

## 17. Delegating Legislative Power

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### Summary

17.1 Under the constitutional doctrine of the separation of powers, parliaments make law, the executive administers and enforces the law, and the judiciary adjudicates disputes about the law. The doctrine is reflected in the structure of the *Australian Constitution*.<sup>1</sup> But the separation between legislative and executive power is not as clear as some might imagine. For one thing, in Australia, members of the executive (the Cabinet and other government ministers) are also members of the legislature.

17.2 From the separation of powers doctrine, and from the principle that it is Parliament's role to make laws on important matters of policy, may be derived the principle that legislative power should not be inappropriately delegated to the executive.

17.3 Laws that have a significant impact on rights and liberties, and laws creating offences with high penalties, should usually be in primary, not delegated, legislation. More generally, wide and vague delegations of legislative power undermine the separation of powers doctrine by allowing those who enforce the law to also make the law.

17.4 Delegating legislative power to the executive is now commonplace and is said to be essential for an efficient and effective government.<sup>2</sup> Parliament delegates such power not only to government ministers, but also government agencies such as the Australian Taxation Office and the Australian Securities and Investments Commission (ASIC).

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1 Chapter I of the *Constitution* is entitled 'The Parliament'; Chapter II, 'The Executive Government'; and Chapter III, 'The Judicature'.

2 There are many types of delegated legislation, including regulations, ordinances, rules, public notices, proclamations, local authority by-laws and specific decrees.

17.5 Given the quantity of delegated law in Australia, careful and ongoing scrutiny—built into the law making process—may be the most suitable way to limit inappropriate delegations of legislative power. This chapter includes various examples of delegations of legislative power, but does not single out particular delegations as inappropriate.

17.6 There are various guides and processes in place to remind law makers about when laws should be in primary rather than delegated legislation. There is guidance in the *Legislation Handbook* and scrutiny by parliamentary committees.<sup>3</sup> There are also procedures that enable either House of Parliament to ‘disallow’ (repeal) most delegated legislation soon after it has been passed.

17.7 This chapter is concerned with laws that delegate *legislative* power, rather than with laws that give ministers and government agencies *executive* power. There may be no bright line between legislative and executive power, but the distinction is ‘essentially between the creation or formulation of new rules of law having general application and the application of those general rules to particular cases’.<sup>4</sup> Creating new rules of law of general application is traditionally the role of Parliament.

## Constitutional limits

17.8 The *Australian Constitution* does not expressly authorise the Commonwealth Parliament to delegate power to make laws, nor is it expressly prohibited. The High Court’s decisions in *Baxter v Ah Way*<sup>5</sup> and *Roche v Kronheimer*<sup>6</sup> are authority for Parliament’s power to delegate certain legislative powers to the executive. In *Victorian Stevedoring and General Contracting Company v Dignan* (‘*Dignan’s case*’), Dixon J said that *Roche v Kronheimer* decided that

a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the *Constitution* does not operate to restrain the power of the Parliament to make such a law.<sup>7</sup>

17.9 Dixon J noted the ‘logical difficulties of defining the power of each organ of government, and the practical and political consequences of an inflexible application of their delimitation’.<sup>8</sup>

17.10 However, there are two constitutional limits on the power to delegate legislative power. First, Dixon J said that in some cases, there may be ‘such a width or such an

3 See Ch 3.

4 *Minister of Industry and Commerce v Toomeys Ltd* (1982) 60 FLR 325, 331. In the *Legislative Instruments Act 2003* (Cth), an instrument is taken to be of a ‘legislative character’ if: ‘(a) it determines the law or alters the content of the law, *rather than applying the law in a particular case*; and (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right’: *Legislative Instruments Act 2003* (Cth) s 5(2) (emphasis added).

5 *Baxter v Ah Way* (1910) 8 CLR 626, 637–8.

6 *Roche v Kronheimer* (1921) 29 CLR 329.

7 *The Victorian Stevedoring and General Contracting Company Proprietary Limited v Dignan* (1931) 46 CLR 73, 101.

8 *Ibid* 91.

uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power'.<sup>9</sup>

17.11 Second, Parliament cannot entirely abdicate its legislative power, for example, by delegating an entire head of legislative power. Evatt J offered an example of such a law: 'The Executive Government may make regulations having the force of law upon the subject of trade and commerce with other countries or among the States'.<sup>10</sup> Abdication is more likely to be found where the legislative power is delegated to a person or body that is not subject to ministerial responsibility or is not a public authority created by Parliament.<sup>11</sup> The rule that a sovereign legislature cannot abdicate its legislative power has also been recognised at common law in Canada and Australia.<sup>12</sup>

17.12 In many countries, enforceable bills of rights create grounds for challenging the validity of delegated legislation that in Australia are unavailable.

17.13 As discussed below, whether constitutionally valid or not, a wide and uncertain delegation of legislative power may not be appropriate.

## Justifications for delegating legislative power

17.14 Parliaments have been delegating powers to the executive for some time—in England, possibly for as long as 650 years.<sup>13</sup> In Australia, delegated legislation has been a major part of the law since colonisation.<sup>14</sup> Today, far more laws are made under delegation than directly by parliaments.<sup>15</sup>

17.15 Practical necessity is perhaps the overriding justification for delegated legislation. The 'modern state depends on reams of delegated legislation'<sup>16</sup> and therefore the ability of a legislature to empower others to make legislation has been

9 Ibid 101.

10 Ibid 119. This limitation does not seem to apply in wartime in respect of defence regulations. In *Wishart v Fraser*, the High Court approved *National Security Act 1939* (Cth) s 5, transferring in wartime virtually all the legislative power on defence to the Governor-General in Council: *Wishart v Fraser* (1941) 64 CLR 470.

11 The fact that 'the grant of power is made to the Executive Government rather than to an authority which is not responsible to Parliament' was treated by Evatt J as a 'circumstance which assists the validity of the legislation': Ibid 120.

12 In *Hodge v The Queen* (1883) 9 App Cas 117, the Privy Council, while upholding the Ontario legislature's power to delegate law making power to the executive, was careful not to authorise the abdication of legislative power. In the legislation considered in *Commonwealth Aluminium Corporation Pty Ltd v Attorney-General (Qld) (Comalco Case)* [1976] Qd R 231 and *West Lakes Ltd v South Australia* (1980) 25 SASR 389, the State legislatures granted concessions to private companies that, according to the Acts, could not be withdrawn without the agreement of the beneficiary companies. In each case, the State Supreme Court considered the reservations as ineffective for being abdications of legislative power. See discussion of these cases in Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) 448–49.

13 See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 5; VCRAC Crabbe, *Legislative Drafting* (Routledge, 2012) 213.

14 Pearce and Argument, above n 13, 5.

15 Ibid.

16 George Winterton, *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (Lawbook Company, 2013) [3.500].

described as ‘an essential adjunct to the practice of government’.<sup>17</sup> The Public Interest Advocacy Centre (PIAC) submitted that, given ‘the breadth and depth of areas now regulated by government, the ability to flesh out primary legislation in subordinate legislation is a necessary and expedient tool of government’.<sup>18</sup>

17.16 Pearce and Argument write that the delegation of legislative power is ‘generally considered to be both legitimate and desirable’ in three situations:

- to save pressure on parliamentary time;
- when the legislation would be too technical or detailed; and
- where the legislation must deal with rapidly changing or uncertain situations.<sup>19</sup>

17.17 Sir Stanley de Smith notes several related reasons to delegate legislative power. ‘Torturous and cumbersome legislation, bulging with minutiae, disfigures the statute book and tends to detract from the prestige of Parliament’.<sup>20</sup> Where the changes to the law require administrative reorganisation and detailed consultations with affected sectors of the community, the commencement of particular parts of the Act may have to be postponed and left to executive discretion.<sup>21</sup> Furthermore, it is sensible to allow the responsible minister to amplify the Act by regulations when it is ‘reasonable to suppose that new contingencies (such as special hardship or technological developments) will arise although their exact form cannot be predicted at the date of enactment’.<sup>22</sup>

17.18 ASIC highlighted the need for delegated legislation in the regulation of corporations and financial services. These sectors are ‘complex and subject to constant innovation’, ASIC submitted, and without delegated legislation, ‘primary legislation would be unable to anticipate and respond in a timely way’.<sup>23</sup>

17.19 Pearce and Argument write that ‘one of the fundamental justifications for putting something into delegated legislation is that it is something that parliament need not be too concerned about but, rather, is something that the parliament can be relatively comfortable merely keeping a watchful eye over’.<sup>24</sup> In other words,

‘important’ things—including the intrinsically ‘political’ things—are to be kept to the primary legislation. The delegated legislation is for the detail, for the machinery.<sup>25</sup>

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17 Pearce and Argument, above n 13, 170.

18 Public Interest Advocacy Centre, *Submission 55*.

19 Pearce and Argument, above n 9, [1.9]. Similar and other reasons justifying delegated legislation were set out in: United Kingdom Parliament, *Report of the Committee on Ministers’ Powers* (‘Donoughmore Report’), Cmd 4060 (1936). See also Caroline Morris and Ryan Malone, ‘Regulations Review in the New Zealand Parliament’ (2004) 4 *Macquarie Law Journal* 7, 9.

20 Stanley de Smith, *Constitutional and Administrative Law* (Penguin Books, 3rd ed, 1977) 325.

21 *Ibid.*

22 *Ibid* 326.

23 Australian Securities and Investments Commission, *Submission 74*.

24 Pearce and Argument, above n 13, 118.

25 *Ibid* 119.

17.20 It might also be argued that parliamentary sovereignty would be limited to some degree if Parliament could not choose to delegate part of its legislative power.

17.21 In practice, members of Parliament rely heavily on the executive to prepare, draft and scrutinise new laws. The quantity of law made each year alone makes it impossible for individual members of Parliament to read and scrutinise every bill, much less every draft legislative instrument. Discussing delegated legislation in the United Kingdom, Professor P S Atiyah wrote:

For practical purposes statutory instruments are an example of law made by civil servants subject to ministerial control, in much the same way that Acts of Parliament are laws largely made by civil servants subject to parliamentary control.<sup>26</sup>

17.22 The proportionality principle, which is useful to test limits on many rights, may be less helpful in determining whether a delegation of legislative power is appropriate. For one thing, applied here, the proportionality principle would suggest that delegations of legislative power should be rare and only made when strictly necessary. However, delegating legislative power to the executive is very common and is a widely accepted method of law making, particularly if subject to parliamentary control.

## Criticisms

17.23 Despite the fact that Parliament commonly delegates legislative power to the executive, some laws are more properly made by Parliament. Pearce and Argument summarise the primary arguments directed against the use of delegated legislation as:

First, that if the executive has power to make laws, the supremacy or sovereignty of parliament will be seriously impaired and the balance of the *Constitution* altered. Second, if laws are made affecting the subjects, it can be argued that they must be submitted to the elected representatives of the people for consideration and approval.<sup>27</sup>

17.24 Professor Denise Meyerson has written that although some delegated legislation is clearly necessary in practice, there is a danger:

if we allow the unlimited transfer of legislative power to the executive we run the risk of subverting the rule of law ideal, fundamental to the control of government, that those who carry out the law should be restrained by those who make it.<sup>28</sup>

17.25 The rule against wide delegations of legislative power has been called a major component of the separation of powers doctrine:

When officials can legislate, interpret and execute their legislation, they have the potential to place themselves above the law—for the law becomes in effect whatever they say is the law in the particular case.<sup>29</sup>

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26 PS Atiyah, *Law and Modern Society* (Oxford University Press, 1983) 130.

27 Pearce and Argument, above n 13, 11.

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

29 Ratnapala and Crowe, above n 12, 124.

17.26 This can threaten many individual rights, freedoms and privileges, such as those considered in this Report. The separation of powers doctrine has been said to be ‘essential for the establishment and maintenance of political liberty’.<sup>30</sup>

17.27 The Law Council of Australia (Law Council) submitted that it should not be ‘left to the executive to determine for itself what powers it has and when and how they may be used’.<sup>31</sup> The rule of law requires that

the law must be readily known, available, certain and clear; and where legislation allows for the Executive to issue regulations, the scope of that delegated authority should be carefully confined and subject to Parliamentary supervision.<sup>32</sup>

17.28 The executive has been said to ‘lack the democratic credentials of Parliament’.<sup>33</sup> The framers of the *Constitution* vested the legislative power in the Australian Parliament ‘because they thought the people’s elected representatives particularly well-suited to the exercise of the “open-ended discretion to choose ends” which is the essence of the legislative task’.<sup>34</sup>

17.29 The process of executive law making also ‘lacks the transparency and publicity of the parliamentary process’.<sup>35</sup> Delegation therefore ‘reduces the accountability of the exercise of legislative power’.<sup>36</sup>

17.30 In the United States Supreme Court, Rehnquist J explained three functions of the rule against excessive delegation as follows:

First and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent that Congress finds it necessary to delegate authority, it provides the recipient of that authority with an ‘intelligible principle’ to guide the exercise of the delegated discretion. Third, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.<sup>37</sup>

17.31 Justice Rehnquist’s third point is that wide delegation diminishes the capacity of courts to limit the misuse of power.

17.32 Some criticism of delegated legislation appears to concern the quality and quantity and law of regulation more broadly, rather than the narrower question of whether such laws belong in primary legislation.<sup>38</sup> David Hamer, for example, has said that delegated legislation is a ‘fertile field for government despotism and bossy

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30 MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 1998) 14.

31 Law Council of Australia, *Submission 140*.

32 *Ibid.*

33 Meyerson, above n 28, 53.

34 *Ibid.*

35 Judith Bannister et al, *Government Accountability* (Cambridge University Press, 2014) 112.

36 *Ibid.*

37 *Industrial Union Department, AFL-CIO v American Petroleum Institute* 448 US 607 at 685–686 (1980). See also *Panama Refining Co v Ryan* 293 US 388 at 418, *ALA Schechter Poultry Corp v United States* 295 US 495 at 537 (1935) and *Opp Cotton Mills Inc v Administrator* 312 US 126 at 144 (1941).

38 The ‘proliferation’ of delegated legislation is discussed in Pearce and Argument, above n 13, 16.

interference by bureaucrats'.<sup>39</sup> In any event, this chapter is not about the quality or quantity of regulation, but rather about whether particular types of delegated law should more properly be made directly by Parliament.

17.33 Some of the types of delegation considered less appropriate are highlighted among the examples that follow.

### Examples of laws that delegate legislative power

17.34 There are thousands of legislative instruments currently in force in Australia, covering a wide range of subject matter, including laws about food standards, fisheries, civil aviation, corporations, superannuation, taxation and migration, to name only a few.

17.35 Acts that include delegations of legislative power often do so in terms similar to this provision, from the *Atomic Energy Act 1953* (Cth):

The Governor-General may make regulations, not inconsistent with this Act, prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.<sup>40</sup>

17.36 Some provisions like this will set out more fully the types of regulations that may be made. For example, there is considerable detail about what the relevant regulations may do in s 63 of the *Therapeutic Goods Act 1989* (Cth).

17.37 Sometimes a provision in an Act delegating legislative power is expressed broadly and there is little substantive law in the primary legislation. This is sometimes called 'skeleton' legislation—the bare bones are in the primary legislation, but most of the law is in the delegated legislation.<sup>41</sup> This arrangement has often been criticised.<sup>42</sup> Pearce and Argument cite the *Carbon Credits (Carbon Framing Initiative) Act 2011* (Cth) and related Acts as an example, although there are many other such Acts.<sup>43</sup> The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) said in 2012 that 'framework' bills were becoming increasingly prevalent<sup>44</sup> and that 'important information' should be included in the primary legislation, 'unless there is a principled reason for including it in delegated legislation'.<sup>45</sup>

39 David Hamer, 'Can Responsible Government Survive in Australia?' (Department of the Senate, 2001) 148.

40 *Atomic Energy Act 1953* (Cth) s 65.

41 This is also called 'coat-hanger' or 'framework' legislation.

42 See Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (May 2012) ch 5; Pearce and Argument, above n 13, 121–123.

43 Pearce and Argument, above n 13, 122.

44 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (May 2012) 35.

45 *Ibid* 34.

17.38 Important questions of policy, particularly when they affect individual rights, are often considered inappropriate subject matter for delegated legislation. The Law Council expressed concern about a new provision to be inserted into the *Migration Act 1958* (Cth), under which a person may be required to provide ‘personal identifiers’ for any purposes under the Act or the *Migration Regulations 1994* (Cth).<sup>46</sup> The Law Council said that significant matters such as this should instead be set out in primary legislation, not in regulations:

the power to prescribe both a purpose for which personal identifiers may be collected and the collection of biometric data via regulation raises the potential for the scheme to go beyond the initial intention of the Bill and the Migration Act, without adequate parliamentary scrutiny. Permitting changes to the purposes of collection of biometric data by regulation can result in significant incursions into privacy, while escaping general public awareness.<sup>47</sup>

17.39 Offence provisions generally belong in primary legislation, particularly where the penalties for infringement are high. For example, s 30B of the *National Credit Code* allows for the making of certain regulations concerning credit card contracts, including for offences and civil penalties against the regulations.<sup>48</sup> Although there are limits in the Act on the offences and penalties, the Scrutiny of Bills Committee said the ‘penalties which may be imposed by regulation are significant and it is unclear why the offences and requirements cannot adequately be specified in the legislation which will be considered in detail by Parliament’.<sup>49</sup>

17.40 ‘Henry VIII clauses’ are another type of delegation of legislative power that is considered inappropriate.<sup>50</sup> These allow delegated legislation to amend the primary legislation. The Scrutiny of Bills Committee often comments on such provisions. In 2009, for example, the Committee noted the large number of Henry VIII clauses in the *National Consumer Credit Protection Bill 2009*—so many in fact that it was ‘not possible to provide commentary in relation to all of them’.<sup>51</sup> The relevant Minister defended the arrangement, telling the Committee that the Government needed to ensure that there was ‘adequate flexibility in the new arrangements to ensure the smooth

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46 The *Migration Amendment (Strengthening Biometrics Integrity) Act 2015* (Cth) inserts s 257A into the *Migration Act 1958* (Cth). At November 2015, the relevant provision of the amending Act had not commenced.

47 Law Council of Australia, *Submission 140*.

48 *National Consumer Credit Protection Act 2009* (Cth) sch 1 s 30B(2).

49 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest* No 4 of 2011 47.

50 The first Henry VIII clause was in the *Statute of Proclamations 1539*: ‘The King for the Time being, with the advice of his Council, or the more Part of them, may set forth Proclamations under such Penalties and Pains as to him and them shall seem necessary, which shall be observed as though they were made by Act of Parliament.’ This in effect authorised the King to make law on any subject by proclamation without the consent of Parliament. Legislation by proclamation was one of the main issues of contention that led to the Revolution of 1688 and the enactment of the Bill of Rights 1689, which denied the remaining royal claims to legislative prerogatives to suspend laws, grant dispensation from law and to impose taxes.

51 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *10th Report of 2009* (September 2009) 370.



transition to a national credit regime'.<sup>52</sup> Section 35A of the *Fair Work Act 2009* (Cth), which relates to the geographical application of the Act, is another example.<sup>53</sup>

17.41 Government agencies and regulators will sometimes be given the power to make delegated legislation. The Commissioner of Taxation and ASIC, for example, both have statutory powers to make certain rules and regulations. For example, under the *Income Tax Assessment Act 1936* (Cth), the Commissioner of Taxation may determine by legislative instrument which taxpayers are required to lodge an income tax return.<sup>54</sup> Under *A New Tax System (Goods and Services Tax) Act 1999* (Cth), the Commissioner of Taxation may make certain determinations in relation to how much Goods and Services Tax is payable on taxable importations.<sup>55</sup>

17.42 ASIC also has the power to make delegated legislation, and this includes the power to modify certain provisions in the *Corporations Act 2001* (Cth), including as they apply to specified classes of people—until recently, called 'Class Orders'.<sup>56</sup> Although these are not strictly speaking Henry VIII clauses, it has been said that ASIC can essentially re-write parts of the Act.<sup>57</sup> Professor Stephen Bottomley has noted that corporate regulators need discretionary powers, given that the 'financial and commercial context in which corporations operate is complex and fast-changing',<sup>58</sup> and statutory modifications via Class Orders are 'beneficial to the flexible regulation of the corporate and finance sector'.<sup>59</sup>

17.43 However, ASIC's law making powers may be unique among Australian federal regulatory agencies and corporate regulatory agencies elsewhere.<sup>60</sup> One danger of giving ASIC powers to modify the law, with relatively little specific legislative guidance, Bottomley writes, is that it may reinforce 'the appearance of a system in which the regulator can make rules of wide application that bypass the process of substantive public scrutiny and accountability that can be applied to statutory rules'.<sup>61</sup> For example, there appears to be no legal requirement that ASIC must consult stakeholders before making a Class Order.<sup>62</sup> Bottomley discusses these dangers and proposes some improvements to the way laws can be changed by ASIC Class Orders.<sup>63</sup> The principle underlying these proposals is that 'legislative change should be done by

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52 Ibid 371.

53 Bannister et al, above n 35, 116.

54 *Income Tax Assessment Act 1936* (Cth) s 161.

55 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ss 13–20(3).

56 See, eg, *Corporations Act 2001* (Cth) ss 283GA(1)(b), 601QA(1)(b), 601YAA(1)(b). For a complete list, see Stephen Bottomley, 'The Notional Legislator: The Australian Securities and Investments Commission's Role as a Law-Maker' (2011) 39 *Federal Law Review* 1, 6. Not all Class Orders modify the Act.

57 Bottomley, above n 56, 2.

58 Ibid 1.

59 Ibid 31.

60 Ibid 2.

61 Ibid 8.

62 Ibid 25.

63 Ibid 28–30.

and through Parliament', largely because Parliament is 'visible and publicly accountable'.<sup>64</sup>

## Safeguards

17.44 Some concerns about delegated legislation may be addressed by the procedures that must be followed in making the legislation, particularly since the enactment of the *Legislative Instruments Act 2003* (Cth). These safeguards are designed to allow Parliament to oversee the making of delegated legislation, to scrutinise it through committees, and to repeal laws that Parliament considers should not have been made.<sup>65</sup>

17.45 The requirement that legislative instruments be published on a public register was a major development introduced by the *Legislative Instruments Act*, and helps make the process of making delegated legislation more open and accountable.<sup>66</sup> Another important safeguard is the automatic repeal or 'sunsetting' of legislative instruments, usually after ten years.<sup>67</sup>

17.46 There are also limits on incorporating other instruments or writings in delegated legislation, although this is subject to a contrary intention in the enabling Act.<sup>68</sup>

17.47 Parliamentary scrutiny, particularly by committees, is also an important safeguard.<sup>69</sup> The Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances (Regulations and Ordinances Committee) both consider whether an Act of Parliament inappropriately delegates legislative power to the executive.<sup>70</sup> Established in 1932, the Regulations and Ordinances Committee in particular scrutinises delegated legislation to ensure 'that it does not contain matter more appropriate for parliamentary enactment'.<sup>71</sup> The legislative scrutiny process and the role of the parliamentary committees have been called the 'key mechanisms for ensuring that the Executive does the right thing'.<sup>72</sup>

64 Ibid 30.

65 See *Legislative Instruments Act 2003* (Cth); Office of Parliamentary Counsel, *Legislative Instruments Handbook* (2014). These safeguards are in addition to the judicial review of delegated legislation, which essentially considers whether the legislation was validly made and within power. There are different standards by which the superior courts may determine the validity of statutory instruments. For example, a local authority by-law may be invalidated on the ground that it is unreasonable whereas a regulation within power cannot be so challenged. Different judicial considerations will also apply to a general rule enacted by regulation and a specific order that affects the rights and duties of parties in the particular case. On judicial review more broadly, see Ch 15.

66 *Legislative Instruments Act 2003* (Cth) pt 4.

67 Ibid pt 6.

68 Ibid s 14.

69 For an overview of parliamentary scrutiny, see Ch 3.

70 Parliamentary committees are discussed in Ch 3.

71 Senate Standing Order 23(3)(d).

72 Stephen Argument, 'Delegated Legislation' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 142.

17.48 Common law principles may also provide additional safeguards. For example, unless the statute provides for the sub-delegation of legislative power,<sup>73</sup> a delegate generally cannot sub-delegate power.<sup>74</sup>

17.49 Further guidance on what are appropriate matters for primary and delegated legislation may be found in the *Legislation Handbook*.<sup>75</sup> It states that, while it is ‘not possible or desirable to provide a prescriptive list’, the following kinds of matters should be included in primary legislation:

- (a) appropriations of money;
- (b) significant questions of policy including significant new policy or fundamental changes to existing policy;
- (c) rules which have a significant impact on individual rights and liberties;
- (d) provisions imposing obligations on citizens or organisations to undertake certain activities (for example, to provide information or submit documentation, noting that the detail of the information or documents required should be included in subordinate legislation) or desist from activities (for example, to prohibit an activity and impose penalties or sanctions for engaging in an activity);
- (e) provisions conferring enforceable rights on citizens or organisations;
- (f) provisions creating offences which impose significant criminal penalties (imprisonment or fines equal to more than 50 penalty units for individuals or more than 250 penalty units for corporations);
- (g) provisions imposing administrative penalties for regulatory offences (administrative penalties enable the executive to receive payment of a monetary sum without determination of the issues by a court);
- (h) provisions imposing taxes or levies;
- (i) provisions imposing significant fees and charges (equal to more than 50 penalty units consistent with (f) above);
- (j) provisions authorising the borrowing of funds;
- (k) procedural matters that go to the essence of the legislative scheme;
- (l) provisions creating statutory authorities (noting that some details of the operations of a statutory authority would be appropriately dealt with in subordinate legislation); and

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73 Although a statute may validly provide for sub-delegation: ‘I have found no reason for concluding that Parliament may not, in authorizing subordinate legislation, confer power to authorize the making of regulations or by-laws not inconsistent with the legislation which Parliament has directly authorized’: *Esmonds Motors v Commonwealth* (1970) 120 CLR 463, 477 (Menzies J). See also Pearce and Argument, above n 19, [23.4].

74 ‘The broad principle that a person cannot, without authority, delegate legislative power that has been delegated has been accepted with only one or two minor expressions of doubt’: Ibid [23.5]. Pearce and Argument discuss the question of sub-delegation of delegated legislative power in Ibid ch 23.

75 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (1999). This is a guide to making legislation for government departments. See Ch 3.

- (m) amendments to Acts of Parliament (noting that the continued inclusion of a measure in an Act should be examined against these criteria when an amendment is required).<sup>76</sup>

17.50 It will generally not be appropriate for such laws to be made in delegated legislation. Further, it may also not be appropriate for Parliament to authorise the making of regulations that impose liabilities with retroactive effect.<sup>77</sup> Parliament should also clearly identify the recipient of the delegated power and should generally not authorise sub-delegation.<sup>78</sup>

17.51 Grants of delegated power ought not to be so expressed that it becomes impossible in practice for courts to review the limits of the power. For example, provisions should not give ministers powers to do that which is, in their opinion, 'requisite or expedient for a broadly framed statutory purpose'.<sup>79</sup>

17.52 The tabling, disallowance, and committee scrutiny of delegated legislation are important safeguards and practical ways for Parliament to control executive law making. If it were thought that legislative power were being inappropriately delegated, consideration might be given to the adequacy of these safeguards, and perhaps to whether the safeguards are ever inappropriately avoided. For example, some statutes exempt legislative instruments from the disallowance or sunset provisions in the *Legislative Instruments Act 2003* (Cth).

17.53 Further measures designed to limit inappropriate delegations of legislative power were suggested by PIAC, which described parliamentary scrutiny of delegated legislation as, in practice, minimal.<sup>80</sup> For example, it recommended that the Regulations and Ordinances Committee should have a stronger role and that legislative instruments be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). It also suggested that the *Legislative Instruments Act* be amended to include a non-exhaustive list of powers and matters which should not be delegated, unless there is a public interest in doing so.<sup>81</sup>

## Conclusion

17.54 Although delegating legislative power to the executive is necessary for an efficient and effective government, some laws are more properly made by Parliament—for example, laws that have a significant impact on individual rights and laws creating serious criminal offences. Given the quantity of delegated law in Australia, robust safeguards and ongoing scrutiny appear to be suitable ways to limit inappropriate delegations of legislative power.

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76 Ibid 3. See also de Smith, above n 20, 325–28.

77 de Smith, above n 20, 328. On retrospective laws, see Ch 13.

78 Ibid.

79 Ibid 327.

80 Public Interest Advocacy Centre, *Submission 55*. PIAC submitted that much depends on the 'individual will of parliamentarians to make themselves aware of the potential impact of tabled delegated legislation':

Ibid.

81 For these and other recommendations, see Public Interest Advocacy Centre, *Submission 55*; Public Interest Advocacy Centre, *Submission 133*.