

THE CONCEPT OF THE 'SAME IN SUBSTANCE': WHAT DOES THE PERRETT JUDGMENT MEAN FOR PARLIAMENTARY SCRUTINY?

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In 2015 an action was brought in the Federal Court to challenge the validity of a legislative instrument — the *Family Law (Fees) Amendment (2015 Measures No 1) Regulation 2015* (Cth), which set the rate of certain Family Court fees (*Perrett v Attorney General of the Commonwealth of Australia*¹ (*Perrett*)).

The validity of the instrument was challenged on the basis that it was 'the same in substance' as a previously disallowed instrument and had been remade within six months of that disallowance, contrary to s 48 of the *Legislative Instruments Act 2003* (Cth) (LIA).² However, the application was dismissed on the basis that s 48 'should be construed as requiring that, in order that a legislative instrument be invalid, it be, in substance or legal effect, identical to the previously disallowed measure'.³ A subsequent appeal of the decision was discontinued on 5 February 2016.⁴

In a number of material respects, the Federal Court's interpretation of the concept of 'the same in substance' may be regarded as in conflict with the earlier and authoritative decision of the High Court in *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)*⁵ (*Women's Employment Case*). *Perrett* therefore raises issues central to the Senate Standing Committee on Regulations and Ordinances' (the R&O committee) scrutiny of delegated legislation raising 'same in substance' questions, as well as to the broader concepts of parliamentary sovereignty and accountability which inform the work of Senate committees.

This article explores the parliamentary and legislative history of the 'same in substance' concept, the tensions between *Perrett* and existing High Court authority, and the way in which the Senate and the R&O committee could seek to respond to the implications of the *Perrett* decision in examining 'same in substance' issues in future. More generally, the article demonstrates the persistent tension between parliamentary oversight of the exercise of legislative power by executive governments and the way in which parliamentary scrutiny principles interact with legal standards and requirements.

Nature of executive law-making

An understanding of the implications of *Perrett* must necessarily be underpinned by an appreciation of both the nature of executive law-making via delegated legislation and the way in which the Commonwealth Parliament maintains a level of control over the exercise of its legislative power by the executive.

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The justifications for the use of delegated legislation are well rehearsed and include that its use reduces pressure on the Parliament's time and allows for technical and unforeseen matters to be dealt with appropriately and expeditiously.⁶ Accordingly, Acts of the Commonwealth routinely delegate the Parliament's legislative power to ministers and other office holders, who may make instruments of delegated legislation that become enforceable as the law of Australia without needing the approval of the Parliament. The delegation of legislative power may be expressed broadly, as in the case of general regulation- and rule-making powers; or relatively constrained, as in the case of Acts which allow for specific matters to be determined (an example would be, as in the case of the *Perrett* instrument, an Act providing that the executive may set fees for the provision of particular services).

According to *Odgers' Australian Senate Practice* (*Odgers*), up to half of the body of Commonwealth law comprises delegated legislation,⁷ and this ubiquity underscores the fact that its use is both well accepted and largely unremarked as a feature of modern legislative practice. However, from a parliamentary perspective, it is important to maintain an appreciation that executive-made law is, in a fundamental sense, inherently undemocratic. As *Odgers*' states:

[The use of delegated legislation] ... has the appearance of a considerable violation of the principle of the separation of powers, the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government.⁸

Odgers' goes on to note, however, that the Parliament's primacy as the legislature is effectively preserved via a system of control based on the power of either House of Parliament to disallow (that is, to veto) instruments of executive-made law.⁹

Parliamentary control of executive law-making

Historical context

At the Commonwealth level, the establishment and development of an effective system of parliamentary control of executive law-making occurred early in the life of the new Commonwealth Parliament. In contrast to the present-day unconcern with the delegation of the Parliament's legislative power to the executive, the broader context of the era was one in which significant debates occurred about the consequences of delegated legislation for parliamentary supremacy and democratic accountability. As noted by Dennis Pearce and Stephen Argument, the exercise of legislative power by the executive (that is, the Crown) in fact 'underlay much of the disputation between the English Parliament and the Crown in the seventeenth century' and, with the ascendancy of the Parliament, led to a 'quiescent period of legislative activity on the part of the executive that lasted until the nineteenth century'.¹⁰

However, by the early years of the Commonwealth Parliament, and in the decade preceding the establishment of the R&O committee in 1932, the greater use of delegated legislation had seen 'public and parliamentary concern' leading to consideration of 'parliamentary procedures to ensure that the exercise of regulation-making power became an active subject of parliamentary scrutiny and liable to a measure of control'.¹¹ This was underlined by parallel developments in the UK during that period, which included the publication by the Lord Chief Justice of England, Lord Hewart, of a work on the dangers of delegated legislation, entitled *The new despotism* — a title which unsubtly conveys the undemocratic character of executive-made law; and the resulting inquiry into ministers' powers by the Donoughmore Committee on the Powers of Ministers, whose report provided both a significant technical exposition of the nature and justification for the use of delegated legislation and recommendations intended to provide a framework for its use and oversight by the (UK) Parliament.

As recounted in *Odgers*, at this time in Australia the Senate, coincidentally, had established a select committee to inquire into the matter of establishing standing committees of the Senate on 'statutory rules and ordinances'.¹² The report of the select committee recommended the establishment of the R&O committee, which was duly established in accordance with a resolution of the Senate following the election of 1931.¹³

Prohibition on making regulations the 'same in substance' as disallowed regulations

The establishment of the R&O committee complemented an earlier innovation of the Senate that had also reflected the general appreciation of the problems of delegated legislation and the concomitant need for direct parliamentary control of such legislation. This was the inclusion in the *Acts Interpretation Act 1904* (Cth) (AIA) of the requirements for the gazettal and tabling of instruments of delegated legislation and, critically, the provisions providing for their disallowance by the Parliament.¹⁴ The ability to disallow instruments of delegated legislation has since been, and remains, the key controlling feature of the Commonwealth Parliament's oversight of executive-made law.

For the R&O committee, the ability to recommend that the Parliament disallow any instruments of delegated legislation that offend its scrutiny principles has been and remains a well-established practice that has ensured that its expressions of concern about delegated legislation have a persuasive character. Indeed, in the roughly 85 years of the R&O committee's existence, the Senate has not failed to act on a recommendation of the R&O committee to disallow an instrument of delegated legislation.¹⁵

However, at the time of, and in the background to, the Senate select committee's consideration of the need for a committee specifically to oversee delegated legislation, a significant controversy unfolded that threatened the efficacy of the Parliament's disallowance power. As recounted by *Odgers*, the Senate's disallowance of regulations made by the Scullin government under the *Transport Workers Act 1928* (Cth) was frustrated by the prompt remaking of the regulations and the refusal of the Senate's petition to the Governor-General not to approve the remade regulations on the basis that they were the same in substance as the disallowed regulations.¹⁶ This petition was no doubt necessary given the absence of a statutory prohibition at that time.

Clearly, the ability of the executive to avoid disallowance by simply remaking disallowed regulations represented a significant hollowing out of the disallowance power and, in 1932, the Parliament acted promptly to restore the efficacy of the disallowance provisions of the AIA. The amendment prohibited remaking of disallowed regulations within six months of disallowance or the making of new regulations 'substantially similar', unless their introduction was preceded by a motion rescinding the earlier disallowance.¹⁷ These provisions and the related provisions for parliamentary control were retained in the LIA, which was enacted in 2005 effectively to consolidate and reform the legal framework governing the making and operation of Commonwealth delegated legislation.

A refinement that, similarly, sought to preserve the efficacy of the disallowance provisions was introduced in 1937, following observations by a member of the House of Representatives that a motion for disallowance effectively could be circumvented if it was simply left unresolved at the conclusion of the disallowance period.¹⁸ To avoid this, a provision was inserted in the AIA to provide that, in the event of any such unresolved notice, the regulations would be deemed to have been disallowed.¹⁹ *Odgers* notes that this provision 'greatly strengthens the Senate in its oversight of delegated legislation'.²⁰

The introduction of the same in substance prohibition, and other provisions to preserve the efficacy of the disallowance power, thus must be recognised as critical elements of the

Parliament's control and oversight of executive-made law via disallowance. More generally, the evolution of the procedural and legal architecture of committee scrutiny coupled with the disallowance power reveals the inherent tension of the delegation of the Parliament's legislative power to the executive and the potential for the diminution of the Parliament's democratic and sovereign nature where the executive is able effectively to circumvent the Parliament's control of delegated legislation.

Judicial consideration of the 'same in substance' concept

The Women's Employment Case

As the preceding account shows, the same in substance prohibition has existed on a statutory footing since its inclusion in the AIA in 1904. As described in Pearce and Argument, the principal judicial consideration of the 'same in substance' concept since that time occurred in the High Court's judgment in the *Women's Employment Case*.²¹ In this case, a declaration from the court was sought that regulations made under the *Women's Employment Act 1942* (Cth) were invalid because they were the same in substance as previously disallowed regulations, in contravention of s 49 of the AIA (in which the same in substance prohibition was then contained).

The Court heard two views as to the correct interpretation of the same in substance provisions. First, it was argued that it prevented only the remaking of regulations that, while having a different legal form or expression, were *identical* in substance or legal effect to a disallowed regulation. Secondly, it was argued that it prevented the remaking of regulations that, regardless of form, had a substantially the same, although *not the identical*, legal effect as a disallowed regulation.

In the most extensive consideration of the interpretation of the provision, by Latham CJ, his Honour clearly preferred the second view in finding that:

in order to give any practical effect to the section, it should be construed ... [as meaning that it] prevents the re-enactment by action of the Governor-General, within six months of disallowance, of any regulation which is *substantially the same as the disallowed regulation in the sense that it produces substantially, that is, in large measure, though not in all details, the same effect as the disallowed regulation*.²²

Similarly, McTiernan J stated:

a new regulation would be the 'same in substance' as a disallowed regulation if, *irrespective of form or expression, it were so much like the disallowed regulation in its general legal operation* that it could be fairly said to be the same law as the disallowed regulation.²³

The brief consideration of the question by Rich J stated that 'in making the necessary comparison [to determine whether a regulation was the same in substance as a previous one] *form should be disregarded*'.²⁴

Justice Williams stated that the provision required 'the court to *go behind the mere form of the regulations and ascertain their real purpose and effect*'.²⁵

These statements regarding the interpretation of the provision appeared consistent with one another, as well as with Latham CJ's identification of the principle of the same in substance prohibition as being to ensure that 'no Government can exercise a legislative power against an objection of either House'. The focus on the substantive or general legal operation was therefore necessary to ensure that the prohibition could not, in practice, be circumvented by the making of minor changes to the legal effect of a disallowed regulation:

The adoption of this view prevents the result that a variation in the new regulation which is real, *but quite immaterial in relation to the substantial object of the legislation*, would exclude the application of s 49.²⁶

For the same reason, Latham CJ stated that, where a new set of regulations covered the same issues as were included in a disallowed set of regulations but also included new material, the new regulations would still offend the same in substance prohibition and therefore be of no effect.²⁷

Further, Latham CJ noted that the court 'should not hesitate to give the fullest operation and effect' to s 49. While the question of whether a new regulation was the same in substance as a disallowed regulation would often be a 'question of degree, upon which opinions may reasonably differ', in the event of a court finding a regulation to be invalid, the Parliament retained the power to rescind the earlier disallowance resolution to allow the making of the later regulation. His Honour stated:

No decision of the court that one regulation is the same in substance as another regulation can prevent the disallowing House from giving effect to a contrary opinion if it wishes to do so.²⁸

Chief Justice Latham's focus on the substance or legal effect of the remade regulation, and his willingness to give the same in substance provision its 'fullest operation and effect', was particularly apparent in relation to his finding that a regulation which provided that, notwithstanding the disallowance of one of the previous regulations by the Parliament, 'decisions preserved by or given under that previous regulation should continue to have full force and effect'.²⁹ Chief Justice Latham held:

So far as this [later regulation] ... operated in relation to these decisions, it operated in defiance of the disallowance, because it preserved in full future operation everything that had been preserved by or done by virtue of the disallowed regulation. Thus it was in the whole of its operation the same in substance, that is, in legal operation, as the disallowed rule.³⁰

The Perrett case

A straightforward reading of the judgments in the *Women's Employment Case* suggests that a majority of the Court interpreted the same in substance provision as rendering invalid a regulation that produces substantially the same result as a disallowed regulation, even though its legal effect might include immaterial differences (or possibly even new matters) in comparison to the disallowed regulation. By interpreting the operation of the provision in this way, the Court ensured that its practical effect was congruent with its animating principle of ensuring that the executive cannot exercise its delegated legislative power against the express objection of the Parliament.

This understanding of the judgments in the *Women's Employment Case* was apparent in the R&O committee's inquiries in relation to the instrument the subject of the challenge in the recent Federal Court judgment of Dowsett J in *Perrett*.³¹ In this case, the government had sought to increase by regulation (the first regulation) a number of family law fees from 1 July 2015. The regulation would:³²

- increase the full divorce fee in the Federal Circuit Court from \$845 to \$1195 (a \$350 increase);
- increase the fee for consent orders from \$155 to \$235 (an \$80 increase);
- increase the fee for issuing subpoenas from \$55 to \$120 (a \$65 increase);
- increase all other existing family law fee categories (except for the reduced divorce fee) by an average of 10 per cent; and
- introduce a new fee of \$120 for the filing of amended applications.

Following the disallowance of the first regulation by the Senate on 25 June 2015, on 9 July 2015 the Attorney-General made the *Family Law (Fees) Amendment (2015 Measures No 1) Regulation 2015* (Cth) (the second regulation) to:

- increase the full divorce fee in the Federal Circuit Court from \$845 to \$1200 (a \$355 increase) and in the Family Court from \$1195 to \$1200 (a \$5 increase);
- increase the fee for consent orders from \$155 to \$240 (an \$85 increase);
- increase the fee for issuing subpoenas from \$55 to \$125 (a \$70 increase);
- increase all other existing family law fee categories (except for the reduced divorce fee) by an average of 11 per cent; and
- introduce a new fee of \$125 for the filing of amended applications.

The Explanatory Statement for the second instrument, noting the disallowance of the first instrument, stated that the 'Government will reintroduce those family law fee increases under the [second] Regulation with an additional \$5 increase'.³³

In September 2015, the R&O committee's report on the second regulation drew attention to the comparative quantum of the increases introduced by the two regulations (with the reintroduced fees being increased by \$5 relative to the earlier increases); the characterisation of the fees as having been reintroduced following the earlier disallowance; and the remarks of Latham CJ³⁴ in the *Women's Employment Case*, referred to above.³⁵ The R&O committee thus cited the significant similarity in the effect of the instruments as the relevant context for seeking the view of the Attorney-General as to whether the second instrument was, for the purposes of s 48 of the LIA, the same in substance as the first regulation and therefore of no effect.

However, the R&O committee's report also noted the substance of the *Perrett* judgment in the Federal Court, which had been handed down on 13 August 2015. The case involved an application to declare the second regulation as being in breach of s 48 of the LIA on the basis that it was the same in substance as the first regulation. However, Dowsett J had dismissed the application on the basis that s 48 'should be construed as requiring that, *in order that a legislative instrument be invalid, it be, in substance or legal effect, identical to the previously disallowed measure*'.³⁶

The R&O committee expressed the view that Dowsett J's interpretation of the same in substance prohibition, by requiring the second regulation to have been identical to the first regulation, appeared to differ in 'material respects' from the higher authority of the High Court's *Women's Employment Case* insofar as the R&O committee had understood the judgments in that case to have collectively held that the provision prevented the remaking of an instrument producing 'substantially the same, though not in all respects', legal effect as a previously disallowed instrument.

However, and perhaps unsurprisingly, the Attorney-General's response to the R&O committee's inquiries in relation to the second regulation did not seek to address the apparent contradictions of the two judgments but instead focused on *Perrett* as the 'current binding judicial authority' on the interpretation of the same in substance prohibition:

The current binding judicial authority on this issue is the decision of the Federal Court of Australia in *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834. In that matter, the Federal Court held that the second instrument was not the 'same in substance' as the first instrument. As indicated by the committee, in making this finding his Honour Justice Dowsett concluded that s 48 of the *Legislative Instruments Act 2003* should be construed as requiring that, for a legislative instrument to be invalid it must be, in substance or legal effect, identical to the previously disallowed measure (at [29]).³⁷

In addition, the Attorney-General referred to aspects of Dowsett J's reasoning in support of the conclusion that the second instrument was not made in breach of the same in substance prohibition:

In reaching this conclusion, his Honour found that the 'same in substance' is not merely 'substantially similar'. Rather, section 48 requires 'virtual identity (or sameness) between the objects of comparison' (at [29]). In *Victorian Chamber of Manufacturers v Commonwealth (Women's Employment Regulations)* [1943] HCA 32; (1943) 67 CLR 347, Latham CJ distinguished between 'substance and detail — between essential characteristics and immaterial features'. In applying this principle, Justice Dowsett stated that it is difficult to accept that any increase in fee could be described as 'detail' or an 'immaterial feature' of the measure. Rather, the amount of a fee or the proposed increase is at the heart of each measure (at [22]) ...³⁸

The Attorney-General also noted that the *Perrett* judgment was at that time the subject of an appeal; however, the appeal did not proceed and was ultimately withdrawn.³⁹

The reasoning in *Perrett*

Substance, form and immaterial differences

While it is not the purpose of this article to provide a very detailed analysis of the reasoning in *Perrett*, some analysis of Dowsett J's judgment is necessary to highlight the difficulty in understanding it as correctly applying the authoritative principles enunciated in the *Women's Employment Case*.

The first element of Dowsett J's substantive reasoning on the question of the same in substance issue proceeded on the basis of a consideration of the judgments in the *Women's Employment Case* and, specifically, the statements of Latham CJ and McTiernan, Williams and Rich JJ, reproduced above. It was suggested that those judgments were consistent in rejecting an approach that required an instrument to be identical in substance to a disallowed instrument and preferring an approach which eschewed form as a relevant consideration in favour of assessing whether its general legal effect was substantially the same as that of a disallowed instrument (though not identical in terms of immaterial respects or perhaps even the inclusion of additional material).

However, Dowsett J regarded three members of the court (Rich, McTiernan and Williams JJ) as in fact preferring the first approach — that is, as understanding s 49 of the AIA as essentially distinguishing between substance (legal effect) and form (legal expression) and requiring that an offending instrument be 'identical in substance with a disallowed regulation'.⁴⁰ Justice Dowsett's reasoning in reaching this conclusion was somewhat elusive but appeared to turn on the characterisation of statements rejecting the relevance of form as amounting to conclusions that identical legal effect was required for the purposes of the same in substance prohibition. For example, noting Rich J's comment that 'in making the necessary comparison form should be disregarded', Dowsett J concluded that 'his Honour adopted the first of the [approaches suggested]' (that is, the requirement for identical legal effect).⁴¹

Similarly, Dowsett J considered McTiernan J's statement that a new regulation 'would be the same in substance if, irrespective of form or expression, it were *so much like* the disallowed regulation in its general legal operation that it *could be fairly said* to be the same law as the disallowed regulation'.⁴² Notwithstanding that McTiernan J's language, which is emphasised in the quote above, appeared to fall well short of a requirement for identical legal effect, Dowsett J summarily concluded:

Superficially, this statement might appear to be somewhat equivocal. However, in my view, it is closer to the position adopted by Rich J [that an offending instrument must be identical in its legal effect] ...⁴³

Justice Dowsett also cited Williams J's statements that the provision required a contextual analysis of the two instruments in question, in which the court should 'go behind the mere form of the regulations and ascertain their *real purpose and effect*'.⁴⁴ However, rather than considering the extent to which questions of 'real purpose and effect' might allow for some differences in legal effect, Dowsett J concluded that, simply because Williams J's judgment had in places distinguished between the substance and form of the new regulation (disregarding form as relevant), his Honour had also found in favour of the first approach (requiring identical legal effect).

Justice Dowsett's reasoning thus led to the characterisation of Latham CJ's judgment as a minority view on the question of the correct interpretation of the same in substance prohibition. However, even in this regard, and as highlighted by the Attorney-General's response to the R&O committee, Dowsett J rejected that Latham CJ's emphasis on distinguishing between substance and detail — between essential characteristics and immaterial features — was substantively different from a distinction between form and substance, at least in cases where the legal effect of the instruments was to impose fees. Justice Dowsett stated:

[Latham CJ's distinction between] essential characteristics and immaterial features ... [may go] beyond that between form and substance, but if so, not by much, at least for present purposes. I find it difficult, in considering the First and Second Regulations, both of which impose fees, to accept that any increase in a fee ... can be described as 'detail' or an 'immaterial feature' of the measure in question. The amount of the fee ... is at the heart of each measure.⁴⁵

Definition of 'the same in substance'

The second element of Dowsett J's judgment was a definitional analysis of the term 'the same in substance', which, as the term was not defined in the LIA, centred on the common meaning of the expression as rendered in dictionary definitions, including the *Oxford English Dictionary* (2nd ed) and the *Macquarie Dictionary* (5th ed). As Dowsett J characterised the applicants (and Latham CJ) as 'tacitly' treating the term 'the same in substance' as meaning 'substantially similar', the thrust of this exercise was to determine whether there was a difference in the meaning of the two terms (that is, 'same' and 'similar'). If any such difference were to exist, the meaning of the actual phrase in the legislation would necessarily prevail.⁴⁶

This starting point appears problematic as, first, it unnecessarily changed Latham CJ's formulation (that is, 'substantially the *same*', though not in 'immaterial' respects) to the phrase 'substantially *similar*', which reduced the concept of 'sameness' to 'similar-ness' and removed from all consideration the question of the materiality or nature and quality of any differences in the legal effect of an impugned instrument. Therefore, Dowsett J's finding that the term 'substantially similar' was not coextensive with the term 'the same in substance', while correct, did not appear square to address the substance of Latham CJ's approach.

In addition to this problematic paraphrasing, Dowsett J's survey of the dictionary definitions of the component words making up the phrase 'the same in substance' was, unfortunately, incomplete. Justice Dowsett's analysis commenced with a survey of possible definitions for a number of isolated terms, including 'in substance', 'substantial', 'substance' and the 'same'. However, while his Honour reasonably and clearly concluded that the term 'same' means 'identical', he did not clearly identify which of a number of possible definitions of the terms 'in substance' and 'substance' was correct for the interpretation of s 48 of the LIA. While one can infer from Dowsett J's ultimate conclusion that he preferred a restrictive definition of 'in substance' — perhaps best understood as meaning the 'actual' or 'real' 'matter of a thing'⁴⁷ — it is not clear why this meaning was preferred over definitions suggesting that, for example, 'substance' means the 'essential' character of a thing 'that is such *in the main*'; real

or true *for the most part*. As definitions of this flavour clearly reflect a common usage that accommodates Latham CJ's formulation (that is, 'substantially the *same*', though not in 'immaterial' respects), Dowsett J's definitional analysis may in fact be taken as drawing into question his own conclusion that the same in substance prohibition requires that, in order to be invalid, a legislative instrument must be *identical* in its legal operation to a previously disallowed instrument.

Full operation and effect

The third and final substantive element of Dowsett J's judgment regarding the same in substance prohibition involved his consideration of the need for the court, as Latham CJ suggested, to give the provision its 'fullest operation and effect' because any finding by the court could not, in effect, bind the Parliament if it wished to 'give effect to a contrary opinion'.⁴⁸ Justice Dowsett noted:

The task conferred upon the Court by s 48 concerns the intersection of the legislative, executive and judicial functions. Whilst it may be true, as Latham CJ said, that the Court should not hesitate to give the fullest operation and effect to legislation of this kind, the courts generally seek to avoid involvement in matters of political judgment. Disputes about whether a \$5 increase in a fee is an essential characteristic or an immaterial feature, or as to whether the result of such increase is substantial or otherwise, may lead to such involvement.⁴⁹

While Dowsett J's concern for the court avoiding involvement in political questions is understandable, the brevity of his reasoning is again problematic. This is particularly because it does not address the key element of ultimate parliamentary control that was emphasised by Latham CJ, the presence of which ensures that any factual finding by a court that an instrument is the same in substance as a disallowed instrument is unlikely to have the character of a political judgment.

Justice Dowsett's caution over the potential for involvement in political judgments also sits uncomfortably with his own statement that it was difficult for any increase in a fee to be described as an 'immaterial feature' of an instrument because 'the proposed increase is at the heart of each measure'.⁵⁰ To the extent that this finding amounted to a determination of fact regarding the materiality of the additional increases in the second regulation, it appears less as a political judgment than one concerning, in the words of Latham CJ, a 'question of degree, upon which opinions may reasonably differ'.⁵¹

Implications of *Perrett* for the work of the R&O committee

Effectiveness of the same in substance provisions

The tensions between the judgments in the *Women's Employment Case* and *Perrett* have significant implications for the work of the R&O committee in examining same in substance issues into the future. While matters raising the same in substance questions have come before the R&O committee relatively infrequently, its longstanding approach, in accordance with the *Women's Employment Case*, has consistently focused on the general substance or legal effect of a remake instrument, notwithstanding that the instrument is not identical to a previously disallowed instrument.

For example, in August 2015, prior to its consideration of the instrument the subject of *Perrett*, the R&O committee examined the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth), which introduced a new visa criterion for protection visas (Subclass 866) to provide that such visas could not be granted to Unauthorised Maritime Arrivals. This regulation followed the disallowance of an earlier regulation that had reintroduced temporary protection visas, which included conditions that an Unauthorised

Maritime Arrival could only be granted a temporary protection visa and could not access the protection visa (Subclass 866). Drawing attention to the same general legal effect of the two regulations, the R&O committee sought the view of the then Minister for Immigration and Border Protection as to whether the later instrument was the same in substance as the disallowed regulation.⁵²

Following *Perrett*, however, the R&O committee may find it more difficult to pursue same in substance matters in cases such as this and *Perrett*, where the legal operation of an instrument is not identical to a previously disallowed instrument. Indeed, the Attorney-General's response to the R&O committee regarding the second regulation demonstrates that the requirement for identical legal effect curtails any substantive consideration of whether the legal effect of an instrument circumvents the disallowance of an earlier instrument, thereby potentially allowing the government to exercise its delegated legislative power, in the words of Latham CJ, 'against an objection of either House'.⁵³ As noted above, Latham CJ's judgment in the *Women's Employment Case* directly contemplated the consequences of the requirement of identical legal operation for the efficacy of the same in substance prohibition — in particular, noting that the inclusion of immaterial differences in a new instrument would be sufficient to avoid being in breach. Similarly, Latham CJ noted that the inclusion of additional matters in a previously disallowed instrument would also be sufficient to escape the same in substance prohibition and to render the provision, in practical terms, 'a complete futility'.⁵⁴

Future approach of the R&O committee

The very real risk that the requirement for identical legal effect in the application of the same in substance prohibition could undermine the intent and purpose of s 48 of the LIA is one that the R&O committee will need to consider carefully in any future cases in which such matters arise, particularly if the executive is inclined to adopt the more restrictive interpretation of Dowsett J in any future dialogue with the R&O committee. In this regard, the R&O committee's concluding remarks on the second regulation appear to indicate that, while it will remain cognisant of legal interpretations of the same in substance prohibition, it will also continue to bring a broader range of factors to its assessments:

The committee's examination of any 'same in substance' issues in the future will continue to take into account relevant jurisprudence on this question, as well as the broader concepts of parliamentary sovereignty and accountability which inform the application of the R&O committee's scrutiny principles.⁵⁵

The R&O committee's reference to 'the broader concepts of parliamentary sovereignty and accountability' which inform its scrutiny principles would suggest that it retains its appreciation of the critical role that the same in substance prohibition has in ensuring the effectiveness of the disallowance power and thus in preserving the Parliament's oversight and control of the exercise of its delegated legislative powers by the executive. In this regard, it is useful to consider how the present legislative regime for delegated legislation has been informed by the work of the R&O committee in the past, and particularly the way in which it interacts with the R&O committee's scrutiny principles (as contained in Senate Standing Order 23).⁵⁶

Interaction of the R&O committee's scrutiny principles with legal standards

With the enactment of the LIA in 2005, the provisions governing disallowance and related provisions such as the same in substance prohibition were moved from the AIA and included in the LIA as part of a comprehensive regime for the making and oversight of delegated legislation. The legislative codification of the architecture for the making and disallowance of legislative instruments in the LIA was a significant innovation, particularly because it also

placed many of the informal or conventional standards and requirements previously enforced by the R&O committee onto a legislative basis for the first time. This included, for example, the requirements for the provision of Explanatory Statements with legislative instruments and the need to provide specific information regarding the conduct of consultation in relation to the making of an instrument.⁵⁷

The practical effect of this was to transform what were previously the R&O committee's conventional expectations around the making of legislative instruments into legal requirements, now falling within the scope of the R&O committee's first scrutiny principle, which requires that instruments of delegated legislation are made 'in accordance with statute'. The R&O committee has since assessed instruments for conformity with these legal requirements of the LIA, rather than as its expectations per se. The accommodation of the legal requirements of the LIA within the R&O committee's scrutiny principles reflects a practical concern for ensuring that, as far as possible, legislation proponents are presented with a consistent and well-understood set of scrutiny standards in negotiating the passage of instruments through the scrutiny process. However, notwithstanding the practical benefits and outcomes of the codification of so many of the R&O committee's requirements and standards via the LIA (now the *Legislation Act 2003* (Cth)), it is important to note that its mandate ultimately derives not from statute but from the principles outlined under Senate Standing Order 23. In accordance with the separation of powers, the R&O committee's duty is not merely to ensure that instruments are in conformity with relevant legal requirements but also to ensure that its scrutiny principles are not breached by instruments of delegated legislation.

A critical and sometimes overlooked consequence of this application of the separation of powers doctrine to understanding the R&O committee's work is that, while the concept of legality is strongly relevant to the R&O committee's scrutiny principles (that of ensuring that instruments are 'in accordance with statute'), mere conformity with applicable legal requirements may not, of itself, ensure that an instrument does not breach one or more of the R&O committee's scrutiny principles under the Senate Standing Orders. The R&O committee has therefore occasionally found the need to remind legislation proponents that the standards derived from its scrutiny principles are essentially distinct from the legal requirements or standards arising from such statutes as the LIA and the AIA.⁵⁸

Legal authority versus scrutiny principles

The essential distinction that the R&O committee makes between conformity with legal requirements and the primary consideration of ensuring that instruments of delegated legislation do not offend its scrutiny principles may suggest that the R&O committee's approach to same in substance matters in future will be guided by the types of purposive considerations that were apparent in the judgments of the *Women's Employment Case*. In this respect, Latham CJ's exposition of the manner in which a requirement for identical legal effect hollows or renders ineffective the same in substance provisions appears to speak directly to the R&O committee's past application of its scrutiny principles to ensure effective parliamentary control of the exercise of its delegated legislative power. Similarly, this concern for parliamentary control echoes the historical development of the disallowance power and related measures to ensure its effectiveness, in which procedural innovations were introduced to prevent the actual or potential circumvention of disallowance by a willing executive.

In contrast, the judgment in *Perrett* — the difficulties of reconciling its reasoning with the authoritative High Court *Women's Employment Case* judgment aside — did not address the consequences of its conclusion that the same in substance prohibition requires identical legal effect. Given that these consequences could include that the same in substance

prohibition may be avoided through the introduction of minor, immaterial differences to a new instrument having the same legal effect as a disallowed instrument, it is suggested that the R&O committee will have limited scope to adopt this restrictive approach in service of its fundamental scrutiny principles.

In the event that the executive henceforth prefers *Perrett* as the correct application of the *Women's Employment Case*, there may be a need for the R&O committee to pursue future dialogue on same in substance matters in the context of its scrutiny principles rather than in a legal context in which the provision is, in practical terms, 'a complete futility'. Applying such an approach, for example, to the circumstances of *Perrett* could see the R&O committee undertaking a factual assessment of whether a \$5 increase, on top of large fee increases previously introduced and disallowed, was immaterial taking into account such things as the relative difference between the amounts and the expected difference in revenue gained over defined periods. If the R&O committee were to regard it as immaterial, the fact of the earlier disallowance would enable it to conclude that the second regulation contained matter 'more appropriate for parliamentary enactment', in breach of its fourth scrutiny principle, and to make its recommendations accordingly.

Conclusion

In the fourth edition to their seminal work on delegated legislation in Australia, Pearce and Argument state that, as at the time of publication, only the Commonwealth, the Australian Capital Territory, the Northern Territory and Tasmania include provisions preventing the making of an instrument the same in substance as a previously disallowed instrument.⁵⁹

However, the relevance of the implications of *Perrett* flow beyond just those jurisdictions which have enacted same in substance prohibitions. As the historical tensions around the delegation of the Parliament's powers to the executive demonstrate, such delegation involves an inherent and persistent tension between the need for parliaments to retain effective control of their legislative power and the desire of executive governments to exercise such powers to the fullest possible extent in implementing their policies and legislative programs. *Perrett* is a demonstration that, notwithstanding the widespread use and acceptance of the delegation of parliaments' legislative powers to the executive, there is a continued need for parliaments to oversee the exercise of legislative power by executive governments and to ensure that the necessary legal and procedural bulwarks are in place to ensure that such oversight is and remains effective.

Perrett is also instructive of the character of technical legislative scrutiny undertaken by parliamentary scrutiny committees and the interplay of legal standards with scrutiny principles. All such committees include the consideration of legal standards and requirements in their assessments of whether instruments of delegated legislation are validly and properly made, and such standards often provide a consistent and accessible benchmark that is easily referable to the scrutiny principles which are the foundation of the work of scrutiny committees. For example, human rights and administrative law standards may act as ready proxies for scrutiny principles and also provide substantial bodies of jurisprudence that can be drawn upon in service of scrutiny principles. However, *Perrett* is a reminder that, where legal standards or principles are unable to serve those deeper principles of parliamentary sovereignty and accountability, scrutiny committees must ultimately draw upon their scrutiny principles in a way that ensures and maintains effective oversight of the exercise of delegated legislative power by the executive.

In this light, while the *Perrett* judgment has cast significant doubt on the correct interpretation of the same in substance provisions, a legal resolution in the form of a further, definitive judgment of a court is not necessary for the R&O committee to be able to continue

adequately to consider any same in substance matters that arise in future. This is because it is open to the R&O committee to draw upon the lessons of history and its own scrutiny principles to interpret the same in substance prohibition in a way that preserves the effectiveness of the disallowance power which is so critical an element of the Parliament's oversight of delegated legislation.

Endnotes

- 1 [2015] FCA 834.
- 2 On 5 March 2016, the *Legislative Instruments Act 2003* (Cth) (LIA) became the *Legislation Act 2003* (Cth) (LA) due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015* (Cth). References in this article are to the LIA, which was the relevant Act for the purposes of this paper. Section 48 of the LA retained the same in substance prohibition under discussion in this article.
- 3 *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, 29.
- 4 *Ting Wei v George Henry Brandis, Attorney-General of the Commonwealth of Australia* (QUD757/2015).
- 5 [1943] HCA 21; (1943) 67 CLR 347.
- 6 See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 6–9.
- 7 Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012) 416.
- 8 *Ibid* 413.
- 9 *Ibid* 416.
- 10 Pearce and Argument, above n 6, 5.
- 11 Evans and Laing, above n 7, 416.
- 12 *Ibid* 417.
- 13 *Ibid*.
- 14 *Ibid* 416.
- 15 *Ibid* 424.
- 16 *Ibid* 417. See also Pearce and Argument, above n 6, 205.
- 17 Evans and Laing, above n 7, 418.
- 18 *Ibid*.
- 19 *Ibid*.
- 20 *Ibid* 421.
- 21 [1943] HCA 21; (1943) 67 CLR 347.
- 22 *Ibid* 364 (emphasis added).
- 23 *Ibid* 389 (emphasis added).
- 24 *Ibid* 377 (emphasis added).
- 25 *Ibid* 405–6 (emphasis added).
- 26 *Ibid* 364 (emphasis added).
- 27 Pearce and Argument, above n 6, 206.
- 28 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, 364.
- 29 *Ibid* 374.
- 30 *Ibid*.
- 31 [2015] FCA 834.
- 32 The full title of the instrument was the *Federal Courts Legislation Amendment (Fees) Regulation 2015* (Cth).
- 33 Explanatory Statement, *Family Law (Fees) Amendment (2015 Measures No 1) Regulation 2015* (Cth) 1.
- 34 [1943] HCA 21; (1943) 67 CLR 347, 364.
- 35 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, No 10 of 2015, 10 September 2015, 2–5.
- 36 *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, 29 (emphasis added).
- 37 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, No 2 of 2016, 24 February 2016, 43–4 (the Attorney-General's letter is reproduced in full in Appendix 1).
- 38 *Ibid* 44.
- 39 The Attorney-General's response is reproduced in full in Senate Standing Committee on Regulations and Ordinances, above n 37, Appendix 1 (Correspondence).
- 40 *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, [18].
- 41 *Ibid* [19].
- 42 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, 389 (emphasis added).
- 43 *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, [20].
- 44 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, 405–6 (emphasis added).
- 45 *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, [22].

- 46 Ibid [23].
- 47 Ibid.
- 48 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, 364.
- 49 *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, [29].
- 50 Ibid [22].
- 51 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, 363.
- 52 The Minister's response to the R&O committee, while stating that the instrument was made in 'full cognisance' of s 48 of the LIA and that legal advice had been received in connection with the making of the instrument, did not in fact state that the instrument was regarded as not being the same in substance as the disallowed regulation. The Minister declined the R&O committee's request to receive a copy of the legal advice received. Following the disallowance of the second regulation, the R&O committee concluded its examination of the issue without it or the Minister having expressed a view as to whether the regulation should be regarded as being the same in substance as the previously disallowed regulation: see Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, No 9 of 2015, 19 August 2015, 15–16.
- 53 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, 364.
- 54 Ibid 361.
- 55 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, No 2 of 2016, 24 February 2016, 46.
- 56 Under Senate Standing Order 23, the R&O committee is required to scrutinise disallowable legislative instruments to ensure that (a) they are in accordance with statute; (b) they do not trespass unduly on personal rights and liberties; (c) they do not unduly make the rights and liberties of citizens dependent upon administrative decisions not subject to review of their merits by a judicial or other independent tribunal; and (d) they do not contain matters more appropriate for parliamentary enactment.
- 57 See, for example, Pearce and Argument, above n 6, 96 (at 4.6), which notes that 'early steps in relation to the preparation of ... [explanatory] material, in the Commonwealth jurisdiction, were largely to address the requirements of the ... committee'.
- 58 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, No 1 of 2016, 3 February 2016, Safety, Rehabilitation and Compensation (Definition of Employee) Amendment Notice 2015 [F2015L01665], 57–60. The R&O committee stated that its requirements are separate from the legal standards of the LIA and noted that, 'while the committee generally seeks to conduct its scrutiny of delegated legislation to accord with, or augment, the provisions of the LIA, the fundamental principle underpinning the committee's expectations is that of ensuring that it is able to effectively scrutinise instruments with reference to the four matters outlined in Senate Standing Order 23' (at 60).
- 59 Pearce and Argument, above n 6, 204.