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SCRUTINY COMMITTEES—A VEHICLE TO SAFEGUARDING FEDERALISM AND THE CONSTITUTIONAL RIGHTS OF PARLIAMENT

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I INTRODUCTION

This paper considers the importance of federalism and outlines the role of the Senate in Australia's constitutional system in safeguarding State interests, with a focus on its legislative scrutiny committees.

Most 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 specific information about these grants accompany appropriation bills in order to assist Senators in scrutinising these payments (noting the role of Senators in representing the people of their State).

II FEDERALISM AND THE ROLE OF THE SENATE

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.

[1] *Williams v Commonwealth* (2012) 248 CLR 156 discussed in detail at 18; *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416 discussed in detail at 22.

A *Federalism*

1 *Overview*

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] It also has many other positive virtues, the recognition of which has contributed to its spread around the world.

In particular, the division of powers between regional and national governments can 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 are also attributed to federalism, such as:

- 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

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[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* (Federation Press, 5th ed, 2008) 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: Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012) 8.

[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]

2 *Federalism in Australia*

The division of powers between the Commonwealth government and State and Territory governments is central to Australian federalism. Importantly, the Constitution provides the basic framework for federalism.

Relevantly, section 51 of the Constitution 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; and section 61 provides a broad executive power to the Commonwealth.

Section 96 allows the Commonwealth Parliament to provide 'financial assistance', tied or otherwise, to the States.

Section 109 provides that in cases of legislative inconsistency, Commonwealth law shall prevail.

Of course, decisions of the High Court are important in determining the meaning of these provisions and therefore the limitations on the Commonwealth's powers.

B *The Role of the Senate in representing the people of the States*

As noted above, the importance of States' rights was a key issue at the 1890s Convention Debates and 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.[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:

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[5] Evans and Laing (eds), above n 3, 9; Senate Select Committee on the Reform of the Australian Federation, Parliament of Australia, *Australia's Federation: an agenda for reform* (2011) 6–12; Federal-State Relations Committee, Parliament of Victoria, *Australian federalism: the role of the States* (1998) 5–9.

[6] *Convention Debates*, 17 September 1897, 784 (Richard Baker, South Australia).

[7] Harry Evans, 'The role of the Senate' (2009) 52 *Papers on Parliament*, 93–94.

- 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 means that it is impossible for a majority to be formed from the representatives of only one or two States.[8] Without this equal State representation in the Senate, 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] 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 the geographically distributed majority.

1 *Criticisms of the Senate's role as a 'States' House'*

The Senate is often criticised because it is said that it approaches its responsibilities from a party standpoint and has therefore not fulfilled its functions as a 'States' House'.[10] It is relevant to briefly address this criticism in case it is thought that the influence of party politics negates any role that the Senate may have in representing State interests.

It is clear that the constitutional framers (mostly politicians themselves) were aware that political parties would be an important feature of the Senate. For example, John Macrosson highlighted that parties existed in the United States Senate (on which the Australian Senate was modelled in many respects) and noted therefore that:

> The influence of party will remain much the same as it is now, and instead of members of the Senate voting…as States, they will vote as members of parties to which they will belong…Parties have always existed, and will continue to exist where free men give free expression to their opinions.[11]

Similarly, Alfred Deakin suggested that 'from the first day the Federation is consummated…the people will divide themselves into two parties' and that the notion that these parties would divide along small/large State lines was 'the last possible eventuality of a thousand eventualities which are more likely to occur'.[12]

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[8] Harry Evans, 'Federalism: an idea whose time has come?' (Paper presented at the Samuel Griffith Society Conference, Canberra, 7–9 March 1997).

[9] Harry Evans, 'The role of the Senate' above n 9, 93.

[10] See, for example, Federal-State Relations Committee, Parliament of Victoria, *Australian federalism: the role of the States* (1998) 21–23.

[11] *Convention Debates*, 17 March 1891, 434 (John Macrosson, Queensland).

[12] *Convention Debates*, 30 March 1897, 297 (Alfred Deakin, Victoria).

However, it is clear that the geographically distributed majority described above, continues to work even where voters in the various States vote for the same political parties (as predicted by the constitutional framers). This is because no political party can afford to neglect any State.[13] 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.[14]

Under the Australian constitutional system, the double majority and geographically distributed majority described above is required for the passage of almost all laws. Thus, except in the circumstances of laws passed at a joint sitting of both Houses following a simultaneous dissolution, all Commonwealth laws have been passed only with the consent of a majority of States speaking through their representatives—it has not been possible to form legislative majorities from a minority of States.[15]

2 *How the Senate represents State interests*

In addition to the fundamental purpose of ensuring that virtually all Commonwealth laws are passed only with the consent of a majority of States speaking through their representatives, the Senate also represents State interests in other ways.

(a) Representation for smaller States in party rooms and the ministry

The composition of the Senate affects the composition of party meetings in a number of ways. First, the higher representation of the smaller States in the Senate is likely to be reflected in party rooms. Second, the relatively even division of party support in the Senate may prevent the under-

[13] Evans, 'The role of the Senate', above n 11, 94–95.

[14] *Convention Debates*, 10 September 1897, 335 (Alfred Deakin, Victoria).

[15] Despite this, the notion that the Senate was intended to represent State governments and senators were to vote in State blocs has remained widespread. As a result, sometimes proposals are advanced to change the Senate so that it is similar to the German upper house whose members are State government ministers who must also vote as a State bloc. The purpose of such reform is said to be that it would tie upper house members more firmly to the politics of the States they represent. However, such proposals ignore the fact that State governments are controlled by particular political parties, and the voting of their delegates on national questions would reflect the party lines of those governments: Evans, 'Federalism: an idea whose time has come?', above n 13. See also Wilfried Swenden, *Federalism and Second Chambers—Regional Representation in Parliamentary Federations: The Australian Senate and German Bundesrat Compared* (PIE-Peter Lang, 2004) 334; Jörg Broschek, 'Federalism and Political Change: Canada and Germany in Historical-Institutionalist Perspective' (2010) 43 *Canadian Journal of Political Science* 1, 15.

representation of the smaller States in a party which is unsuccessful in securing reasonable representation in the House of Representatives in a particular State.[16]

As former Clerk of the Senate J R Odgers notes:

> It must not be forgotten that, before being brought up in the Parliament, legislative proposals are carefully considered at joint meetings of supporters of the Government in both Houses. There, out of the public spotlight, Senators can…act as real guardians of States interests, particularly those of the less populated States.[17]

Relatedly, it is usually desired to have all States (including the smaller 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).[18]

(b) Representation for smaller States through independents and minor parties in the Senate

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.[19] For example, the website of Senator Nick Xenophon (Independent, South Australia), states that the first role of a Senator is to 'represent the views of their state in the Senate'.[20] Similarly, a section of the website of Senator Jacqui Lambie (Independent, Tasmania) relates to 'Putting Tasmania first'.[21] As a result issues of particular interests to these States are regularly discussed in the Senate—for example,

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[16] Campbell Sharman, 'The Australian Senate as a States House' (1977) 12 *Australian Journal of Political Science* 64, 68. For example, from 1975–1987, notwithstanding a party share of the vote ranging from 40.3 percent to 45.1 percent, no ALP candidate for a Tasmanian House of Representatives seat was successful. In the same period there were 4 to 5 ALP senators from Tasmania. In 1998, 2001, 2010 and now 2016, this situation was reversed, with Tasmanian Liberal Party voters unrepresented in the House: Evans and Laing (eds), above n 3, 12.

[17] J R Odgers, *Australian Senate Practice* (Royal Australian Institute of Public Administration, 6th ed, 1991) 11. In this way, it can be suggested that the Senate's structure may influence the way in which the Senate discharges many of its functions because the State basis of Senate representation sensitises its operation to State concerns and may put a distinctive bias on the way in which the Senate participates in the national political and legislative process. In this respect, the Senate can be seen as a channel for keeping the national political process informed of the concerns of all the States in the federation: Sharman, 'The Australian Senate as a States House', above n 21, 73–74.

[18] After the 2013 federal election two out of three federal Cabinet ministers from Western Australia were senators and the only minister from Tasmania was a senator.

[19] Campbell Sharman, 'The representation of small parties and independents in the Senate' (1999) 34 *Australian Journal of Political Science*, 353, 360.

[20] Nick Xenophon, Independent Senator for South Australia, *The role of a senator* <http://www.nickxenophon.com.au/senate/the-role-of-a-senator/>.

[21] Jacqui Lambie, *Putting Tasmania first* <http://senatorlambie.com.au/putting-tasmania-first/>.

the impact of national policies relating to the Murray-Darling Basin on South Australia, South Australia's shipbuilding, defence and steelmaking industries, and transport across the Bass Strait.

(c) Recent bills, committee inquiries and motions in the Senate relating to State issues

State issues are also raised in the Senate through the introduction of bills, committee inquiries and the consideration of motions.

(i) Bills and bill inquiries

Recent bills relating to State issues considered by the Senate include the Commonwealth Grants Commission Amendment (GST Distribution) Bill 2015, introduced by Senator Zhenya Wang (Palmer United Party, Western Australia). This bill sought to address the impact of mining revenue volatility on Commonwealth Grants Commission recommendations relating to GST distribution to the States. An inquiry by the Senate Finance and Public Administration Legislation Committee was conducted into the bill. The inquiry received submissions from the Western Australian Government (which supported the intent of the bill), the Queensland Government (which expressed concern about the impact of mining revenue volatility but did not support the bill), and the Tasmanian Government (which also did not support the bill). In addition, all backbench Liberal senators from Western Australia attached additional comments to the report which stated that 'it is abundantly clear that the present formula used by the Commonwealth Grants Commission to determine GST allocations is having a significant, ongoing and deleterious impact on Western Australia' and recommended that, at a minimum, the government should request that the Productivity Commission undertake an independent, wholesale review of the current GST distribution model.[22]

(ii) Other committee inquiries

Other recent Senate committee inquiries relating to State issues include:

- Decision to commit funding to 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)
- Tasmanian Wilderness World Heritage Area (May 2014)

[22] Senate Finance and Public Administration Legislation Committee, Parliament of Australia, *Commonwealth Grants Commission Amendment (GST Distribution) Bill 2015* (2016) 5–6. Another bill recently considered by the Senate was the National Broadband Network Companies Amendment (Tasmania) Bill 2014, introduced by Senator Anne Urquhart (ALP, Tasmania).

(iii) Motions

Motions are also moved in the Senate in relation to issues affecting a particular State. For example, on 17 March 2016 the Senate agreed to a motion moved by Senator Glenn Lazarus (Glenn Lazarus Team, Queensland) in which the Senate called for 'funding to the Yellow Crazy Ant Eradication Program to fund it for 3 years past June 2016'.[23] The 2015-16 Budget includes $8.8 million to implement a Yellow Crazy Ants biocontrol programme in Far North Queensland.[24]

In another notable example, on 12 August 2009 the Senate agreed to a motion moved by Senator Eric Abetz (Liberal, Tasmania) and Senator Bob Brown (Greens, Tasmania) in which the Senate called 'for the full retention by the Federal Court of Australia of its registry services in the State of Tasmania'.[25] Registry services for the Federal Court remain in Hobart to this day.[26]

This paper aims to demonstrate that, in addition to all the ways outlined above, the Senate plays a role in safeguarding State interests through its legislative scrutiny committees.

III AUSTRALIAN LEGISLATIVE SCRUTINY COMMITTEES

A *Commonwealth Parliament*

The scope of the scrutiny functions of the Scrutiny of Bills Committee and Regulations and Ordinances Committee are defined in Senate standing orders which derive their authority from section 50 of the Constitution.[27]

The Scrutiny of Bills Committee was established in 1981. Its functions, which are set out in Senate Standing Order 24, are to assess bills against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, the rule of law and on parliamentary propriety. Specifically, Senate Standing Order 24(1)(a) requires that the Scrutiny of Bills Committee examine all bills which come before the Parliament and report whether such bills:

i. trespass unduly on personal rights and liberties;

ii. make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

iii. make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

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[23] *Journals of the Senate*, 17 March 2016, 3992-3993.

[24] Budget 2015-16, Portfolio Budget Statements 2015-16, Budget Related Paper No. 1.7. Environment Portfolio, 188- 191. See also: The Nationals, *$8.8 Million to Tackle Crazy Ants in North Queensland* <http://nationals.org.au/8-8-million-to-tackle-crazy-ants-in-north-queensland/>.

[25] *Journals of the Senate*, 12 August 2009, 2273.

[26] Federal Court of Australia, *Contact Tasmania Registry* < http://www.fedcourt.gov.au/contact/tas>.

[27] See Evans and Laing (eds), above n 3, 34.

iv. inappropriately delegate legislative powers; or

v. insufficiently subject the exercise of legislative power to parliamentary scrutiny.[28]

The Regulations and Ordinances Committee was established in 1932. Its functions, which are set out in Senate Standing Order 23, are to examine all disallowable instruments of delegated legislation and conduct a technical inquiry as to whether they comply with the committee's scrutiny principles of personal rights and parliamentary propriety. Specifically, Senate Standing Order 23(3) (which is complementary to Senate Standing Order 24(1)(a)) requires the Regulations and Ordinances Committee to examine each disallowable legislative instrument that is tabled in the Parliament to ensure that it:

a. is in accordance with the statute;

b. does not trespass unduly on personal rights and liberties;

c. does not make the rights and liberties of citizens unduly dependent on administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

d. does not contain matter more appropriate for parliamentary enactment.[29]

B *State and Territory Parliaments*

Much like the Commonwealth Parliament, State and Territory Parliaments in Australia have established committees and procedures for parliamentary oversight of primary and delegated legislation. An investigation of these scrutiny approaches reveals a commonality between the concerns and principles which underpin parliamentary scrutiny across Australia, and the institutional and procedural arrangements which support this critical function of parliaments.

The majority of State and Territory Parliaments undertake scrutiny of all bills introduced to their respective parliaments and, in line with the Scrutiny of Bills Committee, report on (among other things) any Bill that: inappropriately delegates legislative power; and/or does not sufficiently allow the respective Parliament to scrutinise legislative power.[30]

Likewise, the majority of State and Territory Parliaments undertake scrutiny of all delegated legislation and, in line with the Regulations and Ordinances Committee, report on (among other things) any delegated legislation that: does not appear to be within the powers of the enabling Act;

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[28] See Parliament of Australia, *Senate Standing Orders and other Orders of the Senate* (August 2015), 23.

[29] See Parliament of Australia, *Senate Standing Orders and other Orders of the Senate* (August 2015), 22.

[30] Australian Capital Territory (ACT) Legislative Assembly, Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee); Parliament of New South Wales (NSW) Joint Legislation Review Committee; Queensland Parliament Scrutiny of Legislation Committee; and Parliament of Victoria Joint Scrutiny of Acts and Legislation Committee.

and contains any matter or embodies any principles which should properly be dealt with by an Act and not by delegated legislation.[31]

The similarity of the committee's scrutiny principles across the Commonwealth, State and Territory Parliaments suggests that work across the different legislatures has the capacity to inform and enhance the effectiveness of the scrutiny systems in other jurisdictions.

IV The Role of Legislative Scrutiny Committees in Safeguarding Federalism and the Constitutional Rights of the Senate

The role of scrutiny 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 provisions of the Commonwealth Constitution to these functions the 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.

Relevant to this paper, under scrutiny principle 24(1)(a)(v) the Scrutiny of Bills Committee comments on the inappropriate classification of items in appropriation bills that undermine the Senate's constitutional right (sections 53, 54 and 83 of the Constitution) to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. Additionally under scrutiny principles 24(1)(a)(iv) and 24(1)(a)(v) the Scrutiny of Bills Committee comments on the ability of the Parliament to scrutinise grants under section 96 of the Constitution to the States where bills delegate the powers to determine conditions, amounts and timings of payments to the States and Territories, impacting the Senate's ability to effectively scrutinise proposed appropriations.

Similarly, under scrutiny principle 23(3)(d) the Regulations and Ordinances Committee draws to the attention of the Senate instances where disallowable legislative instruments authorise expenditure that appears to have been inappropriately classified as the ordinary annual services of the government and thereby reduces the scope of the Senate's scrutiny of government expenditure (sections 53, 54 and 83 of the Constitution). Additionally, under scrutiny principle 23(3)(a) the Regulations and Ordinances Committee makes inquiries to ensure that Commonwealth spending

[31] ACT Legislative Assembly, Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee); Legislative Assembly of the NT Subordinate Legislation and Publications Committee; Queensland Parliament Scrutiny of Legislation Committee; Parliament of SA, Legislative Council, Standing Legislative Review Committee; Parliament of Tasmania, Parliamentary Standing Committee on Subordinate Legislation; Parliament of Victoria Joint Scrutiny of Acts and Legislation Committee; and Parliament of Western Australia, Joint Standing Committee on Delegated Legislation. Although the Parliament of NSW Joint Legislation Review Committee also reviews regulations they report only where a regulation impacts on personal rights and liberties, or adversely affects the business community.

initiatives authorised by a disallowable legislative instrument are supported by a constitutional head of legislative power (sections 51 and 61 of the Constitution).

This section of the paper explores three examples of the committees' recent work in this area relevant to:

- the Senate's constitutional right to amend proposed appropriations not involving the ordinary annual services of the government;
- the constitutionality of Commonwealth spending initiatives; and
- section 96 grants to the States.

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

1 *The Senate and financial legislation: overview*

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 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'.[32]

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.[33] 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'.[34]

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):

[32] *Convention Debates*, 13 April 1897, 490 (John Forrest, Western Australia).

[33] See, for example, *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 13 April 1897, 499–500 (Richard O'Connor, New South Wales).

[34] *Convention Debates*, 13 April 1897, 490 (John Forrest, Western Australia).

> To set up a Senate which will have no power of the purse will be to set up an absolutely worthless body.[35]

2 *The Senate and financial legislation: sections 53 and 54 of the Constitution*

Section 53 of the Constitution (and related provisions) reflect the federal compromise between the delegates for the smaller and larger colonies. 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.[36]

Section 53 therefore provides that the two Houses of the Parliament have equal powers in relation to all proposed laws, except certain proposed laws imposing taxation or appropriating revenue or moneys.[37] Relevantly, paragraph 2 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.

However, 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 upon 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'.[38]

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.[39] In part, delegates wanted to ensure that the government was not able to 'expand a whole department, and practically make an

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[35] *Convention Debates*, 26 March 1897, 148 (Frederick Holder, South Australia).

[36] Evans and Laing (eds), above n 3, 343.

[37] Ibid 344. As noted above, the Senate retains the power to reject all bills.

[38] Evans and Laing (eds), above n 3, 346.

[39] 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': *Convention Debates*, 15 September 1897, 539–540 (Bernhard Wise, New South Wales).

alteration of policy, on which the House representing the people of the States would have no opportunity of expressing their views'.[40]

(a) '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.[41] 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.[42]

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, and 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'.[43]

However, in recent times concerns in relation to the inappropriate classification of appropriations as ordinary annual services have 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 the ordinary annual services but, as the expenditure could not possibly be ordinary annual services expenditure, both bills were treated as amendable bills by the Senate.[44]

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

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[40] *Convention Debates*, 8 March 1898, 2081 (John Cockburn, South Australia).

[41] Evans and Laing (eds), above n 3, 369.

[42] *Convention Debates*, 8 March 1898, 2076 (William McMillan, New South Wales; Isaac Isaacs, Victoria).

[43] See Evans and Laing (eds), above n 3, 369–370.

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

departments, including expenditure in relation to extraordinary events and new policy proposals.[45] It therefore appeared that virtually all new policies would be classified 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' [emphasis added].[46]

3 *Ordinary annual services and the Scrutiny of Bills Committee*

In *Alert Digest No. 2 of 2016*, the Scrutiny of Bills Committee identified spending items in appropriation bills that may have been inappropriately classified as ordinary annual services when they in fact related to new programs or projects. Specifically, the committee:

- noted that this inappropriate classification undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government;
- highlighted that this issue is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny (see Senate standing order 24(1)(a)(v));
- 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 annual services and therefore included in Appropriation Bill (No. 3) 2015-2016 (which was not amendable by the Senate); and
- sought the advice of the Minister for Finance as to whether the government considered that the initial expenditure in relation to this measure may have been inappropriately classified as ordinary annual services of the government.[47]

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[45] Evans and Laing (eds), above n 3, 371. 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'.

[46] *Journals of the Senate*, 22 June 2010, 3642–3643.

[47] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No. 2 of 2016*, 24 February 2016, 4–8.

The Minister subsequently advised the committee that:

> …the Government prepares Appropriation Bills in a manner consistent with the previous practices of this Government and its predecessors. In particular, that ordinary and ongoing annual appropriation items, for administered and departmental purposes, are included in the odd-numbered Bills [i.e. appropriation bills not subject to amendment by the Senate]. The Cities and the Built Environment Taskforce involves departmental expenditure that falls within an existing outcome. Accordingly this measure was included in Appropriation Bill (No. 3) 2015-2016 [the non-amendable bill].[48]

In response, the committee noted that 'this approach is not consistent with the Senate resolution of 22 June 2010 relating to the classification of ordinary annual services expenditure in appropriation bills' because new policies should be included in appropriation bills which are subject to amendment by the Senate.

The committee drew the 2010 Senate resolution discussed above to the attention of Senators and noted that:

> …the inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. Such inappropriate classification of items 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.[49]

The committee also drew the Senate's attention to the fact that, in this instance, 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 (AAO) for the first time on 18 February 2016.

[48] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2016*, 16 March 2016, 253.

[49] Ibid 254.

The committee therefore drew this matter to the attention of Senators, noting that it appeared that the initial expenditure in relation to the Cities Taskforce had been inappropriately classified as ordinary annual services.

The committee also noted that it 'will continue to draw this important matter to the attention of Senators where appropriate in the future'.[50]

Subsequently, on 18 March 2016, Senator David Leyonhjelm (Liberal Democrats, New South Wales) moved the following second reading amendment in respect of the relevant appropriation bill:

> At the end of the motion add "but given that:
>
> a) section 54 of the Constitution prescribes that the bills appropriating moneys for the ordinary annual services of the Government shall deal only with such appropriations; and
>
> b) appropriations for expenditure on new policies are not appropriations for the ordinary annual services of the Government and the Cities and the Built Environment Taskforce has been 'established' as part of a 'new' Cities Agenda,
>
> the Senate calls on the Government to respect the powers of the Senate and place such programs in appropriation bills other than those for the ordinary annual services of the Government".[51]

In moving the amendment, Senator Leyonhjelm stated that the amendment:

> …draws attention to the government's inclusion of a new policy in an appropriation bill that the Senate cannot amend. It notes that this inclusion undermines the Senate's constitutional right to amend provisions relating to a new policy. It urges the government to not undermine the Senate and the Constitution in this way.[52]

The ability of the Senate, as the chamber representing the people of 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 Parliament. Noting the responsibility of the Scrutiny of Bills Committee to consider instances where legislative provisions may detract from the exercise of the core law-making and scrutiny functions of Parliament, it is likely that the committee will continue to bring this important matter to the attention of the Senate where it is appropriate to do so in the future.

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[50] Ibid 255.

[51] *Journals of the Senate*, 17–18 March 2016, 4074.

[52] Commonwealth, *Parliamentary Debates*, Senate 17–18 March 2016, 2709.

4 *Ordinary annual services and the Regulations and Ordinances Committee*

(a) Background

The power of the federal Parliament to legislate and the power of the executive to spend money arises from a combination of constitutional provisions. Case law informs these constitutional provisions and influences the committees' scrutiny of executive expenditure.

Relevantly, the executive nationhood power 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 on for the benefit of the nation'.[53] In 2009 the importance of federal considerations to the scope of the Commonwealth government's executive power were recognised in *Pape*.[54] In considering the limits of the executive power in the context of the constitutional structure and the State and Territory polities created by federation in Australia, Hayne and Kiefel JJ highlighted that the federal government was one of 'limited and defined powers'.[55] This issue is discussed in further detail below.

Following *Pape*, 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 judgement in *Williams v Commonwealth* (*Williams No. 1*).[56] In brief, the High Court held 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 (NSCP). The decision was based on a narrow view of the 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.[57]

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 section 32B of the *Financial Management and Accountability Act 1997* (Cth) (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

[53] *Victoria v Commonwealth* (1975) 134 CLR 338, 397.

[54] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

[55] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at para 325.

[56] (2012) 248 CLR 156.

[57] For a fuller account of the decision, see Ryall, Glenn, 'Williams v. Commonwealth—A Turning Point for Parliamentary Accountability and Federalism in Australia?', Department of the Senate, *Papers on Parliament*, No. 60, March 2014.

listed in Schedule 1AA (now Schedule 1AB)[58] to Financial Management and Accountability Regulations 1997 (now Financial Framework (Supplementary Powers) Regulations 1997 ((FF(SP) regulations)).[59]

Consequently, the executive can purport to authorise expenditure on programs via the making of regulations adding the particulars of those programs to Schedule 1AB of the now FF(SP) regulations.[60] As such, it is possible for items inappropriately classified as ordinary annual services of the government to be included in disallowable legislative instruments without direct parliamentary approval, effectively reducing the scope of the Senate's scrutiny of government expenditure.

In March 2014, the Chair of the then Senate Standing Committee on Appropriations and Staffing, Senator the Hon. John Hogg, requested that the Regulations and Ordinances Committee monitor executive expenditure authorised by regulation under the now FF(SP) Act, and report on such expenditure to the Senate.[61]

The request noted the fundamental role of Parliament to approve appropriations and authorise revenue and expenditure proposals and, in the context of the Australian Constitution, identified a deficiency in the Senate's scrutiny of executive expenditure authorised via the making of regulations to add items (programs) to Schedule 1AB of the now 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 Committee and 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

[58] On 20 December 2013 the Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089] added Schedule 1AB to the Financial Management and Accountability Regulations 1997. 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, 1–2.

[59] With effect from 1 July 2014, the *Financial Management and Accountability Act 1997* was amended and renamed the *Financial Framework (Supplementary Powers) Act 1997*. The Financial Management and Accountability Regulations 1997 were renamed the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) regulations).

[60] On 20 December 2013 the Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089] added 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.

[61] Correspondence from Senator the Hon. John Hogg the Chair of the then Senate Standing Committee on Appropriations and Staffing to the Senate Standing Committee on Regulations and Ordinances, 17 March 2014. See Senate Standing Committee of Regulations and Ordinances, *Delegated legislation monitor* No. 5 of 2014 (14 May 2014), Appendix 3.

be examined as part of the estimates process, and therefore it was possible for items inappropriately classified as ordinary annual services of the government to be included in now FF(SP) regulations without direct parliamentary approval.

The request proposed that the Regulations and Ordinances Committee's scrutiny of legislative instruments include a specific assessment of the nature of executive expenditure (in accordance with the committee's scrutiny principle 23(3)(d), which requires the committee to ensure that an instrument does not contain matter more appropriate for parliamentary enactment). With reference to this scrutiny principle, the Regulations and Ordinances Committee's scrutiny of regulations authorising expenditure via the addition of items (authorised arrangements, grants and programs) to Schedule 1AB of the now FF(SP) regulations requires a specific assessment as to the nature of executive spending. Where the committee identifies items of expenditure that may have been inappropriately classified as the ordinary annual services of the government, the committee draws this fact to the attention of the Senate and the relevant standing committee.[62]

(b) Case example

The Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 2) Regulation 2015 [F2015L00370] (regulation) provides an informative example of the importance of the Senate Regulations and Ordinances Committee's role in the approval of appropriations and the authorisation of revenue and expenditure.

This regulation added one new item to Part 3 of Schedule 1AB to the FF(SP) regulations to establish legislative authority for a spending activity administered by the Department of Health. Specifically, this regulation allocated $15 million over two years ($7.5 million in 2014-15 and $7.5 million in 2015-16) 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 light of concerns regarding the potential erosion of the Senate's constitutional rights with respect to authorising such expenditure, the Senate Regulations and Ordinances Committee accordingly drew this regulation to the attention of the Senate and the relevant portfolio committee. In their comments, the Regulations and Ordinances Committee noted that prior to the enactment of section 32B of the *Financial Management and Accountability Act 1997* this item should properly

[62] See also Hodder, Patrick, *The Williams decisions and the Implications for the Senate and its Scrutiny Committees*, Department of the Senate, Papers on Parliament, no. 64 (January 2016).

have been contained within an appropriation bill not for the ordinary annual services of government.[63]

Relevantly, the Scrutiny of Bills Committee also drew to the attention of the Senate Appropriation Bill (No. 3) 2014-2015, which provided for additional appropriations from the Consolidated Revenue Fund for the ordinary annual services of the government in addition to the appropriations provided for by the *Appropriation Act (No. 1) 2014-2015* (Cth). Specifically, the Scrutiny of Bills Committee 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) 2014-15, which is not amendable by the Senate).[64]

This example demonstrates the role the scrutiny committees play in safeguarding the Constitution, specifically the Senate's constitutional ability to amend executive expenditure proposals in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny (see Senate Standing Order 24(1)(a)(v)); or whether the exercise of delegated legislative power is more appropriate for parliamentary enactment (see Senate Standing Order 23(3)(d)).

B *The constitutionality of Commonwealth spending initiatives*

1 The constitutionality of Commonwealth spending initiatives: constitutional background and history

The power of the Commonwealth Parliament to legislate and the power of the executive to spend money arises from a combination of constitutional provisions.

Section 51 of the Constitution lists the legislative heads of power under which the Commonwealth Parliament may legislate; and section 61 of the Constitution outlines the executive power of the Commonwealth.[65] A major effect of federalism is that the powers of the Commonwealth Parliament and executive are limited by the Constitution.[66]

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[63] 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], 10–11.

[64] See Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2015* (25 March 2015), 267–271.

[65] This power extends to providing 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 on for the benefit of the nation.' See *Victoria v Commonwealth* (1975) 134 CLR 338, 397.

[66] See Evans and Laing (eds), above n 3, 4.

Pape, Williams No. 1 and the government's response are discussed above. However, in June 2014, the High Court delivered its judgment in *Williams (No. 2)*.[67] In *Williams No. 2*, the purported authorisation of government expenditure to fund an agreement with a private company that provided chaplaincy services to a Queensland government school under the NSCP was challenged on the basis of two submissions: first, there was no Commonwealth head of legislative power to support the authorisation of expenditure on the chaplaincy program; and, second, that section 32B of the FMA Act, via the regulation making power, impermissibly delegated to the executive authorisation of expenditure. The High Court agreed with the first submission, that section 32B did not authorise expenditure on the NSCP because it did not fall within a Commonwealth head of power. The High Court thus confirmed that a Constitutional head of power is required to support spending programs (the second submission was left undecided).

In *Williams No. 2* it was argued that section 32B and the item in the regulations providing authority for the NSCP were supported by the 'benefits to students' limb of section 51(xxiiiA) of the Constitution; and/or the express incidental power (section 51(xxix)) taken together with sections 61 or 81 of the Constitution.[68]

Section 51(xxiiiA) of the Constitution provides the Commonwealth Parliament with the power to make laws with respect to:

> the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances.

In considering whether the 'benefits to students' limb of section 51(xxiiiA) provided constitutional authority for the NSCP the High Court held that the concept of 'benefits' to students was more precise than '(any and every kind of) advantage or good.'[69]

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'.[70] The High Court held that:

> …the only description of how the "support" is to be given is that it includes "strengthening values, providing pastoral care and enhancing engagement with the broader community".

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[67] (2014) 252 CLR 416.

[68] Scripture Union Queensland also argued that the item was supported by the corporations power (section 51(xx)), however, this argument does not form part of this paper. For an account of this argument, see Ryall, Glenn, *Commonwealth Executive Power and Accountability Following Williams (No. 2)*, Department of the Senate, *Papers on Parliament*, no. 63 (July 2015).

[69] *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416, 458 [43].

[70] *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416, 460 [46].

> These are desirable ends. But seeking to achieve them in the course of the school day does not give the payments which are made the quality of being benefits to students.[71]

The High Court therefore rejected the argument that the NSCP was supported by the 'benefits to students' limb of section 51(xxiiA).

Section 51(xxxix) of the Constitution provides the Commonwealth Parliament with the power to make laws with respect to:

> matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

In *Williams No. 2* the Commonwealth proposed that the authorisation scheme established in the FFLA Act was incidental to section 61 of the Constitution (relating to executive power). The High Court rejected this argument on the basis that:

> …to hold that s 32B of the FMA Act now is a law with respect to a matter incidental to the execution of the executive power of the Commonwealth (to spend and contract) presupposes what both *Pape* and *Williams (No 1)* deny: that the executive power of the Commonwealth extends to any and every form of expenditure of public moneys and the making of any agreement providing for the expenditure of those moneys.[72]

The decision in *Williams No. 2* demonstrates the constitutional confines of the Commonwealth's executive power. As Professor Cheryl Saunders suggests:

> In considering whether government action that is not authorised by legislation is supported by section 61 it is necessary to consider not only the division of power between the Commonwealth and the states but also the relationship between the executive and parliament. Both are relevant in determining the constitutionality of contract and spending programs. At least some such programs will require authorising legislation which may, of course, expose the lack of an adequate head of legislative power. The touchstone for making these decisions is the text of section 61, understood in the context of the rest of the Constitution.[73]

Post *Williams* it was therefore necessary for the Commonwealth to ensure that all of its spending initiatives were supported by a constitutional head of legislative power, including future additions to the list of spending schemes made by disallowable instrument, under section 32B of the now FF(SP) Act.

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[71] *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416, 460 [47].
[72] *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 470 [87].
[73] Cheryl Saunders, 'The scope of executive power', *Papers on Parliament*, no. 59, 2013, 28.

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 and Territories.

2 The constitutionality of Commonwealth spending initiatives and the Regulations and Ordinances Committee

Scrutiny principle 23(3)(a) of the Regulations and Ordinances Committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle 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 scrutiny principle, the Regulations and Ordinances Committee's scrutiny of regulations that add items via regulation to Schedule 1AB of the FF(SP) regulations requires a specific assessment as to whether expenditure for each new or amended item is supported by a constitutional head of power.

(a) 'Mathematics by Inquiry' and 'Coding Across the Curriculum' initiatives

The Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572] added new programs to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for those programs. These included the Mathematics by Inquiry program (to provide mathematics curriculum resources for primary and secondary schools) and the Coding across the Curriculum program (to support the introduction of algorithmic thinking and computer coding in Australian schools and the teaching of technologies in classrooms). The constitutional authority for these programs was identified as the external affairs power (namely, implementing obligations under the *Convention on the Rights of the Child* (CRC) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)) as well as the executive nationhood power and the express incidental power.

With reference to the external affairs power, in *Victoria v Commonwealth*, the High Court outlined:

> When a treaty is relied on under s 51(xxix) [the external affairs power] to support a law, it is not sufficient that the law prescribes one of a variety of means that might be thought appropriate and adapted to the achievement of an ideal. The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states.[74]

[74] *Victoria v Commonwealth* (1996) 187 CLR 416, 486.

As such, the committee queried whether these were adequate heads of power, noting that (a) to rely on the external affairs power the programs would need to implement relatively precise obligations under the CRC and ICESCR; and (b) the nationhood power provided for the executive to engage only in enterprises and activities peculiarly adapted to the government of a nation, and which could not otherwise be carried out for the benefit of the nation.[75]

The Minister's response advised that legal advice had been obtained in relation to the constitutional authority for the programs, prompting the committee to request that the Minister provide a copy of that legal advice, or respond to its initial request for the Minister's assurance that the programs were in fact supported by the constitutional grounds cited.[76] At this stage of the inquiry, the Chair of the Committee (Senator Williams) placed a 'protective notice' to disallow the regulation in order to extend the last day for disallowance by 15 sitting days.

In his second response, the Minister again did not directly address the committee's concerns, and rejected the committee's request for the legal advice on the matter, prompting the committee to repeat its requests.[77]

The Minister's third response again did not address the committee's concerns or provide the requested legal advice, prompting the committee to issue a final request that the Minister provide either the legal advice obtained or his personal assurance that the programs were in fact supported by the constitutional grounds cited. Noting that only two days remained to disallow the regulation, the Committee took the unusual step of requesting the Minister's response within 24 hours.[78] The response was duly provided within this timeframe, and enabled the Committee to conclude its examination of the regulation on the basis of the Minister's assurance that the government's legal advice was that the programs were 'supported by the external affairs power and/or the executive nationhood power (coupled with the express incidental power)'. The committee left aside the question of whether the Minister's refusal to provide the requested legal advice was based on a valid public interest immunity claim.[79] The Committee Chair subsequently withdrew the notice of motion to disallow the regulation.

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[75] Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor* no. 6 of 2015 (17 June 2015), 10–14.

[76] Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor* no. 8 of 2015 (12 August 2015), 19–23.

[77] Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor* no. 8 of 2015 (10 September 2015), 8–14.

[78] Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor* no. 12 of 2015 (12 October 2015), 4–14.

[79] Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor* no. 13 of 2015 (13 October 2015) pp. 3–14. While it is beyond the scope of this paper to consider public interest immunity claims, for a discussion of claims by the executive of public interest immunity, see *Odgers' Australian Senate Practice*, 13th ed. (2012), 595-598.

(b) 'Funding for Quantum Computing Research' and 'Prime Minister's Prizes' initiatives

The committee also queried whether spending initiatives were supported by a constitutional head of power in relation to the Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 1) Regulation 2016 [F2016L00513] (IIS regulation). The IIS regulation, in part, purports to provide legislative authority for several initiatives including the 'Funding for quantum computing research' and 'Prime Minister's Prizes'.

The objective of the 'Funding for quantum computing research' initiative is to fund 'world leading quantum computing research to develop a silicon quantum integrated circuit'.[80] The explanatory statement accompanying the IIS regulation identifies the constitutional basis for expenditure in relation to this initiative as follows:

> Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the Commonwealth executive power and the express incidental power (section 61 and section 51(xxxix) of the Constitution).[81]

Therefore, the 'Funding for quantum computing research' contained in the IIS regulation appears to rely on the executive nationhood power (coupled with the express incidental power) as the relevant head of legislative power to authorise the making of this provision (and therefore the spending of public money under it). In this regard, the IIS regulation states that '[t]his objective also has the effect it would have if it were limited to funding measures that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation [the executive power]'.[82]

It is unclear how the 'Funding for quantum computing research' initiative may be regarded as an activity that is 'peculiarly adapted to the government of a nation' and as not able to otherwise be 'carried on for the benefit of the nation'. Therefore, the committee has sought the advice of the minister in relation to the legislative authority for this initiative.[83]

The objective of the 'Prime Minister's Prizes' initiative is to 'provide national prizes and awards to individuals and institutions, recognising achievement in science and innovation'.[84] The

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[80] Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 1) Regulation 2016 [F2016L00513], Schedule 1, table item 142.

[81] Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 1) Regulation 2016 [F2016L00513], Explanatory statement, 2.

[82] Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 1) Regulation 2016 [F2016L00513], Schedule 1, table item 142.

[83] See Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 5 of 2016 (3 May 2016), Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 1) Regulation 2016 [F2016L00513],15–16.

[84] Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 1) Regulation 2016 [F2016L00513], Schedule 1, table item 145.

accompanying explanatory statement to the IIS regulation identifies the constitutional basis for expenditure in relation to this initiative as follows:

> Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution: the social welfare power (section 51(xxiiiA)); and the external affairs power (section 51(xxix)).[85]

In relation to the social welfare power, *Williams No. 2* clarified the extent to which the power can authorise Commonwealth spending to provide 'benefits to students'. The word 'benefits' in section 51(xxiiiA) 'is used more precisely than as a general reference to (any and every kind of) advantage or good'; and, for an initiative to provide 'benefits to students' the benefit should encompass 'material aid provided against the human wants which the student has by reason of being a student'.[86]

In relation to the external affairs power, the IIS regulation states that the objective of the 'Prime Minister's Prizes' initiative 'also has the effect it would have if it were limited to providing support: (a) to provide benefits to students; or (b) by engaging in measures that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation [the executive power]'.[87]

It is 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'.

Therefore, the committee has also requested the advice of the minister in relation to the legislative authority for this initiative.

As the federal election was called shortly after the tabling of this report the committee has not yet received a response to these requests. However, it would seem likely that, in keeping with past practice, the Regulations and Ordinances Committee will write to ministers in the new Parliament to request a response on matters previously raised.

In considering the wide scope of Commonwealth executive spending, Saunders notes:

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[85] Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 1) Regulation 2016 [F2016L00513], Explanatory statement, 6.

[86] *Williams (No. 2)* (2014) 252 CLR 416, [46].

[87] Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 1) Regulation 2016 [F2016L00513], Schedule 1, table item 145

> 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.[88]

The Regulations and Ordinances Committee's scrutiny of additions to the list of spending schemes made by disallowable instruments, under section 32B of the FMA Act (now FF(SP) Act), is critical to the Parliament's 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.[89]

C *Section 96 grants to the States*

1 *Section 96: constitutional background and history*

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 (i.e. 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'.[90]

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.[91] 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

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[88] Cheryl Saunders and Michael Crommelin, *MEANJIN Quarterly*, Reforming Australian Federal Democracy, Volume 74, Number 3, 2015.

[89] 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] (the matter remained under examination at the end of the reporting period and was concluded in Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 13 2015 (13 October 2015)).

[90] Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011) 241.

[91] *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').

> 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.[92]

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'.[93]

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'.[94]

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 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.[95]

2 *Section 96: contemporary use*

In 2016-17 the Commonwealth proposes to make grants of $116.5 billion to the States and Territories (this includes $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.[96]

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[92] Saunders, above n 91, 242.

[93] John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 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': *Convention Debates*, 17 February 1898, 1119 (John Cockburn, South Australia).

[94] Ibid 870–871.

[95] Cheryl Saunders, 'Towards a theory for section 96: Part 1' (1987) 16 *Melbourne University Law Review* 1, 18.

[96] Commonwealth of Australia, *Federal Financial Relations*, 2016-17 Budget Paper No. 3.

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.[97]

3 *Section 96 grants and the Scrutiny of Bills Committee*

In recent years, the Scrutiny of Bills 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.[98] 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. Specifically, the Minister may determine:

- conditions under which payments to the States may be made; and
- the amount and timing of the payments.[99]

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). The committee has therefore noted that this standard provision is relevant to the committee's role in reporting on whether a bill:

- delegates legislative powers inappropriately (Senate standing order 24(1)(a)(iv)); and
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny (Senate standing order 24(1)(a)(v)).

In 2015 the committee noted the complexity of the various regimes under which money is granted to the States under section 96 and therefore requested that additional explanatory material be included in future explanatory memoranda. In particular, the committee requested:

- additional explanatory material in relation to operation of the standard provision; and
- the inclusion of detailed information about the particular purposes for which money is sought to be appropriated for payments to State, Territory and local governments.

As a result of the committee's request, some further information explaining the operation of the provision has been included in explanatory memoranda accompanying recent appropriation bills. The committee noted that the information 'goes some way to providing further clarity to Senators in relation to the appropriation of money for, and the attachment of conditions to, payments to the

[97] Daniel Weight, Commonwealth Parliamentary Library, *Parliamentary scrutiny of payments to the states and territories* (2015).

[98] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Seventh Report of 2015,* 12 August 2015, 511–516; *Ninth Report of 2015*, 9 September 2015, 611–614; *Fifth Report of 2016*, 3 May 2016, 352–357.

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

States and Territories'. However, the committee considered that the particular purposes to which the money will be directed remained unclear.[100]

Therefore, in its most recent consideration of this matter, the committee:

- took the opportunity to reiterate the fact 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 (e.g. through questioning in Senate estimates or the chamber).

In light of these comments, the committee sought the Minister's advice as to:

- whether future Budget documentation could include general information about:
    - the statutory or other provisions 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 following information in their portfolio budget statements where they are seeking appropriations for payments to the States, Territories and local government:
    - 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);
    - the specific statutory or other provisions which detail how the terms and conditions to be attached to the particular payments will be determined; and
    - the nature of the terms and conditions attached to these payments.[101]

[100] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fifth Report of 2016*, 3 May 2016, 353.

As the federal election was called shortly after the tabling of this report the committee has not yet received a response to these requests.

The committee's comments in relation to this matter have informed debate in the Senate. For example, on 23 June 2015 Senator David Leyonhjelm (Liberal Democrats, New South Wales) drew on the committee's work in his second reading speech to Appropriation Bill (No. 2) 2015-2016. In the speech he noted that the 'Senate has a particular responsibility to scrutinise capital spending, grants to the States and spending on new policies'. He further noted that the 'very strong power' given to the Parliament under section 96 (to determine terms and conditions applying to grants to the States) was being delegated to the minister and that determinations made under this delegated power are not subject to disallowance by the Parliament. Noting this very significant delegation of parliamentary power to the executive, Senator Leyonhjelm stated that:

> It is bad enough that the Commonwealth uses section 96 of the Constitution to undermine the Federation; it is unforgivable that this could occur at the whim of a minister, without parliamentary scrutiny. This is a centralisation of power that would put the Soviet Union to shame.[102]

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. It is likely that the committee will continue its dialogue with the government in the future with the aim of ensuring that at least a minimum level of information in relation to grants to the States is readily and easily available in order to enable Senators to determine whether further inquiries about such grants are warranted (e.g. through questioning in Senate estimates or the chamber).

V 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 available to the Commonwealth Parliament has evolved since federation, the constitutional framework continues to protect States' interests. 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.

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[101] Ibid 357.

[102] Commonwealth, *Parliamentary Debates*, Senate, 23 June 2015, 4265–4267. On the same day 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, 2774–2775. 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, 2308–2310.

It is often said that scrutiny committees work 'behind the scenes' as they do not examine the policy merits of legislation nor do they (as committees) formally move amendments or disallowance motions to bills or legislative instruments with any frequency.[103] Instead, they operate to ensure that Australian legislation conforms to certain principles relating to civil liberties and parliamentary scrutiny which underpin the rule of law and separation of powers in the Australian system of government. As has been demonstrated, the work of the scrutiny committees in 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, shows the real capacity of the committees to safeguard federalism and the constitutional rights of the Senate.

[103] The Senate last disallowed an instrument on the instigation of the Senate Standing Committee on Regulations and Ordinances in 1988. See Senate Standing Committee on Regulations and Ordinances, *40th Parliament Report, 112th Report* (June 2005), 10. Of course, amendments are sometimes moved by the government or other Senators as a result of scrutiny committees' comments: for examples of government amendments moved directly in response to the Scrutiny of Bills Committee's comments on recent national security and counter-terrorism legislation see Senate Standing Committee for the Scrutiny of Bills, *The work of the committee in 2014* (March 2015) 13, 22–25.

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