

24 January 2019

Senate Standing Committee on Regulations and Ordinances

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Parliament House

Canberra ACT 2600

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Dear Secretary

**Re: Parliamentary Scrutiny of Delegated Legislation Inquiry**

Thank you for the opportunity to make a submission to the Senate Standing Committee on Regulations and Ordinances. We are writing this submission in our capacity as academics at the Faculty of Law, University of New South Wales. We are solely responsible for the views and content in this submission.

Our submission addresses four aspects of the remit of that inquiry:

- **First**, we make a number of recommendations that relate to the Committee's scrutiny of instruments made under broadly framed delegations of power that require matters of substance and policy to be determined by the delegated decision-maker. In this respect, we make three recommendations:
  - (a) Amend the Committee's terms of reference to require the Committee to report on substantive policy issues while accommodating the commitment to non-partisanship;
  - (b) Amend the Committee's terms of reference to introduce a more formalised and resourced procedure for public comment in relation to these instruments;

- (c) Introduce, through amendments to the Prime Minister and Cabinet’s Legislation Handbook and the terms of reference of the Scrutiny of Bills Committee, affirmative resolution procedures in legislation that contains broadly framed delegations where the delegated instrument will immediately affect individual rights and obligations; and
  - (d) Amend the Office of Parliamentary Counsel’s Directions on Subordinate Legislation, and the terms of reference of the Senate’s Scrutiny of Bills Committee and the Senate’s Regulations and Ordinances Committee to ensure that any broadly framed delegations are in the form of regulations so as to require that they are given appropriate attention by the Office of Parliamentary Counsel.
- **Second**, we make three recommendations to improve the process for the scrutiny of instruments that authorise appropriations and executive expenditure. We recommend that:
    - (a) the Finance Minister’s Determination under the Advance to the Finance Minister in the Appropriations Act (No 1), and the Finance Minister’s determination to waive Commonwealth Debts be made disallowable instruments;
    - (b) an affirmative resolution procedure be introduced in legislation delegating the power to authorise executive expenditure; and
    - (c) a separate scrutiny procedure be introduced through the creation of a new sub-committee of the Committee for delegated instruments authorising appropriations and executive expenditures.
  - **Third**, we make two recommendations as to the Committee’s role in scrutinising the constitutional validity of delegated instruments:
    - (a) the Committee’s terms of reference be amended so as to include ‘issues that go to constitutional validity’ as part of its general scrutiny function; and
    - (b) the Committee introduce new Guidelines that explain the relevance of constitutional authority and limitations in its scrutiny of delegated instruments.

### **Part 1: Scrutiny of instruments under broadly framed substantive delegations**

This submission addresses a change in the style of legislation, and particularly the increase in skeletal primary legislation that contains broadly framed delegations that relate to substantive policy issues.<sup>1</sup>

War powers have always done this, but in peace time, there was a general understanding that it was *inappropriate* to leave issues of policy and substance to the making of secondary

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<sup>1</sup> However, we accept that the delegation of policy and substantive issues is not an exclusively contemporary phenomenon. The delegation under the *Transport Workers Act 1928* (Cth), which was unsuccessfully challenged in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 (*Dignan’s Case*) is an example of a broadly framed discretion that required substantive policy choice by the delegated decision-maker.

legislation. Primary legislation could (and often did) contain matters of fine detail, and even highly technical matters such as prescribed forms that now appear largely in secondary legislation. However, the generally accepted understanding was that primary legislation should not delegate to the Executive the power to address substantive matters in secondary legislation. In essence, Parliament decided the larger matters, whilst the Executive attended to the matters of detail by promulgating secondary legislation.

The Senate Standing Orders that establish the terms of reference for the Committee reflect that original understanding. Rule 23 of the Senate Standing Orders provides the terms of reference for the Standing Committee on Regulations and Ordinances. It is convenient to quote just one part of that Rule:

3. The committee shall scrutinise each instrument to ensure: ...
4. that it does not contain matter more appropriate for parliamentary enactment ...

Rule 24 of the Senate Standing Orders provides the terms of reference for the Standing Committee for the Scrutiny of Bills, which contains a similar provision attaching to the scrutiny of primary legislation:

1. ... [the] Committee ... shall ... report, ... whether ... bills or Acts, by express words or otherwise:
4. inappropriately delegate legislative powers ...

In this respect, the remit of the two committees continues to make sense only if one assumes the continuation of the original understanding, namely, that it would be *inappropriate* for matters of policy or substance to be contained in secondary legislation.

However, the original understanding has become increasingly eroded. Skeleton Acts are increasingly common. Regulatory legislation, for example, will establish a regulatory body, prescribe the criteria for its membership, and stipulate its line of accountability. It will typically grant wide powers, but stipulate very few duties beyond those of reporting to the relevant Minister. The Act will often set out a list of extremely broad goals and functions for the new regulatory body, but the critical provision is typically found towards the end of the Act; this will be a power to make secondary legislation such as is ‘necessary or convenient’.

Both Committees regularly report concerns to the Senate of a perceived breach of the principle against inappropriate delegation. However, the Committee’s work in drawing these concerns to the attention of the Senate on a case by case basis, even where the Committees both express concern about the legislation, is insufficient to address the proliferation of these instruments. As such, we make a number of recommendations to the role of the Committees in relation to these types of delegations.

In this submission, we are not advocating the more radical position that the practice of skeleton legislation should be abandoned.<sup>2</sup> We start from the pragmatic position that accepts both the prevalence of modern practice, and that there can be good reasons for leaving articulation of policy and substance to a time after the primary legislation has been enacted. However, we

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<sup>2</sup> Although see a constitutional argument for this position in Gabrielle Appleby and Joanna Howe, ‘Scrutinising Parliament’s Scrutiny of Delegated Legislative Power’ (2015) 15 *Oxford University Commonwealth Law Journal* 3.

submit that it is time to acknowledge the prevalence of secondary legislation that is laden with policy, and make corresponding adjustments to the role of the relevant scrutiny committees.<sup>3</sup>

### **(a) Reporting substantive policy issues while accommodating the commitment to non-partisanship**

The fundamental premise of the two Senate committees relevant to this submission is that they operate best in a non-partisan spirit. However, serious scrutiny of policy and substance is unlikely to be achieved in that spirit. It is important, therefore, to develop a framework that prompts the Regulations and Ordinances Committee to report policy and substantive concerns to the chamber, whilst not embroiling them in party-political divisions. We therefore recommend that there be an additional term of reference in the Regulations and Ordinances Committee to report, in a neutral and non-partisan manner, the substantive policy choices that are evident in instruments made under broadly framed delegations.

The additional term of reference which we propose would enable the Committee to report to the Senate in a descriptive style, laying out the contending positions on policy, and leaving the Senate with the option of affirming or disallowing the regulation.

To achieve this, it would be necessary to resource the committee with research assistance, and it is submitted that the Parliamentary Library's *Bills Digest* system is ideally adaptable to assisting the Committee to write party-neutral descriptions of policy-laden secondary legislation. The *Bills Digests* are written by talented and dedicated researchers, and they are always careful to describe rather than advocate. There would, of course, be resource implications, but there would be no need to establish a new, stand-alone, body to assist the committee under this recommended reference.

This would reflect the position that was suggested in 2016 in New South Wales. The New South Wales Select Committee on the Legislative Council System suggested the establishment on a trial basis of a new committee to report on matters of substance contained in just a few items of secondary legislation.<sup>4</sup> The recommendation was for a committee of equal numbers of government and opposition members, plus two cross-benchers. It also recommended substantial administrative and research support. It is not clear whether that would sufficiently address the volume of substantive regulations, nor whether it would succeed in avoiding party-political divisions.

### **(b) Introduce a more formalised and resourced procedure for public comment**

The modern reality of secondary legislation being used to articulate substantive policy choices is that secondary legislation is often the direct source of individual legal rights, interests and

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<sup>3</sup> See M Aronson, 'Subordinate legislation: lively scrutiny or politics in seclusion' (2011) 26 *Australasian Parliamentary Review* 4-19.

<sup>4</sup> Legislative Council, *Select Committee on the Legislative Council System*, 2016.

obligations. These rights, interests and obligations, often reflect the balance the Executive has struck between competing policy objectives and the interests of different groups. Where an administrative decision (ie the application of law to an individual's circumstances) will directly affect an individual's interests, the decision-maker is usually required to give that individual a fair hearing. However, where interests will be altered by legislation (including secondary legislation), the Executive usually has no judicially enforceable legal duty to consult affected individuals, regardless of how small the class of individuals affected will be—even if it is only one person or company.<sup>5</sup>

Recognising that individuals, industries, companies and groups should have a input into decisions that directly affect them, even when those decisions are in the form of subordinate legislation, the *Legislation Act 2003* s 17 introduced a principle that instrument-makers should undertake appropriate consultation. The principle is not mandatory and does not affect the validity of secondary legislation.

The Committee's Guideline on Consultation explains that instrument-makers should explain the consultation that was undertaken, or the reasons for not consulting, in the explanatory statement accompanying the instrument. The Committee frequently requests further information from instrument-makers where this has not occurred. However, the Committee relies on the Executive's views as to the appropriateness and adequacy of consultation with those who will be directly affected by secondary legislation.

While it is within the current terms of reference, the Committee does not usually seek public comment on instruments itself. This reflects its historical role as a technical scrutiny committee rather than one which engages with the substantive policy reflected in secondary legislation. In this respect the Committee differs from some other Senate Committees which routinely seek public comment in their inquiries into Bills.

We submit that, given the modern reality of secondary legislation being used to articulate substantive policy and as a source of substantive legal rights, interests and obligations, it is appropriate in certain circumstances for the Committee to seek public comment on secondary legislation.

The circumstances in which it may be appropriate for the Committee to seek public comment include where:

- the instrument has a significant and immediate impact on the legal rights, interests or obligations of defined persons, groups of persons, companies or industries;
- the instrument reflects a substantive policy choice by the Executive, such as the balancing of competing interests;
- the Committee is not satisfied that the Executive has adequately consulted all of those persons, groups of persons, companies or industries likely to be affected by the instrument; and

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<sup>5</sup> See further Andrew Edgar, 'Administrative Regulation-Making: Contrasting Parliamentary and Deliberative Legitimacy (2017) 40 *Melbourne University Law Review* 738, who compares the Australian position with that in the US.

- the Committee considers it appropriate to seek public comment on the instrument.

We recommend that the Committee's terms of reference be changed to explicitly indicate it should inquire into instruments including, where appropriate, seek public comment on them. In order for the Committee to have sufficient time to seek public comment, it may be necessary to extend the time for disallowance, or affirmative resolution (discussed below) by the Senate.

### **(c) Adopting an affirmative resolution procedure**

The Parliament of the United Kingdom has tended to approach the issue of broadly framed delegations at the Bill stage. Statutes in that jurisdiction provide a number of different ways in which the Parliament's committee system handles delegations. Some Statutory Instruments (SIs) receive no scrutiny at all. Others are not disallowable, although some of them must be laid before each House. Yet others are disallowable by a process roughly similar to that which operates in Australia. However, the process of interest to this submission is one in which some SIs come into effect (or, in some cases, remain in effect) only upon an *affirmative resolution* of each House (or of the House of Commons in the case of finance matters).

It is submitted that the affirmative resolution procedure might usefully be adopted for some Commonwealth skeleton Acts that require substantive policy decision-making, and in particular, where the delegated instrument will have an immediate effect on the substantive rights or obligations of individuals.

We recommend accordingly:

- the Prime Minister and Cabinet's Legislation Handbook be amended to recommend an affirmative resolution procedure is included in legislation that contains broadly framed delegation with the capacity to have immediate effects on the substantive rights or obligations of individuals; and
- the Terms of Reference of the Scrutiny of Bills Committee be amended to include 'that, where it contains a broadly framed delegation with the capacity to have immediate effects on the substantive rights or obligations of individuals, it contains an affirmative resolution procedure'.

### **(d) Ensuring drafting standards in delegated instruments**

In late 2014, the Regulation and Ordinances Committee issued a report on a practice that moved away from primary legislation delegating through regulations towards the delegation via rules.<sup>6</sup> A similar concern was noted by the Scrutiny of Bills Committee in 2015.<sup>7</sup> This appears to have been predicated on an attempt by the Office of Parliamentary Counsel (OPC) to reduce its workload in drafting regulations, as rules are not drafted by the OPC. Serious

<sup>6</sup> Senate Standing Committee on Regulations and Ordinances, 'Delegated Legislation Monitor 17 of 2014' (3 December 2014) 6–24 and Appendix 1. Commenting on Office of Parliamentary Counsel, 'Drafting Direction No 3.8: Subordinate Legislation' (Document released July 2017) [2], [30].

<sup>7</sup> Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, 11 February 2015, pp. 21–35.

concerns have been expressed by the Committee and commentators that the use of rules rather than regulations avoids important scrutiny both through the OPC and the approval that is then required by the Executive Council.<sup>8</sup>

The OPC's current Directions state that drafters should use legislative instruments other than regulations unless there is a good reason to do so, except in certain instances where the instrument contains offence provisions, powers of arrest and detention, entry provisions, search provisions, seizure provisions, civil penalties, imposition of taxes, sets an amount of an appropriation, or amends the text of the Act. In these cases, the material should be included in regulation 'unless there is a strong justification' for using another instrument.<sup>9</sup> The Directions indicate that if an instrument other than a regulation is used for such matters this should be discussed with the First Parliamentary Counsel.<sup>10</sup>

However, serious concerns continue to be expressed by the Committees that significant matters are being delegated through the instrument of legislative rules. As the Committee explained, the role of the OPC in drafting regulations 'may be seen (from a parliamentary scrutiny perspective) as a necessary accompaniment to the exercise of Parliament's broadly delegated legislative power.'<sup>11</sup>

In light of these concerns, we recommend three reforms, including providing more explicit and sustained scrutiny of this development while acknowledging that the Committees have already been providing ongoing scrutiny of it:

- an amendment to the Office of Parliamentary Counsel's Drafting Directions on Subordinate Legislation to require that all delegations that contain delegations of substantive policy are made in the form of regulations;
- an amendment to the terms of reference of the Scrutiny of Bills Committee that explicitly includes the scrutiny of the form of delegated instrument to ensure that any broadly framed delegations are in the form of regulations;
- an amendment to the terms of reference of the Regulations and Ordinances Committee that explicitly includes the scrutiny of the form of delegated instruments. This second tier of scrutiny will have the advantage of being informed by the use of instruments to implement substantive policy issues, providing evidence as to whether the correct form of instrument has been chosen.

## **Part II: Sub-committee on delegated appropriation and spending authorisations**

In addition to its law-making role, the Parliament exercises important supervisory, or accountability roles in giving effect to the principle of responsible government. Most of these

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<sup>8</sup> Stephen Argument, 'The Use of "Legislative Rules" in Preference to Regulations" A "Novel" Approach?' (2015) 26 Public Law Review 12.

<sup>9</sup> Office of Parliamentary Counsel, 'Drafting Direction No 3.8: Subordinate Legislation' (Document released July 2017) [2], [3].

<sup>10</sup> Ibid [30].

<sup>11</sup> Senate Standing Committee on Regulations and Ordinances, 'Delegated Legislation Monitor 17 of 2014' (3 December 2014) 11.

relate to taxation and the expenditure of money. In relation to taxation, a satisfactory position has been reached where Parliament can delegate its power to authorise the imposition of taxes to the executive, but the courts will require clear legislative language. There is less clarity in relation to the supervision of appropriations and the authorisation of expenditure.

The Department of Prime Minister and Cabinet's Legislation Handbook recognises that there are some constitutional functions of the Parliament that ought not to be delegated, and these include appropriations of money, an explicit responsibility of Parliament in section 83 of the Constitution. Generally speaking, this position is respected. However, some have argued that the trend to primary legislation authorising the use of outcomes-based appropriations results in a lack of detail and guidance as to what is being authorised.<sup>12</sup> Further, it is increasingly common for the appropriation to be contained in the primary legislation, but the amount of the appropriation to be set by delegated instrument.

Two other significant concerns have arisen with respect to appropriations following recent events. The first is in relation to what is known as the 'Advance to the Finance Minister', contained in the annual *Appropriation Act [No 1]*. This was the appropriation relied on by the government in 2017 to fund the marriage equality plebiscite under the *Census and Statistics Act 1905* (Cth), and its exercise was subject to unsuccessful challenge in *Wilkie v Commonwealth*.<sup>13</sup> The advance allows the Finance Minister to decide, by Determination, to allocate appropriated funds where the Minister is satisfied there is an urgent and unforeseen need for that expenditure. In relation to the 2017 Determination, this decision was taken despite the Senate having explicitly rejected a legislative attempt to authorise a plebiscite on same-sex marriage. A Determination under the Advance to the Finance Minister is a legislative instrument, but not subject to disallowance (and therefore not subject to Committee scrutiny) and sun-setting under s 42 and Part 4, Chapter 3, of the *Legislation Act*.

The second concern has arisen in relation to the Finance Minister's power under s 63 of the *Public Governance, Performance and Accountability Act 2013* (Cth) to waive debts to the Commonwealth. This has been exercised in recent high profile matters, including the waiving of the debt of the chaplaincy providers to the Commonwealth after the High Court struck down the National School Chaplaincy Program; and the waiving of debts owed to the Commonwealth where individuals are found to be disqualified from nominating for election as members of Parliament under section 44, but have been subsequently found by the High Court to be ineligible. While framed as a waiver of a debt to the Commonwealth, the Finance Minister is, in effect, providing an authorisation for a prior payment made to the individual. However, this authorisation is explicitly deemed not to be a legislative instrument.

Finally, there are concerns relating to the practice of delegating the authorisation of executive expenditure, as distinct from appropriations. In 2012, the High Court held that in addition to the requirements of an appropriation, responsible government dictated a further requirement

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<sup>12</sup> This form of appropriations has been approved as constitutionally valid by the High Court in *Combet v Commonwealth* (2005) 224 CLR 494.

<sup>13</sup> (2017) 91 ALJR 1035.



for legislative authorisation of executive expenditure.<sup>14</sup> Unlike in relation to the practice for appropriations, Parliament responded to this decision by delegating that authorisation in section 32B of the (now) *Financial Framework (Supplementary Powers) Act*. The often significant amounts of expenditure for important Commonwealth programs are now authorised in regulations made pursuant to this provision. There remains some uncertainty as to the constitutional validity of such delegations, but these have not been addressed or resolved by the Court.<sup>15</sup> Under the scheme, the Regulations and Ordinances Committee has taken a particularly important role in the scrutiny of parliamentary authorisation of expenditures that is constitutionally mandated.

In light of these developments, and building on the excellent work that the Regulations and Ordinances Committee already undertakes in its scrutiny of delegated expenditure authorisations following the *Williams v Commonwealth (No 2)*,<sup>16</sup> we recommend:

- (a) the Finance Minister's Determination under the Advance to the Finance Minister in the *Appropriations Act (No 1)*, and the Finance Minister's determination to waive Commonwealth debts under s 63 of the *Public Governance, Performance and Accountability Act 2013* (Cth) be made disallowable instruments;
- (b) an affirmative resolution procedure be introduced in legislation delegating the power to authorise executive expenditure under s 32B of the *Financial Framework (Supplementary Powers) Act*; and
- (c) that there be created in the Committee's terms of reference a sub-committee responsible for scrutinising delegation of appropriation determinations, the exercise of the Advance to the Finance Minister and the waiver of Commonwealth debts, and scrutinising delegated authorisations of expenditure.

We believe that the establishment of a separate sub-committee will achieve three objectives. First, it will heighten awareness of the importance of this dimension of the Committee's work. Second, it will demonstrate the distinct constitutional function that is being undertaken when scrutinising these instruments. Finally, it will allow for specific financial expertise to develop in relation to financial matters. The creation of a separate sub-committee will also justify the deployment of additional resources to assist the Committee in conducting this scrutiny.

### **Part III: The Committee's role in scrutinising the constitutional validity of delegated instruments.**

The Committee's terms of reference currently do not explicitly include scrutiny of the constitutional validity of delegated instruments. The Committee has, however, interpreted

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<sup>14</sup> *Williams v Commonwealth (No 1)* (2012) 248 CLR 156.

<sup>15</sup> See these concerns raised in Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253, 279.

<sup>16</sup> *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416.

rule 23(3)(a), which requires the Committee to ensure instruments are made in accordance with the statute, as encompassing scrutiny of constitutional validity.

Requirements for explanation of constitutional validity are not regularly required, however, except in relation to one instance. Since the High Court's decision in *Williams (No 2)*,<sup>17</sup> the Committee has taken a more active role in requiring an explanation of validity in relation to instruments that authorise executive expenditure through amendments to Schedule 1B of the *Financial Framework (Supplementary Powers) Regulations 1997*. Guidelines issued by the Committee state that:

... the committee requires ESs for all regulations which add items to Schedule 1AB to the FF(SP) regulations to explicitly state, for each new program or grant, the **constitutional authority** for the expenditure.

Specifically, the committee expects the ES to include a clear and explicit statement of the relevance and operation of each **constitutional head of power** relied on to support a program or grant; and where numerous constitutional heads of power are identified as supporting elements of a program or grant the committee expects the ES to include sufficient information about the link between each aspect of the constitutional authority relied on and the substance of the new program or grant.

[emphasis added]

We applaud the Committee for its proactive embrace of its role as a responsible constitutional agent of the legislature. As has been argued in greater detail elsewhere, legislators have an independent responsibility to consider the constitutional validity of their actions, including in the passage of legislation, based on foundational concepts of the rule of law and constitutionalism coupled with pragmatic concerns of avoiding legislation being struck down for lack of validity.<sup>18</sup>

We make two further recommendations that will further the Committee's role in achieving this responsibility: first, to extend the express scrutiny for constitutional authority, and second, to state more explicitly the relevance of constitutional authority for scrutiny of legislative action.

First, while we acknowledge that the Committee might have a more general obligation to scrutinise the constitutional authority for the exercise of delegated legislative power within rule 23(3)(a), we believe it would benefit from more explicit articulation and more general application by the Committee beyond the scrutiny of expenditure authorisation. The particular form by which expenditure authorisation has been delegated with such breadth in s 32B of the *Financial Framework (Supplementary Powers) Act* raises serious constitutional questions as to the locus of the constitutional head of power (the question that was raised in *Williams (No 2)*). However, there are other broadly framed delegations that raise similar

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<sup>17</sup> *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416.

<sup>18</sup> See further Gabrielle Appleby and Adam Webster, 'Parliament's Role in Constitutional Interpretation' (2013) 37(2) *Melbourne University Law Review* 255; and Gabrielle Appleby and Anna Olijnyk, 'Constitutional Deliberation in the Legislative Process' in Ron Levy and Graeme Orr (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018).

questions. Other exercises of a delegation raise questions as to the encroachment of the instrument on constitutional limitations such as the implied freedom of political communication.<sup>19</sup>

More explicit and generally applied constitutional scrutiny could be achieved through an amendment to the Committee's terms of reference or, failing that, through the issue by the Committee of a new guideline asking for all Explanatory Statements to include sufficient information about the constitutional validity of the delegated instrument which will include both the link to a constitutional head of power as well as an explanation of how the exercise does not impermissibly breach a constitutional protection such as the implied freedom of political communication.

Second, while we believe that the Committee's advances in requiring a statement of constitutional authority in relation to all delegated expenditure authorisations is a positive development, we would encourage the Committee to be more explicit in its guidelines as to how it will consider those statements.

In summary, we recommend:

- the Committee's terms of reference be amended so as to include 'issues that go to constitutional validity' as part of their general scrutiny function; and
- the Committee introduce new Guidelines that explains the relevance of constitutional authority and limitations in its scrutiny of delegated instruments.

Yours sincerely,

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<sup>19</sup> See, eg, *Wotton v Queensland* (2012) 246 CLR 1; *Attorney-General (SA) v City of Adelaide (Street Preachers Case)* (2013) 249 CLR 1.