



18 June 2020

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Chair,

Inquiry into exemption of delegated legislation from parliamentary oversight

Thank you for your invitation of 6 May 2020 to the Senate Standing Committee for the Scrutiny of Bills (the Committee) to make a submission to the Scrutiny of Delegated Legislation Committee's inquiry into the exemption of delegated legislation from parliamentary oversight.

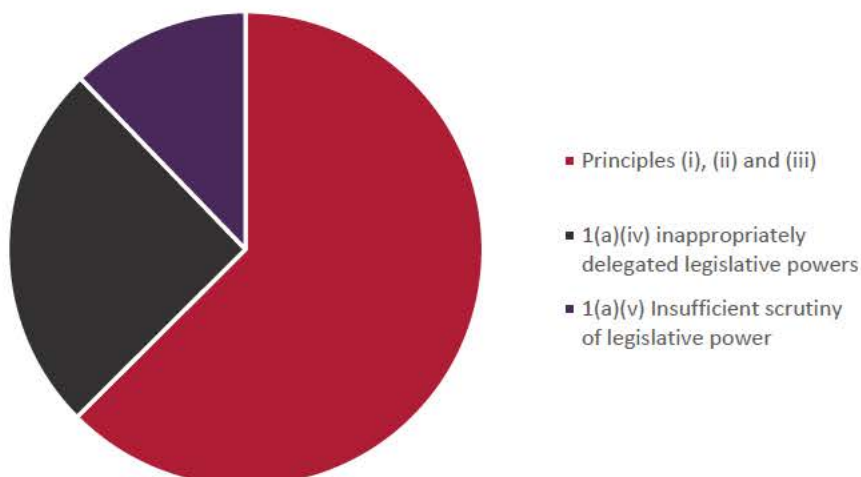
Background

Since 1981 the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against a set of non-partisan accountability standards to assist the Parliament in undertaking its legislative function. These standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny.

Standing order 24(1)(iv) requires the committee to scrutinise each bill introduced into the Parliament to determine whether it inappropriately delegates legislative power. Standing order 24(1)(v) also requires the committee to scrutinise each bill introduced into the Parliament to determine whether it insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

The committee has consistently drawn attention to bills that seek to limit or remove appropriate parliamentary scrutiny. The graph below demonstrates the committee's consistent commitment to addressing these issues as they make up a significant portion of the committee's workload (37.5 per cent from February 2015 to May 2020).

Principles considered 2015-2020



This inquiry provides an important opportunity to evaluate the effectiveness of the current model through which delegated legislation is exempted from parliamentary oversight.

Exemption from disallowance and sunseting

Grounds upon which delegated legislation is exempted from parliamentary oversight

The committee's consistent scrutiny view is that significant matters, such as those dealing with substantive policy issues rather than matters that are purely technical or administrative in nature, should be included in primary legislation rather than delegated legislation. The committee's scrutiny concerns in this regard will be heightened where the relevant instrument is not subject to disallowance. The committee considers that the disallowance process is an important aspect of parliamentary scrutiny.

When a provision of a bill specifies that an instrument is not subject to disallowance the committee expects the explanatory memorandum to set out a full explanation justifying the need for the exemption. The committee has generally not accepted that an instrument is of a class that is exempt from disallowance under the Legislation (Exemptions and Other Matters) Regulations 2015 or another legislative scheme to be a sufficient justification, of itself, for excluding instruments from disallowance, especially where an instrument contains significant policy matters.

The committee recommends that the breadth of these exemptions from disallowance be reviewed to ensure that the default position is that parliamentary oversight remains available for all delegated legislation unless there is a very strong reason for exempting a particular instrument or class of instruments from parliamentary oversight.

The committee notes that there is a lack of guidance provided to legislation proponents regarding when it is appropriate to exempt an instrument from disallowance. Should such guidance be developed, the committee considers that both the Scrutiny of Bills Committee and the Scrutiny of Delegated Legislation Committee should be consulted as part of this process.

Manner in which delegated legislation is exempted from parliamentary oversight

During the course of its inquiry, the Scrutiny of Delegated Legislation Committee might consider the appropriateness of the manner in which exemptions from disallowance are currently authorised via delegated legislation, namely the Legislation (Exemptions and Other Matters) Regulations 2015. The committee also notes that exemptions from sunseting are also specified in this manner.

The committee considers that provisions exempting classes of instruments or particular instruments from any form of parliamentary control should be included in primary legislation. In this regard, the committee notes that the use of delegated legislation removes the ability of the committee to have oversight of which instruments are exempted from disallowance and/or sunseting.

Examples of the committee's scrutiny of bills allowing for the making of non-disallowable instruments

Advances to the Finance Minister

As a part of its scrutiny of Appropriation and Supply bills, the committee has consistently scrutinised provisions that enable the Finance Minister to allocate additional funds to entities

(known as an Advance to the Finance Minister) via non-disallowable legislative instruments.¹ The committee considers that these provisions delegate significant legislative power to the Executive. While this does not amount to a delegation of the power to create a new appropriation, one of the core functions of the Parliament is to authorise *and scrutinise* proposed appropriations. High Court jurisprudence has emphasised the central role of the Parliament in this regard. In particular, while the High Court has held that an appropriation must always be for a purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.² The Advance to the Finance Minister provisions leaves the allocation of the purpose of certain appropriations in the hands of the Finance Minister, rather than the Parliament.

Ministerial directions to funds about investment functions

The committee has commented on a number of bills that seek to create funds for the spending or investment of money. The committee notes that these bills generally provide that an investment mandate will be made to outline the operational details of the fund. These investment mandates are often not disallowable on the basis that they are directions from the relevant minister. The committee notes that this prevents crucial details regarding how government money will be spent or invested from being subject to parliamentary oversight. The committee has consistently suggested that there are methods that would allow for appropriate parliamentary scrutiny while ensuring commercial and operational certainty for both the government and affected parties, such as providing that an investment mandate will not come into force until the disallowance period has passed.³

National security legislation

The committee has consistently commented on the use of non-disallowable instruments and non-legislative policy guidance in relation to the use of coercive powers by national security agencies. The committee's scrutiny concerns in these matters are generally heightened by the serious potential for trespass on individual rights and liberties. The committee notes that leaving these matters to non-disallowable instruments and non-legislative policy guidance severely limits the ability of the Parliament to have oversight of significant matters, such as how coercive questioning powers will be exercised, and this can limit the ability of both the Parliament and the committee to accurately assess the impact of any coercive powers and be satisfied that appropriate safeguards are in place.⁴

Biosecurity Act 2015

The committee's comments on the *Biosecurity Act 2015* (Biosecurity Act) may be of particular relevance to the inquiry's terms of reference. For example, the committee initially raised

¹ See, for example, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2020*, pp. 1-4

² *Combet v Commonwealth* (2005) 224 CLR 494, 577 [160]; *Wilkie v Commonwealth* (2017) 263 CLR 487, 532 [91]

³ See, for example, the Future Drought Fund Bill 2018 (*Scrutiny Digest 15 of 2018*), Emergency Response Fund (*Scrutiny Digest 6 of 2019*) and the National Housing Finance and Investment Corporation Bill 2019 (*Scrutiny Digest 6 of 2019*).

⁴ See, for example, the Intelligence Services Amendment Bill 2018 (*Scrutiny Digest 15 of 2018*) and the Australian Security Intelligence Organisation Amendment Bill 2020 (*Scrutiny Digest 7 of 2020*).

scrutiny concerns about the exemption of emergency declarations made under the Biosecurity Act from disallowance when the Biosecurity Bill 2014 was before the Parliament.⁵

Sunsetting

As part of the government's legislative response to coronavirus, the Coronavirus Economic Response Package Omnibus Bill 2020 provided that a minister could defer the sunseting date of both delegated legislation and primary legislation sunseting before 15 October 2020 by up to 6 months. The committee noted its view that sunseting provides a valuable tool for parliamentary oversight, especially in relation to extraordinary measures included in primary and delegated legislation. The committee expressed concern about the lack of guidance on the face of the bill about when such a deferral would be appropriate.

Henry VIII clauses

The committee has consistently raised significant concerns regarding the use of Henry VIII clauses. A Henry VIII clause is a provision that enables delegated legislation to amend or modify primary legislation. There are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive.

The committee notes that several of the COVID-19 response bills have included broad Henry VIII powers to amend a number of Acts, including the *Corporations Act 2001* and social security legislation. The committee's scrutiny concerns in this instance are heightened by the quick passage of the bills and the lack of limitations and safeguards around the exercise of the power. The committee considers that this has deprived Parliament of a crucial opportunity to have oversight of legislative changes being made during a period of emergency. As such, the committee has consistently recommended that where the Parliament is sitting, changes to, or exemptions from, primary legislation should be made by introducing a bill for consideration by the Parliament, rather than relying on the use of a Henry VIII clause.

Noting their ability to undermine parliamentary oversight, the Scrutiny of Delegated Legislation Committee may wish to consider instruments made pursuant to Henry VIII clauses within the scope of its inquiry.

I trust that this submission will assist the Scrutiny of Delegated Legislation Committee as it undertakes this important inquiry.

Please do not hesitate to contact the committee via the secretariat on 02 6277 3055 or by email to scrutiny.sen@aph.gov.au if the committee can be of any further assistance.

Yours sincerely,



Senator Helen Polley
Chair

⁵ Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 2 of 2015*, pp. 11-26.