CHAPTER 5

INAPPROPRIATE DELEGATION OF LEGISLATIVE POWER

Application of criterion set out in Standing Order 24(1)(a)(iv)

5.1 Criterion (iv) requires the Committee to draw the Senate's attention to legislation where Parliament's power to make laws may have been delegated inappropriately.

5.2 In considering this criterion, a threshold question sometimes arises: is the power proposed to be delegated legislative in nature? At times it is difficult to determine whether the instruments that Parliament empowers another body or person to make are legislative in character. Such instruments might be ministerial guidelines, codes of practice, codes of conduct or practice statements. They are often described as made under a power to direct, determine, notify, order, instruct, declare, issue or publish.

5.3 Examples of provisions that may inappropriately delegate legislative power include those which:

- enable subordinate legislation to amend an Act of Parliament (often called a 'Henry VIII' clause);
- provide that matters which should be regulated by Parliament are to be dealt with by subordinate legislation;
- provide that a levy or a charge be set by regulation; or
- give to the Executive unfettered control over whether or when an Act passed by the Parliament should come into force.

'Henry VIII' clauses

5.4 An express provision that authorises the amendment of either the empowering legislation, or any other legislation, by means of delegated legislation is called a 'Henry VIII' clause. The *Macquarie Dictionary of Modern Law* defines a 'Henry VIII' clause as 'a clause in an enabling Act providing that the delegated legislation under it overrides earlier Acts or the enabling Act itself; so named because of its autocratic flavour'[1]. Since its establishment, the Committee has consistently drawn attention to such clauses.

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1 See also Pearce, D C, *Delegated Legislation in Australia and New Zealand*, Butterworths, Sydney, 1977.

5.5 In *Alert Digest No. 13 of 2001*[2], the Committee commented on a provision in the Migration Amendment (Excision from Migration Zone) Bill 2001, which would authorise a statutory definition ('excised offshore place') to be amended by regulation. The Committee sought the Minister's advice as to why it was appropriate that such a significant definition was able to be amended by regulation.

5.6 The Minister for Immigration and Multicultural and Indigenous Affairs responded that:

> The regulation making provisions in the definition of 'excised offshore place' are intended to provide flexibility to deal with circumstances that may arise in the future.
>
> As is the case with all regulations, any regulations made in relation to an 'excised offshore place' must be tabled in Parliament and may be subject to a disallowance motion.[3]

5.7 The Committee thanked the Minister for this response but expressed continued concern about the possible effect of the provision. Notwithstanding that the bill had already been enacted, the Committee continued to draw this provision to the attention of Senators.

Determination of important matters by regulation

5.8 The Committee also draws attention to provisions that inappropriately delegate legislative power of a kind which ought to be exercised by Parliament alone. One example of such a provision (from a previous Parliament) was a clause which conferred power on the Executive to define a word or phrase in an Act. The definition determined the way in which the Act was to operate.[4] In such circumstances, the Committee will argue that the defining of the word or phrase is too crucial a matter to be left to subordinate legislation and should be undertaken by the Parliament.

5.9 In *Alert Digest No. 1 of 2002*, the Committee commented on a clause in the Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002 that proposed to insert a new subsection in the *Criminal Code* which would allow for the further definition, by regulation, of dangerous or harmful substances, the posting of which would be an offence. The Committee noted that 'this subsection allows for the creation of a criminal offence by Executive Order – in a regulation – rather than by primary legislation, which would be debated in both Houses of the Parliament.'[5]

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2 Note: While this bill was introduced during the 39th Parliament, the Committee's final report on the bill was not tabled until the 40th Parliament, thus its inclusion in this report.

3 Scrutiny of Bills Committee, *First Report of 2002*, p. 42.

4 See, for example *Alert Digest No. 7 of 1992*, commenting on the Commonwealth Electoral Amendment Bill 1992; and *Alert Digest No. 14 of 1992*, commenting on the Student Assistance Amendment Bill 1992.

5 Scrutiny of Bills Committee, *Alert Digest No. 1 of 2002*, p. 17.

5.10 While noting that the proposed new provision was apparently in the same form as the existing section 85X of the *Crimes Act 1914*, the Committee sought the Minister's advice as to why it was appropriate that an offence of such seriousness should be addressed through subordinate, rather than primary, legislation.

5.11 The Attorney-General responded that:

> As stated in the Explanatory Memorandum, it is necessary to have the scope to add items by regulation, because the specific items that are prohibited for posting with Australia Post may change at short notice, including where new types of goods come into existence.
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> The proposed offence replicates the existing offence in subsection 85X(2) of the *Crimes Act 1914*, which also relies on the prescription of dangerous substances in regulations. The current descriptions of dangerous substances in the regulations are based on the Technical Instructions for the Safe Transport of Dangerous Goods by Air published by the International Civil Aviation Organisation, which are updated every two years. By continuing to allow for the prescription of dangerous substances in regulations, proposed subsection 471.15(1) will enable the list of dangerous substances to be revised quickly to ensure consistency with international standards.[6]

5.12 The Committee thanked the Attorney-General for this response. While mindful of the precedent provided by the existing subsection 85X(2) of the *Crimes Act 1914*, the Committee continued to express concern that the bill allowed serious criminal offences to be created or modified by regulation.

5.13 The Attorney-General wrote again to the Committee on 15 March 2002, reiterating the position that the provision 'simply replicates an equivalent provision in the existing section 85X of the *Crimes Act 1914*'. The Attorney-General also emphasised that:

> The parameters of the offence are clearly marked out by the 'dangerous or harmful' test in the primary legislation, allowing full Parliamentary scrutiny of the nature of the offence. Regulations made to give effect to the offence would, of course, be disallowable.[7]

5.14 In thanking the Attorney-General for this further response, the Committee recognised that the proposed new section 471.15 replicated an existing provision in the Crimes Act and that any regulations which were made to give effect to the offence would be disallowable. However, the Committee stated that it 'continues to have concerns where serious criminal offences can be created or modified by regulation.'[8] The Committee concluded that this issue was best left for resolution by the Senate as a whole. The Senate did not amend the bill to address the Committee's concern.

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6 Scrutiny of Bills Committee, *Second Report of 2002*, p. 104.

7 Scrutiny of Bills Committee, *Third Report of 2002*, p. 123.

8 ibid.

5.15 The Committee commented in similar terms on provisions in the Aviation Transport Security Bill 2003[9] and the Maritime Transport Security Bill 2003,[10] both of which included provisions that effectively empowered a member of the Australian Public Service to create criminal offences. In both cases, the Committee reiterated its concern that criminal offences could be created by officials without reference to Parliament, but concluded that 'this is an issue best left for resolution by the Senate'.[11] The Senate did not amend either of these bills to satisfy the Committee's concerns.

Setting the rate of a 'levy' by regulation

5.16 The Committee has consistently drawn attention to legislation that provides for the rate of a 'levy' to be set by regulation. This creates a risk that the levy may, in fact, become a tax. It is for the Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

Providing a statutory maximum rate or a rate-setting formula

5.17 Where the rate of a levy needs to be changed frequently and expeditiously, this may be better done through amending regulations rather than the enabling statute. If a compelling case can be made for the rate to be set by subordinate legislation, the Committee seeks to impose some limit on the exercise of this power. For example, the Committee will seek to have the enabling Act prescribe either a maximum figure above which the relevant regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is delegating an unfettered power to impose fees.

5.18 In *Alert Digest No. 12 of 2003*, the Committee commented on several provisions in the Offshore Petroleum (Safety Levies) Bill 2003 which would allow the amount of various levies to be set by regulation, without any upper limit being specified in the primary legislation. The Committee indicated that it was of the view that the upper limit of such an impost should be determined by the Parliament as a whole, and not merely be subject to possible disallowance, as is the case when the amount is to be fixed by regulation without an upper limit being set in the bill. The Committee sought the Minister's advice as to whether an upper limit on the various levies could be set by the primary legislation.

5.19 The Minister for Industry, Tourism and Resources responded that the Government did not consider it appropriate, in this case, to set upper limits on the various levies imposed in the bill as the function of the levies was purely to recover the costs of the operations of the National Offshore Petroleum Safety Authority (NOPSA) and such costs could not reasonably be determined in advance:

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9 Scrutiny of Bills Committee, *Alert Digest No. 5 of 2003,* pp. 7-8.

10 Scrutiny of Bills Committee, *Alert Digest No. 12 of 2003,* p. 17.

11 Scrutiny of Bills Committee, *Fourteenth Report of 2003,* p. 311 and *First Report of 2004,* p. 14.

> The safety case levy and the pipeline safety management plan levy are measures to recover the costs of NOPSA's day-to-day regulation of offshore facilities and pipelines. These levies will recover most of the NOPSA budget. Until NOPSA is fully operational, it is impossible to ascertain with any accuracy what its annual costs will be. If an upper limit were set for these levies, it would need to be high (an upper-estimate) so as to avoid a situation where NOPSA under-recovers and is unable to fulfil all of its functions. However, setting a high limit would alarm industry and may lead to perceptions that NOPSA is over-recovering or operating in a manner which was extravagant.
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> The safety investigations levy is a means of recovering the costs of conducting investigations into serious incidents or occurrences. It is hoped that there will be no need to charge this levy but should there be a need for a major investigation into an incident or alleged occurrence, the costs of conducting it could run into millions of dollars. For this reason, it is impossible in advance, and particularly without any operational experience of investigations by NOPSA to draw on, to set an upper limit for this levy.[12]

5.20 Furthermore, the Minister indicated that there were a number of safeguards and constraints in place including:

- provisions in the bill that required the amounts raised by these levies to be paid into a Special Account, which could only be used to pay NOPSA's costs in carrying out its statutory functions;
- that the levies would be set in regulations after the finalisation of a cost recovery impact statement, which would be developed in consultation with stakeholders, including industry, and released publicly; and
- annual reporting of NOPSA's ongoing operations and finances, which would be open to Parliamentary scrutiny.[13]

5.21 The Committee thanked the Minister for this comprehensive response and noted that it would have been helpful if this explanation had been including in the explanatory memorandum to the bill.

Commencement by Proclamation: Office of Parliamentary Counsel Drafting Direction 2003, No. 3

5.22 The Committee is wary of provisions that enable legislation to commence on a date 'to be proclaimed' rather than on a determinable date. Where a bill, or part of a bill, is expressed to commence on Proclamation, the date proclaimed should be no later than six months after the Parliament passes the relevant measure.

5.23 The Committee takes the view that Parliament, as the elected holder of Federal legislative power, is responsible for determining when the laws it makes are to

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12 Scrutiny of Bills Committee, *Twelfth Report of 2003*, p. 278.

13 ibid. pp. 278-279.

come into force. In taking this view, the Committee is conscious of Drafting Direction 2003, No. 3 issued by the Office of Parliamentary Counsel. This provides, in part:

> 17. As a general rule, a restriction should be placed on the period within which an Act, or a provision of an Act, may be proclaimed. The commencement clause should specify either a period, or a date, after Royal Assent after which:
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> - the Act commences, if it has not already commenced by Proclamation; or
> - the Act is taken to be repealed, if a Proclamation has not been made by that time.
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> 18. If the specified period option is chosen, the period should generally not be longer than 6 months. A longer period should be explained in the Explanatory Memorandum.
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> 19. If the specified date option is chosen, there is no restriction on how long commencement may be deferred. However, any substantial deferrals should be explained in the Explanatory Memorandum, and it may in fact be sensible to explain the significance of the specified date whenever this option is used.
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> 20. Note that if the "repeal" option is chosen, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made before the end of the specified period or before the specified date.
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> 21. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain and generally not within the Government's control (eg. enactment of complementary State legislation). Commencement provisions of this kind should be explained in the Explanatory Memorandum.

5.24 Where the rules set out in the Drafting Direction are not followed, the Committee prefers to see the reason for this departure set out in the explanatory memorandum. For example, where a six month period is said to be impractical, the Committee likes to see another period – such as a period of 12 months – specified and a justification provided in the explanatory memorandum, rather than no period at all.

5.25 In *Alert Digest No. 16 of 2003*, the Committee commented on the fact that the amendments in Schedule 1 of the Fisheries Legislation Amendment (High Seas Fishing Activities and Other Matters) Bill 2003 would commence on a single day to be set by Proclamation, with no limit set by the legislation within which the amendments must commence in any event. The Committee noted from the explanatory memorandum that the amendments 'will give effect to Australia's obligations as a party to an international agreement relating to the conservation and management of fisheries…' and that the relevant agreement had 'entered into force internationally… on 24 April 2003.'[14] Given the international agreement to which the

14 Scrutiny of Bills Committee, *Alert Digest No. 16 of 2003*, p. 7.

bill related had already come into force, the Committee considered that there did not appear to be any reason for the delayed commencement (beyond the accepted six months after assent) and sought the Minister's advice about this matter.

5.26 In response, the Minister for Agriculture, Fisheries and Conservation advised that the amendments in Schedule 1 of the bill, which would enable Australia to give effect in its domestic law to the obligations it would have as a party to the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, could not be enacted until such time as the Executive Council gave its approval for Australia to become a signatory to the agreement.

> The amendments and repeals as set out in Schedule 1 of the Bill will not take effect, therefore, until a day set by Proclamation to ensure the legislation does not come into force before the Executive Council has considered Australia's acceptance of the Treaty. In the event that the Executive Council may not have completed its deliberations within 6 months of the Parliament passing the Bill, it was not considered appropriate for the legislation to commence on a determinable date or no later than 6 months after the passage of the Bill.[15]

5.27 The Committee thanked the Minister for this response, which addressed its concerns.

5.28 A number of bills considered by the Committee during the 40th Parliament provided for indefinite commencement on Proclamation because their application depended on uncertain events – either the passing of complementary legislation by other jurisdictions (for example the Murray-Darling Basin Amendment Bill 2002[16]) or on the entering into force of an international Convention or agreement (for example the Greater Sunrise Unitisation Agreement Implementation Bill 2004[17]). These provisions were of a kind contemplated by the relevant Drafting Direction and, as long as a clear explanation was provided in the accompanying explanatory memorandum, the Committee noted them without further comment.

5.29 Where no explanation for commencement on Proclamation that exceeded six months was provided in the explanatory memorandum the Committee continued to comment. For example, in *Alert Digest No. 8 of 2004*, the Committee drew the Senate's attention to a provision in the Australian Energy Market Bill 2004, which provided that specified clauses in the bill would commence on Proclamation, but in any event must commence 12 months after assent. The Committee noted that the explanatory memorandum provided no explanation for this extended delay and sought the Minister's advice on this matter.

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15 Scrutiny of Bills Committee, *First Report of 2004,* p. 21.

16 Scrutiny of Bills Committee, *Alert Digest No. 10 of 2002,* p. 11.

17 Scrutiny of Bills Committee, *Alert Digest No. 4 of 2004,* p. 7.

5.30 In response, the Minister for Industry, Tourism and Resources advised that the bill was part of the Commonwealth, State and Territory co-operative legislative scheme and should not commence until amendments had been made to State and Territory legislation. While the Minister hoped that the State and Territory amendments would be made during 2004, this could not be guaranteed, thus the need for a delayed commencement period in respect of the Commonwealth legislation.[18]

5.31 The Committee thanked the Minister for this response, but noted that it would have been useful if this information had been included in the explanatory memorandum.

18 Scrutiny of Bills Committee, *Ninth Report of 2004*, p. 169.