

CHAPTER 5

Framework bills

Overview

5.1 A significant area of concern for the committee is an increase in the number of 'framework bills' being introduced into the Parliament. Framework bills primarily contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme: usually, the detail of the delegated legislation is not publicly available when Parliament is considering the bill. As noted by the Law Council of Australia: 'increasingly the power to make regulations is featuring as a key component of new legislative schemes.'¹ This is inherently problematic from the point of view of effective parliamentary scrutiny,² and avoids detailed parliamentary debate of the content of important provisions.³

5.2 On occasion the Senate has sought to delay the consideration of legislation until draft regulations are available, or has sought to amend legislation to insert provisions constraining the scope of such legislation.⁴ For example, the Senate amended the Health Insurance Amendment (Extended Medicare Safety Net) Bill 2009 to require that determinations made under the bill could not commence until they are approved by each House of the Parliament.⁵

Leaving the detail to regulations

5.3 Peak groups, such as the Law Council of Australia, have expressed concern in relation to bills which leave the main legislative detail to regulations:

...the Law Council has concerns when the power to make regulations extends beyond areas of detail or ancillary matters and concerns the substantive aspects of the legislative scheme. The Law Council has raised concerns, for example, when 'framework' legislation is introduced which provides only a broad outline or platform for the intended legislative scheme and then invests significant power in the Executive to make regulations to give effect to the scheme.⁶

5.4 The Law Council cited the AusCheck scheme as one example where the executive should not have been given broad delegation power. The AusCheck scheme

1 *Submission 19* [2010], p. 29.

2 Senate Procedure Committee, *First report of 2010*, April 2010, p. 1.

3 An idea reflected in *Submission 3A* [2011], p. 1.

4 *Submission 20* [2010], p. 7.

5 *Journals of the Senate*, No. 91, 16 September 2009, p. 2505.

6 *Submission 19* [2010], p. 29.

established the administrative machinery for gathering personal information to conduct 'background checking'. In 2009 a bill to amend the scheme was introduced which:

...allowed for AusCheck regulations to be promulgated which, in themselves, would create new screening regimes independent of any other legislation. There was no explicit limit to the purposes for which these regimes could be developed, outside of the legislative and executive powers of the Commonwealth.⁷

5.5 The Senate Legal and Constitutional Affairs Committee agreed with the Law Council that the bill should be amended so that no new background checking scheme could be established without the passage of other primary legislation. The Government subsequently moved amendments to this effect which were passed by the Senate and agreed to by the House of Representatives.

5.6 The Law Council suggested that:

The experience with this legislation underlines the importance of robust scrutiny of Bills, including whether the legislation seeks to inappropriately delegate matters which should be subject to full parliamentary debate. It also underlines the importance of robust scrutiny of delegated legislation, particularly where the delegation may be...inappropriate.⁸

5.7 Similarly, the Administrative Review Council (ARC) noted the importance of the committee's role in identifying legislative clauses which inappropriately delegate legislative power. The ARC therefore supported the development of guidelines to assist agencies in understanding the committee's concerns about framework bills.⁹ The topic of guidelines generally is discussed in more detail in *Chapter 7, Communication*.

5.8 The Clerk of the Senate has also expressed significant concerns about managing delegated legislation, including relating to framework bills:

Questions about appropriate mechanisms for the control of delegated legislation continue to arise. Increasing volumes of delegated legislation, and increasingly broad provisions authorising such legislation, provide challenges to both [the Regulations and Ordinances Committee and the Scrutiny of Bills Committee] and to the Senate as a whole.¹⁰

Comment

5.9 The committee's position is that it prefers that important information is included in the primary legislation unless there is a principled reason for including it in delegated legislation. To this end, the committee has regularly highlighted

7 *Submission 19* [2010], pp. 29–30.

8 *Submission 19* [2010], p. 30.

9 *Submission 19A* [2011], p. 1.

10 *Submission 20* [2010], p. 7.

instances in which primary legislation may excessively rely on delegated legislation for its operation.¹¹ The committee has done so under the general principle 1(a)(iv) – 'inappropriately delegated legislative powers'. The committee also notes that it considers whether the parliamentary scrutiny afforded to proposed legislation is appropriate under principle 1(a)(v) – 'insufficiently subject the exercise of legislative power to parliamentary scrutiny'.

5.10 The committee notes that the Procedure Committee has stated that it:

...sees merit in encouraging legislation committees in their examination of bills to be alert for cases in which the absence of draft regulations hinders adequate scrutiny of a bill, and to frame recommendations accordingly.¹²

5.11 This accords with the suggestion of the Clerk of the Senate that:

...one new area in which the committee may be able to assist the Senate is in identifying bills which appear to rely significantly for their operation on the making of regulations, the detail of which is not available for the Senate's consideration while the bill is before it.¹³

5.12 The committee endorses this proposal. It can readily include this information, as necessary, in a separate section of its *Alert Digest*. Of course, this would be in addition to any more detailed comments made in the usual course in an *Alert Digest* or *Report*. In addition to general awareness of the issue, this process could assist legislation committees in considering whether to recommend deferral of consideration of a bill in the absence of draft regulations.¹⁴

5.13 Given the increasing prevalence of framework bills and the importance of ensuring they are subject to effective scrutiny it is recommended that the committee's terms of reference be amended to include specific reference to this task. The committee also intends to formulate guidelines to assist those involved in this type of approach to avoid potential scrutiny issues of concern.

5.14 The committee notes that its intention to implement a process for bringing forward its comments during non-sitting periods will complement this recommendation (see *Chapter 3, Committee approach to its work*). In addition, the committee's recommendation to formalise an existing arrangement for informing

11 See, for example, consideration of the Carbon Credits (Carbon Farming Initiative) Bill 2011 in Senate Scrutiny of Bills Committee, *Sixth Report of 2011*, 22 June 2011, pp. 274–276, and the Renewable Energy (Electricity) Amendment Bill 2009 in Senate Scrutiny of Bills Committee, *Ninth Report of 2009*, 19 August 2009, pp. 326–327.

12 Senate Procedure Committee, *First report of 2010*, April 2010, p. 1.

13 *Submission 20* [2010], p. 7, and confirmed in the Clerk's 2011 comments, *Submission 15* [2011], p. 2.

14 The Procedure Committee has encouraged legislation committees, on a case-by-case basis, to consider whether deferral of a bill in the absence of draft regulations is warranted (Senate Procedure Committee, *First report of 2010*, April 2010, p. 1).

legislative and general purpose standing committees of its views on bills that have been referred to another committee will also assist to ensure that communication is appropriate and timely (see *Chapter 7, Communication*).

Recommendation 8

5.15 That Senate standing order 24 be amended to specifically include the scrutiny of bills which excessively rely on delegated legislation for their operation.

Recommendation 9

5.16 That the Scrutiny of Bills Committee develops guidelines in relation to the appropriate level of detail required in primary legislation.

Cooperation with Regulations and Ordinances Committee

5.17 On occasion, the relationship between provisions in primary and delegated legislation has also concerned the Regulations and Ordinances Committee. In particular, the Regulations and Ordinances Committee has noted that it has difficulty in objecting to provisions which are 'authorised' by primary legislation which has been passed by the Parliament. The Regulations and Ordinances Committee suggested that if this committee has doubts or concerns about a provision which involves delegated legislation, the committee could seek advice from the Regulations and Ordinances Committee – either formally or informally. As noted by the Regulations and Ordinances Committee, 'where the work of the committees overlaps, each committee would benefit from the perspective of the other'.¹⁵

5.18 The Scrutiny of Bills Committee agrees that it is useful for the scrutiny committees to communicate and thanks the Regulations and Ordinances Committee for the offer to provide formal or informal advice if this is useful. The Scrutiny of Bills Committee intends to utilise this option as needed.

Other issues relating to delegated legislation

5.19 A number of other issues were also raised in relation to delegated legislation, particularly in submissions addressing a term of reference for the 2010 inquiry about whether parliamentary mechanisms for the scrutiny and control of delegated legislation are optimal. Many of these issues seem to be beyond the direct scope of the Scrutiny of Bills Committee, however, the committee would like to mention the issues raised for the benefit of readers who are interested in this aspect of the terms of reference from the 2010 inquiry.

Inadequate scrutiny of delegated legislation from a policy perspective

5.20 The Clerk of the Senate noted that:

15 *Submission 33* [2010], p. 3.

...there is no ordinary process by which the large volume of delegated legislation produced each year is tested to see whether policy considerations exist which might appropriately become the subject of committee investigation.¹⁶

5.21 The Law Council also expressed concern about the absence of consideration of policy aspects of delegated legislation.¹⁷

5.22 The Regulations and Ordinances Committee suggested that the role of the Selection of Bills Committee, which currently reports to the Senate on whether bills should stand referred to committees, could be expanded to consider the reference of delegated legislation in similar terms. The Regulations and Ordinances Committee also highlighted the approach taken by the House of Lords which established a Select Committee on the Merits of Statutory Instruments in 2003.¹⁸ To ensure that every statutory instrument receives a degree of scrutiny, the committee draws to the 'special attention of the House' any instrument laid in the previous week which it considers may be 'interesting, flawed or inadequately explained by the Government'.¹⁹ In particular, the grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

- that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
- that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
- that it may inappropriately implement European Union legislation;
- that it may imperfectly achieve its policy objectives.²⁰

No process for the consideration of draft delegated legislation

5.23 The Clerk of the Senate also highlighted the fact that there is currently no process for the consideration of draft regulations by either this committee or the Regulations and Ordinances Committee.²¹ As noted by the Clerk, this means that there is no guarantee that the concerns of either committee will be raised in relation to draft regulations.²²

16 *Submission 20* [2010], p. 7.

17 *Submission 19* [2010], p. 29.

18 *Submission 33* [2010], p. 2. In relation to the Selection of Bills Committee suggestion, see also the submission of Ms Janice Paull, *Submission 25* [2010], p. 7.

19 <http://www.parliament.uk/business/committees/committees-a-z/lords-select/merits-of-statutory-instruments-committee/role/>

20 <http://www.parliament.uk/business/committees/committees-a-z/lords-select/merits-of-statutory-instruments-committee/role/tofref/>

21 *Submission 20* [2010], p. 7.

22 *Submission 20* [2010], p. 7.

Inadequate consultation in the making of delegated legislation

5.24 The Regulations and Ordinances Committee also raised the issue of consultation in the making of delegated legislation. The *Legislative Instruments Act 2003* requires that a rule-maker 'must be satisfied that any consultation that is considered by the rule-maker to be appropriate and that is reasonably practicable to undertake, has been undertaken'.²³ In determining whether consultation has been appropriate, a rule-maker 'may have regard to any relevant matter' including the extent to which the consultation drew on the knowledge of those with expertise in the field, and ensured that those affected has an adequate opportunity to comment.²⁴

5.25 The Regulations and Ordinances Committee has highlighted some difficulties with these provisions and suggested that they may be able to be strengthened. At the very least, the committee has suggested that the word 'may' could be replaced with the 'must'. The Regulations and Ordinances Committee recognised that it is difficult for it (and the Senate as a whole) to determine what action is appropriate where consultation is deficient.²⁵

Conclusion

5.26 The committee notes that there is no forum dedicated to discussing these issues about delegated legislation, which are of relevance to both of the Senate scrutiny committees. The committee suggests that it may be useful for further consideration to be given to the matters outlined above in this section.

Recommendation 10

5.27 That the Senate Committee for the Scrutiny of Bills and the Regulations and Ordinances Committee consider issues relating to the scrutiny of delegated legislation discussed in this report, including the scrutiny of draft delegated legislation, to develop a response to these matters.

23 s 17(1), *Legislative Instruments Act 2003*

24 s 17(2), *Legislative Instruments Act 2003*

25 *Submission 33* [2010], p. 2. See also Senate Regulations and Ordinances Committee, *Consultation under the Legislative Instruments Act 2003 – Interim Report*, 113th Report, June 2007.