



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. While Parliament may exempt delegated legislation from disallowance, the committee's consistent scrutiny view is that exemptions from disallowance are only justified in exceptional and limited circumstances. This view is also reflected in a recent resolution of the Senate.¹

Disallowance is the primary means by which the Parliament exercises control over the legislative power that it has delegated to the executive. Exempting an instrument from disallowance directly interferes with democratic oversight of Commonwealth law and with the constitutional role of Parliament as the source of the executive's law-making power. Exemptions from disallowance therefore have significant implications for both the system of responsible and representative government established by the Constitution and for the maintenance of Parliament's constitutionally conferred law-making functions.

Where a bill exempts delegated legislation from disallowance, the committee expects the explanatory memorandum to the bill to explain the exceptional circumstances that justify the exemption, including why other measures could not have been taken to deal with those exceptional circumstances and why it is necessary to inhibit Parliament's fundamental scrutiny role.

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

1 See [Journals of the Senate](#), 16 June 2021, pp. 3581–3582. The Senate noted that exemptions from disallowance should be limited to cases where exceptional circumstances can be demonstrated and resolved that exemptions from disallowance will be subject to rigorous scrutiny.

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 forward proposed legislation in the form of a bill. The committee considers that leaving significant elements of a legislative scheme to delegated legislation may considerably limit the ability of Parliament to exercise appropriate oversight of legislative schemes. Certain matters should therefore generally be included in primary legislation.

While it is not possible to provide an exhaustive list of matters more appropriate for parliamentary enactment, the committee has generally considered that the following matters are not appropriate for inclusion in delegated legislation:

- the appropriation of money;
- the imposition of taxes or levies (see below);
- key elements of new policies or fundamental changes to existing policies;
- matters which may have a significant impact on personal rights and liabilities, including the exercise of coercive or intrusive powers or the imposition of significant penalties;
- provisions which may impose obligations to undertake or desist from certain activities; and
- procedural matters that go to the essence of a legislative scheme.

The committee also has significant scrutiny concerns with framework provisions, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme.

The committee's scrutiny concerns will be heightened where 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 the relevant 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. However, the committee may accept a need for flexibility in circumstances where it is expected that there may be significant technological or other unforeseen developments that require immediate or prompt changes to legislation. This information should be comprehensively included in the explanatory memorandum. Whether this justification is acceptable will depend on the

circumstances of the case at hand, including the apparent significance of the matter which is being left 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*,² 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.

² 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>>.

- 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*.