

# Enabling provisions: the gatekeeper of legislative power

---

LORNE NEUDORF

ASSOCIATE PROFESSOR

DEPUTY DEAN

ADELAIDE LAW SCHOOL

# Delegation of legislative power

---

LEGISLATIVE  
POWER VESTED IN  
PARLIAMENT

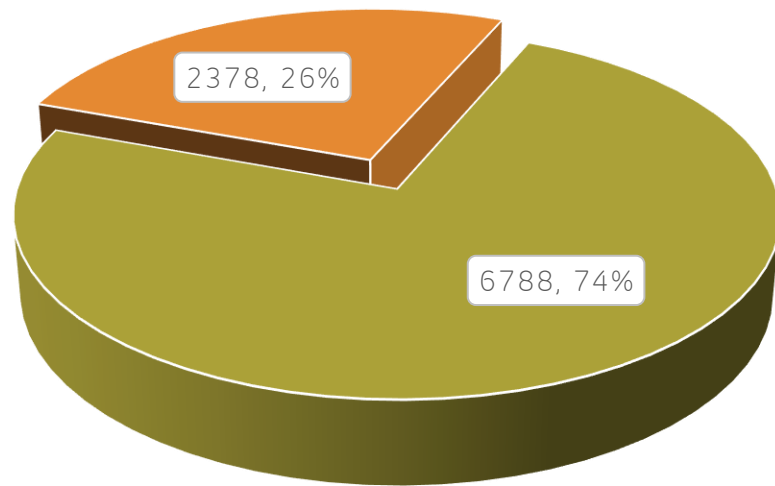
PARLIAMENT  
DELEGATES  
LEGISLATIVE POWER

DELEGATED  
LEGISLATION IS MADE  
OUTSIDE PARLIAMENT

# The predominant form of lawmaking

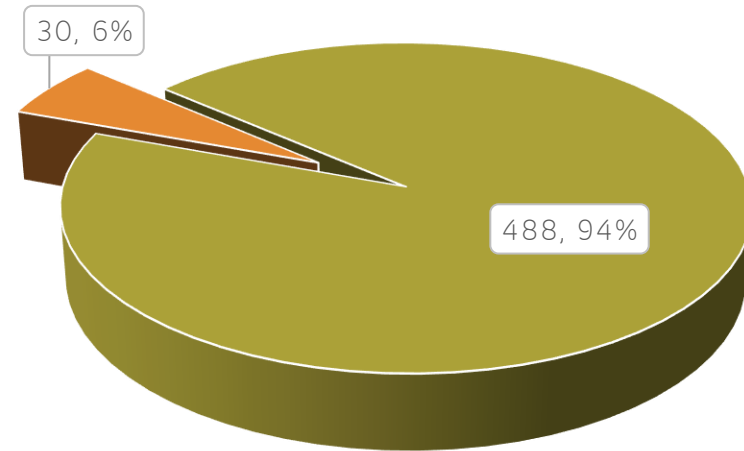
---

Total Pages of Federal Legislative Text in 2019



■ Primary Legislation    ■ Delegated Legislation

Total Number of Federal Instruments in 2019



■ Primary Legislation    ■ Delegated Legislation

# Challenges

---

- Delegated legislation is made directly by the Executive outside the ordinary parliamentary process
- It is less transparent and accountable than primary legislation
- Broad delegations compromise legal certainty and predictability, and allow the Executive to ‘hide’ public policy choices
- Potential constitutional issues with extensive or vague delegations, or the unsupervised exercise of delegated power

# Enabling provisions

---

- Enabling provisions are the gatekeeper of legislative power
- They define and set terms/conditions on delegated powers: the primary source of the Executive's legal powers
- Drafters should carefully delimit enabling provisions and clearly express parliamentary intent about their use
- The goal is to provide a calibrated and intelligible standard

# Enabling provisions

---

- Judicial review provides a ‘safety valve’ (not a comprehensive review) for the unlawful exercise of delegated powers
- Courts must work with enabling provisions as drafted (which tend to be interpreted generously)
- Regulations benefit from a presumption of validity
- Parliamentary committee scrutiny: effectiveness is limited by broad language used in enabling provisions (e.g., 6 of 13 criteria for REGS Committee focus on the enabling legislation)

# Drafting guidance

---

- Canadian uniform drafting conventions:  
*‘Regulation-making powers should be clearly expressed and should be no broader than is necessary’*
- The Guide to Making Federal Acts and Regulations:  
*‘The power to make regulations must not be drafted in unnecessarily wide terms’*

# The practical realities

---

- Legislative drafters may be instructed by clients to provide ‘maximum flexibility’ to allow the Executive to respond to new circumstances as they arise
- Enabling provisions are often drafted in broad or general terms:

*‘The Governor in Council may make regulations generally for carrying out the purposes and provisions of this Act.’*



# COVID-19 delegations

---

- The *COVID-19 Emergency Response Act* delegates sweeping powers
- Delegated legislation can be made by the Executive in relation to matters when ‘appropriate’, ‘necessary’ or even ‘desirable’
- Henry VIII powers allow the Executive to directly change primary legislation such as the *Employment Insurance Act*
- Limited or absent controls: no declaration of emergency, little consultation, no proportionality, limited reporting

# Comparative context

---

- UK's Delegated Powers and Regulatory Reform Committee:  
*'To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny'*
- Bills are accompanied by a 'delegated powers memorandum':  
*Details all delegated powers, their context and purpose, their justification, and the justification for the parliamentary scrutiny procedure in relation to those powers*
- The memoranda are scrutinised along with the enabling provision by the Committee, also referred to by courts
- Committee reports on every bill and often identifies defects/problems in the drafting of enabling provisions (which are usually corrected)

# Comparative context

---

- Australia's Senate Standing Committee for the Scrutiny of Bills:  
*'Whether ... bills ... inappropriately delegate legislative powers'*
- Where there is 'the inclusion of broad discretionary powers', these 'should be thoroughly justified in the explanatory memorandum'
- The memoranda are scrutinised along with the enabling provision by the Committee, also referred to by courts
- Committee reports frequently through its 'Scrutiny Digest' and identifies its concerns, recent focus on Henry VIII powers

# Conclusion

---

- Delegated legislation must be taken seriously given its contemporary importance
- Constitutional vesting of legislative power in Parliament: departures from this lawmaking process through delegations must be justified, limited and supervised
- Many problems are best addressed at the ‘front end’ through careful drafting of enabling provisions – enables other institutional actors to perform their roles
- Comparative context demonstrates there is considerable room for improvement in drafting enabling provisions and lessons to be learned
- New bills should include an explanatory memorandum for enabling provisions to provide accountability and allow more effective judicial and committee scrutiny