



Principle (iv): Inappropriate delegation of legislative powers

Overview

Scrutiny principle (iv) requires the committee to scrutinise each bill as to whether it inappropriately delegates legislative powers. Under this principle, the committee will typically be concerned with bills which:

- include an exemption from disallowance;
- enable delegated legislation to modify the operation of primary legislation or exempt persons or entities from the operation of primary legislation;
- include significant matters in delegated legislation;
- allow delegated legislation to set the rate of a tax or fee; and
- allow delegated legislation to create offences or civil penalties.

The following discussion summarises the committee's expectations regarding key issues arising under principle (iv). The issues identified are not exhaustive.

Exemption from disallowance

The usual parliamentary disallowance process allows a House of the Parliament to disallow (or veto) delegated legislation within 15 sitting days of it being tabled in that House. Disallowance is the primary means by which the Parliament exercises control over its delegated legislative power. The committee therefore considers that delegated legislation should only be exempted from parliamentary disallowance in exceptional circumstances.

Where a bill allows delegated legislation to be made that will be exempt from disallowance, the committee expects the explanatory memorandum to the bill to address the exceptional circumstances that justify the exemption from the usual disallowance process.

Modifications of or exemption from primary legislation

Provisions authorising delegated legislation to modify the operation of, or make substantive amendments to, primary legislation may limit parliamentary oversight and subvert the appropriate relationship between Parliament and the executive. These provisions are sometimes referred to as 'Henry VIII clauses'.

Where a bill authorises delegated legislation to amend, modify the operation of, or exempt persons or entities from the operation of primary legislation, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate to include provisions that allow delegated legislation to modify the operation of primary legislation; and
- whether there are legislative safeguards in place to ensure that such provisions are used appropriately.

Significant matters in delegated legislation

A legislative instrument made by the executive is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. Significant matters should therefore generally be included in primary legislation, which is subject to a greater level of parliamentary oversight.

Significant matters include provisions setting out significant elements of a regulatory scheme and provisions that have a significant impact on personal rights and liberties, such as coercive or intrusive powers. The committee's scrutiny concerns will also be heightened where significant matters are included in delegated legislation that is not subject to disallowance.

Where a bill includes significant matters in delegated legislation, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate to include significant matters in delegated legislation; and
- whether there is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation.

The committee has generally not accepted a desire for administrative flexibility, or consistency with previous arrangements to be a sufficient justification, of itself, for leaving significant matters to delegated legislation.

Taxes and fees in delegated legislation

One of the most fundamental functions of the Parliament is to impose taxation. Consequently, it is for the Parliament, rather than the makers of delegated legislation, to set rates of tax. At a minimum, some guidance in relation to the amount of tax that may be imposed in delegated legislation should be included in the enabling Act.

Where a bill leaves the setting of the rate of a tax (however described) to delegated legislation, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate to leave the setting of the rate of a tax to delegated legislation; and
- if there is no limit on the amount of tax that may be imposed—why it would not be appropriate to include such a limitation on the face of the bill.

In addition, where an instrument allows delegated legislation to set the rate of a fee the committee expects that the bill will include a provision clarifying that the fee must not be such as to amount to taxation.

Offences and civil penalties in delegated legislation

Allowing delegated legislation to create an offence or civil penalty involves a significant delegation of legislative power. Serious criminal offences and significant civil penalties should ordinarily be included in primary, rather than delegated legislation. This is to ensure appropriate primary oversight of the scope of the offence or civil penalty.

Where a bill allows delegated legislation to create an offence or civil penalty, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate to leave the creation of an offence or civil penalty to delegated legislation; and

- whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*,¹ and an explanation where provisions deviate from the principles set out in the Guide.

Explanatory memorandum checklist

The following checklist summarises the types of information which should be included in explanatory memoranda where a bill may engage scrutiny principle (iv).

- Exemption from disallowance** Where a bill allows delegated legislation to be made that will be exempt from disallowance, the explanatory memorandum should explain:
 - the exceptional circumstances that justify the exemption from the usual disallowance process.
- Modifications of or exemption from primary legislation** Where a bill includes provisions authorising delegated legislation to modify the operation of primary legislation, the explanatory memorandum should explain:
 - why it is appropriate to include provisions that allow delegated legislation to modify the operation of primary legislation; and
 - whether there are appropriate legislative safeguards in place to ensure that such provisions are used appropriately.
- Significant matters in delegated legislation** Where a bill includes significant matters in delegated legislation, the explanatory memorandum should explain:
 - why it is appropriate to include significant matters in delegated legislation; and
 - whether there is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation.
- Taxes and fees in delegated legislation** Where a bill leaves the setting of the rate of a tax to delegated legislation, the explanatory memorandum should explain:
 - why it is appropriate to leave the setting of the rate of a tax to delegated legislation; and
 - if there is no limit on the amount of tax that may be imposed—why it would not be appropriate to include such a limitation on the face of the bill.
- Offences and civil penalties in delegated legislation** Where a bill leaves allows delegated legislation to create an offence or civil penalty, the explanatory memorandum should explain:
 - why it is appropriate to leave the creation of an offence or civil penalty to delegated legislation; and
 - whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*.

¹ Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, available at <<https://www.ag.gov.au/legal-system/publications/guide-framing-commonwealth-offences-infringement-notices-and-enforcement-powers>>.