

**Scrutiny Committees: A Vehicle for
Safeguarding Federalism and the
Constitutional Rights of Parliament***

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Most parliamentary legislative scrutiny committees have broadly framed terms of reference which include a requirement to examine whether legislation is within power and whether legislative provisions may detract from the exercise of the core law-making and scrutiny functions of parliament. By considering the relevance of provisions of the Commonwealth Constitution to these terms of reference, the Australian Senate's Scrutiny of Bills Committee and Regulations and Ordinances Committee have demonstrated that they can play a part in safeguarding federalism and the constitutional rights of the Senate. This paper explores three examples of the committees' recent work in this area.

First, the paper considers the scrutiny committees' work with respect to the Senate's constitutional right to amend proposed appropriations (i.e. budget bills) that do not involve the ordinary annual services of the government.

Second, the paper outlines the work of the Regulations and Ordinances Committee post-*Williams*¹ in scrutinising Commonwealth spending initiatives that may not be supported by a constitutional head of legislative power and are therefore not within the legislative competence of the Commonwealth Parliament.

Finally, the paper reviews grants to the states under section 96 of the Constitution and the recent requests of the Scrutiny of Bills Committee that further information about these grants be made available on a routine basis in order to assist senators in scrutinising these payments, noting the role of senators in representing the people of their state.

Before considering how the Senate's legislative scrutiny committees have played a part in safeguarding federalism and the constitutional rights of the Senate, it is helpful to consider the importance of federalism and the role of the Senate in Australia's federal system more generally.

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¹ *Williams v Commonwealth* (2012) 248 CLR 156; *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416.

Federalism

Federalism is important as a way of persuading separate self-governing states to unite on the basis of retaining their separate identities and sovereignty within their own sphere.² The division of powers between regional and national governments can also be seen as an additional safeguard of the rights of the people and against governments misusing their powers.³ Thus federalism, combined with the separation of governmental power between the legislative, judicial and executive arms of government and the division of legislative power among two differently-constituted houses, are important safeguards against arbitrary government. This concept of federalism was articulated by the framers of the United States Constitution:

[In a federation] the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.⁴

Other advantages attributed to federalism, include:

- the adaption of local policies to local circumstances;
- the ability of states to conduct experiments and innovations in policy without involving the whole country;
- a healthy competition between states for the best policies;
- greater scrutiny of national policies as a result of the need to achieve cooperation; and

² In the Australian context, it is clear that a key theme at the 1890s Convention Debates was a desire to ensure that the Commonwealth and the states would each be sovereign within their respective fields—each would be free to perform its functions and exercise its powers without interference, burden or hindrance from the other government. The Constitution was to be ‘an agreement among sovereign powers to give up some of their power to a new central body, but preserving their sovereignty over what they retained. The State was not subordinate to the Commonwealth, nor the Commonwealth to a State’: Leslie Zines, *The High Court and the Constitution*, 5th ed., Federation Press, Annandale, 2008, p. 1.

³ ‘If a bad government possesses all powers, all powers may be abused, but a national or regional government can use its powers, and the people can use their separate votes in electing those governments, to correct, to some extent, any misuse of the powers of either one’: Rosemary Laing (ed), *Odgers’ Australian Senate Practice: As Revised by Harry Evans*, 14th ed., Department of the Senate, Canberra, 2016, pp. 8–9.

⁴ Alexander Hamilton or James Madison, Federalist No. 51: ‘The structure of the government must furnish the proper checks and balances between the different departments’, *New York Packet*, New York, 8 February 1788.

- more opportunities for citizens to participate in decision-making, to gain experience in government and to hold public office.⁵

In Australia the division of powers between the Commonwealth government and state and territory governments is the basis of Australian federalism. This division of power is reflected in the terms of the Commonwealth Constitution. Relevant to the issues considered in this paper:

- section 51 lists the areas in which the Commonwealth Parliament may legislate or exercise jurisdiction, but does so without necessarily depriving the states of authority to legislate in those areas;
- section 61 provides a broad executive power to the Commonwealth; and
- section 96 allows the Commonwealth Parliament to provide ‘financial assistance’, tied or otherwise, to the states.

Of course, decisions of the High Court are important in determining the meaning of these provisions and therefore the balance between Commonwealth and state powers.

The role of the Senate in representing the people of the states

The importance of states’ rights was a key issue at the 1890s Convention Debates. The constitutional framers regarded the Senate as essential to the federal system. As Sir Richard Baker, later the first President of the Senate, noted:

I venture to think that no one will dispute the fact that in a federation, properly so called, the federal senate must be a powerful house ... The essence of federation is the existence of two houses, if not of actually co-equal power, at all events of approximately co-equal power.⁶

However, this does not mean that the constitutional framers intended that senators would vote in state blocs, instead it was intended that every law must have the support of a geographically distributed majority.⁷ The purpose of the Senate and the bicameral structure of the Commonwealth Parliament was to require a double majority for the passage of laws. That is, a proposed law requires:

⁵ Laing (ed), op. cit., p. 9; Senate Select Committee on the Reform of the Australian Federation, *Australia’s Federation: an agenda for reform*, June 2011, pp. 6–12; Federal-State Relations Committee (Parliament of Victoria), *Australian federalism: the role of the States*, October 1998, pp. 5–9.

⁶ *Australasian Federal Convention 1897–98* (Second Session), Sydney, 17 September 1897, p. 784, (Richard Baker, South Australia).

⁷ Harry Evans, ‘The role of the Senate’, *Papers on Parliament*, no. 52, December 2009, pp. 93–4.

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- a majority of the representatives of the people as a whole [the House of Representatives]; and
 - a majority of the representatives of the people of a majority of states [the Senate].

This double majority requirement means that it is impossible for a majority to be formed from the representatives of only one or two states.⁸ Without this requirement, the legislative majority could consist of the representatives of only two states and this could lead to neglect and alienation of the outlying parts of the country.⁹ Most importantly in this regard, equal state representation in the Senate means that no political party can afford to neglect any state.¹⁰ As Deakin noted in relation to parties in the Senate:

There will not be any question of large or small states, but a question of liberal or conservative. Then, as to the Senate, how does the question of equal representation affect parties? It affects them to this extent: that, as in the American Union, the leaders of those parties will take care to rally their forces, and push their campaigns with as much care in the smaller states as in the larger states.¹¹

Similarly, the rationale for equal representation of the states in the Senate was explained by John Cockburn, as follows:

We must dispose of the terms ‘large’ and ‘small’, and think of the great principle which is an essential, I think, to Federation—that the two Houses should represent the people truly, and should have co-ordinate powers. They should represent the people in two groups. One should represent the people grouped as a whole, and the other should represent them as grouped in the States.¹²

This rationale explains why the Senate was given powers in relation to proposed laws virtually equal to those of the House of Representatives. The Senate must agree to every law to ensure that it has the support of a geographically distributed majority.

⁸ Harry Evans, ‘Federalism: an idea whose time has come?’, paper presented at the Samuel Griffith Society Conference, Canberra, 7–9 March 1997.

⁹ Evans, ‘The role of the Senate’, *op. cit.*, p. 93.

¹⁰ *ibid.*, pp. 94–5.

¹¹ *Debates of the Australasian Federal Convention 1897–98* (Second Session), Sydney, 10 September 1897, p. 335 (Alfred Deakin, Victoria).

¹² *Debates of the Australasian Federal Convention 1897–98* (First Session), Adelaide, 30 March 1897, p. 340 (John Cockburn, South Australia).

How the Senate represents state interests

In addition to this fundamental purpose of ensuring that all Commonwealth laws have the support of a geographically distributed majority, the equal representation of the states in the Senate also ensures that state interests are taken into account in other ways. As Barwick CJ recognised:

[the constitutional framers] intended that proposed laws could be considered by the Senate from a point of view different from that which the House of Representatives may take. The Senate is not a mere house of review: rather it is a house which may examine a proposed law from a stand-point different from that which the House of Representatives may have taken.¹³

An important part of this examination from a different standpoint derives from the equal representation of the states in the Senate. This equal representation means that the perspectives of smaller states are more likely to be considered in the Senate. While much (and seemingly, most) Commonwealth activity does not have a significantly different impact on different states, where there is a differential impact the equal representation of the states allows the Senate to bring a different point of view which takes into account the interests of the smaller states to a much greater extent than in the House of Representatives.¹⁴ In this way, the Senate's structure influences the way in which the Senate discharges many of its functions because the state basis of Senate representation sensitises its operation to state concerns.¹⁵ In this regard, it is important to note that, despite the importance of party in the Senate, few senators dismiss the relevance of state-based representation altogether.¹⁶

The Senate's scrutiny function

While it is often acknowledged that the modern Senate has a strong role as a house of scrutiny or review¹⁷, the fact that this role is complementary to the Senate's role as a states' house is often overlooked. The procedures available to senators relating to the

¹³ *Victoria v Commonwealth* (1975) 134 CLR 81, 122 ('PMA Case').

¹⁴ A recent example of this relates to consideration of the distribution of GST revenues to the states. While Western Australia has strongly supported changes to the distribution formula, other states such as Tasmania strongly support the existing system. This debate has been reflected in the Senate, while the issue has received comparatively little attention in the House of Representatives.

¹⁵ Campbell Sharman, 'The Australian Senate as a States House', *Australian Journal of Political Science*, vol. 12, no. 2, 1977, pp. 73–4.

¹⁶ Scott Brenton, 'State-Based Representation and National Policymaking: The Evolution of the Australian Senate and the Federation', *Journal of Legislative Studies*, vol. 21, no. 2, 2015, p. 274.

¹⁷ See, for example, Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis*, Hart Publishing, Oxford, 2011, p. 120.

Senate's role as a house of scrutiny provide many opportunities to pursue state interests.¹⁸ These processes and procedures include:

- amendments to government bills¹⁹;
- Senate committee inquiries²⁰;
- Senate estimates hearings²¹;
- the introduction of private senators' bills²²;
- disallowance of Commonwealth delegated legislation that impacts a particular state²³;
- orders for the production of documents²⁴; and
- questions to ministers in question time.²⁵

Importantly, other than questions to ministers in question time, these procedures are, in practice, not realistic options in the House of Representatives. In this way, it can be said that the procedures that the Senate has developed as a house of scrutiny are complementary to its work in representing state interests.

Party rooms and the ministry

In addition to bringing the perspectives of smaller states to debate in the Senate and its committees, equal representation of the states in the Senate also allows for increased representation of the smaller states in party rooms.²⁶ Relatedly, it is usually desired to

¹⁸ Paula Waring, 'The Pursuit of State Interests in the Senate', *Papers on Parliament*, no. 66, October 2016, pp. 139–59.

¹⁹ For example, an amendment to the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth), co-sponsored by Senator Eric Abetz (Liberal) and Senator Bob Brown (Greens), was passed by the Senate on 27 October 2009 to ensure that the government's plan to close down the Federal Court registry services in Hobart could not proceed.

²⁰ Recent examples of Senate inquiries relating to state matters include inquiries into the Perth Freight Link project (May 2016), Outcomes of the 42nd meeting of the Council of Australian Governments held on 1 April 2016 (May 2016), Regulation of the fin-fish aquaculture industry in Tasmania (August 2015), Privatisation of State and Territory assets and new infrastructure (March 2015), and the Select Committee on the Reform of the Australian Federation (June 2011).

²¹ For example, recently Tasmanian senators examined the take-up and efficacy of a Commonwealth wage subsidy scheme offered to Tasmanian employers and the Defence Materiel Organisation has been questioned extensively about the proposed construction of submarines in South Australia.

²² For example, the Commonwealth Grants Commission Amendment (GST Distribution) Bill 2015.

²³ Recent examples include disallowance motions which sought to stop a 'super trawler' operating off the Tasmanian coastline, and to stop the declaration of the Coral Sea Conservation Zone because of its potential impact on Queensland fisheries.

²⁴ For example, the Senate will often order ministers to table documents in the Senate relating to state issues, such as Commonwealth funding for state infrastructure projects.

²⁵ Questions relating to the distribution of GST revenue to the states have been common in recent years.

²⁶ J. R. Odgers, *Australian Senate Practice*, 6th ed., Royal Australian Institute of Public Administration, Canberra, 1991, p. 11; Sharman, op. cit., p. 68; Waring, op. cit., p. 158.

have all states fairly represented in the federal ministry. Without the Senate this would be much more difficult, or impossible in situations where a governing party lacks any representation in the House of Representatives from a particular state.

Minor parties and independent senators

The proportional representation electoral system for the Senate allows independents and minor parties to more easily secure representation in the Senate than in the House of Representatives. These minor party and independent senators often have distinctive regional constituencies and use the Senate to bring national attention to particular state-based concerns.²⁷ For example, Independent Tasmanian Senator Brian Harradine secured increased subsidies for Bass Strait shipping as part of the budget negotiations in 1993 and \$353 million for environmental, technical and other programs in Tasmania as part of the negotiations in relation to the sale of Telstra in 1996 and 1999. In 2009, Independent South Australian Senator Nick Xenophon was able to negotiate \$900 million in fast-tracked funds for water buy-backs for the Murray-Darling Basin.²⁸

The role of the legislative scrutiny committees in safeguarding federalism and the constitutional rights of the Senate

The scrutiny role undertaken by the Senate also allows it to play a role in representing the constitutional interests of the states. This work is most often done through the Senate's legislative scrutiny committees. As former Chief Justice French has noted, the scrutiny of legislation by the Senate's legislative scrutiny committees is:

a special process which stands apart from the mainstream of parliamentary debate about legislation based upon contested policy ... It aspires to bipartisanship in ensuring that legislation is subjected to a degree of parliamentary quality control according to agreed parliamentary criteria.²⁹

The 'parliamentary quality control' undertaken by these committees includes examining whether legislation is within power and whether legislative provisions may detract from the exercise of the core law-making and scrutiny functions of parliament. By considering the relevance of various constitutional provisions to these functions, in

²⁷ Campbell Sharman, 'The representation of small parties and independents in the Senate', *Australian Journal of Political Science*, vol. 34, no. 3, 1999, p. 360.

²⁸ Waring, *op. cit.* p. 144.

²⁹ Chief Justice Robert French, 'Adding Value to Law Making', speech delivered at the Australia-New Zealand Scrutiny of Legislation Conference: Scrutiny and Accountability in the 21st Century, Canberra, 6 July 2009, p. 1.

recent years the Scrutiny of Bills Committee and the Regulations and Ordinances Committee has sought to represent state interests through:

- highlighting the Senate's constitutional right to amend proposed appropriations (i.e. budget bills) that do not involve the ordinary annual services of the government;
- highlighting instances where it appears that Commonwealth executive spending programs may be intruding into areas of state responsibility; and
- increasing the availability of information in relation to section 96 grants to the states.

The Senate's constitutional right to amend proposed appropriations not involving the ordinary annual services of the government

The extent of the financial powers of the Senate was one of the most contentious issues at the 1890s Convention Debates and one in which the possibility of federation itself was at stake. In 1897 Sir John Forrest stated that if strict adherence to the Westminster form of responsible government (in relation to the powers of the houses over 'money bills') were 'the only terms upon which [the larger colonies] want Federation, they must federate for themselves, and leave the other colonies to stand out of the compact'.³⁰

In the debates about 'money bills', delegates from the larger colonies demanded that the 'majority must rule' and that the Senate should not have the power to reject or amend financial legislation.³¹ On the other hand, delegates from the smaller colonies argued that if the traditional Westminster conception of responsible government was not altered to provide the Senate with adequate financial powers 'we may as well hand ourselves over, body and soul, to those colonies with the larger populations'.³²

In the end, the smaller colonies largely achieved their aims with the Senate having nearly the same legislative powers as the House of Representatives, including the power to reject all bills. As Frederick Holder succinctly put it, in the context of the Senate being integral to the federal structure of the Constitution: 'To set up a Senate which will have no power of the purse will be to set up an absolutely worthless body.'³³

³⁰ *Debates of the Australasian Federal Convention 1897–98* (First Session), Adelaide, 13 April 1897, p. 490 (John Forrest, Western Australia).

³¹ *ibid.*, pp. 499–500 (Richard O'Connor, New South Wales).

³² *ibid.*, p. 490 (John Forrest, Western Australia).

³³ *ibid.*, p. 148 (Frederick Holder, South Australia).

Sections 53 and 54 of the Constitution

Section 53 of the Constitution (and related provisions) reflects the federal compromise between the delegates for the smaller and larger colonies. Relevantly, the second paragraph of section 53 of the Constitution provides that:

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The rationale for these provisions is to reserve to the executive government the initiative in proposing appropriations and impositions of taxation, without affecting the substantive powers of the Senate.³⁴ Section 53 therefore provides that the two houses of parliament have equal powers in relation to all proposed laws, except certain proposed laws imposing taxation or appropriating revenue or moneys.³⁵

The Constitution contains two sections which are designed to ensure that the Senate is not unduly inhibited in its consideration of financial legislation by the conditions imposed on it by section 53. Of particular relevance is section 54, which provides that a proposed law that appropriates money for the ordinary annual services of the government must deal only with such appropriation:

This means that appropriations for purposes other than the ordinary annual services of the government ... may not be combined in one bill with provisions which the Senate may not amend. This ensures that the Senate is not prevented from amending provisions which do not appropriate money for the annual services of the government because of such provisions being linked with such appropriations in a single bill. Such a linkage of provisions is usually referred to as 'tacking', and section 54 seeks to prevent 'tacking'.³⁶

At the 1890s Convention Debates delegates were aware of the problem of 'tacking' in the United States and section 54 was designed to remedy the issue.³⁷ In part, delegates

³⁴ Laing (ed), op. cit., p. 359.

³⁵ *ibid.*, pp. 359–60. As noted above, the Senate retains the power to reject all bills.

³⁶ *ibid.*, p. 362.

³⁷ Bernhard Wise noted that the importance of section 54 is 'rendered obvious when one notices that in more than half of the constitutions of the states of America this clause has been inserted as a constitutional amendment, owing to the grave and increasing difficulties arising from the practice of tacking to appropriation bills measures not appropriate to such bills ... the States have generally provided a remedy for the evil by enacting that no law shall contain more than one subject, which shall be plainly expressed in its title': *Debates of the Australasian Federal Convention 1897–98* (Second Session), Sydney, 15 September 1897, pp. 539–540 (Bernhard Wise, New South Wales).

wanted to ensure that the government was not able to ‘expand a whole department, and practically make an alteration of policy, on which the House representing the people of the States would have no opportunity of expressing their views’.³⁸

‘The ordinary annual services of the government’

The framers of the Constitution had a fairly clear conception of the meaning of the phrase ‘the ordinary annual services of the government’: the expression referred to the annual appropriations which were necessary for the continuing expenses of government, as distinct from major projects not part of the continuing and settled operations of government.³⁹ For example, it was clear that expenditure on extraordinary matters, such as bushfires, would not be part of the ‘ordinary annual services of the government’:

Mr McMillan— ... Calamities, such as the bush fires which have recently occurred in Tasmania and Victoria, take place, and the expenditure which they necessitate is of an extraordinary character ...

Mr Isaacs—I should hope that the expenditure caused by a bush fire would not be part of an annual service expenditure incurred for bush fires...would not be ordinary, it would not be annual, and it would not be a service.⁴⁰

Despite this clear intention of the constitutional framers there have been many examples where expenditure for extraordinary matters has been included in the bill for the ordinary annual services of the government. This matter has been of great concern to the Senate as it undermines the Senate’s constitutional rights in relation to appropriation bills. Therefore in 1965 an agreement between the Senate and the government was reached in relation to the interpretation of what should be regarded as ‘ordinary annual services of the government’.⁴¹

However, in recent times concerns in relation to the inappropriate classification of appropriations as ordinary annual services have again become apparent. This was evident in March 2005 when two appropriation bills were presented to replenish money spent by departments and agencies on relief for the victims of the 2004 tsunami. One of the bills purported to be for ordinary annual services but, as the

³⁸ *Debates of the Australasian Federal Convention 1897–98* (Third Session), Melbourne, 8 March 1898, p. 2081 (John Cockburn, South Australia).

³⁹ Laing (ed), op. cit., p. 386.

⁴⁰ *Debates of the Australasian Federal Convention 1897–98* (Third Session), Melbourne, 8 March 1898, p. 2076 (William McMillan, New South Wales; Isaac Isaacs, Victoria).

⁴¹ Laing (ed), op. cit., p. 386.

expenditure could not possibly be ordinary annual services expenditure, both bills were treated as amendable bills by the Senate.⁴²

These instances indicated that the government appeared to be taking a position that ordinary annual services include anything it regarded as falling within vaguely-expressed outcomes of departments, including expenditure in relation to extraordinary events and new policy proposals.⁴³ It therefore appeared that virtually all new policies would be classified by the executive as ordinary annual services of the government and the appropriation of money for such policies would be included in a bill that is not amendable by the Senate.

On 22 June 2010, as a result of continuing concerns relating to the misallocation of some items in appropriation bills, the Senate resolved ‘to reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government’ and that ‘appropriations for expenditure on ... *new policies not previously authorised by special legislation* ... are not appropriations for the ordinary annual services of the Government’.⁴⁴

Consideration of ordinary annual services by the Scrutiny of Bills Committee

The Scrutiny of Bills Committee regularly identifies spending items in appropriation bills that may have been inappropriately classified as ordinary annual services when they in fact relate to new programs or projects.⁴⁵ Specifically, the committee has noted that this inappropriate classification undermines the Senate’s constitutional rights and impacts on the Senate’s ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects.

Recently, for example, the committee alerted the Senate to the fact that it appeared that the initial expenditure in relation to the establishment of a new ‘Cities and the Built Environment Taskforce’ may have been inappropriately classified as ordinary

⁴² The Northern Territory Emergency Response package of bills repeated this anomaly, as did bills to cover expenditure on an equine influenza outbreak.

⁴³ Laing (ed), op. cit., p. 388. For example, any new policy in the education and training portfolio that relates to either (a) ‘improving early learning, schooling, student educational outcomes and transitions to and from school through access to quality child care, support, parent engagement, quality teaching and learning environments’ (outcome 1), or (b) ‘promoting growth in economic productivity and social wellbeing through access to quality higher education, international education, and international quality research, skills and training’ (outcome 2) would be regarded as ‘ordinary annual services of the government’.

⁴⁴ *Journals of the Senate*, 22 June 2010, pp. 3642–3 [emphasis added].

⁴⁵ In accordance with Senate standing order 24(1)(a)(v), the committee is required to report on bills that insufficiently subject the exercise of legislative power to parliamentary scrutiny.

annual services and therefore included in Appropriation Bill (No. 3) 2015–2016, which was not amendable by the Senate. The committee considered that the case for suggesting that the Cities Taskforce was a new policy, the appropriation for which should be subject to amendment by the Senate, was particularly strong because:

- the expenditure related to the *establishment* of a Cities Taskforce to develop and implement the Government’s *new* Cities Agenda;
- an entirely new program was created within the Environment Portfolio to support the new cities and the built environment policy; and
- it appeared that responsibility for a ‘national policy on cities’ was included in the Administrative Arrangements Order for the first time on 18 February 2016.⁴⁶

The committee’s comments on this matter also informed debate in the Senate in relation to the bill.⁴⁷

The ability of the Senate, as the chamber representing the people of the states, to amend proposed appropriations where the government seeks to implement a new policy is essential to safeguarding federalism and the constitutional rights of the Senate. Recognising this, the Scrutiny of Bills Committee has noted that it will ‘continue to draw this important matter to the attention of Senators where appropriate in the future’.⁴⁸

Consideration of ordinary annual services by the Regulations and Ordinances Committee

The Regulations and Ordinances Committee identifies items in regulations that authorise expenditure that may have been inappropriately classified as the ordinary annual services of the government.⁴⁹ In light of concerns regarding the potential erosion of the Senate’s constitutional rights with respect to the authorisation of such

⁴⁶ Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2016*, 16 March 2016, p. 255.

⁴⁷ *Journals of the Senate*, 17–18 March 2016, p. 4074; Commonwealth, *Parliamentary Debates*, Senate, 17–18 March 2016, p. 2709.

⁴⁸ Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2016*, 24 February 2016, pp. 4–8; Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2016*, 16 March 2016, pp. 253–5.

⁴⁹ In accordance with Senate standing order 23(3)(d), the committee is required to ensure that a disallowable legislative instrument does not contain matter more appropriate for parliamentary enactment.

expenditure post-*Williams*⁵⁰, the committee has taken the approach of drawing any such instances to the attention of the Senate and the relevant standing committee.⁵¹

The *Williams* cases brought into question the validity of direct Commonwealth government payments to persons, other than a state or territory. In 2012, the High Court delivered its judgment in *Williams v Commonwealth (Williams No. 1)*⁵², holding that the Commonwealth executive did not have the power to enter into a funding agreement with a private company that provided chaplaincy services to a Queensland government school under the National School Chaplaincy Program. The decision emphasised the limited scope of the executive power to enter into contracts with private parties and spend public monies without statutory authority, and had the effect of casting doubt over the constitutional validity of a significant proportion of Commonwealth expenditure.⁵³

In response to *Williams No. 1* the government enacted the *Financial Framework Legislation Amendment Act (No. 3) 2012* (Cth) (the FFLA Act), which purported to retrospectively provide legislative support for over 400 non-statutory funding schemes whose validity was thrown into doubt. This Act also inserted a provision (section 32B) into the *Financial Management and Accountability Act 1997* (Cth) (the FMA Act) to provide legislative authority for the government to spend monies on programs listed in regulations.⁵⁴ Consequently, the executive can purport to authorise expenditure on programs via the making of regulations by adding the particulars of those programs to a list in the relevant regulations.⁵⁵ As such, it is possible for items

⁵⁰ *Williams v Commonwealth* (2012) 248 CLR 156; *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416.

⁵¹ See for example Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 5 of 2015, 12 May 2015, Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 2) Regulation 2015 [F2015L00370], pp. 10–11 and Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2015*, 25 March 2015, pp. 267–71, which commented that it seemed the initial expenditure in relation to the items provided for in the Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 2) Regulation 2015 [F2015L00370] in the Health portfolio may have been inappropriately classified as ordinary annual services (and therefore included in Appropriation Bill (No. 3) 2014-15, which is not amendable by the Senate). See also Patrick Hodder, ‘The Williams decisions and the Implications for the Senate and its Scrutiny Committees’, *Papers on Parliament*, no. 64, January 2016, pp. 143–59.

⁵² (2012) 248 CLR 156.

⁵³ For a fuller account of the decision, see Glenn Ryall, ‘*Williams v. Commonwealth—A Turning Point for Parliamentary Accountability and Federalism in Australia?*’, *Papers on Parliament*, no. 60, March 2014, pp. 131–48.

⁵⁴ The FFLA Act inserted section 32B of the FMA Act (now *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act)) to provide legislative authority for the government to spend monies on programs listed in Schedule 1AA (now Schedule 1AB) to Financial Management and Accountability Regulations 1997 (now Financial Framework (Supplementary Powers) Regulations 1997 ((FF(SP) regulations)).

⁵⁵ Schedule 1AB of the now FF(SP) regulations. On 20 December 2013 the Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089] added

inappropriately classified as ordinary annual services of the government to be included in regulations without direct parliamentary approval, effectively reducing the scope of the Senate's scrutiny of government expenditure.

In March 2014, the then Senate Standing Committee on Appropriations and Staffing requested that the Regulations and Ordinances Committee monitor executive expenditure authorised by regulation under the now *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act), and report on such expenditure to the Senate.⁵⁶

The request noted the fundamental role of parliament to approve appropriations and authorise revenue and expenditure proposals and, in the context of the Commonwealth Constitution, identified a deficiency in the Senate's scrutiny of executive expenditure authorised via the making of regulations to add programs to Schedule 1AB of the now Financial Framework (Supplementary Powers) Regulations (FF(SP) regulations), specifically in relation to items of expenditure inappropriately classified as the ordinary annual services of the government. The request noted that previously such items were drawn to the attention of the Senate Standing Committee on Appropriations and Staffing and Senate legislation committees examining estimates of expenditure; and a list of such items was also drawn to the attention of the Minister for Finance. However, post the government's response to *Williams*, such items would not be examined as part of the estimates process.

In looking at disallowable legislative instruments that authorise expenditure of government funds, the Regulations and Ordinances Committee plays an important role in safeguarding the Senate's constitutional ability to amend executive expenditure proposals.⁵⁷

For example, the Senate Regulations and Ordinances Committee drew to the attention of the Senate and the relevant portfolio committee a regulation which established

Schedule 1AB to the FMA regulations. After this date arrangements, grants and programs have been specified under Schedule 1AB rather than Schedule 1AA. This was a technical change to avoid the need to group items under the administering department (as required under Schedule 1AA). See Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089], explanatory statement, pp. 1–2.

⁵⁶ Correspondence from Senator the Hon. John Hogg, Chair of the then Senate Standing Committee on Appropriations and Staffing, to the Senate Regulations and Ordinances Committee, 17 March 2014. See Senate Standing Committee of Regulations and Ordinances, *Delegated legislation monitor*, no. 5 of 2014, 14 May 2014, appendix 3.

⁵⁷ Noting the Scrutiny of Bills Committee's responsibility to consider whether the exercise of legislative power is subject to sufficient parliamentary scrutiny (See Senate standing order 24(1)(a)(v)) and discussion of the Scrutiny of Bills Committee's consideration of ordinary annual services above), which is supported by the scrutiny mandate of the Regulations and Ordinances committee to report on whether the exercise of delegated legislative power is more appropriate for parliamentary enactment (See Senate standing order 23(3)(d)).

legislative authority for a spending activity administered by the Department of Health, which allocated \$15 million over two years to support the construction of a replacement training and administration base for the Gold Coast Suns Australian Football League (AFL) team at Metricon Stadium, so as to enable the site of the team's existing training and administration base to be used in connection with the 2018 Commonwealth Games. In their comments, the committee noted that prior to the enactment of section 32B of the FMA Act (now the FF(SP) Act) this item should properly have been contained within an appropriation bill not for the ordinary annual services of government.⁵⁸

The constitutionality of Commonwealth spending initiatives

Background

The fact that the Commonwealth raises much more revenue than it needs for its own purposes has:

encouraged the Commonwealth over the years to engage in direct expenditure on a wide range of matters beyond the scope of its legislative power, generally in areas of State responsibility, relying on the executive power in section 61.⁵⁹

However, the *Williams* decisions⁶⁰ have 'put a brake on this option'.⁶¹ In these cases, the court drew on the federal structure of the Constitution and the system of

⁵⁸ See Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 5 of 2015, 12 May 2015, Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 2) Regulation 2015 [F2015L00370], pp. 10–11. See also Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2015*, 25 March 2015, pp. 267–71. Relatedly, the Scrutiny of Bills Committee drew to the attention of the Senate Appropriation Bill (No. 3) 2014–2015, and commented that it seemed the initial expenditure in relation to the 'Gold Coast Suns AFL Club – upgrade of Metricon Stadium facilities' in the Health portfolio may have been inappropriately classified as ordinary annual services (and therefore included in Appropriation Bill (No. 3) 2014–2015, which is not amendable by the Senate).

⁵⁹ Cheryl Saunders, 'Australian Federal Democracy', speech delivered for the Law Oration 2015, Victoria Law Foundation, Melbourne, 14 October 2015, http://www.victorialawfoundation.org.au/sites/default/files/attachments/vlf_law_oration_2015.pdf.

⁶⁰ *Williams v Commonwealth (No. 1)* (2012) 248 CLR 156; *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416 (Williams No. 2).

⁶¹ Saunders, 'Australian Federal Democracy'. In addition, in *Williams No. 2* the High Court clarified the meaning of the term 'benefits to students' in paragraph 51(xxiiiA) (the social welfare power) of the Constitution. Specifically, the Court held that the concept of 'benefits' to students was more precise than '(any and every kind of) advantage or good'. *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 458 [43]. For something to come within the meaning of 'benefits to students' relief should amount to 'material aid provided against the human wants which the student has by reason of being a student'. *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 460 [46]. This is relevant to the consideration of the constitutionality of Commonwealth expenditure on the Prime Minister's Prizes initiative discussed below.

representative and responsible government that it establishes to hold that the Commonwealth executive does not (except in limited circumstances) have the power to spend public money without legislative authority. It is now clear that almost all Commonwealth spending programs must be authorised by legislation and therefore be supported by a head of legislative power.⁶² As a result, post-*Williams* the Commonwealth executive cannot intrude into areas of state responsibility by using its executive power to expend public money in areas that fall outside the scope of Commonwealth legislative power.

Consideration by the Regulations and Ordinances Committee

As Lynch notes, the insistence of the High Court in the *Williams* cases:

that, exceptional circumstances aside, statutory approval is required for Commonwealth spending has obviously created an opportunity for Parliament to take on an oversight role'.⁶³

This oversight role has largely been undertaken by the Senate Regulations and Ordinances Committee because the purported legislative authority for new Commonwealth spending programs is provided by specifying the relevant program in regulations.⁶⁴ In the context of key provisions of the Constitution, the work of the Regulations and Ordinances Committee in the aftermath of *Williams* demonstrates the role the committee plays in parliamentary accountability and federalism where the executive authorises expenditure in areas that are historically the responsibility of the states.

The Regulations and Ordinances Committee's terms of reference require the committee to ensure that an instrument is made in accordance with statute.⁶⁵ This requires the committee to ensure that disallowable legislative instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements. With reference to this, the Regulations and Ordinances Committee has drawn on the reasoning in *Williams No. 2* to request that the explanatory statement accompanying each regulation authorising Commonwealth expenditure on new

⁶² Anne Twomey, 'Post-*Williams* Expenditure—When Can the Commonwealth and States Spend Public Money Without Parliamentary Authorisation?', *University of Queensland Law Journal*, vol. 33, no. 1, 2014, pp. 9–10.

⁶³ Andrew Lynch, 'Commonwealth Spending After *Williams* (No 2): Has the New Dawn Risen?', *Public Law Review*, vol. 26, no. 2, June 2015, p. 86.

⁶⁴ Financial Framework (Supplementary Powers) Regulations 1997.

⁶⁵ See Senate standing order 23(3)(a).

programs explicitly state the constitutional head of power that supports the expenditure.⁶⁶

In considering the wide scope of Commonwealth executive spending, Saunders and Crommelin note:

The outcome in the *Williams* cases has reined in the practice to the extent that each program is now supported at least by subordinate legislation, in which some attempt is made to identify a plausible head of Commonwealth constitutional power. Old habits die hard, however. Executive action with limited parliamentary involvement has many attractions for incumbent governments. The legislation is written in very general terms; its subordinate status preserves executive control; and at least some of the claims for supporting power are fanciful.⁶⁷

The Regulations and Ordinances committee now routinely turns its mind to questions of the constitutionality of executive spending programs and despite initial resistance by the government, the work of the committee has successfully established a practice whereby the government points to which of its constitutional powers it is relying on to support each new spending program.⁶⁸

As a result of the committee's continuing consideration of these constitutional issues, it appears that there have recently been improvements in the quality of responses to the committee's requests for advice regarding the purported constitutionality of

⁶⁶ Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 15 of 2014, 19 November 2014, p. 6.

⁶⁷ Cheryl Saunders and Michael Crommelin, 'Reforming Australian Federal Democracy', *Meanjin Quarterly*, vol. 74, no. 3, 2015, p. 8.

⁶⁸ For example, in 2015 the committee questioned the Minister for Finance as to whether the constitutional heads of power identified by the minister (in this case the external affairs power and/or the executive nationhood power coupled with the express incidental power) actually supported the following new spending programs: Mathematics by Inquiry program (to create and improve mathematics curriculum resources for primary and secondary school students); and Coding Across the Curriculum program (to encourage the introduction of computer coding and programming across different year levels in Australian schools). In this instance, the committee continued to seek further information from the minister where it had received successive unsatisfactory responses. When the minister's third response also failed to directly address the committee's concerns the committee sought the minister's explicit and positive assurance that, in exercising the powers delegated by the parliament in the making of the regulation, he was satisfied that there was sufficient constitutional authority for the exercise of that power. The committee ultimately concluded its examination of the matter after receiving a fourth response in which the minister assured the committee that the government's legal advice confirmed that that the Mathematics by Inquiry and the Coding Across the Curriculum programs were supported by the external affairs power and/or the executive nationhood power (coupled with the express incidental power). See Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 12 of 2015, 12 October 2015, pp. 10–13, and Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 13 of 2015, 13 October 2015, p. 3.

executive spending schemes. For example, in 2016 the committee questioned the Minister for Finance as to whether each of the constitutional heads of power identified by the minister (including the ‘benefits to students’ limb of the social welfare power) actually supported new spending on the Prime Minister’s Prizes initiative (to provide national prizes and awards to individuals and institutions, recognising achievement in science and innovation). In this instance, the minister’s response advised that the Prime Minister’s Prizes initiative had been revised and that it no longer included any expenditure that would rely on the students’ benefits power.⁶⁹

Relatedly, the committee has recently sought further information from the Minister for Finance to clarify the constitutional foundation for expenditure on new programs where numerous constitutional heads of power are identified in a regulation as supporting a new program.⁷⁰ In such cases, where the relevant explanatory statement does not include a clear and explicit statement of the relevance of each constitutional head of power relied on to support the operation of the program, the committee has sought, and received, detailed responses from the minister as to the relevance of each constitutional power that the regulation seeks to rely on to support the new program.

Lynch and Meyrick suggest that in instances where contentious constitutional issues arise ‘the Parliament may proceed with enactment and leave validity to be determined by the High Court’ but only after parliamentary committees have played their part ‘by

⁶⁹ In detail, the committee questioned the Minister for Finance, amongst other things, as to whether the constitutional heads of power identified by the minister (in this case the social welfare power; the external affairs power; and the executive nationhood power coupled with the express incidental power) actually supported the following new spending program: Prime Minister’s Prizes (to provide national prizes and awards to individuals and institutions, recognising achievement in science and innovation). As it was unclear how the funding of the ‘Prime Minister’s Prizes’ initiative may be regarded as providing ‘benefits to students’ within the scope of the social welfare power; or an activity peculiarly adapted to the government of a nation’; and as not able to be otherwise ‘carried out for the benefit of the nation’; the committee requested the advice of the Minister for Finance in relation to the legislative authority for this initiative. The minister’s response advised that the Prime Minister’s Prizes initiative had been revised and that it no longer included any expenditure that would rely on the students’ benefits power. The response argued that the revised initiative was supported by the executive nationhood power coupled with the express incidental power as it ‘provides national-level prizes and awards to recognise the nation’s most outstanding scientists and science teachers’ and ‘has national significance as part of the Commonwealth’s science strategy’. See Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 7 of 2016, 12 October 2016, p. 73.

⁷⁰ See for example: Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor*, no. 4 of 2017, 29 March 2017, Financial Framework (Supplementary Powers) Amendment (Attorney-General’s Portfolio Measures No. 4) Regulation 2016 [F2016L01924] pp. 37–40; Financial Framework (Supplementary Powers) Amendment (Health Measures No. 4) Regulation 2016 [F2016L01751] pp. 41–53; Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 1) Regulation 2016 [F2016L01921] and Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 2) Regulation 2016 [F2016L01925] pp. 54–62.

engaging in conscious consideration of the Constitution'.⁷¹ As demonstrated above, it is clear that the Regulations and Ordinances Committee is undertaking this 'conscious consideration' in relation to the constitutionality of executive spending schemes. The Regulations and Ordinances Committee's work in this area has required the Commonwealth executive to directly turn its mind to the question of whether a proposed spending program is supported by a constitutional head of power. Thus, it may be the case, that some proposed Commonwealth spending programs have not gone ahead because the Commonwealth has received advice that the proposed program does not fall within a constitutional head of legislative power. The Regulations and Ordinances Committee's requirement that the purported constitutional authority for a spending program be made explicit on the face of the relevant instrument is apt to focus the minds of the government and its legal advisers in this regard.

The recent work of the committee demonstrates that the parliament plays a critical role in ensuring Commonwealth spending initiatives (i.e. executive actions authorised by delegated legislation) are within the scope of Commonwealth power and are therefore constitutionally valid.⁷² By raising the profile of potential Commonwealth incursions into areas of traditional state responsibility, the committee plays a role in protecting the constitutional interests of the states.

Section 96 grants to the States

Background

Consistent with the vertical division of power between the Commonwealth and the states, the Commonwealth administers its own legislation and spends money for its own purposes. However, as is the case in other federations such as Canada and the United States, a more difficult issue concerns the Commonwealth's capacity to spend for other purposes—that is, in areas that are traditionally the responsibility of the states. In Australia this issue is particularly significant as a result of the 'vast fiscal imbalance in favour of the Commonwealth, while major expenditure responsibilities remain with the States'.⁷³

⁷¹ Andrew Lynch and Tessa Meyrick, 'The Constitution and Legislative Responsibility', *Public Law Review*, vol. 18, 2007, pp. 163–4.

⁷² See for example: Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 6 of 2015, 17 June 2015, Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572] and Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, no. 13 of 2015, 13 October 2015.

⁷³ Saunders, *The Constitution of Australia*, p. 241.

Unlike Canada and the United States, the Australian Constitution includes an express power for the Commonwealth to spend through grants to the states. Under section 96, the ‘Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit’. This grant power has been interpreted very broadly by the High Court.⁷⁴ As Saunders notes:

grants can be made on condition that a State exercises its powers in a particular way or that it refrains from exercising a power. A State is not compelled to accept a grant, although given the fiscal imbalance, refusal is rare ... through the mechanism of conditional grants, the Commonwealth exercises extensive de facto control over most areas of State responsibility that involve significant levels of expenditure.⁷⁵

It is interesting to note the High Court’s broad interpretation of the grants power in section 96 in light of the genesis of this provision. At the 1890s Constitutional Conventions a clause similar to current section 96 was proposed; however, the clause was only supported by a few delegates. The proposed clause was objected to as being ‘too indefinite, as making the Commonwealth a “rich uncle” for the States and casting a slur on their solvency, as opening the door to continual applications for “better terms”, and as being a disastrous commentary on the efficiency of the financial clauses’.⁷⁶

In the end, current section 96 was inserted at the last minute at the 1899 Premiers’ Conference. The only official explanation of the views of the premiers was that the section was intended to give effect to the opinion that power should be granted to the parliament to deal with any exceptional circumstances which may from time to time arise in the financial position of any state. It was noted that the power ought not to be used except in cases of emergency and that the section is ‘intended as the medicine, not the daily food, of the Constitution’.⁷⁷

Importantly, and perhaps despite the text and constitutional history of section 96, based on High Court authority to date, it appears settled that the terms and conditions

⁷⁴ *Victoria v Commonwealth* (1926) 38 CLR 399 (‘Federal Aid Roads case’); *South Australia v Commonwealth* (1941) 65 CLR 373 (‘Uniform Tax case (No. 1)’); *Victoria v Commonwealth* (1957) 99 CLR 575 (‘Uniform Tax case (No. 2)’); *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559 (‘DOGS case’).

⁷⁵ Saunders, *The Constitution of Australia*, p. 242.

⁷⁶ John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, 1901, p. 869. For example, Dr Cockburn noted that if the clause were to be accepted ‘it would certainly sap the independence of the States by placing the Federal Parliament as a sort of Lord Bountiful over the States’: *Debates of the Australasian Federal Convention 1897–98* (Third Session), Melbourne, 17 February 1898, p. 1119 (John Cockburn, South Australia).

⁷⁷ *ibid.*, pp. 870–1.

attaching to ‘financial assistance’ provided to the states need not be fixed by the parliament itself as the power may be delegated to the executive.⁷⁸

Contemporary use

In 2016–17 the Commonwealth proposed to make grants of \$116.5 billion to the states and territories. This included \$61.3 billion in ‘general revenue assistance’ (grants without conditions) and \$55.3 billion in ‘payments for specific purposes’ (grants provided with conditions). The main form of general revenue assistance is the GST entitlement. Payments for specific purposes cover health, education, skills and workforce development, community services, affordable housing, infrastructure, environment, and other ‘national partnership’ payments.⁷⁹ The conditions attached to these payments for specific purposes govern the purpose and manner of the expenditure and often stipulate required outcomes. Thus, it can be said that these grants ‘structure the way in which most State constitutional responsibilities are carried out’.⁸⁰ Despite the obvious importance of these conditions, the conditions themselves ‘are not necessarily accessible in the public domain’.⁸¹

The vast majority of grants to the states and territories are provided for by special (standing) appropriations, but some money for grants is also appropriated in the annual appropriation bills.⁸²

It has been suggested that despite the wording of section 96, which emphasises that it is the parliament that may ‘grant financial assistance to any State on such terms and conditions as the Parliament thinks fit’, the conditions attaching to section 96 grants ‘are rarely determined or even scrutinised by the Commonwealth Parliament’.⁸³ The aim of this section of the paper is to demonstrate how, in recent years, the Senate has taken some steps towards subjecting section 96 grants and the conditions attaching to them to some level of scrutiny.

⁷⁸ Cheryl Saunders, ‘Towards a theory for section 96: Part 1’, *Melbourne University Law Review*, vol. 16, no. 1, 1987, p. 18.

⁷⁹ Commonwealth of Australia, *Federal Financial Relations*, 2016–17 Budget Paper No. 3.

⁸⁰ Saunders, ‘Australian Federal Democracy’, p. 10.

⁸¹ *ibid.*

⁸² Daniel Weight, ‘Parliamentary scrutiny of payments to the states and territories’, *Budget Review 2015–16*, Commonwealth Parliamentary Library, May 2015, p. 23, http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4036352/upload_binary/4036352.pdf;fileType=application/pdf.

⁸³ Saunders, ‘Australian Federal Democracy’, p. 10. See also Saunders and Crommelin, *op. cit.* The *Australian Education Act 2013* (Cth) is one example where the Commonwealth Parliament outlined some conditions attaching to financial assistance to the states in primary legislation (see especially Part 2 of that Act).

Consideration by Senate committees generally

One of the most obvious mechanisms for the scrutiny of section 96 grants is through questioning of ministers and officials at Senate estimates hearings. For example, at recent estimates hearings questions have been asked by Tasmanian senators in relation to funding provided to Tasmania under the \$43.1 million Tourism Demand-Driver Infrastructure program.⁸⁴ Other questions have been asked in relation to the impact of a new condition placed on Commonwealth funding for the National Partnership Agreement on Homelessness. This new condition required states and territories to prioritise homelessness services directed at youth and the victims of domestic violence. Senators were interested in whether this new condition had resulted in other homelessness services in their state (such as those directed to the elderly or people suffering mental illness) being defunded as a result of the new condition.⁸⁵

On occasion Senate committees will also inquire into issues relating to section 96 grants to the states. For example, in March 2015 the Senate Economics References Committee completed an inquiry into the Commonwealth's 'Asset Recycling Initiative', which was designed to encourage states to sell off public assets in return for a 15 per cent 'incentive payment' in the form of a grant from the Commonwealth if certain conditions were met.⁸⁶

Consideration by the Scrutiny of Bills Committee

In recent years significant work in relation to section 96 grants has been undertaken by the Scrutiny of Bills Committee.⁸⁷ Specifically, the committee has commented on a standard provision in appropriation bills which deals with the parliament's power under section 96 to provide financial assistance to the states.⁸⁸ As noted above, section 96 states that 'the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.' However, a standard provision in Commonwealth appropriation bills delegates this power to the minister. Under this provision the minister may determine:

⁸⁴ Senate Foreign Affairs, Defence and Trade Legislation Committee, *Official Committee Hansard*, 26 February 2015, pp. 181–7 (Senator Singh); Senate Foreign Affairs, Defence and Trade Legislation Committee, *Official Committee Hansard*, 6 May 2016, pp. 165–7 (Senator Brown).

⁸⁵ Senate Community Affairs Legislation Committee, *Official Committee Hansard*, 22 October 2015, pp. 124–6 (Senator McLucas).

⁸⁶ Senate Economics References Committee, *Privatisation of state and territory assets and new infrastructure*, March 2015, pp. 24–5.

⁸⁷ In accordance with Senate standing orders 24(1)(a)(iv) and (v), the committee is required to report on bills that inappropriately delegate legislative powers and insufficiently subject the exercise of legislative power to parliamentary scrutiny.

⁸⁸ Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, 12 August 2015, pp. 511–6; *Ninth Report of 2015*, 9 September 2015, pp. 611–4; *Fifth Report of 2016*, 3 May 2016, pp. 352–7.

- conditions under which payments to the states may be made; and
- the amount and timing of the payments.⁸⁹

Importantly, the relevant provision also provides that the above ministerial determinations are not legislative instruments and are therefore not subject to the tabling and disallowance provisions of the *Legislation Act 2003* (Cth).

In undertaking this work the committee has explicitly emphasised the terms of section 96 and the role of senators in representing the people of their state. Specifically, the committee has:

- highlighted that the power to make grants to the states and to determine terms and conditions attaching to them is conferred on the parliament by section 96 of the Constitution;
- noted that while the parliament has largely delegated this power to the executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory;
- noted that some information in relation to grants to the states is publicly available; however, effective parliamentary scrutiny is difficult because the information (where it is available) is only available in disparate sources; and
- stated that it is appropriate that at least a minimum level of information is readily and easily available as a matter of course in order to enable senators and others to determine whether further inquiries are warranted (for example, through questioning in Senate estimates, other committees or the chamber).⁹⁰

As a result of this work some further information has been provided to the committee or included in the relevant explanatory materials accompanying appropriation bills.⁹¹ For example, the only information available on the face of the relevant bill in relation to a proposed \$23 million grant in the 2015–16 financial year was that it related to outcome 3 of the Department of Infrastructure and Regional Development.⁹² However, following the committee’s inquiries further information was provided

⁸⁹ See, for example, Appropriation Bill (No. 4) 2015-2016 (Cth) cl 14.

⁹⁰ Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, 12 August 2015, pp. 511–6; *Ninth Report of 2015*, 9 September 2015, pp. 611–4; *Fifth Report of 2016*, 3 May 2016, pp. 352–7.

⁹¹ Commonwealth, *Parliamentary Debates*, Senate, 12 October 2016, p. 85 (Senator Polley).

⁹² Outcome 3 relates to ‘strengthening the sustainability, capacity and diversity of regional economies including through facilitating local partnerships between all levels of government and local communities; and providing grants and financial assistance’.

which indicated that the \$23 million grant related to the Latrobe Valley Economic Diversification Program.⁹³

To date, the committee has welcomed the provision of such additional information, although it has considered that further information should be provided in future and has sought the finance minister's advice as to:

- whether future budget documentation could include general information about:
 - the statutory provisions across the Commonwealth statute book which delegate to the executive the power to determine terms and conditions attaching to grants to the states; and
 - the general nature of terms and conditions attached to these payments; and
- whether the Department of Finance is able to issue guidance advising departments and agencies to include the certain specific information in their portfolio budget statements where they are seeking appropriations for payments to the states, territories and local government.⁹⁴

In response to this request, the finance minister advised the committee that he would ask his department, in consultation with the Treasury, to review the current suite of budget documentation to give consideration to including additional information on payments to the states, territories and local government in time for the next budget.⁹⁵ The committee noted that it 'looks forward to considering the outcome of this review' which should be reflected in the 2017–18 budget papers.⁹⁶

The committee's comments in relation to this matter have also informed debate in the Senate.⁹⁷

⁹³ Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2016*, 3 May 2016, pp. 352–7.

⁹⁴ The specific information requested by the committee included: (a) the particular purposes to which the money for payments to the States, Territories and local government will be directed (including a breakdown of proposed grants by State/Territory); (b) the specific statutory or other provisions which detail how the terms and conditions to be attached to the particular payments will be determined; and (c) the nature of the terms and conditions attached to these payments. See Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016*, 9 November 2016, p. 459.

⁹⁵ Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016*, 9 November 2016, p. 460.

⁹⁶ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 3 of 2017*, 22 March 2017, p. 54.

⁹⁷ Commonwealth, *Parliamentary Debates*, Senate, 23 June 2015, pp. 4265–7 (Senator Leyonhjelm). Senator Leyonhjelm moved an amendment to Appropriation Bill (No. 2) 2015–2016 to lower the debit limit for national partnership payments (one type of tied grants to the States) from \$25 billion to \$11 billion: *Journals of the Senate*, 23 June 2015, pp. 2774–5. See also an amendment moved by Senator Leyonhjelm (described by the senator as 'symbolic') to Appropriation Bill (No. 4) 2014–2015. The amendment sought to remove authorisation to appropriate money for a \$250,000 tied grant to the states in the infrastructure and regional development portfolio: *Journals of the Senate*, 17 March 2015, pp. 2308–10.

In addition, in specific instances the committee has also requested that a statutory requirement be inserted into bills to ensure that agreements with the states in relation to grants of financial assistance are tabled in the parliament and published on the internet.⁹⁸

The ability of the Senate, as the chamber representing the people of states, to effectively scrutinise proposed grants to the states and territories is essential to safeguarding federalism and the constitutional rights of the parliament. This matter appears to be of ongoing interest to the Scrutiny of Bills Committee as its Chair recently noted that the committee ‘will continue to take an interest in the parliamentary scrutiny of section 96 grants’ into the future.⁹⁹

Conclusion

The Australian federal structure aims to disperse power between the Commonwealth and the states and territories. Even though the array of financial and legislative powers utilised by the Commonwealth has evolved since Federation, the constitutional framework continues to protect states’ interests in a number of ways. This paper demonstrates how the Scrutiny of Bills Committee and the Regulations and Ordinances Committee play a crucial part in the broader role of the Senate in safeguarding states’ interests.

In particular, the committees play a vital role in the scrutiny of proposed appropriations, Commonwealth executive expenditure, and section 96 grants to the states. Through their continued dialogue with the government in these areas, the committees’ have been successful in raising the profile of potential Commonwealth incursions into areas of traditional state responsibility, as well as increasing the level of information available to the public in relation to these matters. This work of the scrutiny committees in examining whether relevant legislation is within power, and whether legislative provisions may detract from the exercise of the core law-making and scrutiny functions of parliament, shows the real capacity of the committees to safeguard federalism and the constitutional rights of the Senate.

⁹⁸ Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016*, 9 November 2016, pp. 462–4 (grants relating to dental services); Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2016*, 23 November 2016, pp. 575–6 (grants relating to industry, innovation, science and research programs).

⁹⁹ Commonwealth, *Parliamentary Debates*, Senate, 12 October 2016, p. 85 (Senator Polley).