AUSTRALIAN SENATE

Senate Standing Committee for the Scrutiny of Delegated Legislation
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Principle (j): Matters more appropriate for parliamentary enactment

Overview

Scrutiny principle (j) requires the committee to scrutinise each instrument as to whether it contains matters more appropriate for parliamentary enactment. This principle is underpinned by the concern that significant matters should be included in primary legislation, which is subject to a greater level of parliamentary oversight than delegated legislation. Under this principle, the committee will typically be concerned with instruments which:

- establish significant elements of a regulatory scheme;
- impose significant penalties;
- impose taxes or levies;
- modify the operation of primary legislation or provide an exemption to primary legislation; and
- have a serious impact on personal rights and liberties.

Significant elements of a regulatory scheme

Significant elements of a regulatory scheme should ordinarily be included in primary legislation, rather than delegated legislation, due to the additional level of parliamentary scrutiny attached to the legislative process for primary legislation. Such elements could include:

- key definitions central to the operation of the regulatory scheme;
- significant elements of how the scheme is to operate (for example, whether a scheme is to be 'opt in' or 'opt out');
- principles underpinning the scope and exercise of significant discretionary powers;
- the availability of independent review of administrative decisions made under the scheme;
- safeguards to protect against undue trespass on personal rights and liberties in the administration of the scheme; and
- significant penalties for regulatory breaches.

However, where an instrument nevertheless contains significant elements of a regulatory scheme, explanatory statement should explain:

- the legislative authority relied upon for including significant elements of the regulatory scheme in the instrument; and
- why it is considered necessary and appropriate to include significant elements of a regulatory scheme in delegated legislation, rather than primary legislation.

The committee does not generally consider operational flexibility, on its own, to constitute a sufficient justification for including significant elements of a regulatory scheme in delegated legislation.

Imposition of taxes or levies

The levying of taxation is one of the most fundamental functions of the Parliament. Accordingly, the committee considers that taxes should generally be imposed by primary rather than delegated legislation. Where an instrument imposes a charge, fee, levy, scale or rate of cost or payment, the explanatory statement should explain the purpose of the imposition (e.g., fee for services rendered) to make it clear that the amount does not constitute a tax.

Where an instrument *does* impose a tax or levy, the instrument should solely deal with that matter. In addition, the explanatory statement to the instrument should explain:

- the legislative authority relied upon for using delegated legislation to set the levy or tax (e.g. a charges Act);
- whether the enabling Act sets any limits on the imposition of tax (for example, a cap on the amount that may be imposed); and
- why it is considered necessary and appropriate to use delegated legislation to set the levy or tax, rather than primary legislation.

Modification of or exemption from primary legislation

Provisions in delegated legislation which modify the operation of primary legislation, or exempt persons or entities from the operation of primary legislation, may limit parliamentary oversight and subvert the appropriate relationship between Parliament and the executive. Such provisions should not ordinarily be included in delegated legislation. Where an instrument nevertheless includes such provisions, it should cease to operate no more than three years after the commencement date for the instrument. This is to ensure a minimum degree of parliamentary oversight. In addition, the explanatory statement to the instrument should explain:

- the legislative authority relied upon to modify primary legislation, or exempt persons or entities from the operation of primary legislation, by delegated legislation;
- the scope of the relevant modification or exemption, including the persons, entities or classes of persons or entities to which it applies;
- why it is considered necessary and appropriate to modify primary legislation, or exempt persons or entities from the operation of primary legislation, by delegated legislation (instead of amending primary legislation);
- whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate (including whether it is appropriate to include the provisions in delegated legislation).

Significant penalties

Serious criminal offences and significant penalties should ordinarily be included in primary, rather than delegated, legislation. This is to ensure appropriate parliamentary oversight of the scope of the offence and penalty. Generally, delegated legislation should not contain custodial penalties, or penalties exceeding a maximum penalty of 50 penalty units for individuals and 250 penalty units for body corporates. Where an instrument includes more significant penalties, the explanatory statement to the instrument should explain:

- the nature and scope of the offence and what penalties apply;
- why the penalty is appropriate to the relevant offence;

- why it is considered necessary and appropriate to include such penalties in delegated legislation; and
- whether the Attorney-General was consulted in relation to the inclusion of custodial penalties, in accordance with the Attorney-General's Department's *Guide to Framing Commonwealth Offences* [3.3].

Significant trespass on personal rights and liberties

Matters which have a significant impact on personal rights and liberties are more appropriately enacted via primary legislation rather than delegated legislation, irrespective of whether that impact is positive or negative. Such matters may include coercive powers or powers to disclose personal information. The committee's expectations with regard to instruments that contain such provisions are set out in its guidance on principle (h).

Explanatory statement checklist

The following checklist summarises the types of information which should be included in explanatory statements to instruments which contain matters that may be more appropriate for parliamentary enactment:

☐	**Significant elements of a regulatory scheme**	Where an instrument contains significant elements of a regulatory scheme, the explanatory statement should explain: • the legislative authority relied upon for including significant elements of the regulatory scheme in the instrument; and • why it is considered necessary and appropriate to include significant elements of a regulatory scheme in delegated legislation, rather than primary legislation.
☐	**Imposition of taxes and levies**	Where an instrument imposes a charge, fee, levy, scale or rate of cost or payment, the explanatory statement should explain the purpose of the imposition (e.g., fee for services rendered). Where the amount does constitute a tax or levy, the explanatory statement should explain: • the legislative authority relied upon for using delegated legislation to set the levy or tax (e.g., a charges Act); • whether the enabling Act imposes any limitations on the imposition of taxation (for example, a statutory cap on the amount that may be imposed); and • why it is considered necessary and appropriate to use delegated legislation to set the levy or tax, rather than primary legislation.
☐	**Modification of / exemption from primary legislation**	Where an instrument includes a provision which modifies the operation of primary legislation, or exempts persons or entities from the operation of primary legislation, the explanatory statement should explain: • the legislative authority relied upon to modify or exempt persons or entities from the operation of primary legislation by delegated legislation; • the scope of the relevant modification or exemption, including the persons, entities or classes of persons or entities to which it applies; • why it is considered necessary and appropriate to modify primary legislation by delegated legislation, instead of amending primary legislation; and • whether there is any intention to review the provisions to determine whether they remain necessary and appropriate (including whether the provisions remain appropriate for inclusion in delegated legislation).

☐	**Significant penalties**	Where an instrument imposes a penalty for individuals above 50 penalty units, or imposes a custodial penalty, the explanatory statement should explain: • why it is considered necessary and appropriate to include such penalties in delegated legislation; • why the penalty is appropriate to the relevant offence; and • whether the Attorney-General was consulted in relation to the inclusion of custodial penalties.
☐	**Serious impact on personal rights and liberties**	Where an instrument has a serious impact on personal rights and liberties, the explanatory statement should address the matters outlined in the guideline on principle (h).