

Committee Secretary
Senate Standing Committee for the Scrutiny of Delegated Legislation
PO Box 6100
Parliament House
Canberra ACT 2600

24 June 2020

Dear Secretary,

My name is Jackson Ho, a Juris Doctor student at the University of Canberra. I am writing the submission as a member of the public to contribute to the inquiry into the 'Exemption of delegated legislation from parliamentary oversight'.

The submission will address both terms of references regarding (1) the appropriateness and adequacy of the existing framework for exempting delegated legislation from parliamentary oversight; and (2) whether the existing framework for exempting delegated legislation from parliamentary oversight should be amended, and, if so, how.

The submission comprises three pages. It addresses both terms of references together by first commenting on the appropriateness of various aspects of exemption under the current framework and then followed by recommendations.

Please let me know if I may provide any further assistance to the Committee. Thank you.

Yours faithfully,
Jackson Ho

[Redacted]

Telephone: [Redacted]

Submission

I INTRODUCTION

As the two main terms of reference are interconnected, the submission will address them together by first commenting on the appropriateness and adequacy of the existing framework for exempting delegated legislation from parliamentary oversight. Then, it provides opinions on whether the existing framework for exempting delegated legislation from parliamentary oversight should be amended, and, if so, how.

The *Australian Constitution* sets out the separation of power by vesting the legislative, executive and judicial powers in the Parliament, the Executive and the Judiciary respectively.¹ However, Australia also follows the Westminster system of government where members of the executive are also members of Parliament.

Also, the *Australian Constitution* did not provide for whether Parliament cannot or cannot delegate its legislative power to make law to a non-legislative body.² The High Court held *Baxter v Ah Way*,³ *Roche v Kronheimer*,⁴ and *Victorian Stevedoring and General Contracting Company v Dignan* ('*Dignan*') that Parliament may do so.⁵ One caveat stated by Evatt J in *Dignan* was that Parliament cannot completely abdicate its legislative power.⁶

Abdication refers to a situation where the legislative power is delegated to a non-legislative body or person not subject to ministerial responsibility or is not a public authority created by Parliament.⁷ Common law also recognises that a sovereign legislature cannot abdicate its legislative power.⁸

Overly extensive delegation of legislative power to a non-legislative body may also undermine the rule of law where those who enforce the law should be bound by those who created it instead of being one and the same.⁹ In addition to the rule of law, the democratic accountability of Parliament, the transparency of law-making will also be undermined if delegated legislation is used excessively.

In addition, potential disallowance under parliamentary oversight allows for discourse between different stakeholders since the role of the Senate Standing Committee for the Scrutiny of Delegated Legislation is already nonpartisan.¹⁰ The framework and prestige of the Committee for parliamentary oversight is conducive to informed discussion.¹¹ The exemption of delegated legislation from parliamentary oversight should be limited.

Therefore, exempting delegated legislation from parliamentary oversight poses further challenges to the rule of law, the democratic accountability and the transparency of public

¹ *Constitution* chs I, II, III.

² Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report No 129, March 2016) 448–9.

³ (1910) 8 CLR 626, 637–8.

⁴ (1921) 29 CLR 329.

⁵ (1931) 46 CLR 73.

⁶ *Ibid* 120.

⁷ Australian Law Reform Commission (n 2) 449.

⁸ *Commonwealth Aluminium Corporation Pty Ltd v A-G (Qld)* [1976] Qd R 231; *West Lakes Ltd v South Australia* (1980) 25 SASR 389.

⁹ Denise Meyerson, 'Rethinking the Constitutionality of Delegated Legislation' (2003) 11(1) *Australian Journal of Administrative Law* 45, 52.

¹⁰ Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 5th ed, 2017) 62–9.

¹¹ *Ibid*.

governance based on the same reasons and criticisms against regular and non-exempted delegated legislation above.

II COMMENTARY ON THE APPROPRIATENESS OF EXEMPTION & RECOMMENDATIONS

A Appropriateness of Sections in the Legislation Act 2003 (Cth)

Under s 44(2)(a) of the *Legislation Act 2003* (Cth), it allows for the primary legislation to provide that the disallowance provisions for parliamentary oversight do not apply.¹² Further, s 44(2)(b) also permits the use of delegated legislation to exempt other delegated legislation from the disallowance provisions and parliamentary oversight.¹³ For example, regs 9 and 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth) exempt a range of delegated legislation.¹⁴

The ground under s 44(2)(b) to exempt delegated legislation from parliamentary oversight is circuitous and problematic. It provides that one piece of delegated legislation may exempt another piece of delegated legislation from parliamentary oversight. The process is subject to less parliamentary scrutiny as it bypasses the law-making procedures for primary legislation in both houses of Parliament. Instead, this process would at best just subject the first piece of exempting delegated legislation to parliamentary oversight only if it was not already exempted by an Act or another piece of delegated legislation. Excessive use of such process would render the parliamentary oversight of disallowance meaningless.

Also, it gives rise to concerns of one delegated body or person conferring exemption to another that may undermine democratic accountability, transparency and legitimacy of Parliament, the Executive and the delegated bodies or persons.

It is recommended that the exemption of delegated legislation should only be made through primary legislation. The current framework should be amended to address and remedy the concerns and shortcomings arising from the implications under s 44(2)(b) of the *Legislation Act 2003* (Cth). The current exemptions made under regs 9 and 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth) should also be thoroughly reviewed and moved to primary legislation should such review deem the exemptions appropriate.

B Overall Inappropriateness of 'Henry VII clauses'

'Henry VII clauses' in delegated legislation allows that delegated legislation to amend the primary legislation. Those clauses are inappropriate because (1) the delegated body or person may lack the democratic accountability and transparency in the law-making process; and (2) a comparable adage in constitutional law that 'a stream cannot rise above its source'¹⁵ because the authority of the delegated legislation derives from the primary legislation. However, delegated legislation with such clauses can parcel out and modify contents of the primary legislation so that the delegated legislation, the delegated body or person may become 'a law unto itself'.

The current framework for the exemption of delegated legislation from parliamentary oversight should be amended to prohibit or restrict the exemption of delegated legislation with 'Henry VII clauses'.

¹² *Legislation Act 2003* (Cth) s 44(2)(a).

¹³ *Ibid* s 44(2)(b).

¹⁴ *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth) regs 9, 10.

¹⁵ *Heiner v Scott* (1914) 19 CLR 381, 393; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258.

C Appropriateness of Exemption During Emergencies

In times of turmoil, greater flexibility for exempting some delegated legislation and a more expansive use of delegated legislation are necessary to address changing circumstances amid uncertainty. However, parliamentary scrutiny of delegated legislation may remain a pivotal safeguard during emergencies. As the Senate Standing Committee for the Scrutiny of Delegated Legislation is nonpartisan, it provides necessary checks and balances during times of emergencies to maintain pre-existing legislative standard for delegated legislation and to uphold existing rights and freedoms as far as possible for the public as a source of certainty during tumultuous times.

In *Liversidge v Anderson*, Lord Atkin, in his now celebrated dissent, stated that ‘[A]midst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace.’¹⁶ The case was decided during WWII on whether a defence regulation in England permitted the Home Secretary to determine subjectively, instead of objectively with evidence, the reasonable cause of someone being of hostile association or origin for ordering the person’s detention. Unlike Lord Atkin’s dissent, the majority held that the Home Secretary needed not have demonstrable evidence and his subjective opinion was sufficient.¹⁷

Similar to Lord Atkin’s reasoning, the legality and legitimacy of all branches government remain the same bedrock of society in times of emergencies as in times of stability, parliamentary oversight of delegated legislation during emergencies will uphold the values fundamental to both societal and individual well-being. The exemption of delegated legislation during times of emergencies should therefore only be a last resort necessary to the extent of resolving or ameliorating the emergencies.

D Additional Recommendations

It is recommended that the *Legislation Act 2003* (Cth) be amended to allow for the power to review and disallow applicable delegated legislation at any time by the Senate Standing Committee for the Scrutiny of Delegated Legislation and either house of Parliament respectively. Currently, the review and disallowance processes focus almost exclusively on examining and disallowing the delegated legislation before it came into effect.¹⁸ In contrast, the New Zealand House of Representatives may disallow applicable delegated legislation at any time.¹⁹

Furthermore, the *Legislative Act 2003* (Cth) may be amended to set out a prescribed period (for example, one year) that the exempted delegated legislation cannot be disallowed but after the expiration of that time period the Senate Standing Committee for the Scrutiny of Delegated Legislation may review and either house of Parliament may disallow that previously exempted delegated legislation.

¹⁶ *Liversidge v Anderson* [1941] 3 All ER 338, 361.

¹⁷ *Ibid.*

¹⁸ David Hamer, *Can Responsible Government Survive in Australia?* (Department of the Senate, 2004) 314–16.

¹⁹ *Legislation Act 2012* (NZ) s 42.