



Tabling Statement

Delegated Legislation Monitor 9 of 2021

Wednesday, 23 June 2021

I rise to speak to the tabling of the Scrutiny of Delegated Legislation Committee's *Delegated Legislation Monitor 9 of 2021*.

This Monitor includes details of the committee's scrutiny concerns regarding instruments across a number of portfolios including instruments relating to paid parental leave, the regulation of bankruptcies and the provision of funding to airlines to enable them to offer discounted fares in response to the COVID-19 pandemic. These are significant issues which are very much representative of the work that the committee undertakes every day.

In this context, I would like to take this opportunity to thank the Senate for agreeing last week to the adoption of three vital recommendations made as part of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight. The Senate's action in this regard is timely.

Delegated legislation now constitutes about half the law of the Commonwealth by volume. There are over 31,000 legislative instruments currently in force, making up the law on minor and substantial matters in every field. Delegated legislation does not only deal with matters that are technical and administrative. It is increasingly used to legislate matters of policy significance.

While there may be good reasons to delegate legislative power to the executive; there are very few good reasons to exempt such legislation from disallowance. The resolutions agreed to last week go to the heart of the role of the Parliament in a constitutional democracy. The Constitution vests Commonwealth legislative power in the Federal Parliament. Parliament's fundamental role is to legislate on behalf of the people. Our system of representative and responsible government established by the Constitution requires the Parliament to hold the executive government to account.

In light of this, allowing for legislative powers to be delegated to the executive would seem to be a violation of the principle of the separation of powers. This principle is preserved, however, by the disallowance mechanism.

Disallowance is not just a technical process. It is the means by which this chamber retains oversight of delegated legislative power and thus fulfills its role under the Constitution. It is important to emphasise that an exemption from disallowance means the Parliament does not have the opportunity to scrutinise the laws once they are made by the executive.

It also means Parliament does not have the power to prevent legislative power being exercised in a manner not foreseen or not provided for in the primary legislation, or in a way that might be considered undesirable.

With this background in mind, Resolution 1 agreed to last week in the Senate sends a strong message to ministers and the bureaucracy that there are only very limited circumstances in which it might be appropriate to exempt an instrument from disallowance. Any claims to exceptional circumstances cannot be accepted at face value or rely on provisions in regulation. The committee considers that there must be rigorous scrutiny of these claims and that such claims will only be justified in rare cases.

Resolution 2 requires the Attorney-General to table a statement setting out the rationale for current exemptions from disallowance. In its final inquiry report, the committee discussed grounds upon which it might be appropriate to exempt delegated legislation from disallowance.

The committee provided guidance to the effect that exemptions from disallowance can only be justified in exceptional circumstances and for the purpose of technical or administrative matters. But even if an instrument satisfies these categories, it must also not adversely affect rights, liberties, duties and obligations, and should only be exempt if there is an alternative form of accountability.

When presenting the final report to the Senate, I remarked that the grounds upon which exemptions from disallowance may be acceptable are 'vanishingly small'. The view of the committee has certainly not changed.

In coming to this conclusion, the committee considered a range of rationales that have previously been permitted by the Parliament when it has passed bills exempting delegated legislation from disallowance. The final report found the majority could not be supported and should not continue to be accepted by the Parliament.

Of particular concern to the committee is the *Legislation (Exemptions and Other Matters) Regulation 2015* which I will refer to as the 2015 Regulation. This Regulation exempts vast amounts of delegated legislation from disallowance, regardless of whether there are grounds or even a clear need for such an exemption.

The 2015 Regulation itself is not only an instrument that is exempt from sunseting and hence, the Parliament will not have the opportunity to reconsider its content but it is also an exemplar of the failure of the Parliament to take seriously its scrutiny function over many years.

During the inquiry, the committee heard from many eminent constitutional scholars. The Centre for Comparative Constitutional Studies argued delegated legislation exempted from disallowance through the 2015 Regulation is unconstitutional because the Parliament is no longer making legislation. It has abdicated rather than exercised its legislative power.

The government has previously acknowledged that exemptions from disallowance should only be made in 'very limited circumstances'. The continued use of the 2015 Regulation to provide for a wide range of exemptions from disallowance is therefore inconsistent with the government's expressed view. The committee has provided clear guidance on the very limited grounds upon which an exemption from disallowance may be justified.

Resolution 2, requiring the Attorney-General to table a statement setting out the rationale for current exemptions from disallowance, will allow the Parliament to consider whether there are genuinely exceptional circumstances to justify the significant number of current exemptions.

I now turn to Resolution 3. Without disallowance, the only way the Parliament can cease an instrument is by repealing or amending the enabling legislation. However, having the ability to overturn the enabling legislation is not sufficient. We must not only retain control over the legislative power we delegate to the government, but also be in a position to supervise the exercise of this delegated power in order to effectively exercise this control.

As acknowledged by Professor Anne Twomey, the only systemic way for delegated legislation to be scrutinised is through parliamentary committees. If delegated legislation is not scrutinised, the Parliament may be abdicating its power because it simply does not know how legislative power is being exercised. This is totally unacceptable. The Parliament must be informed, and to be informed, we must retain a level of supervision over the exercise of legislative power delegated to the executive.

Since its establishment in 1932, the committee has been limited by the standing orders to scrutinising disallowable legislative instruments. Accordingly, the committee recommended that standing order 23 be amended to allow the committee to scrutinise legislative instruments exempt from disallowance. These amendments to the standing orders agreed to last week will go some way to ensuring the Parliament can continue to fulfill its constitutionally mandated function.

I would also like to take this opportunity to thank our Secretary, Glenn Ryall and all his team as well as our legal advisor, Professor Andrew Edgar for all their hard work.

Can I also acknowledge and thank committee members – Deputy Chair Kim Carr and Senators Raffaele Ciccone, Perin Davey, Nita Green and Paul Scarr for their support and commitment to the importance of our role as parliamentarians.

I also place on record my thanks to the former chair, John ‘Wacka’ Williams and senators who served on the committee with him who started this journey quite some years ago.

When we sit in this place, we are not just politicians, we are parliamentarians. We are responsible to our constituents to scrutinise all legislation that comes before us. If we fail to recognise this responsibility and act accordingly, we undermine the compact upon which representative democracy rests for its legitimacy.

With these comments I commend the committee's *Delegated Legislation Monitor 9 of 2021* to the Senate.