

15. Delegating Legislative Power

Contents

A constitutional principle	103
Protections from statutory encroachment	104
Australian Constitution	104
Justifications for delegating legislative power	106

A constitutional principle

15.1 Under the constitutional doctrine of the separation of powers, parliaments make laws, the executive administers or enforces laws, and the judiciary adjudicates disputes about the law.¹ But these powers are not as separate and the distinctions 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.

15.2 Nevertheless, from the separation of powers doctrine² may be derived the principle that legislative power should not be inappropriately delegated to the executive. Although it is common for parliaments to delegate the power to make certain laws to the executive—not only government ministers, but also government agencies—this chapter is about when this would not be appropriate.³ It briefly discusses the source and rationale for this aspect of the separation of powers doctrine and how the principle is protected from statutory encroachment. The ALRC calls for submissions on two questions.

1 MJC Vile formulated a ‘pure doctrine’ of the separation of powers as follows: ‘It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the Same time a member of more than one branch’: MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 1998) 13.

2 The doctrine is reflected in the structure of the *Australian Constitution*: Ch 1 concerns the Parliament, Ch II the Executive Government, and Ch III the Judicature.

3 This chapter is primarily concerned with the delegation of power, rather than how such powers are then used.

Question 15–1 What general principles or criteria should be applied to help determine whether a law that delegates legislative power to the executive is justified?

Question 15–2 Which Commonwealth laws unjustifiably delegate legislative power to the executive, and why are these laws unjustified?

15.3 While delegating legislative power to the executive is commonplace and said to be essential for an efficient and effective government, some laws are more properly made by Parliament. Professor Denise Meyerson has written:

we know that the legislative and executive branches are closely connected in a parliamentary system of government and we also know that for reasons of practical necessity it is impossible to confine the executive to the performance solely of executive tasks. But this does not mean that the ideal of dividing legislative and executive power is altogether illusory. On the contrary, it is clear that 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.⁴

15.4 The primary arguments directed against the use of delegated legislation are:

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.⁵

15.5 Although it is not clearly a right, freedom or privilege itself, the principle that legislative power should not inappropriately be delegated to the executive may be an important way of protecting other rights, freedoms and privileges. MJC Vile said the separation of powers doctrine (which supports the principle discussed in this chapter) was ‘essential for the establishment and maintenance of political liberty’.⁶

Protections from statutory encroachment

Australian Constitution

15.6 The *Australian Constitution* does not expressly authorise the Commonwealth Parliament to delegate power to make laws, but nor is it expressly prohibited.

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

5 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 3rd ed, 2005) [1.10].

6 Vile, above n 1, 14.

15.7 The High Court's decision in *Baxter v Ah Way* (1910) has been held to support the Parliament's power to delegate power. In this case O'Connor J stated that:

Now the legislature would be an ineffective instrument for making laws if it only dealt with the circumstances existing at the date of the measure. The aim of all legislatures is to project their minds as far as possible into the future, and to provide in terms as general as possible for all contingencies likely to arise in the application of the law. But it is not possible to provide specifically for all cases, and, therefore, legislation from the very earliest times, and particularly in more modern times, has taken the form of conditional legislation, leaving it to some specified authority to determine the circumstances in which the law shall be applied, or to what its operation shall be extended, or the particular class of persons or goods to which it shall be applied.⁷

15.8 In *Victorian Stevedoring and General Contracting Company Proprietary Limited v Dignan* (1931), 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'.⁸ Dixon J went on in that case to say that *Roche v Kronheimer* (1921)⁹ 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.¹⁰

15.9 Dixon J suggested when a delegation of legislative power may not be valid:

This does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject matter may be, if it does not fall outside the boundaries of Federal power. There may be such a width or such an 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. Nor does it mean that the distribution of powers can supply no considerations of weight affecting the validity of an Act creating a legislative authority.¹¹

15.10 Whether constitutionally valid or not, a 'wide' and 'uncertain' delegation of legislative power, some would argue, will not be appropriate.

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

8 It is 'one thing to adopt and enunciate a basic rule involving a classification and distribution of powers of such an order, and it is another to face and overcome 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': *The Victorian Stevedoring and General Contracting Company Proprietary Limited v Dignan* (1931) 46 CLR 73, 91 (Dixon J).

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

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

11 *Ibid.*

Justifications for delegating legislative power

15.11 The ability of a legislature to empower others to make legislation has been described as ‘an essential adjunct to the practice of government’.¹² The ‘modern state depends on reams of delegated legislation’.¹³

15.12 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.¹⁴

15.13 But when would a delegation of legislative power not be appropriate? Overly wide and uncertain delegations of legislative power may not be appropriate, as suggested by Dixon J’s comments in *Victorian Stevedoring*, quoted above. Discussing insufficiently specific delegations of power, Morris and Molone cite the following provision in a New Zealand statute:

The Governor-General may from time to time, by Order-in-Council, make such regulations ... as appear to him to be necessary or expedient for the general purpose of this Act and for giving full effect to the provisions of this Act for the due administration of this Act.¹⁵

15.14 For all intents and purposes, Morris and Molone write, this section grants the executive ‘a free hand to legislate to implement any policy it liked, provided that the regulation carrying the policy could be linked with maintaining prices’.¹⁶

15.15 Although many laws delegating legislative power may be justified, the ALRC invites submissions identifying *inappropriate* delegations of legislative power, and explaining why these delegations are not appropriate.

12 Pearce and Argument, above n 4, [12.3].

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

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

15 *Economic Stabilisation Act 1948* (NZ) s 11(1).

16 Morris and Malone, above n 13, 11.