

Australian democracy and Executive law-making: Practice and principle

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Introduction

As detailed in this paper, there has been a remarkable growth in the volume of delegated legislation in the 115 years since Federation. It is through this delegated legislation that the Executive, under powers delegated to it by the Parliament, makes laws – hence the reference to “Executive law-making” in the title of this Senate Occasional Lecture.

Beyond pure volume, however, is the issue of the content of delegated legislation and the effect of delegated legislation on the Australian public (and on Australian democracy). It is my view that there is too little understanding, by the Australian public, of the extent to which their lives are affected by legislation that is made by the Executive and the extent to which the operation and effect of that delegated legislation may be beyond what an ordinary citizen might otherwise expect.

This paper re-states the fundamental principles that underpin Executive law-making, including the processes by which Executive law-making is monitored and supervised in the Commonwealth Parliament. It also considers some recent challenges presented by Executive law-making. Finally, the paper considers some recent issues in relation to delegated legislation in the United Kingdom that demonstrate (in my view) the relative maturity of the processes applicable in the Commonwealth, in comparison.

Executive law-making

It may be useful, given the apparent lack of understanding about the operation and importance of delegated legislation (particularly in some sections of the Australian media), to begin by setting out some fundamental information in relation to Executive law-making. In this context “Executive law-making” is intended to refer to the making of regulations and other forms of delegated legislation by Ministers and the bureaucracy, under powers delegated by the Parliament, in legislation.

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“Delegated legislation” or “subordinate legislation”?

An important threshold point is the use, in this paper, of the term *delegated* legislation, in preference to *subordinate* legislation or *secondary* legislation, terms that are also routinely used to describe the legislative emanations of Executive law-making. While, clearly, delegated legislation is subordinate to primary legislation (ie Acts), the term “delegated” legislation is preferred for presentational reasons. This reflects a point recently made by the Hansard Society (UK), in its 2014 report, *The Devil is in the Detail: Parliament and Delegated Legislation*.¹ While the report is discussed further below, it is important to note at the outset that, in *The Devil is in the Detail*, the Society is careful to use the term “delegated legislation” in preference to “subordinate legislation”. The first footnote to the report states (in part):

Throughout this report, for the purposes of simplicity, and in order to avoid confusion, we have chosen to use the term ‘delegated’ legislation (with ‘secondary’ legislation used when seeking to distinguish the balance with primary legislation). We do not use the term ‘subordinate’ legislation as such nomenclature might convey to the general reader that it is of lesser importance than primary legislation, a view this report seeks to dispel. However, we recognise that it is commonly used in a legal context. ...²

This is a significant point for the Society to make and reflects a general point that the report propounds – that delegated legislation ...

... is crucial to the effective operation of government and affects almost every aspect of both the public and private spheres: individuals, businesses, charities and public bodies are all affected by regulations it creates, often financially in terms of major new cost burdens.³

Why do we have delegated legislation?

Odgers’ Australian Senate Practice (Odgers) notes that the *Constitution* does not explicitly authorise the Commonwealth Parliament to delegate the power to make laws.⁴ *Odgers* points to the High Court decision in *Baxter v Ah Way* ((1910) 8 CLR 626) as an early recognition of the need for a power to make regulations, etc. In that decision, O’Connor J stated (at pages 637-8):

... 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

1 An executive summary of the report is available here <http://www.hansardsociety.org.uk/wp-content/uploads/2014/12/The-Devil-is-in-the-Detail-exec.-summary.pdf>.

2 *The Devil is in the Detail* (note 1), p 23.

3 *The Devil is in the Detail* (note 1), p 23.

4 See http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers/chap1502.

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.

Oggers goes on to state:

The essential theory of delegated legislation is that while the Parliament deals directly with general principles, the executive, or other body empowered to make subordinate legislation, attends to matters of administration and detail. As the theory was expressed in 1930 by Professor K.H. Bailey: "It is for the executive in making regulations to declare what Parliament itself would have laid down had its mind been directed to the precise circumstances." (Evidence to the Senate Select Committee on the Standing Committee System, PP S1/1929-31, p. 20.)

Another fundamental issue in delegated legislation are the justifications traditionally advanced for its use. In *Delegated Legislation in Australia* (4th edition), Pearce and Argument refer to 3 situations in which delegated legislation "is generally considered to be both legitimate and desirable, subject to certain safeguards". The 3 situations are:

1. *To save pressure on parliamentary time:* It is generally accepted that parliamentary sitting time is relatively scarce, partly because Australian parliaments tend to sit for shorter periods than many of their counterparts in other countries. As a result, governments have fairly limited time within which to pass essential legislation and oppositions have limited opportunities to demonstrate the deficiencies of governments. This tends to have the effect of parliaments being accepted as places where only the broad policy issues are considered (although this effect is, itself, lessened by the increasing use of parliamentary committees as forums for detailed debate and consideration of legislation and other issues). Parliaments therefore tend to set the parameters of a particular area of legislative activity in an empowering Act, leaving the details to be worked out by the executive in delegated legislation.
2. *Legislation too technical or detailed to be suitable for parliamentary consideration:* The pressure on available parliamentary time is magnified when legislation is necessarily of a technical or scientific nature. Parliaments have neither the time nor the expertise to consider such matters (although note the comment above concerning the increased use of parliamentary committees). This tends to result in parliaments resolving that legislation is warranted but, having done so, deciding that the detail is best left to delegated legislation. Civil aviation orders, voluminous documents dealing with highly technical aspects of air safety, etc, are a good example.
3. *Legislation to deal with rapidly changing or uncertain situations:* One of the features of the legislative process and the limited sitting times is that the process of amending Acts is laborious and slow. This means that amendment of primary legislation is ill-suited to situations requiring flexibility and responsiveness, where the environment in which the legislation operates is uncertain and rapidly changing (for example, in areas such as the approval of drugs and other therapeutic goods). A variation on this situation is the need

to be able to deal promptly with cases of emergency, something that, again, the primary legislation process is ill-suited to do.⁵

Pearce and Argument also note the suggested 6 reasons for the “necessity” of delegated legislation that are set out (at pages 51-2) in the report of the Donoughmore Committee (the Committee on Ministers’ Powers) of the United Kingdom Parliament in 1932 (Report, 1932, Cmd 4060), namely:

1. Pressure on parliamentary time.
2. Technicality of subject matter.
3. Unforeseen contingencies
4. Flexibility,
5. Opportunities for experiment.
6. Emergency powers.⁶

On the “unforeseen contingencies” point, Pearce and Argument note that the Donoughmore Committee Report states (at page 51):

If large and complex schemes of reform are to be given technical shape, it is difficult to work out the administrative machinery in time to insert in the Bill all the provisions required; it is impossible to foresee all the contingencies and local conditions for which provision must eventually be made.⁷

Regulations and “legislative instruments”

As Odgers notes, regulations have traditionally been the primary form of delegated legislation. Acts of the Commonwealth Parliament have generally contained a provision allowing the Governor-General (acting on the advice of the Federal Executive Council (**ExCo**)) to make regulations “required or permitted” by the Act or “necessary or convenient to be prescribed for carrying out or giving effect” to the Act. Over the years, delegated legislation expanded beyond regulations, to encompass a wide variety of other species of delegated legislation, with varying names and made by a variety of Executive and administrative authorities, including Ministers, heads of departments and agencies, and their delegates.⁸

Since the commencement of the *Legislative Instruments Act 2003* (recently re-named as the *Legislation Act 2003* (**Legislation Act**)), the standard terminology for delegated legislation (including regulations) has been the concept of a “legislative instrument”. The (now) Legislation Act sets out requirements for the registration of legislative instruments on the Federal

5 Pearce, DC and Argument, S, *Delegated Legislation in Australia* (4th edition), (2102, LexisNexis Butterworths, Australia), page 6.

6 Pearce and Argument (note 5), page 7.

7 Pearce and Argument (note 5), page 7.

8 See Pearce and Argument (note 5), paragraphs [1.16] to [1.17]. See also, generally, Argument, S, “Parliamentary scrutiny of quasi-legislation”, *Papers on Parliament No. 15* (May 1992) (available at <http://www.aph.gov.au/binaries/senate/pubs/pops/pop15/c01.pdf>), chapter 3.

Register of Legislation (**FRL** – formerly the Federal Register of Legislative Instruments (**FRLI**)) and for them to be tabled in both House of the Parliament within 6 sitting days of having been registered on the FRL.⁹ Once tabled, legislative instruments are generally then subject to disallowance by either House.

Parliamentary review of delegated legislation

In delegating to Ministers (as advisers to the Governor-General and ExCo) and others the power to make delegated legislation, the Commonwealth Parliament has also put in place mechanisms to ensure that the Parliament retains an oversight role in relation to delegated legislation that is made. This is primarily achieved by the requirement that delegated legislation be tabled in both Houses of the Parliament. This allows the Parliament to see what use is made of the delegated power. It also allows the Parliament to bring the relevant Minister to account if it has any concerns about or disapproves of the use of that power. It also generally allows the Parliament to disallow the delegated legislation in question.

In all Australian jurisdictions, parliamentary review of delegated legislation is assisted by the work of parliamentary committees. It is important to note at the outset, however, that the role of those committees is to conduct a “technical” review of delegated legislation, according to their terms of reference, concentrating on matters such as the adherence to formalities, on the one hand, and the protection of the basic rights of the citizen, on the other. Disallowance of delegated legislation on the basis of its policy content is intrinsically a political matter and one for the various Houses of Parliament themselves, since the relevant committees studiously avoid matters of policy.

Senate Standing Committee on Regulations and Ordinances

Turning specifically to the Senate, all disallowable legislative instruments are subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances (**R and O Committee**), against terms of reference set out in Senate Standing Order 23. It should be noted at the outset that the R and O Committee has been in existence since 1932 and has served as an exemplar for legislative scrutiny committees throughout Australia and around the world.¹⁰

In this context, I note that, until about 5 years ago,¹¹ I had always assumed that the establishment of the R and O Committee at this time was in some way connected to the report of the Donoughmore Committee, which was published in 1932. However, in researching an earlier paper, I discovered

9 See sections 24, 38 and 42 of the *Legislation Act 2003*. The provisions relating to tabling and disallowance largely replicate provisions that had previously been located in the *Acts Interpretation Act 1901*.

10 See, generally, Argument, S, “Legislative Scrutiny in Australia: Wisdom to Export?”, 2011 32(2) *Statute Law Review* 116 and Grenfell, L, “An Australian spectrum of political rights scrutiny: ‘Continuing to lead by example?’”, (2015) 26 *Public Law Review* 19.

11 See Argument (note 10), at page 117.

that there seems to be no link to the report of the Donoughmore Committee and that, in fact, the innovation was entirely the work of the Australian Senate.

In 1929, the Senate appointed a select committee to consider, report and make recommendations on the advisability or otherwise of establishing a standing committee system and, in particular, on establishing standing committees on:

- (a) regulations and ordinances;
- (b) international relations;
- (c) finance; and
- (d) private members' bills.

The Senate Select Committee on Standing Committees (**Select Committee**) produced 2 reports. The first, tabled in 1930, duly recommended that a Standing Committee on Regulations and Ordinances be established. The basis of the recommendation appears primarily to have been the volume of regulations that were, at that time, being promulgated. The report referred to evidence before the Select Committee that “no fewer than 3,708 pages” of Commonwealth Acts had been passed between 1901 and 1927, compared to 11,263 pages of regulations, etc in the same period.¹² I will return to the issue of volume of regulations, etc below.

The Select Committee stated:

The power to make regulations is necessarily used very freely by Governments and as a result a very large number are submitted to Parliament every Session. They are so numerous, technical and voluminous that it is practically impossible for Senators to study them in detail and to become acquainted with their exact purport and effect. It is admitted that Senators receive copies of these regulations or Statutory rules, but the many calls upon their time render it almost impossible for them to make a detailed examination of every regulation.¹³

The Select Committee went on to state:

A very strong case has been made out by various witnesses before the Committee in favour of some systematic check, in the interests of the public, on the power of making statutory rules and ordinances.¹⁴

The Select Committee went on to refer to a number of bills (6 are listed), “the chief effect of which was to give a regulation-making power”. I briefly mention this issue below, in a more recent context.

12 See Parliamentary Paper S1/1929-31, at page ix.

13 See Parliamentary Paper S1/1929-31, at page ix.

14 See Parliamentary Paper S1/1929-31, at page x.

It is interesting to note that one of the reasons canvassed for the establishment of the R and O Committee was the availability of such a committee to receive submissions critical of regulations. The Select Committee refers to the “probable usefulness” of affording the public such an opportunity, noting that this would be “both more timely and cheaper” than taking matters to the High Court, as had recently been required in relation to various regulations that the Select Committee listed in the report.¹⁵

The Select Committee recommended that a “proper and sufficient check” was required on the power to make regulations and that such a check could be provided by the establishment of a Regulations and Ordinances Committee.¹⁶

It is interesting to note that the Select Committee’s recommendation was that the proposed R and O Committee “would be charged with the responsibility of seeing that the clause of each bill conferring a regulation-making power does not confer a power which ought to be exercised by Parliament”.¹⁷ The fascinating element of this recommendation is that what is, in fact, recommended here is a role (in relation to delegated legislation) similar to that performed (since 1981) by the Senate Standing Committee for the Scrutiny of Bills.

The Select Committee’s recommendation as to the terms of reference of the proposed Regulations and Ordinances Committee was that the Committee scrutinise regulations to ascertain:

- (a) that they are in accordance with the statute;
- (b) that they do not trespass unduly on personal rights and liberties;
- (c) that they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions;
- (d) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

A final thing to note was the following observation about the proposed Regulations and Ordinances Committee’s role in relation to “policy” issues:

It is conceivable that occasions might arise in which it would be desirable for the Standing Committee [on Regulations and Ordinances] to direct the attention of Parliament to the merits of certain Regulations but, as a general rule, it should be recognized that the Standing Committee [on Regulations and Ordinances] would lose prestige if it set itself up as a critic of governmental policy or departmental practice apart from the terms [of reference] outlined above.¹⁸

15 See Parliamentary Paper S1/1929-31, at page x.

16 See Parliamentary Paper S1/1929-31, at page x.

17 See Parliamentary Paper S1/1929-31, at page x.

18 See Parliamentary Paper S1/1929-31, at page x.

The issue of whether the R and O Committee should consider “policy” issues is not an issue that this paper will canvass. However, my views on this issue (and opposing views from Professor Dennis Pearce) are on the record.¹⁹

Again, these are issues that the paper returns to below.

For completeness, it should be noted that the Select Committee’s second report, tabled in 1930, again recommended that a Regulations and Ordinances Committee be established, though the recommendation did not, on this occasion, contain recommended terms of reference for the Committee. As already noted, the Regulations and Ordinances Committee was, in fact, established in 1932.

A matter of trust?

In the course of preparing this paper, I had cause to re-visit something that I said in a 2007 book, titled *Australian Administrative Law; Fundamentals, principles and doctrines*.²⁰ In that book, I stated:

Parliamentary committees, specifically legislative scrutiny committees, play a very important role in the oversight of delegated legislation. The most significant of the ‘evils’ identified by Lord Hewart [author of *The New Despotism* and a member of the Donoughmore Committee] relates to the likelihood that delegated law-making, because of its volume and complexity, makes it difficult or impossible for the Parliament to check the detail of the various regulations, rules, orders, and so on. Lord Hewart might not have appreciated just how voluminous and complex delegated legislation would become. Experts are appointed to assist legislative scrutiny committees in scrutinising the minutiae of delegated legislation.

There is a certain irony that one of the answer to the evils of delegated legislation is for Parliament to entrust the task of scrutinising delegated legislation to a committee and for the committee (in effect) to entrust an expert with the responsibility of providing it with technical advice as to the contend of the legislation and whether or not it might offend against a series of established (but nevertheless highly subjective) principles. The committee also has to be able to trust the legal adviser not to go off on a campaign or frolic of his or her own.²¹

19 See Pearce, DC, “Legislative scrutiny: Are the ANZACS still the leaders?”, paper delivered to Australia-New Zealand Scrutiny of Legislation Conference, “Scrutiny and Accountability in the 21st Century”, 6-8 July 2009, Canberra (available at http://www.aph.gov.au/About_Parliament/Senate/Whats_On/Conferences/sl_conference/papers/pearce) and Argument, S, “The Poms can’t teach us nuthin’- Commentary on paper by Professor Dennis Pearce”(available at http://www.aph.gov.au/~media/Committees/Senate/sl_conference/papers/argument.pdf).

20 Edited by Groves, M and Lee, HP (2007, Cambridge University Press, Port Melbourne).

21 Argument, S, chapter titled “Delegated legislation” in Groves and Lee (note 20), page 142.

When I wrote this, I had been the Legal Adviser (Subordinate Legislation) to the ACT Scrutiny Committee for just over a year. At that time, I could not have envisaged that I would end up in the privileged role of legal adviser to the Senate R and O Committee. However, my view is largely unchanged. The only thing that I would add is that the secretariats to the various committees also play an invaluable role in providing technical advice to the committees (and also – with the support of highly-engaged committee members – play a role in keeping in check legal advisers with any inclination to frolic).

A side-issue that I have come to appreciate is the role of committee members and, in particular, ex-committee members. In presentations that I have given both in Australia and overseas, I have often been asked about the “engagement” of committee members in the work of committees. There seems to be a widespread assumption that legislative scrutiny reports are principally the work of legal advisers and committee secretariats and that committee members merely rubber-stamp them. I have always been quick to point out that that has never been my experience. In fact, my experience of legislative scrutiny committees has been that committee members are highly-engaged in the finalising of reports and there is no suggestion of merely rubber-stamping drafts prepared for them by others.

But a further, little-appreciated issue is the role of ex-committee members. It has been my experience that many committee members have gone on to become Ministers in Executive governments. They do so having (presumably) learned a great deal about the kinds of issues that attract the attention of legislative scrutiny committees. In their later, ministerial capacity, ex-committee members invariably become the recipients of comments by legislative scrutiny committees. They end up on the receiving-end of the sorts of comments that they were previously responsible for formulating. While I cannot point to any particular examples, it is my view that the involvement of ex-committee members in the legislative scrutiny committee process, as Ministers responding to committee comments, is a significant factor in informing the kinds of responses that legislative scrutiny committees receive from ex-committee members.

For completeness, I note that, in the 2007 book, I went on to state:

There is another element of trust in the process. The committees, to a certain extent, have to be able to trust the rule-makers (as the [Legislative Instruments Act] calls them) to do the right thing. In particular, the committees need to be able to trust rule-makers to be open and fulsome in their Explanatory Statements. Whether this trust is warranted may on occasions be questioned.²²

I do not resile from anything in the above paragraph.

I concluded the chapter by stating:

22 Argument (note 20), page 142.

Delegated legislation involves the Parliament entrusting the Executive with the power to make legislation, without requiring that it be passed by the Parliament. The key mechanism for ensuring that the Executive does the right thing is the legislative scrutiny process and the role of parliamentary committees such as the Senate's R and O Committee. Australia has, for seventy years, led the world in legislative scrutiny. With the enactment of the [Legislative Instruments Act], the Commonwealth jurisdiction has gone to the cutting-edge of legislative scrutiny, by implementing a scrutiny trigger that operates by reference to what legislative instruments do, rather than by what they are called. In so doing, the Commonwealth Parliament has set an example that other jurisdictions would do well to follow.²³

Again, I do not resile from anything in the paragraph above. Though I note that the R and O Committee has now been in existence for closer to **85** years.

Some current challenges presented by delegated legislation

I turn now to some challenges that I identify in delegated legislation (particularly in the Commonwealth jurisdiction). The challenges discussed below are not intended either as being an exhaustive representation or to be set out in an order that demonstrates their importance.

Volume of delegated legislation

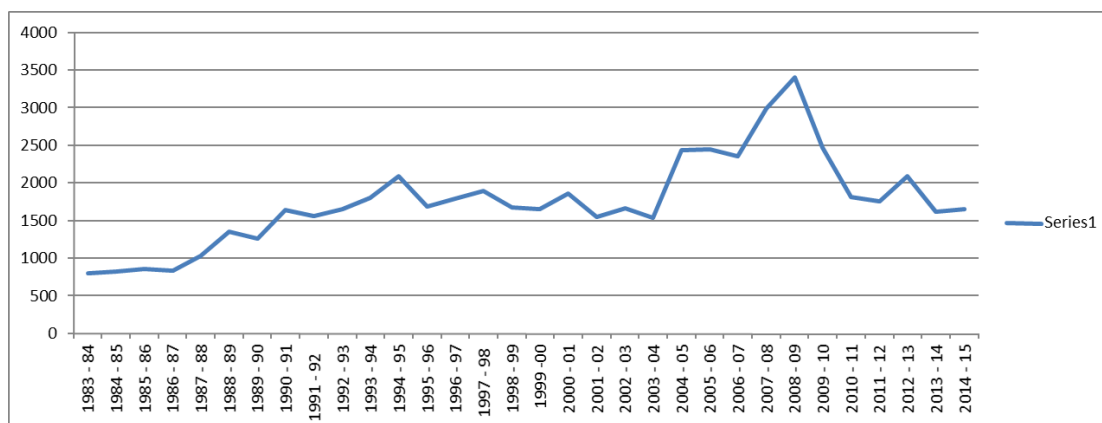
As I have noted above, the R and O Committee was, at least in part, set up in recognition of the volume of delegated legislation that was being made in the years leading up to 1930. As I have noted, the Senate Select Committee on Standing Committees referred to evidence that “no fewer than 3,708 pages” of Commonwealth Acts had been passed between 1901 and 1927, compared to 11,263 pages of regulations, etc in the same period. The current figures are frightening in comparison. In its annual report for 2014-2015, OPC reported that, for that financial year, 172 Bills, totalling 6,395 pages, were introduced. OPC also reported that, in that same period, 253 ExCo Legislative Instruments, totalling 8,091 pages, drafted by OPC were made and registered on the FRL. On top of that, OPC reported that a further (approximately) 103 legislative instruments, totalling 1,647 pages, had been drafted by OPC. And the number of instruments drafted by OPC only tells a fraction of the story. Going purely by the highest FRL registration number for 2015 calendar year, it would appear that 2,141 “legislative instruments” (this being the common term for delegated legislation in the Commonwealth, since 2005) were registered on FRL in that calendar year.

Internal statistics of the R and O Committee indicate that, in the 2015 calendar year, the R and O Committee scrutinised 1,828 instruments that were disallowable by the Senate.

I am grateful for the assistance of the secretariat of the R and O Committee and the Senate Research section for preparing the following graphical

23 Argument (note 20), page 142.

representation of the number of disallowable instruments examined by the R and O Committee from 1983-84 to 2014-15:



The 1983-84 figure is 800 disallowable instruments. The 2008-09 figure is 3,404 disallowable instruments. While the more recent 1,828 disallowable instruments pales into comparison with the 2008-09 figure (which may, in fact, be attributable to the “backcapturing” process of existing instruments that the Legislative Instruments Act initially required²⁴), it is surely the case that this sort of volume of delegated legislation carries with it challenges for the Parliament, if it is to maintain proper control over the content of delegated legislation. Clearly, scrutinising the content of such a volume of delegated legislation is a significant challenge.

Quality of drafting of delegated legislation

A related issue is the drafting of delegated legislation. As I have already mentioned, it was initially the case the delegated legislation in the Commonwealth consisted mainly of regulations. In all States and Territories, except Victoria, regulations are drafted by the same people (ie legislative drafters, in the various offices of parliamentary counsel) who draft primary legislation. Based on my experience as a legislative drafter, it is difficult to imagine that any lesser level of skill is brought to the drafting of regulations than is brought to the drafting of primary legislation.

In the Commonwealth jurisdiction, all regulations are now drafted by the OPC. Previously, regulations were drafted by a separate office – most recently, the Office of Legislative Drafting and Publishing (**OLDP**), a division of the Attorney-General’s Department – also staffed with trained legislative drafters.

24 But see also Senate Standing Committee on Regulations and Ordinances, *Report on the work of the committee in the 42nd Parliament*, Report no.115 (available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Reports/report115/index), at paragraph 3.4 and Senate Standing Committee on Regulations and Ordinances, *Report on the work of the committee in 2010-11*, Report no. 116, (available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Reports/report116/index), at paragraph 3.3, for other explanations of the fluctuations in instrument numbers around that time.

In 2012, the functions of OLDP were transferred to OPC.²⁵ Under the new arrangement, regulations are nevertheless drafted only by trained legislative drafters.

However, as I have already mentioned, there is a vast body of Commonwealth delegated legislation outside of regulations. In my 3 years as Legal Adviser to the R and O Committee, I have been fascinated to observe both the proportion of delegated legislation drafted other-than-by-OPC and also the (at best) variable quality of the non-OPC-drafted legislation.

On the proportion issue, I did some rough calculations for the purposes of a seminar that I presented in November 2013. The calculations were based on figures provided to me by OPC.

In 2011, 1,471 legislative instruments were registered on the FRLI (as it then was). Of those legislative instruments, 286 were “Select Legislative Instruments” or SLIs. Regulations are SLIs. In simple terms, it can safely be assumed that most SLIs were drafted by OPC. This being so, for 2011, just over 19% of legislative instruments registered on the FRLI were drafted by OPC.

For 2012, 2,591 legislative instruments were registered on the FRLI, of which 331 were SLIs. That means that, for 2012, just under 13% of legislative instruments registered on the FRLI were drafted by OPC.

As of November 2013 (when I presented the seminar), 1,832 legislative instruments were registered on the FRLI, of which 235 were SLIs. That means that, to that point, for 2013, just under 13% of legislative instruments registered on the FRLI were drafted by OPC.

From 2014 onwards, I have been keeping figures for myself. In particular, I have been keeping a running weekly total of the overall number of disallowable instruments that I scrutinise and the number of instruments within that number that have been drafted by OPC (with the latter group being identifiable by the presence of an OPC footer). For the 2014 calendar year, I scrutinised 1,722 instruments, of which 295 had been drafted by OPC. That is just over 17%.

For the 2015 calendar year, I scrutinised 1,828 instruments, of which 329 – or just under 18% – had been drafted by OPC.²⁶

While 18% is obviously better than 13%, I find the volume of drafting that is left to other-than-OPC drafters alarming. I would be surprised if it is generally known that OPC drafts such a small proportion of Commonwealth delegated legislation.

25 For a more detailed history of OPC, see Meiklejohn, C, *Fitting the Bill: A History of Commonwealth Parliamentary Drafting* (Office of Parliamentary Counsel, 2012).

26 See also Argument, S, “The importance of legislative drafters – Challenges presented by recent developments in the Commonwealth jurisdiction”, 2015 (81) *AIAL Forum* 40, at page 52.

Use of “legislative rules” in preference to regulations

A further, related issue is a “novel” approach to delegated legislation that was introduced by OPC in 2014.

In 1904, a definition of “prescribed” was introduced into the *Acts Interpretation Act 1901* (Cth). The definition (which now sits in section 2B of the *Acts Interpretation Act*) provides that “prescribed” means “prescribed by the Act or by regulations under the Act. Since the introduction of that definition, users of Commonwealth legislation who saw the term “prescribed” used in an Act would generally look to the regulations made under the Act for any matter that was to be “prescribed”.

Early in 2014, the Federal Minister for Industry made the Australian Jobs (Australian Industry Participation) Rule 2014. The Rule was made under section 128 of the *Australian Jobs Act 2013*, which allows for various matters in relation to that Act to be prescribed, by the minister, by “legislative rules”, rather than by the Governor-General, by regulations. This was first commented on by the R and O Committee in March 2014, in the context of its *Delegated legislation monitor No. 2 of 2014*.²⁷ Over the following 9 months, the R and O Committee explored with relevant Ministers and with the First Parliamentary Counsel (**FPC**) this “novel” approach to making delegated legislation in the Commonwealth jurisdiction. The exploration occurred through a series of letters and, in response, further questions from the Rand O Committee.

I do not propose to go through the various issues raised by the R and O Committee here.²⁸ However, a focus of the R and O Committee’s concerns was on the possible impact of the new approach on the quality of Commonwealth delegated legislation. A significant part of the issue related to the drafting of legislative rules as opposed to the drafting of regulations. Under existing arrangements (including the Legal Services Directions 2005²⁹), OPC is required to draft all Commonwealth regulations. Importantly, OPC does so at no cost to the instructing agency. For legislative rules, however, neither the OPC monopoly nor the “at no cost to the agency” rule applies, meaning both that *anyone* can draft legislative rules and that OPC will only draft legislative rules on the payment of a fee. The R and O Committee was concerned that there might be an impact on the quality of drafting of delegated legislation if the new approach meant that less delegated legislation ended up being drafted by OPC.

27 Available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_ctte/mon2014/pdf/n02.pdf.

28 For further information, see generally, *Delegated legislation monitor* No. 17 of 2014 (available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_ctte/mon2014/word/no17.docx?la=en). See also Argument, S, “The use of ‘legislative rules’ in preference to regulations: A ‘novel’ approach?”, (2015) 26 *Public Law Review* 4 and also Argument (note 26).

29 Available at <https://www.legislation.gov.au/Details/F2015C00533>.

In 1990, the late Emeritus Professor Douglas Whalan, while working as one of my eminent predecessors as Legal Adviser to the R and O Committee, said:

There is relatively easy access to statutes, regulations and, indeed, ordinances. Not only are they drafted by specialist professionals, but they are properly published in a series in print that can be read without the aid of a microscope. In contrast, some instruments have turned up on rather scrappy bits of paper, with the drafting in them of poor standard and with an indecipherable signature.³⁰

Professor Whalan was speaking at a time when the passage of the *Legislative Instruments Act 2003* was still quite some way (and quite some pain for everyone involved) into the future. It has always been my view that the Legislative Instruments Act did much to address the sorts of problems identified by Professor Whalan. Further, it was also initially my view that section 16 of the Legislative Instruments Act (now section 16 of the *Legislation Act 2003*), which imposes on (now) the FPC an obligation “to encourage high standards in the drafting of legislative instruments” would do much to address ongoing issues. After my time in OLDP/OPC, as a legislative drafter, and after 3 years of scrutinising Commonwealth delegated legislation for the R and O Committee, my fear is that there has been little real impact. If there *has* been any real impact then it has eluded me. And I stand to be corrected on this point.

More worrying, however, is my concern that the recent developments in relation to pushing material that was previously in regulations into “legislative rules” may result in the Commonwealth legislative landscape being taken backwards, not forwards. If non-OPC drafters are to be responsible for drafting even more Commonwealth delegated legislation than they do at present then – in the absence of a concerted effort by OPC to carry out the obligations imposed by section 16 of the (now) Legislation Act (something that, I should note, FPC has told the R and O Committee is now occurring³¹) – I have significant concerns for the effect on the overall quality of Commonwealth delegated legislation.

This is not to disparage the work of non-OPC drafters in the Commonwealth jurisdiction. I am sure that they all do their best to produce the best legislation that they possibly can. The problem is that (in my experience) most of them do so without formal training as legislative drafters, without any substantive guidance as to how they should approach their drafting and (presumably) without the same sorts of formal settling and editing process implemented in offices such as OPC. That being so, it is important (in my view) that the FPC does all that he can to fulfil his obligations under section 16 of the (now) Legislation Act.

30 Whalan, DJ, “The final accolade: Approval by the committees scrutinizing delegated legislation”, paper given to seminar conducted by the (Commonwealth) Attorney-General’s Department titled “Changing attitudes to delegate legislation”, held in Canberra on 23 July 1990, at page 9 of the paper.

31 See *Delegated legislation monitor* No. 17 of 2014 (note 28), especially at pages 15-6.

In this context, there is a link between my earlier comments on the increasingly pervasive nature of delegated legislation and the importance of legislative drafting and legislative drafters. In *The Devil is in the Detail*, the Hansard Society highlights the importance of delegated legislation to the effective operation of government, not the least because of its effects on almost every aspect of both the public and private spheres. That being so, great care should be taken in the drafting of all forms of delegated legislation, both to ensure that it is effective and also to ensure that its effects on the public and on business are as optimal as they can be.

In a recent text on legislative drafting, Professor Helen Xanthaki, of the University College London, (writing from a UK perspective) has stated ...

... the life of citizens tends to be more directly affected by delegated legislation than it is by general framework type laws passed by the Houses of Parliament. Moreover, it is delegated legislation that is applied by most authorities in their interaction with citizens, thus rendering the possibility and danger of corruption all the more pronounced. It is for these reasons that delegated legislation requires the attention and skill of the legislative drafter.³²

Significantly, Professor Xanthaki goes on to state:

The task is mammoth, and the resource implications of allocating all legislation to the Office of Parliamentary Counsel are extreme.³³

This applies equally in Australia. With the ongoing squeezing of bureaucratic resources in Australian jurisdictions (by the imposition on the bureaucracies of successive “efficiency dividends” and the like), the challenges will only increase.

Challenges presented by issues arising from the High Court’s Williams decisions

It is trite to observe that the High Court’s decisions in *Williams (No. 1)*³⁴ and *Williams (No. 2)*³⁵ present challenges for the Parliament and for the R and O Committee. In *Williams (No. 1)*, the High Court confirmed that executive authority to spend appropriated monies is not unlimited and therefore generally requires legislative authority. As a result of the subsequent decision in *Williams (No. 2)*, which strengthened the requirements in relation to legislative authority, the R and O Committee started requiring that the explanatory statements for all instruments specifying new programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers)*

32 Xanthaki, H, *Drafting Legislation: Art and Technology of Rules for Regulation*, Hart Publishing, Oxford and Portland, Oregon, 2014, page 261.

33 Xanthaki (note 32), page 261. See also Argument, S, “Delegated legislation not of lesser importance to primary legislation – But is it subject to the same standards of scrutiny?”, (2015) 26 *Public Law Review* 137.

34 *Williams v Commonwealth* (2012) 248 CLR 156.

35 *Williams v Commonwealth* (2014) 252 CLR 416.

Act 1997 explicitly state, for each new program, the constitutional authority for the expenditure.

I do not propose to deal with the *Williams* decisions in any detail in this paper. First, because Professor Cheryl Saunders, in her paper for this Senate Occasional Lecture, will deal with the *Williams* decisions with greater insight than I could possibly muster. Second, because I defer to the analysis set out in Dr Patrick Hodder's excellent *Papers on Parliament* paper, titled "The *Williams* Decisions and the Implications for the Senate and its Scrutiny Committees".³⁶ However, I make the following, brief comments about the practical implications of (in particular) the *Williams* (No. 2) decision for the work of the R and O Committee.

Since *Williams* (No. 2), the R and O Committee has required that instruments that add new programs to the Financial Framework (Supplementary Powers) Regulations 1997, under the power set out in section 32B of the Financial Framework (Supplementary Powers) Act are specific about the constitutional authority for the new program. If a program cites the external affairs power of the *Constitution* (section 51(xxix)) as authority, the R and O Committee has sometimes required that the relevant instrument, or its explanatory statement, identify the international instrument whose obligations are relied upon and the particular obligations involved (ie by reference to specific articles of the relevant international instrument).³⁷ This is based on the R and O Committee's understanding that, in order to rely on the power in connection with obligations under international treaties, legislation must be appropriately adapted to implement relatively precise obligations arising under the relevant treaty.

Similarly, where the executive nationhood power (section 61) or the express incidental power (section 51(xxxix)) are relied upon, the R and O Committee has sometimes required that the relevant instrument, or its explanatory statement, identify the reasons why the relevant enterprises or activities are enterprises or activities that are peculiarly adapted to the government of a nation and cannot otherwise be carried out for the benefit of the nation. This is based on the R and O Committee's understanding that the relevant powers provides the Commonwealth Executive with a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.

The R and O Committee's requirements in this regard are in accordance with principle (a) of the R and O Committee's terms of reference, which requires the R and O Committee scrutinise instruments to ensure that they are "in accordance with the statute".

36 Available at http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~media/7D469B4A037244249054B09FEA72C34A.ashx. See also Lynch, A, "Commonwealth spending after *Williams* (No. 2): *Has the new dawn risen?*", (2016) 26 *Public Law Review* 77, page 83.

37 See, eg, *Delegated legislation monitor* No. 6 of 2015 (available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_ctte/mon2015/word/no06.docx?la=en), at pages 11-3.

It is pleasing to observe that, despite questioning the appropriateness of responding to the R and O Committee's requirements,³⁸ and despite routinely qualifying any reference to constitutional authority (ie by prefacing any reference to constitutional authority with a statement to the effect of "[n]oting that it is not a comprehensive statement of the relevant constitutional considerations"³⁹), the Executive has generally been quite co-operative in relation to the R and O Committee's requirements in this regard.

There was a not-insignificant hiccup in this approach when the R and O Committee considered the Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015. The Minister for Finance, Senator Mathias Cormann, declined to provide the R and O Committee with legal advice in relation to the constitutional authority that supported the relevant new programs. However, the Minister also failed to advance a public interest immunity claim in relation to declining to provide the requested advice, leading the R and O Committee to pursue the issue (including by lodging a "protective" motion to disallow the relevant regulation). Finally, the R and O Committee effectively gave the Minister the option of providing the legal advice or assuring the R and O Committee that he was satisfied that the new programs were constitutionally supported by the relevant powers. The Minister eventually provided the R and O Committee with that assurance.⁴⁰

Use of delegated legislation in anticipation of primary legislation

A more unusual (and in many ways more troubling) challenge recently presented by delegated legislation in the Commonwealth is the making of regulations that make amendments in anticipation of the same amendments later being made to primary legislation. An example is the amendments made by the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 [F2014L00891], which the R and O Committee first considered in *Delegated legislation monitor* No. 10 of 2014.⁴¹ The R and O Committee noted that the explanatory statement for the regulation provided the following reason for introducing the changes via regulation rather than primary legislation:

38 See, eg, letter from the Minister for Finance to the R and O Committee, dated 1 September 2015, in relation to the R and O Committee's comments on the Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015, reproduced in *Delegated legislation monitor* No. 10 of 2015, at page 33 (available at

http://www.aph.gov.au/~media/Committees/Senate/committee/regord_ctte/mon2015/word/no10.docx?la=en).

39 See, eg, explanatory statement for Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 1) Regulation 2016 [F2016L00163].

40 See, generally, *Delegated legislation monitor* No. 13 of 2015 (available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_ctte/mon2015/word/no13.docx?la=en).

41 Available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_ctte/mon2014/word/no10.docx?la=en.

...time sensitive FOFA amendments will be dealt with through regulations and then put into legislation. This approach provides certainty to industry and allows industry to benefit from the cost savings of the changes as soon as possible.

The R and O Committee then noted that the Senate Standing Committee for the Scrutiny of Bills had expressed doubt as to whether industry certainty (and benefit) amounts to a sufficient justification for effecting significant policy change via regulation, noting that that committee had stated:

...enabling a regulated industry to benefit from legislative change 'as soon as possible' is not a sufficient justification to achieve policy change through regulations rather than Parliamentary enactment as this justification could be claimed with respect to any proposal. The fact that the changes may subsequently be enacted in primary legislation does not moderate the scrutiny concerns in this regard.⁴²

The R and O Committee then stated:

In light of these comments, the committee notes that key elements of the regulation (item 7) may be described as involving 'fundamental change' to the primary legislative scheme, and as 'mirroring' the proposed amendments in the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014.

Given this, the committee considers that the changes effected by the regulation may be regarded as more appropriate for parliamentary enactment, in respect of both their substantive effect and temporary or interim character. **The committee therefore requests the advice of the minister in relation to this matter.**⁴³

It should also be noted that the R and O Committee recognised from the outset that various amendments were time-limited in their effect, operating only from the commencement of the regulation (1 July 2014) until 31 December 2014. This meant that the amendments (in the regulations) had a limited operation and effect.

The Minister for Finance and Acting Assistant Treasurer, Senator Mathias Cormann, responded to the R and O Committee in a letter dated 13 September 2014. The R and O Committee dealt with the Minister's response in its *Delegated legislation monitor* No. 12 of 2014,⁴⁴ in which the R and O Committee quoted the Minister's response in some detail. While what I set out below involves voluminous quotes from the Minister and the R and O

42 Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2014*, 16 July 2014, page 348.

43 *Delegated legislation monitor* No. 10 (note 41), at pages 2-3.

44 Available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_ctte/mon2014/word/no12.docx?la=en.

Committee, I think that the detail that is provided by reproducing the quotes is illuminating.

In his 13 September 2014 letter, the Minister stated:

My response to the first issue raised in *Delegated Legislation Monitor* No. 10 of 2014 (the monitor) is that the magnitude of the burden on the financial advice industry by Labor's reforms warranted swift action. In the lead up to the 2013 federal election, I outlined how Labor's Future of Financial Advice (FOFA) reforms had been too costly to implement and failed to strike the right balance between consumer protection and the need to ensure the ongoing availability, accessibility and affordability of high quality financial advice. From speaking with numerous industry stakeholders, it was clear that the financial services industry was being significantly affected by Labor's FOFA reforms. As such, I stated that we would move quickly to implement changes to FOFA if the Coalition were elected.

It should be noted that Treasury's estimates of the ongoing cost savings of the Regulation are approximately \$190 million per year, with one-off implementation savings of approximately \$90 million; these estimates represent just over half of the estimated \$375 million ongoing costs of complying with FOFA. Further, the Australian Securities and Investments Commission's facilitative compliance approach to FOFA was scheduled to end on 30 June 2014; this provided additional impetus to ensure industry received certainty through legislative change.

As the Committee noted, the Regulation is largely mirrored in the Bill. Those provisions in the Bill have been—and will continue to be—subject to full parliamentary scrutiny. The Bill passed the House of Representatives on 28 August 2014 and was introduced in the Senate on 1 September 2014. The interim Regulations will be repealed once the Bill receives Royal Assent. I note that both the Senate Economics Legislation Committee and the Senate Economics Reference Committee are—respectively—conducting inquiries into the Bill and financial advice reforms.⁴⁵

The R and O Committee thanked the Minister his response but noted that

... the minister's response has not satisfactorily addressed the key scrutiny concern raised by both the Scrutiny of Bills committee and this committee—namely, that the regulation makes fundamental legislative change that may be more appropriate for parliamentary enactment (that is, via primary rather than delegated legislation). While the minister cites both the need for 'swift action' and the estimated savings or benefit to industry, the minister has not addressed the committee's

45 *Delegated legislation monitor* No. 12 of 2014 (note 44), at page 5.

concern that such imperatives may not amount to sufficient justification for effecting significant policy change via regulation (and therefore without the full scrutiny and approval of the parliament). The committee notes that the minister's advice as to the scale of the intended effect of the regulation, and the existence and significance of the bill currently being considered by other Senate committees, could be equally taken as supporting a conclusion that the measures are more appropriately subject to the Senate's full deliberative processes. The committee is particularly concerned that the policy imperatives cited to justify the use of regulation in this case do not appear to be distinguishable from any case in which, in view of the anticipated timeframes and uncertainty applying to the full legislative process, the government might regard it as preferable or convenient to effect policy change via delegated legislation. **The committee therefore seeks further advice from the minister as to whether the legislative changes made by the regulation should be considered appropriate for delegated legislation.**

The committee further notes that, notwithstanding the minister's assurance that the regulation will be repealed once the bill receives Royal Assent, the nature of the full legislative process is such that there remains significant uncertainty as to whether and in what form the bill may eventually be passed. **Given this, the committee also seeks the minister's advice as to whether all or part of the instrument will be repealed in the event that the bill is not passed by the parliament, or is passed with substantive amendments to matters currently provided for in the regulation.**⁴⁶

The Minister responded to the above comments in a letter dated 23 October 2014. The R and O Committee dealt with the Minister's response in *Delegated legislation monitor* No. 14 of 2014, where it quoted extensively from the Minister's response, noting that the Minister had advised:

I previously outlined to the Committee the magnitude of the burden imposed on the financial advice industry by Labor's Future of Financial Advice (FOFA) changes, and I indicated that the burden warranted swift action. In my discussions with industry stakeholders since the commencement of the Regulation on 1 July 2014, it has become clear that the Regulation has provided much needed clarity and certainty to the financial advice industry. Importantly, the Regulation has reduced costs in the financial advice industry by removing costly and burdensome red-tape such as requiring clients to resign contracts with their advisers at least every two years to continue an ongoing advice relationship. As such, the Regulation has been a crucial first step in ensuring the ongoing availability, accessibility and affordability of high-quality financial advice; further improvements will ensue from the accompanying legislative amendments.

46 *Delegated legislation monitor* No. 12 of 2014 (note 37), at pages 5-6.

I would like to bring to the Committee's attention the fact that some of the amendments contained in the Regulation have always been considered an interim solution. The Government has consistently stated that time-sensitive changes would initially be made through regulations and then reflected through legislative amendments. Indeed, as far back as 7 November 2013, the Assistant Treasurer, Senator the Hon Arthur Sinodinos AO, indicated that "time sensitive amendments will be dealt with through regulations and then locked in to legislation". The Government has not wavered from this commitment. Indeed I again confirmed this approach in a comprehensive statement on improvements to Labor's regulations on 20 June 2014.

The Committee should note that parts of the Regulation are designed to only have effect from 1 July 2014 to 31 December 2015. This arrangement appropriately reflects the differential treatment of primary and secondary law. It also demonstrates the bone fides of the Government that it would not permit a temporary mechanism to turn into a permanent legislative artefact.

As I indicated in my 13 September 2014 letter to the Committee, the financial impacts of Labor's FOFA reforms compelled an urgent response. Treasury's estimates of the ongoing cost savings of the Government's Regulation to improve FOFA are approximately \$190 million per year, with one-off implementation savings of approximately \$90 million. These estimates represent just over half of the estimated \$375 million ongoing costs to industry—and ultimately to consumers—of complying with Labor's FOFA.

Further, the Australian Securities and Investments Commission's facilitative compliance approach to FOFA was scheduled to end on 30 June 2014. This provided an interim period where the compliance emphasis was on education and assistance, before the regulator moved to a stricter enforcement approach. This provided additional impetus to ensure industry received certainty through legislative change before businesses incurred substantial costs implementing Labor's FOFA reforms in an unamended form in the 2014-15 financial year. It would be evidently less disruptive for this significant industry and for Australians saving for their retirement and managing financial risks through life, to avoid the costs of implementing short-lived changes and then incur costs to unwind them. Given this urgency, making amendments through regulations provided the most effective mechanism to ensure certainty to industry and to investors alike.

As the Committee previously noted, many of the amendments made in the Regulation are to be reflected in legislation: specifically, the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (the FOFA Bill). Those provisions in the FOFA Bill have been—and will continue to be—subject to full parliamentary scrutiny.

Although Senate scrutiny processes for regulations are different to that for principal legislation, the deliberative processes of the Senate have provided for extensive scrutiny of this Regulation. I draw the Committee's attention to the considerable Senate debate on two motions for disallowance of the Regulation: the first was a full disallowance motion, which was resolved in the negative on 15 July 2014; the second was a partial disallowance motion—on items 1 to 27 and 30 of the Regulation—which was resolved in the negative on 1 October 2014. Disallowance had been scheduled for debate and deferred on an almost daily basis for most of the Spring sittings to date.

The FOFA Bill has also been subject to two comprehensive Senate Economics Legislation Committee inquiries, which reported on 16 June 2014 and 22 September 2014 respectively, as well as consideration by the Senate Standing Committee on the Scrutiny of Bills. The Senate Economics Legislation Committee recommended that the Senate pass the FOFA Bill in both its reports. It should be noted that the FOFA Bill, which is endorsed by the Senate Economics Legislation Committee, creates entrenchment of some bridging reforms that are reflected in the Regulation.

Regarding the Committee's question as to whether all or part of the Regulation will be repealed in the event the FOFA Bill is not passed by the Parliament, the Government is committed to working with the Senate to deliver our election commitment. I do not presume to pre-empt the outcome of this process.

Having provided clarity and certainty to industry through the Regulation, the Government can now turn its attention to additional efforts to improve the accessibility, affordability and quality of financial advice. This work includes progressing an enhanced public register of financial advisers and supporting efforts to raise professional, ethical and educational standards in the industry.⁴⁷

The R and O Committee responded as follows:

47 *Delegated legislation monitor* No. 14 of 2014 (available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_ctte/mon2014/word/no14.docx?la=en), pages 8-10.

The committee notes the minister's reiteration of the claim to the urgency of the measures in question, arising from the minister's assessment of the 'magnitude of the burden imposed on the financial advice industry by Labor's Future of Financial Advice (FOFA) changes'. The minister also reiterates his previous advice regarding the financial benefit of the changes to industry. However, the committee notes that the considerations raised are not in the nature of exigencies (intrinsically requiring the measures in question) but are in fact political and policy considerations falling outside the scope of the committee's technical scrutiny of delegated legislation. The appropriateness, desirability and cost-benefit implications of particular measures for regulating a specific industry are not matters which go to the substance of the key concern raised by this (and the Scrutiny of Bills) committee, which is that the regulation makes fundamental legislative change that may be more appropriate for parliamentary enactment (that is, via primary rather than delegated legislation).

In this respect, the committee notes the minister's view that the 'deliberative processes of the Senate have provided for extensive scrutiny' of the regulation. However, while the technical matters flagged by the committee have been referenced in debates on the regulation, those debates have centred on the policy aspects of the regulation. The scrutiny concerns and principles relevant to this matter have not yet been the primary subject of any motion debated by the Senate.

Simply stated, the committee remains concerned that the minister's position is capable of forming a precedent for the use of delegated legislation in favour of primary legislation on the basis that, due to the inherent uncertainty of the Parliament's full legislative processes, it is the most convenient or preferred means to effect policy change. While the committee acknowledges the minister's advice that the end-dating of some measures 'demonstrates the bona fides of the Government that it would not permit a temporary mechanism to turn into a permanent legislative artefact', the committee considers that questions of duration are secondary to the fundamental question of whether the Parliament approves of the legislative approach.

Finally, the committee notes the minister's advice regarding the government's intentions in the event that the bill is amended or not passed by the Parliament:

Regarding the Committee's question as to whether all or part of the Regulation will be repealed in the event the FOFA Bill is not passed by the Parliament, the Government is committed to working with the Senate to deliver our election commitment. I do not presume to pre-empt the outcome of this process.

The committee does not view consideration of the potential consequences of using regulation to implement fundamental changes that anticipate a particular legislative outcome on a bill as pre-emptive.

As the committee has previously noted, it is in fact the pre-emptive character of the use of regulation in this case that gives rise to the committee's inquiries. The committee's questions on this issue point to the significant possibility that the bill is not passed in a form which contains all the measures in the regulation. The committee considers that the potential for this approach, in this and future cases, to 'permit a temporary mechanism to turn into a permanent legislative artefact', or to continue in operation despite the clearly expressed will of the Parliament (for example, if the bill were passed with an amendment to remove one of the measures in the regulation), is critical to the assessment of whether the legislative approach offends the committee's scrutiny principle (d).

In light of these concerns about the potential inclusion of matters more appropriate for parliamentary enactment in primary legislation (scrutiny principle (d)), the committee draws this matter to the attention of senators. Noting the end-dating of the regulation, the committee leaves the question of whether the use of regulation is appropriate in this case to the Senate as a whole.⁴⁸

In coming to this conclusion, the R and O Committee also withdrew the "protective" notice of motion that it had placed on the regulations in question.

One might have expected that, after the interchange reproduced above, Ministers might have been more circumspect in adopting a similar approach for future instruments. Not so. More recently, the R and O Committee considered the Corporations Amendment (Financial Advice) Regulation 2015 [F2015L00969] in *Delegated legislation monitor* No.11 of 2015.⁴⁹

The R and O Committee noted that the explanatory statement the instrument provided the following reason for introducing the changes by way of delegated legislation rather than primary legislation:

The majority of these time sensitive [Future Of Financial Advice] amendments will also be enacted in legislation. The Government has adopted this approach to provide certainty to industry as quickly as possible.

The R and O Committee questioned this approach, again noting the questions previously asked by the Senate Standing Committee for the Scrutiny of Bills as to whether industry certainty (and benefit) amounts to a sufficient justification for effecting significant policy change via regulation.

In light of these considerations, the R and O Committee advised the Minister for Finance that it considered that the changes effected by the regulation could be regarded as more appropriate for parliamentary enactment.

48 *Delegated legislation monitor* No. 14 of 2014 (note 47), pages 10-1).

49 Available at

http://www.aph.gov.au/~media/Committees/Senate/committee/regord_ctte/mon2015/word/no11.docx?la=en.

The Minister's response stated (in part):

The majority of the amendments made through the Revising FOFA Regulation and the Regulation will also be enacted in legislation through the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014, which is currently before the Senate and will be subject to full Parliamentary scrutiny.

The Minister's response also advised that there was "bipartisan support" for the relevant amendments.

The R and O Committee again engaged the Minister over a series of *Delegated legislation monitors* and responses from the Minister. In the light of the extensive quoting in relation to the previous example, above, I will not reproduce those answers here. Suffice to say that the R and O Committee was equally vigorous in maintaining its position in relation to the approach of implementing amendments by regulation, in anticipation of later amendments being made by primary legislation.

In concluding its dealing with the matter, the R and O Committee noted the current progress of the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014, namely that it had been introduced into the Senate on 1 July 2014 (ie more than 2 months' prior to the R and O Committee's current consideration of the instrument). However, the R and O Committee indicated that it maintained its concern that the Minister's position was capable of forming a precedent for the use of delegated legislation in favour of primary legislation, on the basis that, due to the timing or inherent uncertainty of the Parliament's full legislative processes, implementing amendments by delegated legislation could be the most convenient or preferred means to effect (interim) policy change. The R and O Committee concluded by stating:

While the committee notes the minister's advice that there is bipartisan support for the changes contained in the regulation, as the committee has previously noted, it is the pre-emptive character of the use of regulation in this case that gives rise to the committee's inquiries. The committee's questions on this issue point are based on the possibility that, notwithstanding the apparent bipartisan support for the regulation, the bill may not be passed in a form which contains all the measures in the regulation. The committee considers that the potential for this approach, in this and future cases, to 'permit a temporary mechanism to turn into a permanent legislative artefact', or to continue in operation despite the clearly expressed will of the Parliament (for example, if the bill were passed with amendments to remove one of the measures in the regulation or not complemented by the operation of the regulation), is critical to the assessment of whether the legislative approach offends the committee's scrutiny principle (d).

In light of these concerns about the potential for the regulation to implement changes that are subsequently not passed by the

Senate, the committee has determined to give a notice of motion for disallowance to ensure that the ability to disallow the instrument is protected prior to the finalisation of the Senate's consideration of the bill.⁵⁰

Fortunately, the primary legislation was passed and there was no need for the disallowance motion to proceed. However, it is important to note that the Minister's final response to the R and O Committee explicitly referred to the timetable for the passage and commencement of the relevant primary legislation, in an evident attempt to address the R and O Committee's concerns. Nevertheless, attempts to legislate in this way remain a matter for concern, especially if the previous attempts indicate that this is intended to be an acceptable approach to legislating.

Quite correctly, the R and O Committee has not accepted that the use of delegated legislation in this way was justified on the basis of Pearce and Argument's "legislation to deal with rapidly changing or uncertain situations" justification or the Donoughmore Committee's "emergency" justification. What was involved were issues of political expediency (albeit that the expediency also went to providing certainty to relevant stakeholders). Underlining my concern about the exercise of legislative power in this way is that my inquiries of other Australian jurisdictions indicate that this is genuinely a novel approach to legislation. I can find no example of a similar approach being adopted in any other jurisdiction.

This is an issue in relation to which the R and O Committee will have to maintain its vigilance.

Challenges presented by issues arising from the Federal Court's Perrett decision

Another recent challenge presented to the Senate arises from the decision (on 13 August 2015) of the Federal Court of Australia in *Perrett v Attorney General of the Commonwealth of Australia* [2015] FCA 834 (**Perrett**). In that decision, the Federal Court (Dowsett J), rejected a challenge by 5 applicants to the Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015 (Cth) (**the Second Regulation**). The basis of the application was that the Second Regulation was "the same in substance" as the Federal Courts Legislation Amendment (Fees) Regulation 2015 (Cth) (**the First Regulation**), which was disallowed by the Senate on 25 June 2015.

The applicants argued that the making the Second Regulation, on 9 July 2015, was contrary to section 48 of the Legislative Instruments Act (now section 48 of the Legislation Act), which prohibits the making of a legislative instrument (or a provision of a legislative instrument) that is "the same in substance" as a legislative instrument (or a provision of a legislative instrument) that has been disallowed, within 6 months of the disallowance of the first legislative instrument. In the particular case, provisions of the First Regulation provided for significant increases in the filing fees for various

50 See *Delegated legislation monitor* No.11 of 2015 (note 49), at page 6.

Family Court applications. Those provisions were disallowed by the Senate. The Second Regulation largely replicated the disallowed provisions but also increased relevant fees by a further \$5.

The Federal Court upheld the validity of the Second Regulation. Dowsett J (in essence) concluded that section 48 of the Legislative Instruments Act required “complete identity” between disallowed regulations and subsequent regulations before it would come into effect.

While I do not intend to analyse the *Perrett* decision in great detail for this paper, I nevertheless record my concern about the potential effect of the decision on the work of the Senate. My view is that the decision operates to leave section 48 of the (now) Legislation Act with *little* (if any) operation and effect, since (on Dowsett J’s analysis) it can be so easily side-stepped by an Executive government. In fact, the particular case demonstrates that point. In that regard, it is significant to note that no explanation is given for the additional \$5 increase provided for by the Second Regulation. One of the justifications for the fees increases provided for by the First Regulation was the funding of the relevant courts. Surely, a further \$5 increase would have negligible practical effect on the “structural deficits currently facing the family courts” that are referred to in the explanatory statement for the Second Regulation. One does not have to be a rampant cynic to speculate that the principal reason for the further \$5 increase was to get around section 48 of the (now) Legislation Act.

The Senate disallowed the Second Regulation on 11 August 2015.

Several of the applicants to the Federal Court appeal initially appealed the Federal Court decision to the Full Federal Court. However, that appeal was discontinued on 5 February 2016.⁵¹ This means that, despite the immediate issue of the increase in fees having been dealt with, the issue of the possible “precedent” value of the Federal Court decision remains. That being so, the R and O Committee has stated, in its *Delegated legislation monitor* No. 2 of 2016:

In concluding its examination of the instrument, the committee notes that the appeal to the Full Federal Court of the *Perrett* decision was discontinued on 5 February 2016.⁵² However, the committee observes that tensions remain between the interpretation of the concept of ‘the same in substance’ by the Federal Court in that decision and the authoritative decision of the High Court in *Victorian Chamber of Manufactures v Commonwealth (Women’s Employment Regulations)* (1943) 67 CLR 362. 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

51 See <https://www.comcourts.gov.au/file/Federal/P/QUD757/2015/actions>.
52 *Ting Wei v George Henry Brandis, Attorney-General of the Commonwealth of Australia* (QUD757/2015).

concepts of parliamentary sovereignty and accountability which inform the application of the committee's scrutiny principles.⁵³

Given the potential impact of the *Perrett* decision on the Senate's effectiveness in its supervisory role in relation to delegated legislation, this is a significant position for the R and O Committee to take. Watch this space.

"Skeletal" or "Skeleton" legislation

In his recent text, *Soft Law and Public Authorities: Remedies and reform*,⁵⁴ Dr Greg Weeks discusses "the perils of skeletal legislation". He states:

There is a tendency to draft legislation in minimalist or "skeletal" form and to leave issues of detail or uncertainty "to the Regs".⁵⁵

Dr Weeks footnotes my paper titled "'Leaving it to the Regs' - The pros and cons of dealing with issues in subordinate legislation', presented to Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, from 26-8 July 2011.⁵⁶ In that paper, I noted that this issue was touched on by Professor Pearce, in his paper to the 2009 Australia-New Zealand Scrutiny of Legislation Conference. Professor Pearce stated:

More and more we are seeing major policy matters being dealt with in delegated legislation. There are probably many reasons for this. For example, I am told that matters are often left to be included in regulations because there has not been time to cover all issues in the Bill introduced into the Parliament. Time is thus gained to deal with matters that may be of significance.

Another reason for using delegated legislation for substantive issues flows from the approach that has many advocates of drafting Bills in skeletal form setting out only the major principles. By definition, this means that significant material must be included in the delegated legislation.⁵⁷

My "Leaving it to the Regs" paper was largely based on my observations as a legislative drafter, in the years leading up to the 2011 conference. However, "skeletal" legislation is not an issue that I have particularly noticed in my 3 years of working with the R and O Committee. However, Dr Weeks' comments suggest that it is an issue that should continue to be monitored.

As I indicated at the outset, these are just some of the recent challenges that delegated legislation has presented in the Commonwealth jurisdiction.

53 Available at http://www.aph.gov.au/~media/Committees/Senate/committee/regord_ctte/mon2016/word/no2.docx?la=en, see page 44.

54 2016, Hart Publishing, London and Portland Oregon.

55 Weeks (note 54), at page 27.

56 Available at http://www.parliament.qld.gov.au/documents/committees/SLC/2011/SLC_Conference/SLCConf-Sess11-Argument.pdf.

57 Pearce (note 19).

Some issues in the United Kingdom – *Strathclyde Review: Secondary legislation and the primacy of the House of Commons*

Background

I now turn to some recent, highly contentious issues involving delegated legislation in the United Kingdom that (in my view) allow some observations to be made about how we deal with delegated legislation in Australia. I note at the outset that there is a lot of detail in what I set out below. However, I hope that at least some of the material will be of interest to readers and that the observations (by reference to the situation in Australia) that I make are useful.

On 17 December 2015, the UK Government published the report of the “Strathclyde Review”.⁵⁸ The review, led by Lord Strathclyde, had been commissioned, by the UK Government, the previous October (meaning that it was completed in a very short time-frame). The purpose of the review was “to examine how to protect the ability of elected governments to secure their business in Parliament in light of the operation of these conventions” and to “consider in particular how to secure the decisive role of the elected House of Commons in relation to its primacy on financial matters, and secondary legislation”.⁵⁹

The stimulus for the review was a decision of the House of Lords, made on 26 October 2015, to “withhold agreement” to the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015. Those regulations were put to the House of Lords under section 66 of the *Tax Credits Act 2002* (UK), which provided (in part):

66 Parliamentary etc. control of instruments

This section has no associated Explanatory Notes

- (1) No regulations to which this subsection applies may be made unless a draft of the instrument containing them (whether or not together with other provisions) has been laid before, and approved by a resolution of, each House of Parliament.
- (2) Subsection (1) applies to—
 - (a) regulations prescribing monetary amounts that are required to be reviewed under section 41,
 - (b) regulations made by virtue of subsection (2) of section 12 prescribing the amount in excess of which charges are not taken into account for the purposes of that subsection, and

58 <https://www.gov.uk/government/news/government-publishes-strathclyde-review>. The report can be found at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486790/53088_Cm_9177_Web_Accessible.pdf.

59 <https://www.gov.uk/government/speeches/strathclyde-review-statement-by-baroness-stowell>.

- (c) the first regulations made under sections 7(8) and (9), 9, 11, 12 and 13(2).
- (3) A statutory instrument containing—
- (a) regulations under this Act,
 - (b) a scheme made by the Secretary of State under section 12(5), or
 - (c) an Order in Council under section 52(7),

is (unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament) subject to annulment in pursuance of a resolution of either House of Parliament.

.....

It appears that the regulations in question were “first regulations”, for the purposes of paragraph 66(2)(c) of the Tax Credits Act. As a result, a positive resolution of both Houses was required in relation to the regulations if they were to proceed into effect. As indicated, the House of Lords declined to make such a positive resolution.

The report notes that on the following day (ie 27 October 2015), a motion was moved and narrowly defeated which would have annulled the Electoral Registration and Administration Act 2013 (Transitional Provisions) Orders 2015.

These were obviously considered to be momentous events, leading the Prime Minister to invite Lord Strathclyde “to conduct a review of statutory instruments and to consider how more certainty and clarity could be brought to their passage through Parliament”.⁶⁰

In the foreword to the report, Lord Strathclyde stated:

The Lords convention on statutory instruments has been fraying for some years and the combination of less collective memory, a misunderstanding of important constitutional principles, a House more willing to flex its political muscles, and some innovative drafting of motions against statutory instruments has made it imperative that we understand better the expectations of both Houses when it comes to secondary legislation and, in particular, whether the House of Lords should retain its veto.⁶¹

In some of the background information in the report, Lord Strathclyde referred to work previously done by a “Joint Committee on Conventions of the UK Parliament”, noting:

60 Report of Strathclyde Review (note 58), page 3.
 61 Report of Strathclyde Review (note 58), page 3.

A third convention considered by the Joint Committee is central to the current review and relates to secondary legislation. The Committee noted that assertions had been made in debate in the Lords since the 1950s that it would be wrong for the Lords to reject delegated legislation. When the Committee considered the matter, there had only been two occasions on which the House of Lords had rejected an SI (in 1968 and 2000, in the cases mentioned below). The Committee concluded that “the House of Lords should not regularly reject Statutory Instruments, but that in exceptional circumstances it might be appropriate for it to do so”. A number of specific circumstances were identified, for example, when the provisions of an SI were of the sort more normally found in primary legislation or in the case of certain specific orders. If these or other particular circumstances did not apply, then “opposition parties should not use their numbers in the House of Lords to defeat an SI simply because they disagree with it”.

Since the Joint Committee reported in 2006, and the Lords and Commons noted the report with approval, the Lords have rejected SIs on the three further occasions [that are discussed later in the report].⁶²

The important thing to note here is the apparent rarity of the House of Lords challenging (for want of a better word) delegated legislation.

I do not propose to consider here the detail of the reasoning of the report of the Strathclyde Review. It is largely UK-Parliament-specific, referring both to UK legislations, particular conventions (and history) of the UK Parliament and also the complex and confusing nature of legislative scrutiny in the UK Parliament.⁶³ What is important is the 3 options put forward by Lord Strathclyde, as a result of his review:

- One option would be to remove the House of Lords from statutory instrument procedure altogether. This has the benefit of simplicity and clarity. However, it would be controversial and would weaken parliamentary scrutiny of delegated legislation and could make the passage of some primary legislation more difficult.
- The second option would be to retain the present role of the House of Lords in relation to statutory instruments, but for that House, in a resolution or in standing orders, to set out and recognise, in a clear and unambiguous way, the restrictions on how its powers to withhold approval or to annul should be exercised in practice and to revert to a position where the veto is left unused. This option seeks to codify the convention. However, since a resolution of the House could be superseded, or standing orders could be suspended, by further decisions of the House, it would not provide certainty of application.
- A third option would be to create a new procedure - set out in statute - allowing the Lords to invite the Commons to think again when a

62 Report of Strathclyde Review (note 58), page 11 (footnotes omitted).

63 See, eg, *The Devil is in the Detail* (note 1), pages 73-90.

disagreement exists and insist on its primacy. This would better fit with the established role of the House of Lords as regards primary legislation.⁶⁴

Lord Strathclyde recommended the third option. To me, all of the options seem pretty extreme.

Why is the reaction indicated by the report of the Strathclyde Review so extreme?

Clearly, I do not know enough about the situation in the UK Parliament to be able to offer any informed analysis of the reasoning behind Lord Strathclyde's recommended options. However, I note that Professor Meg Russell, Constitution Unit at the University College London offered this contemporary analysis:

The current argument concerns the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 which significantly limit people's eligibility for tax credits. This is a piece of 'delegated legislation' (a 'statutory instrument') meaning that it is subject to an expedited parliamentary process, much less onerous than the process for passing a bill (see summary here). The government is seeking to use powers delegated to it under the *Tax Credits Act 2002*, which allows for regular updating of rates and bands. This kind of delegated power is commonplace, to ensure that a new bill is not required every time there are small changes to the implementation of policy. Notably, delegated legislation cannot be amended by the Lords, only rejected or agreed.⁶⁵

The point to note about the above paragraph is the suggestion that delegated legislation is to be used for "small changes". Professor Russell goes on to discuss the role of the House of Lords in relation to delegated legislation:

The House of Lords has a formal veto over delegated legislation.

If the House of Lords used its veto power on a regular basis this could be very disruptive. In practice it has treated such matters with caution. The House of Lords Library have collated useful data on such motions. These show that in the period 1999-2012 the Lords voted on 27 fatal and 42 non-fatal motions, which resulted in 17 defeats – just three of them on fatal motions. Two occurred in 2000 over arrangements for the London mayoral elections, and another in 2007 over the Manchester 'supercasino'.

Prior to this there had been only one such fatal defeat of a statutory instrument, in 1968, leading to claims of a convention that the Lords

64 Report of the Strathclyde Review (note 58), page 5.

65 See Russell, M, "Everything you ever wanted to know about tax credits and the House of Lords - but were afraid to ask, *The Telegraph*, 26 October 2015 (available at <http://www.telegraph.co.uk/comment/11955288/Everything-you-ever-wanted-to-know-about-tax-credits-and-the-House-of-Lords-but-were-afraid-to-ask.html>).

should not vote on such matters. It is hence not unprecedented for the Lords to use its veto power, but it is unusual.⁶⁶

Professor Russell goes on to state:

Two other political points are important. First, the threat of a Lords defeat on a statutory instrument can result in compromise. While they cannot be amended, the tabling of a motion, or even the threat to table a motion, occasionally results in an instrument being withdrawn by the government and replaced by an amended version. A vote, and possible defeat, only occurs when these informal processes fail. Second, it is a far greater threat to the government than it is to the Lords if the existing convention breaks down. If it became routine for statutory instruments to be rejected, a great deal of government business could grind to a halt. The maintenance of the system depends on some give and take on both sides.⁶⁷

While I will go on to make some remarks about how *different* things are in the Senate, I note that the preceding paragraph suggests that compromise (and “informal processes”) is as much a factor in the House of Lords as it is in the Senate.

Professor Russell offered some further insight in evidence that she gave to the Public Administration and Constitutional Affairs Committee of the House of Commons on 19 January 2016, in oral evidence given to that committee’s inquiry into the Strathclyde Review:

Q8 Mrs Cheryl Gillan: In the same vein as “one swallow doesn’t a summer make”, were you surprised that one defeat triggered a whole review?

Professor Russell: Well, tempers had got very high. I was a little surprised at the way it was handled, although not entirely. One of the things that I commented on, which is another crucial piece of context for all of this, was when I published something immediately after the 2010 election saying, we are now in uncharted political waters. We have a majority Conservative Government, albeit a slender majority in the Commons, facing a House of Lords that is potentially politically hostile to it, in which the Labour Opposition can potentially join forces with others to outnumber the Conservative Government.

This is a new situation, and I think it is taking Ministers some time to get used to that situation. I think it has also taken the Opposition some time to get used to that situation, and Lord Strathclyde acknowledged this in his speech in the debate last week. This is a new situation for the Conservatives. It is also a new situation for Labour, and indeed for the Liberal Democrats, who are very important voters in the Lords.

66 Russell (note 65).

67 Russell (note 65).

In that sense it is not surprising, because this is new and people are finding their feet in this new situation, but I think what was potentially surprising was that Ministers raised the temperature so much on this issue so early, because this is not by any means the first time that there have been rumblings in the House of Lords that a statutory instrument is problematic and that it might be rejected. What has historically happened is that Ministers have thought about it before the vote and withdrawn the instrument, and sometimes relaid an amended instrument in order to defuse the situation, whereas the Government's approach here was that they wanted to have the fight. Once tempers had got that raised, perhaps it is not surprising that you end up with a review to see what is going on.

Q9 Mrs Cheryl Gillan: It is fair to say that the drive came from Ministers, and it was surprising that the drive was quite so vociferous to move to a review. Is that what you are inclined to say?

Professor Russell: I do not have any difficulty with there being a review. I think it is a perfectly reasonable thing to do. It is an important area. It is a very thorough review. It presents us with some nice evidence that we can discuss. It is difficult to criticise Ministers for deciding that there should be a review, but the reason that this became such a contested topic was perhaps in the end because Ministers were not adequately aware of the risk of defeat and the fact that speaking out against the Lords publicly would not necessarily make the problem go away.

Q10 Mrs Cheryl Gillan: They had not done their homework, is what you are saying?

Professor Russell: It is the job of the business managers to advise Ministers as to what they can get through Parliament, and somehow Ministers seemed to have the impression that by pushing ahead very loudly they would be able to get this through, and it did not work.⁶⁸

Perhaps it was all just a stuff-up.

Small changes??

An obvious point to make is that if delegated legislation is only for "small changes", how can it be that the rejection by the House of Lords of a piece of delegated legislation resulted in the British Prime Minister being reportedly "furious" with the House of Lords and threatening to take "rapid" action in response?⁶⁹ If only 'small changes' were involved in the Tax Credits (Income

68 Available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-administration-and-constitutional-affairs-committee/strathclyde-review/oral/27335.html>.

69 See, eg, Watt, N, "Tax credits vote: PM accuses Lords of breaking constitutional convention", *The Guardian*, 27 October 2015 (available at <http://www.theguardian.com/money/2015/oct/26/tax-credit-cuts-halted-as-lords-vote-to-protect-low-income-earners>).

Thresholds and Determination of Rates) (Amendment) Regulations 2015, why did their rejection result in the Strathclyde review and, in turn, the 3 “reform” options suggested by Lord Strathclyde?

An obvious possibility is that, in fact, the relevant regulations did not contain “small changes” but, rather, *significant* changes. If that is the case, then why were the changes not implemented by way of primary legislation?

In Australia, in the Commonwealth jurisdiction, the *Legislation Handbook*, published by the Department of the Prime Minister and Cabinet, offers the following guidance in relation to what should go into primary, rather than delegated, legislation:

Primary or subordinate legislation

1.12 While it is not possible or desirable to provide a prescriptive list of matters that should be included in primary legislation and matters that should be included in subordinate legislation, it is possible to provide some guidance. Matters of the following kinds should be implemented only through Acts of Parliament:

- (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;⁷⁰

.....

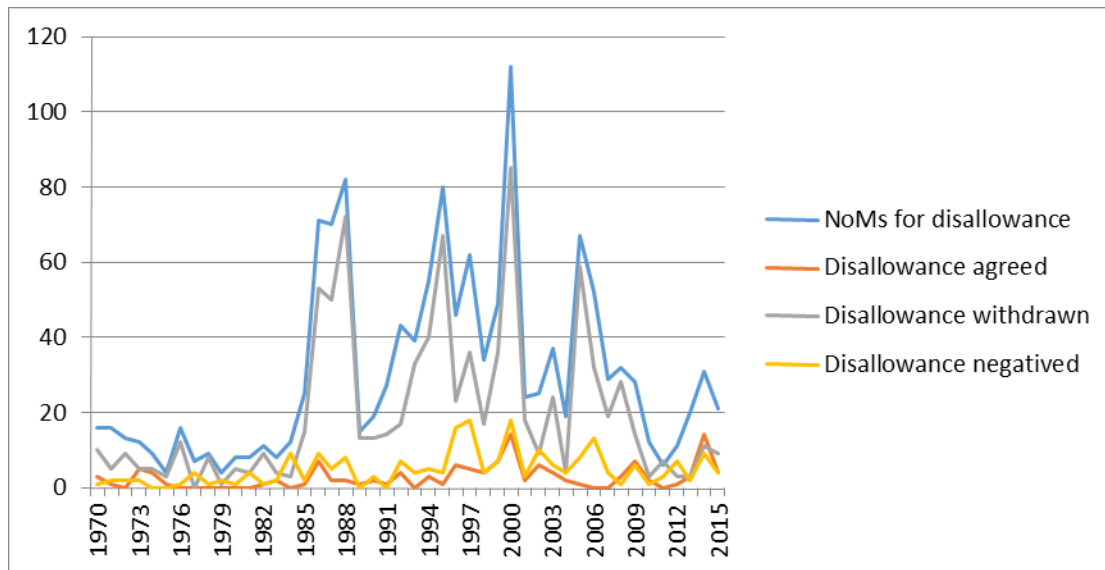
I suggest that (b) or (c) would probably apply if the legislation that led to the Strathclyde Review was to be implemented in the Commonwealth jurisdiction and that primary legislation would have been required, rather than delegated legislation.

An over-reaction perhaps?

My overwhelming initial reaction to reading the 3 options presented in the report of the Strathclyde Review is that the 3 options were so drastic that (in the absence of any other explanation) they represented an over-reaction. However, my initial reaction was tempered somewhat when I considered the statistics on how often delegated legislation had been stymied in the House of Lords over the past 50 years.

This caused me to look into the equivalent figures for the Senate. I am grateful for the assistance of the secretariat of the R and O Committee and the Senate Research section for preparing the following graphical representation of the number of disallowable motions for which notices were given, agreed, withdrawn and negated in the Senate between 1970 and 2015:

70 Available at <http://www.dpmc.gov.au/pmc/publication/legislation-handbook>.



The peak above is for 2000, when 112 notices were given. In more recent years, 20 notices were given in 2013, 31 in 2014 and 21 in 2015.

The table above does not separate out notices given on behalf of the R and O Committee. Odgers offers the following explanation in relation to the R and O Committee's role in relation to notices of motion for disallowance of delegated legislation:

The Standing Committee on Regulations and Ordinances follows a practice of giving notices of motions to disallow regulations or other subordinate legislation within the prescribed period, and then withdrawing the notices after correspondence with the responsible minister satisfies the committee's concerns.

Giving notices of motions to disallow indicates concern about the delegated legislation in question, and these are known colloquially as protective notices of motion, in that they protect the right of the committee, and of any senator, to move disallowance if it is subsequently decided that this is appropriate. Such concern is often allayed by further explanatory material from the minister or an undertaking to amend the legislation. Where the committee's concerns are met, the notice of motion to disallow is withdrawn (although it may be taken over by another senator). There are some occasions where the responsible minister does not satisfy the committee and the motion to disallow proceeds.

Frequently a protective notice of motion is withdrawn on the basis of undertakings from a minister to take action addressing the matters causing concern, usually by amending the legislation in question.

The practice of ministerial undertakings has the benefit of securing an outcome agreeable to the committee without necessarily interrupting

administration and implementation of policy by disallowance of the instruments in question.⁷¹

It is an oft-quoted fact that in the over-80-year history of the R and O Committee, there has been no occasion on which the R and O Committee has proceeded to a Senate vote on a notice of motion to disallow and the vote was not passed by the Senate (though this has not actually occurred since 1988).⁷²

Of the 20 notices given in 2013, 2 were given on behalf of the R and O Committee. Both were later withdrawn (ie on the basis of the R and O Committee receiving a satisfactory response from the relevant Minister). Of the 31 notices given in 2014, 5 were given on behalf of the R and O Committee. All were later withdrawn (though one instrument was disallowed by the Senate in any event, on the motion of an individual Senator). Of the 21 motions given in 2015, 12 were given on behalf of the R and O Committee. All but 2 (on which the R and O Committee is still awaiting a satisfactory response from the Minister) were later withdrawn.

Two obvious points arise from the figures stated above. First, notices of motion for disallowance are routinely given (without there being any obvious calamity or cause for fury). Second, the later withdrawal of the notices, on the R and O Committee receiving a satisfactory response from the relevant Minister, demonstrates that there is a high degree of co-operation (and possibly compromise) between the R and O Committee and Ministers.

As to the effect of motions that actually result in disallowance, I note that 59 disallowance motions have been agreed to by the Senate since 2000. In 2000 and 2014 alone, 14 motions were agreed to in each of those years. The sky has not fallen in. I have seen no reports of Prime Ministerial fury in the press.

Some possible explanations for the Strathclyde Review and its recommended options

I now offer some further, fairly unstructured observations on the possible reasoning behind the Strathclyde Review and the options that it gives for the way forward. On 17 December 2015, in the debate in the House of Lords on the report of the Strathclyde Review, Baroness Smith of Basildon (a Labour peer) stated:

At this point, most normal people's eyes will glaze over, but SIs [ie Statutory Instruments] are the Government's secret weapon. Traditionally, they were not used for issues that should be in primary legislation or for major policy changes where there should be full scrutiny and consideration. But their use has grown over a number of years and, more significantly, at a faster rate since 2010. The tax

71 Available at http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers13?file=chapter15§ion=15&fullscreen=1.

72 See Pearce and Argument (note 5), at paragraph 3.12.

credits changes originally proposed were a major policy shift, and it would have been entirely appropriate for them to have been considered in primary legislation. But the Government chose to use an SI.

We will want to consider the report from the noble Lord, Lord Strathclyde, in more detail, but I say to the noble Baroness that the process he recommends is a very significant change. First, it is a major departure to use legislation to address this issue. Secondly, in terms of procedure, a statutory instrument is not sent to your Lordships' House from the House of Commons but from the Executive—from the Government. It is not like legislation where proposals are considered and sent from one House to another.

In terms of statutory instruments, both Houses separately consider measures proposed by the Government. Either House can accept or reject, and rejection by either House is in effect a veto. That is why this House has so rarely rejected a statutory instrument. Since 1999, it has happened just four times in 16 years—approximately once a Parliament. The noble Baroness referred to this, but let us be clear that in this Parliament three attempts at a so-called fatal Motion to reject an SI have failed.⁷³

I was interested by the proposition that the use of Statutory Instruments had “grown over a number of years and, more significantly, at a faster rate since 2010”. Appendix H to *The Devil is in the Detail* is a table of Statutory Instruments laid in the House of Commons, in accordance with scrutiny procedures between 1997-98 and 2013-14, divided into instruments subject to “negative” procedures, instruments subject to “affirmative” procedures, instruments subject to “strengthened” procedures (special procedures that apply to instruments that amend primary legislation) and instruments laid in the House but not subject to any formal scrutiny.⁷⁴ I reproduce the figures below:

Session	Negative	Affirmative	Strengthened	Laid (no scrutiny)
1997-98	1,591	225	5	35
1998-99	1,266	178	4	34
1999-00	1,241	180	0	32
2000-01	717	123	2	26
2001-02	1,468	262	10	57
2002-03	1,216	233	10	24

73 Available at <http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/151217-0001.htm#15121733000919>.

74 *The Devil is in the Detail* (note 1), at page 236.

2003-04	1,038	207	4	34
2004-05	660	126	6	6
2005-06	1,583	271	4	31
2006-07	1,135	24	5	2
2007-08	1,049	257	6	13
2008-09	1,010	261	8	26
2009-10	631	179	3	10
2010-12	1,371	386	11	51
2012-13	742	214	26	37
2013-14	882	267	13	23

I do not discern in the above figures any particular increase since 2010. Further, in comparison to the number of disallowable legislative instruments that have come through the R and O Committee over the equivalent periods (and bearing in mind the disparities in populations), the delegated legislation workload of the UK Parliament seems positively benign.

I was also struck by this statement in Professor Russell's article (quoted above):

The broader politics matter a great deal here as well. The House of Lords will rarely go out on a limb on a controversial policy matter where there is not widespread political concern elsewhere. Although unelected, peers are aware of the wider political mood, including public opinion and media responses. In particular, the chamber will tend to act with greater boldness where there is clear unhappiness on the government benches in the Commons.⁷⁵

It has been suggested to me that part of the fury that has been directed at the rejection of the legislation by the House of Lords that prompted the Strathclyde Review might be explicable by the fact that the House of Lords is "unelected" and might be considered to be "unrepresentative". The point apparently being that an "unrepresentative" legislative body has no right to act in a way that obstructs the elected government. I have 2 observations to make in response to that proposition.

75 Russell (note 65).

First, what is the point of giving a legislative body powers if it is on the (unstated) understanding that the legislative body will not actually exercise those powers? This simply makes no sense to me.

Second, there is the very issue of the House of Lords being “unrepresentative”. I was reminded of the famous Paul Keating reference to the Senate as “unrepresentative swill”.⁷⁶ I also recall giving a guest lecture at the University of Wollongong Law School at around that time (when I was actually working full-time for the Senate) and being asked about the comment. Of course, I rejected (and continue to reject) the proposition. My detailed response was that (leaving aside the “swill” issue) the Senate was *differently* representative, rather than *un*representative. The same might be said of the members of the House of Lords. While it is certainly the case that they are unelected, I am not convinced that they are necessarily *un*representative. Surely, they represent *something*. In the case of former parliamentarians, they are (at least) representative of their former political parties, perhaps. And, of course, it is not irrelevant that many former parliamentarians were elected *at some time*.

The main point, however, is that I can see no point in a legislative body having powers if the body is not actually allowed to use them.

A final comment on the situation in the UK – the excellent work of the Hansard Society

Before concluding my comments on the UK situation, I would like to offer a plug for 2 excellent reports from the (UK) Hansard Society. I have already referred to *The Devil is in the Detail* report. That report is the result of a study by the Society over several years into the use and parliamentary scrutiny of delegated legislation in the United Kingdom (UK). The report serves as an excellent companion-piece to the Society’s 2010 report, titled *Making Better Law: Reform of the legislative process from policy to Act*,⁷⁷ in which the Society considered the legislative process more generally.

In *The Devil is in the Detail*, the Society looks at the process by which delegated legislation is made, exploring how decisions are made about what goes into primary and what goes into secondary legislation and who makes them. It also looks at the evolution of delegated legislation, how the process works in both Houses of the UK Parliament, and examines different aspects of the current scrutiny system, revealing how and why – in the Society’s view – the system is no longer fit for purpose.

In reading both reports, I was struck by how many of the comments made could be applied equally to what happens in the Commonwealth jurisdiction. However, particularly in relation to *The Devil is in the Detail* report, I was also

76 See, eg, Crabb, A, “Senate is hardly unrepresentative swill”, *Sydney Morning Herald*, 4 April 2014 (available at <http://www.smh.com.au/comment/senate-is-hardly-unrepresentative-swill-20140405-36690.html>).

77 A short summary of the report is available here <http://www.hansardsociety.org.uk/making-better-law-reform-of-the-legislative-process-from-policy-to-act/#more-3908>. See also Argument (note 33).

struck by how much better we do things here in Australia. In some respects, at least.

Concluding comments

I hope that the first part of this paper (rather than insulting the intelligence of the reader) provides a timely reminder of the principles that underpin the use of delegated legislation and the excellent, proven-over-time processes that are employed in the Australian Parliament to monitor its use. I hope that the second part of the paper gives at least a flavour of some of the issues that currently arise in relation to the use of delegated legislation in the Commonwealth jurisdiction.

The comparisons that I make with the situation in the UK (including by reference to the report of the Strathclyde Review) are intended to demonstrate my view that we do things so much better in Australia. I firmly believe that the Strathclyde Review could not happen in Australia. For example, I cannot conceive of a situation where an option was put forward to remove the Senate's power to disallow delegated legislation. There is a maturity about the scrutiny of delegated legislation in Australia (particularly in the Senate) that includes an acceptance by the Executive that delegated legislation will be scrutinised, questioned and, even, disallowed in the Senate. The fact that the Senate has routinely disallowed delegated legislation over the years, without provoking public "fury" from Prime Ministers and the like, and without the system grinding to a halt, is something of which we can be proud.

I hope that there may be some lessons in the discussion above for people outside of the Commonwealth jurisdiction.