limited circumstances in which it may be appropriate to exempt instruments from disallowance.⁵

While the government supported paragraph (b) of this recommendation, it did not support the proposal in paragraph (a) to amend the Legislation Act to ensure that exemptions from disallowance are contained in primary legislation. In particular, the government's response suggested that this proposal was impractical "...given the substantial time and resources required to redraft existing delegated legislation and primary legislation."⁶

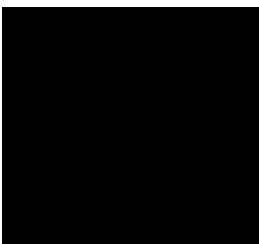
The committee may wish to seek clarification from the government about whether there are ways to mitigate these practical issues (for example, by aligning a transition to a new requirement for exemption of instruments from disallowance to the period for sunseting of instruments, or by preserving existing exemptions while requiring future exemptions to be provided for in primary legislation). In effect, the committee might consider that it should maintain the policy position of its predecessor committee that the exemption of instruments from the disallowance provisions should be done by primary legislation rather than via regulation. Where a new legislative scheme is being established, this would have the advantage of ensuring that it is clear on the face of the bill that it is proposed that delegated legislation will be exempt from disallowance. This would help to ensure that the Parliament is making an explicit decision to delegate its legislative powers without retaining its power of veto.

Exemptions in times of emergency

It is understandable that the Parliament may consider that particular emergencies justify a different approach to the powers it authorises to be exercised through delegated legislation and to the exemption of legislative instruments from disallowance. An important constraint in those circumstances would be to limit the operation of the exemption, or the instrument itself, to the period of the emergency.

I would be happy to provide any further information which would be of assistance to the committee.

Yours sincerely



(Richard Pye)

⁵ Senate Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation*, June 2019, p. 124.

⁶ Australian Government response to Senate Standing Committee on Regulations and Ordinances report: *Parliamentary scrutiny of delegated legislation*, November 2019, p. 5.