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15 March 2026

Legal and Constitutional Affairs Committee
Legislative Assembly of the Northern Territory

Submitted by e-mail to LA.Committees@nt.gov.au

Re: Inquiry into the Review of Historical Regulations

Dear Members of the Legal and Constitutional Affairs Committee,

Thank you for the opportunity to make a submission in relation to this inquiry.

I currently serve as the Legal Adviser to the Senate Standing Committee for the Scrutiny of Delegated Legislation. The views expressed in this submission are my own.

I understand that the Committee is inquiring into regulations made prior to 1990 in order to encourage the proactive management of delegated legislation.

Section 6 of the *Northern Territory (Self-Government) Act 1978* vests, subject to certain terms, the legislative power of the Territory in the Legislative Assembly. The Legislative Assembly is an elected and representative forum dedicated to the task of lawmaking. While it may delegate certain powers to the Executive Government, it remains lawmaker-in-chief for the Northern Territory. Regulations made under authority delegated by the Legislative Assembly are therefore an exercise of its legislative power. The Legislative Assembly retains the capacity to amend or repeal any such delegation of lawmaking power.

Because it is the source of legislative authority in the Northern Territory, the Legislative Assembly has an important responsibility to oversee the exercise of delegated lawmaking powers. This oversight may principally take place through a legislative committee, such as the Subordinate Legislation and Publications Committee, the functions of which are currently assigned to the Legal and Constitutional Affairs Committee, which examines and reports upon delegated legislation.¹

Such a committee performs a dual role. First, it helps to uphold minimum standards expected of all legislation in a democratic society founded on the rule of law. Second, it monitors the use of delegated legislative powers by the Executive Government and

¹ <https://parliament.nt.gov.au/committees/list/legal-and-constitutional-affairs-committee/LCAC-Terms-of-Reference-16-October-2024.pdf>

informs the legislature about how those powers are being exercised. In this way, the committee operates as the eyes and ears of the legislature, enabling it to remain aware of how its delegated powers are used and to determine whether any action may be required in relation to the relevant enabling legislation. This function is an important element of democratic accountability and transparency, achieved through the committee's regular reporting to the legislature.

I understand that the Northern Territory does not currently have a sunseting regime that applies generally to delegated legislation. This stands in contrast with other jurisdictions, such as the Commonwealth of Australia, where delegated legislation will ordinarily be repealed after 10 years by operation of Part 4 of the *Legislation Act 2003*. The regular sunseting of delegated legislation provides an important opportunity for the Executive Government to review the necessity and effectiveness of existing laws, particularly with the benefit of fresh public consultation. It also reduces the accumulation of delegated legislation that can result in a cluttered statute book. Maintaining a clear and orderly statute book promotes the accessibility of the law, making it easier for the public, practitioners and officials to identify and understand the legal rules that apply. A well-maintained body of legislation supports the rule of law principle that the law should be accessible and capable of being understood.

Sunseting also provides an opportunity to ensure that laws reflect evolving drafting conventions and language by allowing historical drafting to be updated in line with contemporary approaches. Over time, drafting practices, legislative language and structures evolve to improve clarity, consistency and accessibility. Older laws may therefore contain dated terminology or drafting approaches that are difficult for contemporary readers to understand. Such legislation may also have been interpreted by the courts in earlier cases that do not reflect contemporary circumstances or legal developments. A periodic review through sunseting therefore enables the Executive Government to modernise the language and structure of delegated legislation so that it aligns with current drafting standards and can more effectively achieve its intended purpose.

Perhaps most importantly, sunseting provides an opportunity for a legislative committee, such as the Legal and Constitutional Affairs Committee, to freshly scrutinise the instrument. Through this process, the committee may consider the instrument in light of its contemporary scrutiny principles and jurisprudence. As noted earlier, the committee also plays an important role in informing the legislature about the use of delegated lawmaking powers by the Executive Government. In this way, sunseting strengthens legislative oversight of delegated legislation through periodic review and promotes the accountability of the Executive Government to the legislature as the source of its lawmaking powers.

There is, of course, a resource implication associated with this work. However, it should be understood as an investment in strengthening the quality and accessibility of the law and in ensuring that the Legislative Assembly preserves its role as lawmaker-in-chief. Technology may also play an important role in assisting this task. In light of recent advances, including in artificial intelligence, the Northern Territory has an opportunity to position itself as a leader in exploring how such tools might assist with the operation of a new sunseting regime for delegated legislation. Used appropriately as a tool, technology may assist agencies during a transition period to a new sunseting regime and, once the regime is fully operational, help track instruments approaching their sunseting date.

Implementing a sunseting regime would likely require a cultural shift within agencies, as well as the development of internal systems within regulation-making bodies to ensure that sunseting periods are clearly understood and properly managed. Such systems would enable agencies to monitor upcoming sunseting dates, plan periodic reviews of existing instruments and ensure that any necessary replacement instruments are prepared in a timely manner.

I also note the following matters:

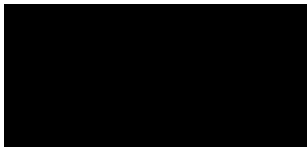
- It appears that there is a drafting practice in the Northern Territory to repeal amending regulations on the day following their commencement. This practice could raise questions about the legal effectiveness of disallowance. In my view, in the absence of a legislative framework clarifying that the legal effect of disallowance would be to reverse the relevant changes made by the amending instrument, consideration should be given to repealing such instruments only after the conclusion of the disallowance period. Allowing the instrument to remain in force for the duration of that period ensures that the Legislative Assembly retains a meaningful opportunity to exercise its disallowance power and more appropriately respects its role as lawmaker-in-chief.
- I understand that there is no legal requirement to publish regulatory impact statements or details of consultation undertaken in relation to delegated legislation. In the absence of such a requirement, the Legislative Assembly may wish to consider amending Standing Order 176(3) to add a scrutiny principle relating to consultation. For example, in relation to the Commonwealth of Australia, Senate Standing Order 23(3)(d) provides that the Senate Standing Committee for the Scrutiny of Delegated Legislation scrutinises all legislative instruments to determine whether 'those likely to be affected by the instrument were adequately consulted in relation to it'. The Senate Committee's *Guidelines* elaborate its expectations in this regard. Because delegated legislation does not go through the ordinary parliamentary process, consultation assumes particular importance for transparency and the quality of lawmaking. It is also good practice to ensure that those who are likely to be

affected by changes in the law are made aware of potential changes. To assist the Committee in scrutinising whether this has occurred, there should be a public record associated with each instrument, such as an explanatory statement, indicating whether experts and those likely to be affected by the law were consulted, together with a summary of the issues raised and the response to those views.

I have enclosed a submission recently made by myself and my research assistant, Mohamad Dannaoui, to the Delegated Legislation Committee of the Legislative Council of New South Wales, which touches on some of these themes.

Thank you again for the opportunity to make this submission. I would be happy to discuss or elaborate on any aspect of it further.

Yours sincerely,



Professor Lorne Neudorf

Dean, La Trobe Law School

Legal Adviser to the Senate Standing Committee for the Scrutiny of Delegated Legislation

Encl.

1. Lorne Neudorf and Mohamad Dannaoui, *Submission to the Delegated Legislation Committee of the Legislative Council of New South Wales* (17 December 2025).



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17 December 2025

Delegated Legislation Committee
Legislative Council of New South Wales

Submitted by e-mail to dlc@parliament.nsw.gov.au

Re: Inquiry into the consolidation of the provisions of the *Interpretation Act 1987*,
Subordinate Legislation Act 1989 and *Legislation Review Act 1987* relating to
delegated legislation

Dear Members of the Delegated Legislation Committee,

Thank you for the opportunity to make a submission in relation to this inquiry.

The process by which delegated legislation is made and subject to meaningful parliamentary oversight is more important than ever. The majority of new law in Australia is not made by elected and representative legislatures. Instead, it is made by the executive government under delegated authority.

Information published on the NSW legislation website, which is managed by the Parliamentary Counsel's Office, makes clear that the volume of delegated legislation made in New South Wales far exceeds that of legislation enacted by the Parliament.

In 2024, the New South Wales Parliament enacted 96 statutes. In the same year, 332 statutory instruments¹ and 291 environmental planning instruments were made, producing a total of 623 delegated instruments. Measured by number alone, delegated legislation accounted for approximately 87 per cent of all New South Wales laws made in 2024.

The disparity is also evident when measured by legislative text. The 96 statutes comprised a total of 1,301 pages, whereas the 332 statutory instruments comprised 2,620 pages and the 291 environmental planning instruments comprised a further 1,050 pages. In total, delegated instruments accounted for 3,670 pages. On this basis, delegated instruments comprised approximately 74 per cent of the total legislative text made in New South Wales in 2024.

By either measure, the conclusion is clear. The overwhelming majority of New South Wales law is made in the form of delegated legislation.

¹ Proclamations have been excluded from this total.

2024 NUMBER OF LAWS MADE IN NEW SOUTH WALES

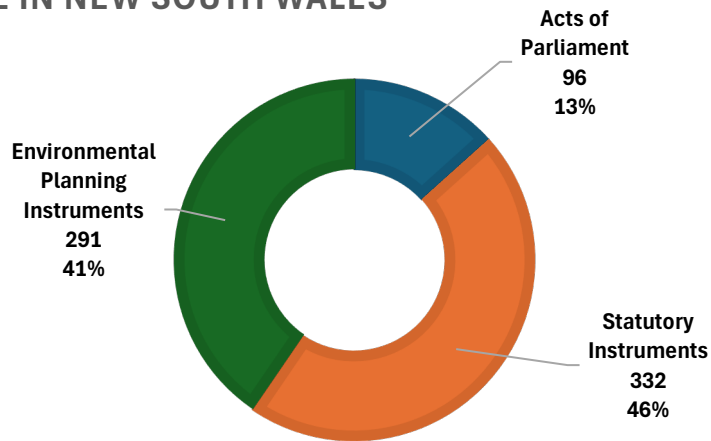


Figure 1: Number of Laws Made in New South Wales in 2024 by Type

2024 PAGE COUNT OF LAWS MADE IN NEW SOUTH WALES

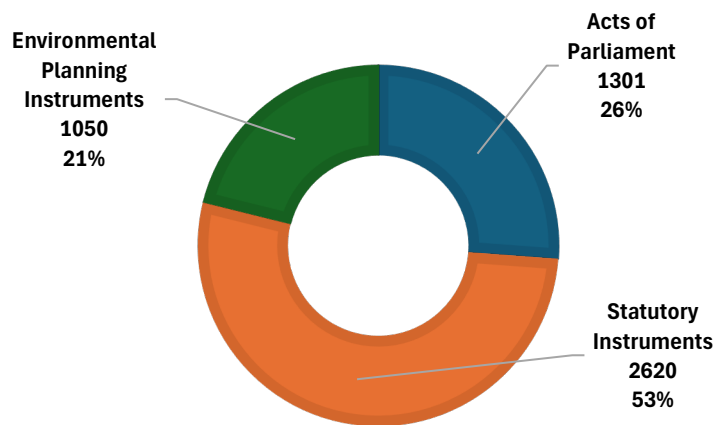


Figure 2: Page Count of Laws Made in New South Wales in 2024 by Type

The proliferation of delegated legislation makes both the processes by which it is made and the effectiveness of parliamentary oversight matters of increasing concern. In New South Wales, these issues are also ripe for reform. The current framework governing delegated legislation is fragmented across multiple statutes, creating unnecessary complexity and contributing to confusion, potential accountability gaps, and weaknesses in oversight.

The extent to which laws are made by the executive branch, rather than the legislature, also raises concerns about the constitutional role of the New South Wales Parliament as lawmaker-in-chief. The *Constitution Act 1902* provides that the legislature holds the ‘power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever’, subject only to provisions in the Commonwealth Constitution and, in relation to the appropriation of public revenue or rates or taxes, to requirements that such legislation originates in the Legislative Assembly. The legislature is entrusted with this broad power because of its institutional design as a forum devoted to the task of lawmaking, particularly its democratic and representative qualities.

In a system in which most of the law is made by delegates rather than by the legislature, questions arise as to whether Parliament is fulfilling its constitutional role. While Parliament retains legislative authority, it has conferred substantial amounts of lawmaking power on the executive. Parliamentary oversight therefore plays a critical role in supplying the legitimacy necessary to sustain this form of lawmaking in a democratic society.

One of the co-authors of this submission has recently written a book chapter that considers lessons learned from delegated legislation made by the Commonwealth during the COVID-19 pandemic. The chapter is enclosed for the Committee’s reference. In summary, it argues that while not every law can be expected to reflect the ideal of representative and democratic deliberation, the lawmaking system as a whole must maintain an acceptable democratic standard, which depends on both who makes the law and how it is made.

With these introductory comments, we now turn to the questions asked by the Committee in its discussion paper.

Question 1

What are the impacts of the overlapping definitions of a 'statutory rule' across the current legislative framework?

The legislative framework governing delegated legislation in New South Wales is spread across three Acts, each of which plays a role in establishing requirements for the making, commencement, publication, tabling, scrutiny, disallowance and sunseting of delegated legislation.

The use of overlapping but not identical definitions of the term 'statutory rule' across these Acts introduces unnecessary complexity. Although the definitions are similar, they are not the same. The existence of multiple definitions is inefficient and creates avoidable uncertainty for those responsible for making, administering and scrutinising delegated legislation. Where definitions are similar but not identical, there is a risk of misunderstanding or uneven application in practice. This may result in a particular instrument being treated differently under different Acts, and carries a risk of fragmentation in the operation of the delegated legislation framework.

From a rule of law perspective, this complexity is undesirable. Clear and coherent legal frameworks promote predictability and accountability.

There is also the potential for similar but slightly different definitions to give rise to divergent judicial interpretations over time. In any particular case, the relevant statute will be interpreted and applied to the facts at hand. Even small variations in statutory language can assume significance in the interpretive exercise and may create opportunities for distinguishing other definitions. This divergence would undermine the objective of a cohesive framework for delegated legislation.

The Commonwealth's framework for delegated legislation, by contrast, is based on a consolidated approach set out in the *Legislation Act 2003* (the 'Legislation Act'). That statute adopts an integrated approach to governing delegated legislation. While interpretive challenges are likely to arise under any statutory scheme, the Commonwealth model comparatively promotes greater certainty for those who make and administer legislative instruments, predictability for those subject to them, and accountability through oversight mechanisms such as disallowance.

A consolidated approach in New South Wales would better support these objectives and would strengthen the integrity of the framework governing delegated legislation.

Question 2

What are your views on the potential creation of a consolidated Legislation Act which would instead apply to 'instruments of a legislative character'? Do you think this is the right policy setting for the application of the three Acts?

Yes. A test of legislative character should form part of a consolidated framework governing delegated legislation in New South Wales to ensure that all delegated legislation is captured and subjected to that framework. A legislative character test focuses on the substance of an instrument rather than the form in which it is made. It directs attention to the content and legal effect of the instrument, rather than to its label or the process by which it is made. This is particularly important in the context of delegated legislation, where instruments made under different enabling Acts may be described and made in a variety of ways. A test of legislative character cuts through these differences and operates as the gateway to the application of important oversight, accountability and transparency mechanisms that should apply to delegated legislation as minimum standards.

At the Commonwealth level, subsection 8(4) of the Legislation Act includes a test of legislative character for the classification of federal instruments as 'legislative instruments'.² Where an instrument meets that test, it is ordinarily subject to the full suite of requirements under the Act, including those relating to consultation, registration, tabling, explanatory statements, disallowance and sunseting. Registration is also a condition of a legislative instrument's enforceability.

While a test of legislative character is, on balance, to be preferred over a formalistic approach, it has the potential to provide less certainty.

The first question concerns how legislative character is to be defined and applied in practice. While many cases will be clear, there will inevitably be instruments that sit close to the boundary between legislative and administrative action. Courts themselves have acknowledged the difficulty of this distinction. In *RG Capital Radio Ltd v Australian Broadcasting Authority*, for instance, the Full Court of the Federal Court of Australia observed that '[t]here is no simple rule for determining whether a decision is of an administrative or a legislative character'.³ In that case, the Court adopted a multifactorial approach, taking into account considerations such as whether the instrument laid down a rule of general application or applied an existing

² Subsection 8(4) of the Legislation Act provides that an instrument has a legislative character where it is made under delegated authority and determines or alters the content of the law, rather than merely applying the law to particular cases, and where it affects rights, obligations, privileges or interests.

³ *RG Capital Radio Ltd v Australian Broadcasting Authority* [2001] FCA 855, [40].

rule to a particular case, the extent of parliamentary control, publication and consultation requirements, the presence of broad policy considerations, the availability of merits review and whether the instrument had binding legal effect.

The complexity of a multifactorial approach to identifying legislative character raises an important institutional question: who is responsible for interpreting and applying the test? That question has significant consequences, because a determination that an instrument is not legislative in character is likely to remove it from the ordinary requirements that apply to delegated legislation under the relevant framework. For this reason, careful consideration should be given to the allocation of this responsibility, together with the provision of appropriate guidance, to ensure that determinations are made with integrity and are not motivated by a desire to avoid parliamentary oversight or other requirements applicable to delegated legislation. Further questions also arise as to whether such determinations should be subject to review, including independent administrative review or judicial review.

Even when these questions are resolved, the framework for delegated legislation may operate in ways that effectively short-circuit its own requirements through exemptions. This will occur, for example, where the framework authorises instruments that have a legislative character to be classified in another form with the effect of avoiding some or all of the ordinary requirements. At the Commonwealth level, the Legislation Act provides two main exemptions. First, it allows an instrument to be deemed not to be a legislative instrument even if it has a legislative character.⁴ This can be done through primary legislation or regulation and is a growing concern. Entire classes of instruments, in addition to particular instruments, are deemed not to be legislative instruments under the *Legislation (Exemptions and Other Matters) Regulation 2015*. In addition, as of writing, nearly 400 Commonwealth Acts deem certain decisions, determinations, notices, policies and other writings not to be legislative instruments, notwithstanding that they may have the force of law and would, in some cases, be legislative in character. Second, the Legislation Act creates a separate category of 'notifiable instruments', which are subject to fewer requirements than legislative instruments.

While full or partial exemptions to the ordinary requirements of the Legislation Act relating to delegated legislation may be intended to provide certainty in cases where the application of the legislative character test is unclear, their availability and extensive use raise questions about whether exemptions are applied in a principled manner.

⁴ Subsections 8(6) and 9(2) of the *Legislation Act 2003* make clear that an instrument may be deemed not to be a legislative instrument, even where it is legislative in character. The Act expressly provides that such deeming does not imply that the instrument is not, or must not be, of legislative character in the ordinary sense.

This issue has been considered by the Senate Standing Committee for the Scrutiny of Delegated Legislation. In its interim report on the exemption of delegated legislation from parliamentary oversight, the Committee noted that it was ‘concerned about the potentially inappropriate classification of emergency-related instruments as non-legislative’, and that evidence suggested that some instruments had been classified as not being legislative instruments ‘to circumvent parliamentary scrutiny mechanisms such as disallowance’.⁵ In its final report, the Committee recommended that the Legislation Act be amended to require that notifiable instruments must not be legislative in character.⁶

In its response, the government noted that this issue would be considered as part of a later review of the Legislation Act.⁷ That review subsequently concluded that ‘there is room for additional safeguards against inappropriate classification to be implemented’ and found that policy guidance should ensure that instruments that are legislative in character are classified as such ‘in all but the most exceptional circumstances’.⁸ The Legislation Act was not amended. The Parliamentary Counsel’s current drafting guidelines note that while there is an expectation that instruments meeting the legislative character test will be subject to the ‘full requirements’ of the Legislation Act, there may be a ‘special reason that justifies a full or partial exemption’.⁹

One of the co-authors of this submission has written further on the challenges with the Legislation Act’s legislative character test in a submission to the review of that Act, which is enclosed with this submission for the Committee’s reference.

A recent Commonwealth example illustrates these concerns. The 656-page Aged Care Act 2024 contains 39 instances where various writings are deemed not to be legislative instruments. In one case, the Act authorises the use of computer programs to take certain administrative actions through an ‘arrangement’, which is deemed not to be a legislative instrument. As a result, such arrangements will not be subject to the

⁵ Senate Standing Committee for the Scrutiny of Delegated Legislation, *Exemption of Delegated Legislation from Parliamentary Oversight* (Interim Report, Parliament of Australia, 2020) 84.

⁶ Senate Standing Committee for the Scrutiny of Delegated Legislation, *Exemption of Delegated Legislation from Parliamentary Oversight* (Final Report, Parliament of Australia, 2021) recommendation 11.

⁷ Australian Government, *Government Response to the Senate Standing Committee for the Scrutiny of Delegated Legislation, Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (Presented to the Senate, 18 November 2021) 8.

⁸ Attorney-General’s Department (Cth), *2021-22 Review of the Legislation Act 2003* (Report, June 2022) 41–42.

⁹ Office of Parliamentary Counsel (Cth), *Drafting Direction No 3.8: Subordinate Legislation* (Parliamentary Counsel, 9 December 2021) 12.

ordinary requirements of delegated legislation under the Legislation Act, including disallowance. They can be, however, subject to scrutiny by the Senate Standing Committee for the Scrutiny of Delegated Legislation.¹⁰ Given the risks of automated decision-making highlighted by the Royal Commission into the Robodebt Scheme, this approach raises concern.

In our view, however, it is important not to throw the baby out with the bathwater. The challenges associated with a legislative character test are, on balance, preferable to a formalistic approach. While formalism offers a degree of certainty, it is too rigid and can itself be manipulated by deliberately designing forms of delegated legislation to fall outside the scope of what is captured by the framework. The better approach for delegated legislation is a framework that seeks to capture all instruments that are legislative in nature. It should err on the side of inclusion in light of the importance of the requirements for delegated legislation that reflect a shared commitment to fundamental rule of values for legislating and provide for parliamentary oversight, recalling the Parliament's constitutional role as lawmaker-in-chief. Any departure from that framework should be narrowly construed, subject to a high threshold such as 'extraordinary circumstances', require clear justification, and be confined to particular cases rather than operating as broad or categorical exclusions. Such departures should also be subject to ongoing review and monitoring.

Question 3

How should we assess which instruments are of a legislative character, and what should the definition of 'instruments of a legislative character' be?

The Commonwealth framework under the Legislation Act provides an important starting point for establishing a definition of the legislative character test, which can be supplemented by the comparative study of other jurisdictions and case law. Please also see the response to Question 2 above.

Question 4

If a set of criteria were established to assess which instruments should be exempt from regulatory and scrutiny frameworks, what should that criteria consist of?

Any departure from the framework for delegated legislation should be subject to appropriate safeguards. This should include exceptions being narrowly construed, subject to a high threshold such as 'extraordinary circumstances', accompanied by a requirement for clear justification, and subject to ongoing review and monitoring.

¹⁰ Senate Standing Order 23(4A) permits the committee to scrutinise instruments made under Acts of the Parliament that are not subject to disallowance.

Please also see the response to Question 2 above.

Question 5

Should documents that are incorporated by an instrument of a legislative character be treated as an instrument of a legislative character and therefore be subject to regulatory and oversight requirements?

At the Commonwealth level, the scrutiny principles of the Senate Standing Committee for the Scrutiny of Delegated Legislation include documents that are incorporated by reference.¹¹ As set out in its Guidelines, the Committee will seek clarification in relation to the manner of incorporation (e.g., fixed at a certain date or from time-to-time), the legislative authority relied upon for incorporation and whether the incorporated content may be freely accessed and used.¹² Because it forms part of the law, content incorporated by delegated legislation should be subject to scrutiny by parliamentary committees in the ordinary way.

We would also suggest considering whether incorporated content should, as a matter of principle, be treated formally as delegated legislation and therefore subject to the ordinary requirements that apply to delegated legislation. While it is accepted that subjecting incorporated material to the full suite of requirements may reduce flexibility, particularly where technical standards or frequently updated documents are concerned, flexibility is not the only consideration. From the perspective of those subject to the law, there is no meaningful distinction between rules set out on the face of the instrument and rules incorporated from another source.

The danger of not taking this approach is that content may be incorporated into the law in order to give a run-around to the ordinary requirements for delegated legislation. Treating incorporated material as falling outside the delegated legislation framework creates a structural loophole. It allows substantive legal content to be given binding legal effect without being subject to essential requirements such as

¹¹ Senate Standing Order 23(3)(f) requires scrutiny of whether an instrument, and any material incorporated by it, can be freely accessed and used.

¹² Senate Standing Committee for the Scrutiny of Delegated Legislation, *Committee Guidelines* (3rd ed, July 2024) 19–20. Section 14 of the *Legislation Act 2003* authorises incorporation by reference in delegated legislation, but limits both the sources that may be incorporated and the manner of incorporation. Acts, certain legislative instruments and rules of court may be incorporated either as in force at a particular time or from time-to-time, whereas other instruments or writings may generally only be incorporated as in force at, or before, the commencement of the incorporating instrument. Ambulatory incorporation of such other material is not permitted unless authorised by the enabling legislation.

tabling, explanatory material or sunseting. This could undermine the coherence and integrity of the scrutiny framework.

We would submit that the preferred approach should be that, where incorporated material has legislative effect, the default position is that it is subject to the same requirements as other forms of delegated legislation. Any exemption from that position should be narrowly construed, require clear justification, and be accompanied by appropriate oversight.

Question 6

Should environmental planning instruments be treated as instruments of a legislative character and therefore be subject to regulatory and oversight requirements, for example, Regulatory Impact Statements and public consultation?

We understand that environmental planning instruments operate within a distinct statutory planning framework under the *Environmental Planning and Assessment Act 1979*, and that they are subject to their own procedural requirements, including public exhibition and consultation processes. We also recognise that planning law is a specialised area, and that environmental planning instruments may serve a range of functions, including the application of policy to particular local contexts.

That said, environmental planning instruments in New South Wales can be considered instruments of a legislative character in the sense that they create binding rules that shape how land may be used and developed across suburbs, local government areas and regions, and therefore have broader effects on communities rather than only individual landholders. Environmental planning instruments commonly operate through zoning, mapped controls and development standards that apply across wider areas and multiple landholdings. As a result, their legal effect is not confined to a single person or parcel of land but extends to the allocation of competing land uses and development opportunities across communities, with potential social, economic and environmental consequences that impact the rights and interests of both persons and communities more broadly.

On that basis, we would suggest that environmental planning instruments should, as a default position, be subject to the ordinary requirements that apply to delegated legislation, even where there are additional or overlapping requirements under the *Environmental Planning and Assessment Act 1979* or other enabling Acts. To the extent that modifications to those requirements are considered necessary, for instance where a requirement is duplicated, we would submit that such changes should be made within the relevant enabling Acts, rather than through exemptions

from the delegated legislation framework. It is helpful to think of that framework as supplying the bedrock or minimum requirements for delegated lawmaking that can be accepted in a democratic society founded on the rule of law. These should not be set aside lightly.

There may, however, be limited circumstances in which the application of all such requirements is not considered appropriate for particular planning instruments, having regard to their function, scope or interaction with existing planning processes. However, any departure from the ordinary requirements should be approached in the same way as exemptions under the delegated legislation framework more generally. Exemptions should be narrowly framed, clearly justified and be confined to particular cases. They should also be subject to ongoing review and monitoring.

We recognise that the availability of disallowance raises distinct considerations in the planning context, and that a previous inquiry of this Committee concluded that the case had not been made for environmental planning instruments to be subject to disallowance, noting concerns about potential uncertainty and inconsistency within the planning system. While disallowance may introduce a degree of uncertainty, it places executive lawmaking before the body to which it is ultimately accountable, as a delegate of Parliament's legislative authority. With an appropriately designed framework for delegated legislation, including the application of a suitably high threshold for disallowance, the risks identified by the Committee can be managed. In that sense, disallowance operates not as a routine planning control, but as an ultimate and likely exceptional accountability mechanism that reinforces Parliament's constitutional role and ensures that decisions with community impact remain subject to parliamentary control.

Question 7

Are there any other classes of 'instruments of a legislative character' not explicitly referred to in this discussion paper that should be exempt from any or all the requirements of the three Acts insofar as they relate to delegated legislation?

With the exception of rules of court to maintain the separation of powers, we do not propose any classes of instruments that should be automatically exempt. In our view, any departure from the framework for delegated legislation should be subject to appropriate safeguards as noted in the response to Question 2.

Question 8

Are Regulatory Impact Statements (RIS) effective in promoting consultation with stakeholders who are likely to be impacted by proposed statutory rules?

- (a) Should the RIS process be amended if it were expanded to apply to all instruments of a legislative character? If so, how?**
- (b) Which, if any, classes of instruments should be exempt from the process?**

We understand that, in New South Wales, Regulatory Impact Statements may play a role in promoting transparency and structured consideration of impacts in relation to certain statutory rules. To that extent, they can assist in identifying affected stakeholders and documenting consultation processes and policy justifications.

While providing additional justification or explanation for delegated legislation is positive, Regulatory Impact Statements should not be regarded as a substitute for an independent consultation requirement within the ordinary framework for delegated legislation. The focus should remain on establishing sound lawmaking practice through that framework, including consultation as a core requirement. Other mechanisms, such as Regulatory Impact Statements, may supplement or go beyond these minimum acceptable standards, but should not displace them.

Question 9

Should legislative requirements in New South Wales include requirements that NSW Parliament be informed about the consultation undertaken in the making of delegated legislation?

Yes. Legislative requirements should require the New South Wales Parliament to be informed about the consultation undertaken in the making of delegated legislation.

Under the Commonwealth framework, section 15J of the Legislation Act requires a legislative instrument to be accompanied by an explanatory statement, which must include a description of the consultation undertaken or an explanation of why no consultation was undertaken. Section 17 requires that, before making a legislative instrument, the rule-maker be satisfied that appropriate and reasonably practicable consultation has been undertaken, which may include consultation with experts in the relevant field and persons likely to be affected by the proposed law. A limitation of this requirement, however, is that section 19 provides that a failure to consult does not affect the validity or enforceability of a legislative instrument, meaning that the consultation requirement is not legally enforceable. In practice, this limitation is addressed through scrutiny by the Senate Standing Committee for the Scrutiny of

Delegated Legislation, which applies its own scrutiny principle relating to consultation.¹³

In our view, the framework for delegated legislation in New South Wales should not only include a requirement to inform Parliament about the consultation undertaken in the making of delegated legislation, it should also include standards against which consultation can be assessed. This would support effective parliamentary scrutiny and reinforces democratic accountability, particularly given that delegated legislation does not go through the ordinary parliamentary process of multiple readings, debate and committee consideration.

Question 10

Should the current process of, and requirements relating to, tabling statutory rules in Parliament be amended, particularly if it were to apply to all instruments of a legislative character? If so, how?

Yes. If the framework for delegated legislation in New South Wales were expanded to apply to all instruments of a legislative character, the tabling requirements should be strengthened to ensure effective parliamentary oversight. Tabling is the mechanism by which delegated legislation is brought formally before Parliament and made available for scrutiny, including consideration by parliamentary committees and, where applicable, disallowance. Without clear and enforceable tabling requirements, the ability of Parliament to supervise executive lawmaking is weakened.

The Commonwealth framework provides an appropriate model. Under section 38 of the Legislation Act, legislative instruments must be tabled in each House within 6 sitting days following registration, and a failure to comply results in the automatic repeal of the instrument. This creates a strong incentive to ensure timely tabling and reinforces the role of Parliament in overseeing delegated legislation.

In addition, tabling requirements should extend not only to the instrument itself but also to its accompanying explanatory material. Explanatory statements play an important role in enabling Parliament and its committees to assess the instrument's purpose, scope, consultation undertaken and legal effect.

¹³ Senate Standing Order 23(3)(d) requires scrutiny of whether persons likely to be affected by an instrument were adequately consulted in relation to it.

Question 11

Could improvements to the system of publication of delegated legislation be made, particularly in relation to instruments of a legislative character that are not currently required to be published on the NSW legislation website?

Yes. It appears that the current system for locating delegated legislation in New South Wales is fragmented and difficult to navigate, even for experienced legal practitioners. Instruments of a legislative character may be published in different locations, including the NSW Gazette, the NSW legislation website, departmental websites, or in the archives of the Parliamentary Library. This dispersion makes it unnecessarily difficult for users of the law to identify what the law is at any given time. A legal system in which the content of the law cannot be readily found fails a basic rule of law requirement: that the law be accessible, knowable and capable of guiding conduct.

In our view, all instruments of a legislative character should be published in a single, authoritative and publicly accessible online repository, ideally the NSW legislation website. A centralised publication model would provide a clear point of access for Parliament, the courts, regulated entities and the public. Ensuring that all delegated legislation of legislative character is published in a consistent and easily accessible manner would greatly strengthen the accessibility of the largest source of new law in New South Wales.

Question 12

If incorporated documents were to be treated as instruments of a legislative character, should these documents be subjected to the same publication requirements as other instruments? If so, how should such a requirement operate in practice?

Yes. If incorporated documents are treated as instruments of a legislative character, they should be subject to publication requirements to ensure accessibility. Accessibility is a cornerstone of the rule of law. If a person's legal rights or obligations are affected by incorporated content, those subject to the law must be able to readily locate that law.

We recognise that practical challenges may arise, particularly where incorporated material is technical, subject to copyright, or maintained by third parties. However, these challenges do not negate the underlying principle. At a minimum, incorporated documents should be made accessible through stable links or by publication of copies alongside the incorporating instrument. Where incorporation occurs as at a particular point in time, appropriate archiving should be required to ensure that the

incorporated content remains available in the form that has legal effect. Reliance on external websites alone carries risks, including content being moved, altered or removed.

In our view, the preferred approach is that all material forming part of the law, whether set out on the face of an instrument or incorporated by reference, should be available through a central and authoritative repository. This would provide accessibility and certainty for all users of the law. While accommodation may be needed in exceptional cases, the guiding objective should remain that the law, in all its forms, is publicly accessible in a single and reliable place.

Question 13

Would New South Wales benefit from a requirement that a period of time must pass between the publication of a delegated instrument and its commencement?

- (a) Would delayed commencement provisions be appropriate to apply to all classes of instruments of a legislative character?**
(b) If not, which classes of instruments should be exempt?

Delayed commencement is attractive in principle, as it provides advance notice to those affected and time to understand and adjust to new legal obligations. In practice, however, a mandatory delay between publication and commencement is often resisted by governments and may be difficult to apply consistently across different instruments, particularly where they respond to time sensitive matters.

More robust processes earlier in the lawmaking cycle may be more effective. Mechanisms such as exposure drafts, public consultation and committee consideration of draft instruments allow issues to be identified and addressed while policy choices are still open, rather than after they have been settled. Earlier engagement also promotes greater transparency and accountability in the lawmaking process itself. We recognise that this may not be possible in all cases due to time constraints, but a focus on earlier engagement may produce better outcomes.

In our view, while delayed commencement may have value, it is unlikely to be suitable as a universal requirement. Emphasis should instead be placed on improving draft scrutiny and consultation processes, which can also provide advance notice of proposed legal changes and a meaningful opportunity for input before laws are finalised. That approach better supports effective scrutiny while retaining the flexibility required for delegated legislation to operate in practice.

Question 14

Does the current disallowance process contained in the Interpretation Act 1987 adequately achieve the goals of Parliamentary oversight over delegated legislation in New South Wales, particularly if the process were to apply to all instruments of a legislative character? If not, what changes should be made?

On the whole, the current disallowance process in New South Wales appears to provide an appropriate mechanism for the parliamentary oversight of delegated legislation. Disallowance is the main way in which Parliament retains control over executive lawmaking. If the framework for delegated legislation were expanded to apply to all instruments of a legislative character, it would be appropriate for disallowance to apply to all such instruments as a matter of principle.

That said, consideration could be given to strengthening the operation of the disallowance mechanism by introducing a legal consequence where a notice of motion for disallowance is not resolved within a specified period, such as automatic repeal. This would provide additional leverage for parliamentary scrutiny and help ensure that concerns raised by scrutiny committees are addressed in a timely manner.

For example, it is common practice for the Chair of the Senate Standing Committee for the Scrutiny of Delegated Legislation to give a 'protective' notice of motion for disallowance where concerns about an instrument have not yet been resolved. This practice extends the period available for scrutiny under the Legislation Act and facilitates prompt engagement with the responsible minister. Where concerns are resolved, the notice of motion is withdrawn.

Question 15

Should any classes of instruments of a legislative character that are not currently subject to the disallowance process continue to be exempt from the process?

We submit that there should be no classes of instruments of a legislative character categorically exempt from the disallowance process. Disallowance is a fundamental mechanism through which Parliament retains oversight and control over executive lawmaking and is central to democratic accountability in the Australian context.

At the Commonwealth level, the Senate Standing Committee for the Scrutiny of Delegated Legislation conducted an inquiry into exemptions from parliamentary oversight. The Committee emphasised that when instruments are exempted from

disallowance, Parliament's constitutional role as lawmaker-in-chief is undermined.¹⁴ It noted a trend over time towards an increasing number of exemptions from disallowance.¹⁵ The Committee recommended that any exemption from disallowance be contained in primary legislation.¹⁶

Adopting a similar principle in New South Wales would help ensure that exemptions are not used to avoid parliamentary oversight. Any claim for an exemption should be subject to rigorous scrutiny and accepted only in exceptional circumstances where there is a compelling reason for Parliament to forgo the opportunity to disallow.

In our view, the default position should be that all instruments of a legislative character are subject to disallowance. Broad or categorical classes of exemptions undermine the constitutional role of the Parliament and should be avoided. Where a particular instrument is exempted from disallowance on the basis of exceptional circumstances, the basis for that departure should be set out clearly and itself be subject to parliamentary review, such as by requiring it to be contained in primary legislation.

Question 16

Could the system of automatic repeal of regulations in New South Wales after five years be improved, particularly if the application of the system was extended to apply to all instruments of a legislative character?

We do not express a view on the optimal design of the sunseting system in New South Wales. Sunseting creates an opportunity for periodic reconsideration of delegated legislation, helps ensure that laws remain fit for purpose, and reduces the risk of outdated, redundant or poorly functioning rules remaining in force.

If such a system were to be extended to apply to all instruments of a legislative character, careful consideration would need to be given to a number of factors in order to achieve an effective system. These include the appropriate length of the sunseting period, the volume of delegated legislation subject to review, the capacity

¹⁴ Senate Standing Committee for the Scrutiny of Delegated Legislation, *Exemption of Delegated Legislation from Parliamentary Oversight* (Final Report, Parliament of Australia, 2021) xv–xvi.

¹⁵ Senate Standing Committee for the Scrutiny of Delegated Legislation, *Exemption of Delegated Legislation from Parliamentary Oversight* (Final Report, Parliament of Australia, 2021) 8–9.

¹⁶ Senate Standing Committee for the Scrutiny of Delegated Legislation, *Exemption of Delegated Legislation from Parliamentary Oversight* (Final Report, Parliament of Australia, 2021) recommendation 1.

of administering agencies, and the workload of parliamentary scrutiny committees. In relation to the appropriate period for automatic repeal, consideration would need to be given to certainty and stability in the law, including in areas such as environmental planning where longer-term reliance on particular regulatory settings may be especially important.

The sunseting system should be calibrated to ensure that there is a genuine opportunity to review the continued necessity and operation of the law, rather than encouraging routine remaking on a copy-and-paste basis or creating unnecessary burdens or uncertainty in the law.

Question 17

Should environmental planning instruments be subject to or exempt from the system of automatic repeals if these instruments were to be treated as instruments of a legislative character?

Our view is that all instruments of a legislative character should be subject to the ordinary requirements of the delegated legislation framework with limited exceptions. Please see our response to Question 6.

Question 18

What are some potential mechanisms to improve, streamline or expand the current processes for scrutinising delegated legislation in New South Wales, and how can these processes be provided for in a consolidated Legislation Act?

Our comments focus on the scrutiny functions of the Delegated Legislation Committee. As currently framed, those functions are broad and include reporting on instruments of a legislative nature, including their policy and substantive content, draft delegated legislation, and trends or systemic issues in delegated legislation. In addition, paragraph 9(1)(b) of the *Legislation Review Act 1987* requires the Committee to scrutinise instruments subject to disallowance against a set of established scrutiny principles. Taken together, this represents an exceptionally broad remit, and a consolidated framework extended to all instruments of a legislative character could expand this further.

We suggest that one parliamentary committee, such as the Delegated Legislation Committee, should retain responsibility for scrutinising all delegated legislation systematically. It is essential that all instruments are examined at least once. That said, the current scrutiny framework appears to create an unmanageable burden, particularly given disallowance timelines and the pace and volume at which delegated

legislation is made. While the Committee's Secretariat undoubtedly provides excellent support, it is not realistic to expect comprehensive application of all scrutiny principles to every instrument, especially those that require policy evaluation.

In particular, some of the scrutiny principles in paragraph 9(1)(b) appear to call for policy judgment and detailed regulatory analysis. Assessing whether an objective could have been achieved by alternative and more effective means, or whether a regulation duplicates, overlaps or conflicts with other legislation, requires substantial investigation and contextual understanding. Applying these principles comprehensively risks placing the Committee in a quasi-regulatory role, rather than a focused scrutiny role.

There may therefore be value in reconsidering the scope and formulation of the scrutiny principles. Consideration should be given to ensuring that any instrument that is legislative in character can be scrutinised against the principles, including any exempted in whole or in part from the ordinary requirements of the framework that applies to delegated legislation. The principles themselves might be refined to focus on legal and fundamental rule of law values. In that context, it is also unclear why emphasis is currently placed by the *Legislation Review Act 1987* on adverse impacts on the business community, rather than on the rights and liberties of persons more generally.

Consideration could be given to whether responsibility for policy-focused scrutiny should be allocated to a separate committee and removed from the Delegated Legislation Committee's remit. The effectiveness of scrutiny depends in part on the standing and authority of the committee, and on its willingness, where necessary, to support its expectations with stronger action such as disallowance. Effective scrutiny operates as a graduated process, directed toward resolving concerns and improving outcomes, rather than as an adversarial exercise. Concerns are best framed as requests for advice that can be addressed to the committee's satisfaction. In many cases, concerns may be resolved through clarification or amendment of an instrument's explanatory materials. In other cases, amendments to the instrument itself may be required.

This form of scrutiny is best supported by a consensus-based, non-partisan approach, which is by design intended by committees that are evenly divided between government and non-government members, as is the case with the Delegated Legislation Committee. A focus on technical, legal and shared values-based scrutiny principles, similar to the Commonwealth model, may better support that approach and strengthen the overall effectiveness of scrutiny of delegated legislation in New South Wales.

There may also be value in considering the source of the Committee's scrutiny functions and principles. As the Delegated Legislation Committee is a committee of the Legislative Council, it may be preferable for some aspects of its functions and scrutiny principles to be set out in the Legislative Council's standing rules and orders, rather than in primary legislation as is currently the case. This would provide the Legislative Council with greater flexibility to adapt the Committee's role and procedures over time. Such an approach could operate alongside, and be supported by, legislative provisions in a consolidated framework, in a manner similar to the Commonwealth, where the Senate Standing Committee for the Scrutiny of Delegated Legislation's work is grounded both in legislation and in the standing orders of the Senate.

Question 19

Should there be specific requirements for a regulation, or any other instrument of a legislative character, made under a 'Henry VIII provision' to be identified? If so, what should the requirements be?

Yes. Instruments made under so-called Henry VIII provisions should be clearly identified and subject to exacting scrutiny, particularly in relation to their justification. Any exercise of a Henry VIII power should occur only in exceptional circumstances and only for so long as is strictly necessary.

Henry VIII provisions reverse the ordinary constitutional order by permitting the executive, through delegated legislation, to amend or modify primary legislation enacted by Parliament. While enabling legislation enacted by Parliament is required to create a Henry VIII power, there is a risk that such powers remain on the statute book for extended periods and may be exercised at any point, including at times and in circumstances not originally contemplated. It is therefore critically important that parliamentary committees scrutinising bills are alert to the proposed creation of Henry VIII powers at the 'front end' and closely examine their scope and potential future impact on the statutory scheme.

We recognise that there is some disagreement about the precise boundaries of what constitutes a Henry VIII provision. Many delegated instruments affect the practical operation of primary legislation to some extent, and there will inevitably be marginal cases. That said, there are also clear and uncontroversial examples where delegated legislation directly amends, repeals or modifies statutory provisions. Some uncertainty at the margins should not prevent the adoption of a framework that identifies and subjects the use of these exceptional powers to heightened scrutiny.

In our view, where an instrument is made under a Henry VIII provision, that fact should be expressly identified in the explanatory material accompanying the instrument. The explanatory material should also provide a clear justification for the use of the power, including why it is necessary in relation to exceptional circumstances, why it cannot be achieved through ordinary legislative means, and why its duration is appropriate. This would enable committee scrutiny of the use of the Henry VIII power against the committee's expectations for such instruments.

In practice, this expectation may be most effectively embedded through committee scrutiny practice rather than through legislation. It would be helpful for the Delegated Legislation Committee to articulate its expectations regarding Henry VIII provisions through published guidelines (which would cover all of its scrutiny principles), similar to the approach taken at the Commonwealth level by the Senate Standing Committee for the Scrutiny of Delegated Legislation. Such guidance would assist drafters in identifying and justifying the use of Henry VIII powers and could be updated over time as the Committee's scrutiny practice and expectations evolve.

Question 20

How should regulation-making powers that appear to include a time limit be interpreted and scrutinised?

Regulation-making powers that authorise instruments to exempt persons from the application of the law are, in effect, authorising an immunity. While there may be appropriate justification for such exemptions in certain circumstances, they can also challenge basic rule of law principles relating to equal application of the law. Where such an authorising provision includes a time limit, and an instrument made under that provision is repeatedly renewed, it should attract fresh committee scrutiny on each occasion when it is remade.

While the remaking of an instrument may be legally unproblematic, scrutiny committees should examine whether the justification advanced for the renewed instrument continues to hold. Circumstances may have changed, temporary conditions may no longer exist, or what was intended as an exceptional measure may be becoming routine. Applying fresh committee scrutiny on each occasion helps ensure that time-limited powers do not, in effect, become permanent through serial renewal without adequate reconsideration and appropriate and relevant justification.

This question raises a further point. As highlighted by the example in the discussion paper, ministerial responses to scrutiny concerns may sometimes simply be that the instrument is legally authorised by the enabling legislation. That response highlights an important distinction between legal validity and compliance with scrutiny expectations. While scrutiny committees will examine whether an instrument is validly made and complies with legal requirements, their scrutiny principles will go beyond whether the instrument is legally authorised. An instrument may be legally valid and yet still fall short of a committee's expectations. Scrutiny principles articulate standards about how lawmaking power should be exercised within the authority conferred by Parliament. The fact that a power has been conferred does not mean that every exercise of it will automatically meet those standards. In this sense, scrutiny principles reflect fundamental, shared values that shape the contours of acceptable executive lawmaking from the perspective of Parliament as the source of legislative power.

This distinction raises questions about the appropriate committee response in cases where legal validity is put forward as a complete defence to the committee's concerns in relation to its scrutiny principles. In some cases, seeking disallowance may be an effective mechanism to promote compliance with the committee's expectations. In other cases, it may be preferable for the committee to report the matter to the Parliament, allowing further consideration and potential action in that forum. This can be done in a variety of ways, including through tabling statements and drawing attention to the unresolved concern in committee reports. For example, the Senate Standing Committee for the Scrutiny of Delegated Legislation will in some cases conclude its examination of a particular concern while drawing it to the attention of the Senate. It also includes, in its reports, a chapter containing lists of instruments that do not meet its expectations in relation to exemptions from sunset and disallowance.

This question also highlights the importance of regular reporting by scrutiny committees. Reporting of committee work, with sufficient detail, helps to build a coherent body of committee jurisprudence over time, which promotes transparency and consistency of approach. It also puts delegated rule-makers on notice of the standards they will be expected to meet, incentivising good lawmaking practice.

Question 21

Should there be a legislated maximum percentage of the maximum penalty for an offence that may be prescribed as the amount payable for a penalty notice for that offence?

We do not express a view on whether there should be a legislated maximum percentage of the maximum penalty for an offence that may be prescribed as the amount payable for a penalty notice. However, we emphasise the importance of careful parliamentary scrutiny of penalties imposed through delegated legislation.

The imposition of significant penalties in delegated legislation raises questions of democratic accountability and what is appropriate lawmaking as between the Parliament and the executive. As a general principle, significant penalties should be provided for in primary legislation, where they are subject to greater parliamentary oversight, rather than contained in delegated legislation. Where delegated legislation nevertheless includes significant penalties, they should be subject to scrutiny to ensure that they are justified in the circumstances, even where they are authorised by the relevant enabling Act. Related concerns may also arise where primary legislation creates serious offences but leaves key elements of those offences to be determined through delegated legislation. In such cases, the practical content and reach of the offence may be shaped largely by executive lawmaking rather than by Parliament, giving rise to similar concerns.

In terms of the quantum of what constitutes a significant penalty, the Commonwealth Senate Standing Committee for the Scrutiny of Delegated Legislation adopts the view that these are above 50 penalty units for an individual (currently approximately \$16,500) or 250 penalty units for corporations (currently approximately \$82,500).¹⁷

Conclusion

Thank you again for the opportunity to contribute to this inquiry.

Committees that scrutinise delegated legislation fulfil important constitutional and democratic functions and have a significant practical impact. Through scrutiny, they help ensure that delegated legislation meets basic expectations about lawmaking in a democratic society founded on the rule of law. They provide the only systematic form of parliamentary oversight of this mode of lawmaking, which now accounts for the overwhelming majority of new law made. In performing this role, scrutiny committees operate as the eyes and ears of the Parliament, which is constitutionally vested with legislative power, in relation to the exercise of that power by delegates. They act as a

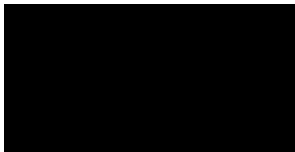
¹⁷

gatekeeper for the application of parliamentary expectations governing delegated lawmaking and play an important role in protecting rights and liberties. Over time, their work also incentivises better lawmaking practices that align with those expectations. A consolidated framework governing delegated legislation in New South Wales would reinforce minimum standards for delegated lawmaking and provide a stronger foundation for effective parliamentary scrutiny.

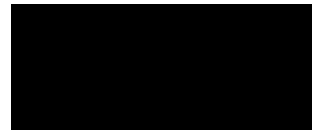
We commend the Committee for its forward-looking approach and its willingness to consider reforms aimed at strengthening the governance of delegated legislation in New South Wales.

We would be pleased to discuss any aspect of this submission.

Yours sincerely,



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Encl.

1. Lorne Neudorf, 'Restoring the 'Democratic Circuit' for Delegated Legislation: Lessons from Australia's COVID-19 Response' in Tom Gerald Daly and Jonathan Hafetz (eds), *Pandemocracy in the Anglosphere: Democracy's Power to Meet Tomorrow's Polycrisis* (Hart Publishing, forthcoming 2026).
2. Lorne Neudorf, *Submission to the Attorney-General's Department Review of the Legislation Act 2003* (23 December 2021).

12

Restoring the 'Democratic Circuit' for Delegated Legislation: Lessons from Australia's COVID-19 Response

LORNE NEUDORF

I. Introduction

When Australian law students encounter administrative law, usually halfway through their degree, they are struck by the vast scale and reach of the administrative state. They are equally surprised to discover how modern lawmaking really works. Until that point, their understanding of the legal system tends to be coloured by a romanticised view of the common law, in which court judgments sit neatly alongside legislation as co-equal sources of law.¹ It is understandable that judgments, as a form of storytelling, capture more imagination than lifeless statutory codes. In Administrative Law, however, students come to see that nearly every area of economic and social life is governed not by precedent but by detailed legislation, often with little or no directly relevant case law. More striking still, most of this legislation is not enacted by parliament but is made by the executive branch under delegated authority. In Australia, at both federal and state levels, delegated legislation has eclipsed parliamentary legislation as the principal source of new law. The result is that most Australian laws are made in the absence of parliamentary debate, committee study or a public vote. Further, delegated legislation can be made, amended and commence with little or even no advance notice.

This chapter presents a case study of the Australian federal government's use of delegated legislation during the COVID-19 pandemic through the lens of democratic legitimacy. It raises concern about the exemption of many of these laws from the ordinary parliamentary scrutiny and disallowance processes during that period. While some of the democratic shortcomings exposed by the pandemic have since been addressed through reform, others remain. The study draws on comparative insights at times to help illuminate the Australian experience and offers lessons for emergency lawmaking both in Australia and comparable jurisdictions. It concludes that parliamentary oversight of delegated legislation is not a mere formality, but an essential safeguard that is necessary to complete the democratic circuit. It must continue to operate even in times of emergency to preserve the legitimacy of delegated lawmaking.

¹ Compulsory subjects taken earlier in the degree, including those on public law and legal institutions, help set the scene. A more complete understanding of contemporary lawmaking practices and the reach of the administrative state, however, is seldom developed until students encounter Administrative Law.

II. Delegation and Legitimacy: The Need for Parliamentary Oversight

There are sound reasons for the legislature to delegate some of its lawmaking authority to the executive.² Scholars have long cautioned, however, against an excessive reliance on this form of lawmaking. More than a century ago, Cecil Thomas Carr observed that Acts of Parliament were becoming ‘more and more dependent on subsidiary legislation’, with most containing only ‘incomplete statements of law’.³ In Australia’s leading text on delegated legislation, Dennis Pearce and Stephen Argument outline a range of concerns in relation to delegated lawmaking,⁴ and document its continuing proliferation.⁵ The central challenge remains how to maintain an appropriate balance between laws made by the executive and those made by the legislature, a question that turns on the democratic character of each form of lawmaking and what can be accepted within a democratic society.

A. Constitutional and Legal Limits

While this chapter considers delegated legislation principally through the lens of democratic legitimacy, it is worth first recognising constitutional and legal doctrines that work to preserve parliament’s lawmaking role from being hollowed out by excessive delegation. These doctrines call upon the judiciary to articulate limits.⁶ Their purpose is not to prohibit delegated legislation, but to ensure that the legislature maintains its role as lawmaker-in-chief. Although courts must be prepared to enforce limits when necessary,⁷ the articulation of boundaries itself provides institutional actors with a better understanding of their constitutional roles and creates a powerful incentive to internalise those limits.

The starting point is the constitutional architecture that establishes the legislature and sets out its powers. In the United States, for example, the non-delegation doctrine has developed as a necessary implication of the legislative power being constitutionally vested in Congress as the elected and representative forum for federal lawmaking.⁸ Because Congress holds that power, it cannot delegate to the executive branch the power to make ‘rules’ in the absence of an intelligible standard. The doctrine ensures that Congress must consider, and to some degree, direct the kinds of laws that may be made under delegated authority.⁹ In Westminster systems, this form of reasoning has not gained traction, being dismissed on the basis that separating

² See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (6th edn, LexisNexis Butterworths 2023) 6-9, where various reasons advanced for delegating legislative authority are canvassed and discussed.

³ Cecil Thomas Carr, *Delegated Legislation: Three Lectures* (Cambridge University Press 1921) 1.

⁴ Pearce and Argument (n 2) 10-26.

⁵ Pearce and Argument (n 2) xiii, 15-16.

⁶ Even in a system lacking an enforceable written constitution, the judicial recognition of constitutional principle would still be valuable to inform actors of their roles and responsibilities.

⁷ Courts should approach doctrines that relate to institutional relationships and the constitutional architecture cautiously to prevent judicial overreach, as has occurred in some contexts, see for example Lorne Neudorf, ‘The Judicialisation of Parliamentary Privilege in Canada: A Cautionary Tale’ (2024) 13 3 *Laws* 26.

⁸ *J W Hampton Jr & Co v United States* 276 US 394 (1928). For a recent discussion, see *Federal Communications Commission v Consumers’ Research* 606 US ___ (2025).

⁹ The doctrine has been the subject of extensive academic commentary, including criticisms, see for example Keith E Whittington and Jason Iuliano, ‘The Myth of the Nondelegation Doctrine’ (2016) 165 *University of Pennsylvania Law Review* 379, arguing that courts do not actually enforce the doctrine, and Eric A Posner and Adrian Vermeule, ‘Interring the Nondelegation Doctrine’ (2002) 69 4 *University of Chicago Law Review* 1721, arguing that the exercise of delegated power is executive rather than legislative.

legislative and executive power is not possible nor desirable given their institutional overlap.¹⁰ This objection misconceives the nature of the problem. The question is not whether a more complete separation can or should exist like in the United States, but what must as a logical consequence follow from the constitutional vesting of legislative power in the parliament, which in Australia occurs in the very first section of the Constitution. This vesting should be seen to establish minimum standards necessary to give meaning and effect to that constitutional choice. Standards would not prevent delegation, but would ensure that delegated lawmaking remains accountable and consistent with parliament's constitutional role.

In this respect, Australian courts have drawn the boundary far too loosely, requiring only that parliament not 'abdicate' its lawmaking function, a threshold no court has ever found to be crossed.¹¹ This standard is likely superfluous, since the doctrine of parliamentary sovereignty, even if qualified by a written constitution, would enable parliament to reclaim its legislative authority at any time. As I have argued in the Canadian context, which is similar in this respect, courts should reconsider wartime precedent and develop more meaningful constitutional doctrines to place controls on delegation to preserve the legislative institution. Although such a reorientation was rejected by a majority of the Supreme Court of Canada in a 2021 judgment, it found support in the partly dissenting reasons of Justice Côté. In that case, the enabling legislation contained delegated powers that were so sweeping that Justice Côté would have held them to be unconstitutional on the basis that they were 'inconsistent with our system of democracy'.¹²

A second and complementary means of preserving the legislature's constitutional role lies in the judicial interpretation of enabling legislation that authorises delegated lawmaking. In the United States, the major questions doctrine flows from the non-delegation doctrine, but is in substance a presumption of statutory interpretation. In a series of recent judgments on the major questions doctrine, the Supreme Court of the United States has required clear congressional authority where executive rules carry significant economic, social or political consequences.¹³ The doctrine prevents the executive from relying on ambiguous, vague or incidental statutory language to authorise delegated laws that have a major national impact. Its effect is to place the 'big decisions' before Congress, ensuring that the legislature confronts the significance of the authority that it delegates to the executive.

Again, this approach has not found much support in Westminster systems.¹⁴ In Australia, courts will review the legality of a delegated law, but tend to interpret enabling provisions generously, which allows many delegated laws to survive when challenged.¹⁵ I have argued that Australian courts should adopt a version of the United States' major questions doctrine

¹⁰ *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan* [1931] HCA 34, 46 CLR 73, 101 to 102 (Dixon J).

¹¹ *Dignan* (n 10) 121 (Evatt J).

¹² *References re Greenhouse Gas Pollution Pricing Act* 2021 SCC 11, para 241.

¹³ See for example *Alabama Association of Realtors v Department of Health and Human Services* 594 US ___, 141 S Ct 2485 (US 2021); *National Federation of Independent Business v Department of Labor; Occupational Safety and Health Administration* 595 US ___, 142 S Ct 661 (US 2022); *West Virginia v Environmental Protection Agency* 597 US ___, 142 S Ct 2587 (US 2022); *Biden v Nebraska* 600 US ___, 143 S Ct 2355 (US 2023).

¹⁴ Although see the analysis of Oren Tamir, 'Getting Right What's Wrong with the Major Questions Doctrine' (2024) 62 *Columbia Journal of Transnational Law* 543.

¹⁵ There is a rebuttable presumption in favour of the validity of delegated legislation: *Telstra Corp v Queensland* [2013] FCA 1296. Challenging delegated legislation, as compared to an administrative decision, has a 'much sterner onus': *Re Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy* [1992] FCA 351, para 42.

that would operate in a similar manner to the well-established principle of legality.¹⁶ This principle ensures that fundamental rights can only be limited by clear statutory language.¹⁷ Although rights can still be limited, legislation cannot do so inadvertently through ambiguous or vague language. It must do so clearly and explicitly, with the effect that parliament must confront and accept the associated costs and consequences. Similar reasoning could support an Australian version of the major questions doctrine, which would ensure that major policy decisions rest on clear statutory authorisation. As the Supreme Court of the United States has observed, a legislature is presumed not to ‘hide elephants in mouseholes’.¹⁸

B. The Question of Democratic Legitimacy

Underlying these constitutional and legal doctrines is the question of democratic legitimacy, which is the foundation of lawmaking in a democratic society. What should we expect in terms of the democratic quality of our laws, both in aspirational terms and at the level of a minimum standard that must be met? A democratic society is unlikely to expect that every ordinary law will embody the full suite of democratic qualities found in the ideal model of representative deliberation. Some variation in the democratic character of individual laws will be tolerated, provided that especially significant laws move closer to the ideal and that the system as a whole maintains an acceptable standard. This recognition requires an evaluation of different laws and forms of lawmaking, particularly delegated legislation as the main source of new law, in terms of the extent to which they contribute to or detract from the overall democratic character of the lawmaking system.

A formalist might argue that delegated legislation is democratically defensible on the basis that parliament has itself chosen to confer lawmaking powers on the executive. Although there is a connection between parliament and executive-made laws through the enabling legislation, it is too simplistic to treat this as the complete picture. A statutory authorisation cannot, by itself, confer upon delegated laws the legitimacy of primary legislation. Authorisation may be legally necessary, but it is not democratically sufficient. Delegated legislation is, in the words of Hermann Pünder, ‘further remote from the source of democratic legitimation’.¹⁹ The legislature’s democratic credentials do not automatically extend to laws later made by its delegate, which functions as a distinct lawmaker. Delegation is not agency. It is necessary to distinguish between a formal source of law and its democratic qualities. Further, the formalist view reduces legitimacy to an all-or-nothing attribute when it is better understood as a matter of degree. Assessing the democratic character of a law requires consideration of several factors, including the composition and representativeness of the lawmaker, specifically whether it is freely and fairly elected and whether it reflects a cross-section of the political community such that it can be said to genuinely represent different interests.

It is not only *who* makes the law that speaks to its democratic legitimacy. It also depends on *how* the law was made. Jeremy Waldron evokes an ideal of lawmaking where

¹⁶ Lorne Neudorf, ‘The US Major Questions Doctrine: Lessons to Strengthen Democratic Accountability in Australia’ (2025) 35 *Public Law Review* 299.

¹⁷ See for example *Coco v R* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

¹⁸ *Whitman v American Trucking Associations Inc* 531 US 457, 468 (2001) (Scalia J).

¹⁹ Hermann Pünder, ‘Democratic Legitimation of Delegated Legislation: A Comparative View on the American, British and German Law’ (2009) 58 2 *International and Comparative Law Quarterly* 353, 356.

‘representatives of the community come together to settle solemnly and explicitly on common schemes and measures that can stand in the name of them all ... in a way that openly acknowledges and respects ... the inevitable differences of opinion and principle among them’.²⁰ Waldron has identified a set of process-oriented principles for lawmaking, which include explicit and public deliberation, a duty to take care, deliberation within a representative forum that gives voice to different interests and views, respect for disagreement, deliberation that responds to opposing perspectives, structured debate focused on the legislative text, and decision-making that ensures political equality.²¹ In practice, lawmaking processes will reflect these principles to varying degrees. Taken together, however, the principles provide a yardstick for assessing the legitimacy of a law by considering the process through which it was made.

Even a cursory assessment of the composition and representativeness of the lawmaker, together with the lawmaking processes for primary and delegated legislation, makes clear that parliament enjoys vastly superior democratic qualities compared to the executive. Delegated legislation is democratically deficient and requires legitimation to strengthen its democratic character. In Australia, the fact that delegated legislation constitutes the vast majority of new law heightens this concern. Parliamentary oversight, through scrutiny and control, remains the most important means of supplying legitimation.²² Such oversight provides essential visibility and accountability in relation to the executive’s use of delegated power. It completes the democratic circuit by bringing delegated legislation directly before the source of legislative power. As Adam Tucker observes, ‘[t]he risks [delegated legislation] poses can only be managed by scrutiny aimed at boosting its legitimacy ... because Parliament is the only institution with the law-making virtues necessary for the making of legitimate legislation’.²³ In a similar vein, Andrew Edgar’s comparative study concludes that ‘general, systemic safeguards in both the UK and Australia go a long way to providing democratic legitimacy for regulations’.²⁴

III. Delegated Legislation and Parliamentary Oversight

A. The Ordinary Framework

The Australian Parliament routinely delegates considerable legislative power to the executive. The *Help to Buy Act 2024* is a recent example. The Act establishes a program for shared equity arrangements between the federal government and low- to middle-income home buyers, but leaves considerable detail to come later through delegated legislation. In fact, the program is

²⁰ Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press 1999) 2.

²¹ Jeremy Waldron, ‘Principles of Legislation’ in Jeremy Waldron, *Political Political Theory* (Harvard University Press 2016) 145-166.

²² See for example Thomas G Fleming and Tasneem Ghazi, ‘Parliamentary Scrutiny of Delegated Legislation: Lessons From Comparative Experience’ (2023) 94 3 *Political Quarterly* 412, calling for reform to UK parliamentary scrutiny based on comparative insights from Australia, Canada, India, Ireland, New Zealand and South Africa. See also Adam Tucker, ‘Parliamentary Scrutiny of Delegated Legislation’ in Alex Horne and Andrew Drewry (eds), *Parliament and the Law* (2nd edn, Hart Publishing 2018) 347. Pearce and Argument discuss various Australian models of parliamentary scrutiny: Pearce and Argument (n 2) 63-123.

²³ Tucker (n 22) 362. In Tucker’s view, legitimacy requires delegated legislation to be subject to meaningful parliamentary scrutiny and to be vulnerable to defeat, even if rare in practice, to compel the government to publicly justify its delegated laws (363).

²⁴ Andrew Edgar, *Regulation-Making in the United Kingdom and Australia: Democratic Legitimacy, Safeguards and Executive Aggrandisement* (Hart Publishing 2023) 6. See also 194, noting the connection between legitimacy and safeguards, particularly parliamentary scrutiny.

incomplete and inoperable without it. The Act therefore empowers the minister to make certain rules.²⁵ In the *Help to Buy Program Directions 2025*, the minister sets out rules such as those for eligibility and participation.²⁶ The routine use of delegated legislation to give meaning to, or complete a statutory scheme, has resulted in a large volume of delegated legislation being made each year. In its 2024 Annual Report, for example, the Senate Standing Committee for the Scrutiny of Delegated Legislation (the ‘Committee’) observed that it had scrutinised 1,500 delegated laws in the reporting period of 17 Nov 2023 to 28 Oct 2024, which represents more than ten times the number of Acts passed by Parliament during the same time.²⁷

Most Australian federal delegated legislation is made under the *Legislation Act 2003* (the ‘Legislation Act’), which establishes a framework for the making of a ‘legislative instrument’. A legislative instrument is defined as a law made under the authority of primary legislation having a legislative character, or a law that is otherwise declared or registered as a legislative instrument.²⁸ The Legislation Act includes rules related to consultation,²⁹ drafting,³⁰ lodgement and registration,³¹ tabling,³² and sunseting.³³ Legislative instruments typically commence prospectively, although the Legislation Act provides for retrospective operation to the extent a person’s rights are not disadvantaged or a liability imposed prior to the instrument’s registration.³⁴ A small number of rules in the Legislation Act, such as the limitation on the retrospective operation of a legislative instrument, operate ‘subject to any contrary provision in an Act’.³⁵ An explanatory statement must be drafted and tabled for each legislative instrument. It is intended to describe in plain language the instrument’s purpose and operation, identify any material incorporated by reference and how it can be accessed, outline the consultation process undertaken (or explain why it was not undertaken), and include a statement of compatibility with human rights.³⁶

Importantly, the Legislation Act provides for the parliamentary control of delegated legislation by establishing a disallowance process. The process authorises either House of the Parliament to disallow, or repeal, a legislative instrument.³⁷ It is initiated upon a notice of motion for disallowance given by a member or senator within a period of 15 sitting days

²⁵ *Help to Buy Act 2024* (Cth) s 24.

²⁶ *Help to Buy Program Directions 2025* (Cth) (F2025L00682).

²⁷ Senate Standing Committee for the Scrutiny of Delegated Legislation, *Annual Report 2024* (March 2025) para 2.5.

²⁸ *Legislation Act 2003* (Cth) s 8; see also ss 9-10.

²⁹ *Legislation Act 2003* (Cth) s 17, which provides that rule-makers ‘should’ consult with relevant experts and persons likely to be affected to the extent considered appropriate and reasonably practicable, although a total failure to consult does not affect validity: s 19.

³⁰ *Legislation Act 2003* (Cth) s 16 (requiring the First Parliamentary Counsel to take measures to promote high drafting standards).

³¹ *Legislation Act 2003* (Cth) ss 15G-15H.

³² *Legislation Act 2003* (Cth) s 38.

³³ *Legislation Act 2003* (Cth) s 50; the Attorney-General may defer sunseting in certain circumstances: s 51. Sunseting provides for the automatic repeal of legislative instruments after a fixed period, typically ten years.

³⁴ *Legislation Act 2003* (Cth) s 12.

³⁵ *Legislation Act 2003* (Cth) s 12(4); see also ss 13(1), 14(1) and 14(2).

³⁶ *Legislation Act 2003* (Cth) ss 15G(4), 15J and 39; however, the failure to lodge an explanatory statement does not affect the validity of the instrument to which it relates: s 15K(2).

³⁷ In the United States, a one-House veto of delegated executive action has been held unconstitutional because it offends the requirements of bicameralism and presentment to the President: *Immigration and Naturalization Service v Chadha*, 462 US 919 (1983). Nevertheless, I have argued that the United States Congress should strengthen its oversight of agency rulemaking: Lorne Neudorf, ‘Learning from Australia: Strengthening Congressional Scrutiny of Federal Agency Rulemaking’ (2025) *Georgetown Journal of International Affairs* (8 January 2025).

beginning the first sitting day after the instrument is tabled.³⁸ If, within 15 sitting days of that notice, the House passes a resolution disallowing the instrument, it is repealed immediately.³⁹ A provision of an instrument, rather than the entire instrument, can also be disallowed, which permits the House to sever an offending provision.⁴⁰ If a legislative instrument is disallowed, another the same in substance cannot be made for a period of six months following disallowance, except where the disallowing House passes a resolution approving the replacement instrument.⁴¹

Not every legislative instrument is disallowable. The Legislation Act provides for an instrument, or a provision of an instrument, to be exempted from disallowance by an Act or regulation.⁴² The *Legislation (Exemptions and Other Matters) Regulation 2015* exempts both individual instruments and classes of instruments.⁴³ For example, the *Help to Buy Program Directions 2025* are exempt from disallowance by the regulation on the basis that they are ‘[a]n instrument that is a direction by a Minister to any person or body’.⁴⁴ In addition, enabling legislation may exempt legislative instruments made under them, such as subsection 44(3) of the *Biosecurity Act 2015* (the ‘Biosecurity Act’) that exempts instruments that establish requirements for persons entering Australia in relation to listed human diseases.⁴⁵ Despite its availability, exemption is generally expected to be the exception rather than the norm as it places executive-made laws beyond the principal mechanism of parliamentary control that is provided by the Legislation Act. In *Baker v Commissioner of the Australian Border Force*,⁴⁶ a case involving COVID-19 border controls, Justice Mortimer of the Federal Court of Australia observed that the exemption of the controls from disallowance ‘indicates the exceptional nature’ of the instrument in which they were contained.⁴⁷ Nevertheless, approximately 15% of new legislative instruments are exempt.⁴⁸

While either House may disallow a legislative instrument, the Senate has played an especially important role in overseeing delegated legislation. In 1932, it established the Senate Standing Committee for the Scrutiny of Regulations and Ordinances, now termed the Senate Standing Committee for the Scrutiny of Delegated Legislation.⁴⁹ By scrutinising all newly made delegated legislation against a series of scrutiny principles, the Committee functions as a parliamentary sieve, identifying legislative instruments and their explanatory materials that do not meet its expectations. The Committee is comprised of three government party senators and three opposition senators, and works in a non-political manner by consensus. Its work is

³⁸ *Legislation Act 2003* (Cth) s 42(1).

³⁹ *Legislation Act 2003* (Cth) s 42(1). If a notice of motion is not withdrawn or resolved within fifteen sitting days, the legislative instrument (or relevant provision) is automatically repealed: s 42(2). If the House of Representatives is dissolved or Parliament prorogued, any notice of motion is revived on resumption, with the fifteen sitting day period resetting: s 42(3).

⁴⁰ Repealing one or more provisions in an instrument, rather than the entire instrument, may radically alter the effect of the instrument with immediate legal consequences. The enabling legislation can specify whether an instrument, or a provision within it, is exempt from disallowance: *Legislation Act 2003* (Cth) s 44(2).

⁴¹ *Legislation Act 2003* (Cth) s 48.

⁴² *Legislation Act 2003* (Cth) s 44(2).

⁴³ *Legislation (Exemptions and Other Matters) Regulations 2015* (F2024C01174) reg 9 (classes of instruments) and reg 10 (particular instruments).

⁴⁴ *Legislation (Exemptions and Other Matters) Regulations 2015* (F2024C01174) reg 9 item 2.

⁴⁵ For example, *Biosecurity Act 2015* (Cth) s 44(3) in relation to listed human disease requirements for persons entering Australia.

⁴⁶ *Baker v Commissioner of the Australian Border Force* [2020] FCA 836.

⁴⁷ *Baker* (n 46) para 63.

⁴⁸ Scrutiny Committee, *Annual Report 2024* para 2.44.

⁴⁹ The composition, functions and powers of the Committee are set out in Senate Standing Order 23.

respected, and it is often successful in prompting changes to legislative instruments and their explanatory materials to resolve concerns. It also provides an important incentive for good lawmaking.⁵⁰ In a broader sense, the Committee serves the public interest in a number of ways, including by improving the quality of delegated legislation and by reducing the burden on individuals impacted by deficient instruments who would otherwise need to seek a remedy in court through judicial review.

The Committee's scrutiny principles are described as technical in nature. Technical, in this sense, means exclusion of the consideration of the policy content of legislative instruments. While the principles include identifying drafting defects,⁵¹ they extend to matters that reflect fundamental rule of law values. For example, the Committee considers whether legislative instruments unduly trespass on rights and liberties or make such rights depend upon insufficiently defined administrative powers.⁵² The Committee considers whether instruments are legally authorised and comply with other legal requirements,⁵³ a question that a court would be called upon to answer authoritatively if an instrument were challenged by way of judicial review. It considers the accessibility of delegated legislation, including whether material incorporated by reference is accessible,⁵⁴ and whether the explanatory material enables users of the law to clearly understand it.⁵⁵ The Committee also examines if adequate consultation was undertaken with those likely to be affected by the instrument.⁵⁶ The principles seek to safeguard the primacy of parliament by considering whether matters would be more appropriately dealt with in primary legislation,⁵⁷ whether exemptions from sunseting are justified,⁵⁸ and whether the exercise of Henry VIII-type powers to amend or modify primary legislation, or to exempt persons from the law's operation, are limited in duration.⁵⁹ In sum, the scrutiny principles and the Committee's expectations require delegated legislation to be well-planned, carefully drafted and of sufficient quality. The focus is not on the policy advanced by the instrument, but on the way in which it has been given legal effect and whether it is consistent with rule of law values.

The Committee generally tables a Delegated Legislation Monitor each sitting week of the Senate. The Monitor provides an overview of the Committee's work during the relevant reporting period. Through its regular reporting, the Committee develops jurisprudence on its expectations and the interpretation and application of the scrutiny principles. The Monitor includes detailed entries for legislative instruments for which significant concerns are identified. These concerns are raised with the responsible minister, and ministerial responses

⁵⁰ The Committee disseminates its expectations in relation to its scrutiny principles through the regular publication of the *Delegated Legislation Monitor* each sitting week of the Senate, which reports on the Committee's work, and through the publication of its *Guidelines* (now in their 3rd edn).

⁵¹ Senate Standing Order 23(3)(e).

⁵² Senate Standing Order 23(3)(c).

⁵³ Senate Standing Order 23(3)(a).

⁵⁴ Senate Standing Order 23(3)(f).

⁵⁵ Senate Standing Order 23(3)(g).

⁵⁶ Senate Standing Order 23(3)(d), which goes beyond the requirement in *Legislation Act 2003* (Cth) s 17 (which provides that rule-makers 'should' consult with relevant experts and persons likely to be affected to the extent considered appropriate and reasonably practicable, but failure to consult does not affect validity: s 19).

⁵⁷ Senate Standing Order 23(3)(j).

⁵⁸ Senate Standing Order 23(3)(k).

⁵⁹ Senate Standing Order 23(3)(l). Henry VIII-type powers are those that 'amend, modify or exempt persons or entities from the operation of primary legislation' and 'may limit parliamentary oversight and subvert the appropriate relationship between Parliament and the executive': Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines* (3rd edn, July 2024) 39.

are published in a subsequent Monitor. After receiving a ministerial response, the Committee may conclude or continue to engage if its concerns remain unresolved.⁶⁰ Minor scrutiny concerns may be first addressed by the secretariat engaging with the relevant agency. Although details of these interactions are not published, the Monitor lists the instruments involved. If a concern is not resolved informally, it is escalated and published as a formal Monitor entry for a ministerial response. The Monitor also includes a list of new and outstanding ministerial undertakings,⁶¹ instruments to be drawn to the attention of the Senate on the basis that they specify expenditure or levy taxation,⁶² and instruments that do not meet the Committee's expectations relating to exemptions from disallowance or sunseting.⁶³

Where the disallowance period is nearing expiry for a legislative instrument still under consideration, the standard practice is for the Committee chair to place a notice of motion for disallowance, which triggers an extension of time for a further period of 15 sitting days.⁶⁴ If the Committee concludes its consideration of the instrument during this time, the chair will withdraw the notice. In practice, the Committee successfully resolves most of its concerns prior to disallowance, with the result that disallowance through the initiative of the Committee is rare. Ministers are, however, undoubtedly aware that in all cases where disallowance has been pursued, the Committee's action has been supported by a majority of the Senate, resulting in the instrument's disallowance.⁶⁵

B. During the Pandemic

This section considers declarations and delegated legislation made by the Australian federal government under the Biosecurity Act, although it should be noted that a significant volume of delegated legislation was made under other enabling Acts.⁶⁶ Within Australia's federal system, the states retain legislative responsibility for a wide range of matters within their borders and made substantial amounts of delegated legislation in response to the pandemic, including in relation to lockdowns.

On 21 January 2020, the Director of Human Biosecurity listed a 'human coronavirus with pandemic potential' as a human disease under the Biosecurity Act.⁶⁷ The listing triggered broad powers for the Health Minister to, among other things, establish entry and exit requirements;⁶⁸ and ban, restrict or require a 'behaviour or practice'.⁶⁹ Health officials were also authorised to impose coercive control orders on individuals.⁷⁰ Less than two months later,

⁶⁰ The Committee will sometimes conclude on a concern by drawing it to the attention of the Senate, as provided in Senate Standing Order 23(4). This option provides an opportunity for the Committee to resolve a concern in relation to a legislative instrument short of seeking its disallowance.

⁶¹ Chapter 4 of the *Delegated Legislation Monitor*.

⁶² Chapter 5 of the *Delegated Legislation Monitor*.

⁶³ Chapter 6 of the *Delegated Legislation Monitor*.

⁶⁴ *Legislation Act 2003* (Cth) s 42(1).

⁶⁵ Pearce and Argument (n 2) 261.

⁶⁶ See, for example, Edgar (n 22) 175-177. A list of federal delegated legislation made in response to the pandemic is maintained by the Senate Standing Committee for the Scrutiny of Delegated Legislation:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Work_of_the_committee/Scrutiny_of_COVID-19_instruments/.

⁶⁷ *Biosecurity (Listed Human Diseases) Amendment Determination 2020* (Cth).

⁶⁸ *Biosecurity Act 2015* (Cth) ss 44 and 45.

⁶⁹ *Biosecurity Act 2015* (Cth) s 51(2).

⁷⁰ *Biosecurity Act 2015* (Cth) ss 60 and 89-93. Notably, control orders are not legislative instruments, which means they are not subject to disallowance or Committee scrutiny.

the Governor-General declared a human biosecurity emergency, enabling for the first time certain extraordinary powers under the Biosecurity Act.⁷¹ Delegated laws made under these powers have a quasi-constitutional character by being deemed to have legal effect ‘despite any provision of any other Australian law’. Extended repeatedly, the emergency declaration remained in place for more than two years.

The Biosecurity Act establishes significant penalties for non-compliance with delegated laws made under its authority, including in some cases imprisonment for up to 5 years and fines exceeding AUD \$65,000, or both.⁷² It also provides that the disease listing and emergency declarations, along with the delegated laws made under the powers triggered as a result of those declarations, are exempt from disallowance.⁷³ Under the Senate’s Standing Orders at the time, exempt instruments were not referred to the Committee and therefore were not scrutinised in the ordinary way.

Over the course of the emergency period, more than 700 pandemic-related legislative instruments were made, comprising more than 10,000 pages of text.⁷⁴ These delegated laws included dozens of exempt instruments under the Biosecurity Act that had a significant impact on individual rights and liberties, such as by restricting international travel and travel to remote communities, requiring health screening, closing certain retail outlets, establishing price controls on certain goods and requiring contact tracing measures.

Prior to the pandemic, the Committee had highlighted a trend towards the growth of legislative instruments exempt from disallowance, which accounted for nearly 20% of all instruments made in 2019.⁷⁵ The Committee called for ensuring that all exemptions were contained in primary legislation, which was not supported by the government in part due to practical considerations.⁷⁶ In April 2020, the Committee initiated an inquiry into exemptions to ‘guard against the inappropriate exemption of such laws from parliamentary oversight’.⁷⁷ The Committee’s interim report focused on COVID-19 delegated legislation. Noting the ‘unprecedented circumstances’ of a global health challenge, the Committee observed that ‘Parliament must still be in a position to effectively fulfil its duty to exercise control over laws made by the executive’.⁷⁸ In its interim report, the Committee recommended that the Senate amend its Standing Orders to ensure that all legislative instruments would be referred to the Committee for scrutiny, noting ‘the non-disallowable status of emergency-related legislative instruments exacerbates the need for parliamentary committee consideration of such legislation’.⁷⁹ In its final report, the Committee repeated its call for the Senate to amend its Standing Orders to allow the Committee to ‘consider instruments made under the authority of Acts of the Parliament that are not subject to disallowance ... [and] consider whether it is

⁷¹ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth), made under *Biosecurity Act 2015* (Cth) s 475, triggering powers under ss 477-478.

⁷² For example, *Biosecurity Act 2015* (Cth) s 479, which provides for certain requirements or directions.

⁷³ *Biosecurity Act 2015* (Cth) ss 475(2), 476(2) and 477(2).

⁷⁴ Australian Law Reform Commission, ‘Lawmaking During the COVID-19 Pandemic’ (12 December 2022) <https://www.alrc.gov.au/datahub/topics-of-interest/lawmaking-during-the-covid-19-pandemic/>.

⁷⁵ Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation* (3 June 2019) 122-124.

⁷⁶ Regulations and Ordinances Committee, *Parliamentary Scrutiny of Delegated Legislation* (3 June 2019) 124; Australian Government, *Response to the Senate Standing Committee on Regulations and Ordinances Report: Parliamentary Scrutiny of Delegated Legislation* (November 2019) 5, noting that ‘legislative instruments should only be exempted from disallowance in very limited circumstances’.

⁷⁷ Scrutiny Committee, *Interim Report* (2 December 2020) xiv.

⁷⁸ Scrutiny Committee, *Interim Report* (2 December 2020) 3.

⁷⁹ Scrutiny Committee, *Interim Report* (2 December 2020) 120-121.

appropriate for the instrument to be exempt from disallowance.’⁸⁰ The Senate adopted the Committee’s recommendation and amended its Standing Orders effective 1 July 2021.⁸¹

IV. Democratic Shortcomings

A. Scholarly Reflections

The pandemic provided an opportunity to observe how emergency governance intersected with constitutional principles and democratic lawmaking. Since the pandemic, law and politics scholars have considered the way in which delegated legislation was utilised by the Australian government and the institutional implications. Many scholars highlighted the dominance of the executive over the other branches, particularly the legislature. Tamara Tulich and Sarah Murray observed that the government’s approach created ‘cleavages in governmental transparency and accountability’.⁸² Parliamentary oversight ‘faced real hurdles as a mechanism for holding the executive and legislature to account ... particularly with the reliance of governments on delegated legislation that is exempt from disallowance’.⁸³ Marco Rizzi and Tamara Tulich similarly noted the executive’s ‘absolute prevalence’ over other institutions and concluded that political decision-making had become prioritised over legal processes.⁸⁴ While the government’s response helped control the spread of COVID-19, it did so ‘at the cost of sidelining mechanisms of executive accountability and parliamentary scrutiny, which imposed significant restrictions on basic freedoms with little independent oversight’.⁸⁵ The ‘democratic deficits’ of lawmaking included exemptions that limited the work of parliamentary committees, including the human rights committee.⁸⁶

Others faulted the legislature for not asserting itself. Harry Hobbs and George Williams noted that parliaments failed to properly fulfil their constitutional roles.⁸⁷ They argued that the federal Parliament should have introduced amendments to the Biosecurity Act ‘to permit it to scrutinise and overturn declarations of emergency and public health directions’.⁸⁸ While recognising that the legislature may be less effective during an emergency, they emphasised that this ‘should not mean that Parliament should abandon its constitutional and democratic responsibilities’, and that ‘with broad emergency powers must come sharp scrutiny and vigilance’.⁸⁹

Many scholars called for reforms to strengthen parliamentary oversight of emergency lawmaking. Sarah Moulds and Anja Pich proposed systematic post legislative scrutiny reforms

⁸⁰ Scrutiny Committee, *Final Report* (16 March 2021) 121.

⁸¹ *Delegated Legislation Monitor 16/2021* (25 November 2021) vii. Notably, similar reform had been proposed earlier: Lauren Fletcher, ‘In These Uncertain Times: (A Lack of) Oversight of the Biosecurity Act 2015 (Cth)’ (2020) 41 2 *Adelaide Law Review* 641, 651.

⁸² Tamara Tulich and Sarah Murray, ‘Executive Accountability and Oversight in Australia During the COVID-19 Pandemic’ (2022) 30 2 *Michigan State International Law Review* 283, 320.

⁸³ Tulich and Murray (n 82) 320.

⁸⁴ Marco Rizzi and Tamara Tulich, ‘All Bets on the Executive(s)! The Australian Response to COVID-19’ in Joelle Grogan and Alice Donald (eds), *Routledge Handbook of Law and the COVID-19 Pandemic* (Routledge 2022) 457, 470.

⁸⁵ Rizzi and Tulich (n 84) 457.

⁸⁶ Rizzi and Tulich (n 84) 457, 465-466.

⁸⁷ Harry Hobbs and George Williams, ‘Australian Parliaments and the Pandemic’ (2023) 46 4 *University of New South Wales Law Journal* 1314.

⁸⁸ Hobbs and Williams (n 87) 1348.

⁸⁹ Hobbs and Williams (n 87) 1354.

to ‘introduce options for review in the form of removing disallowance exemptions’.⁹⁰ Similarly, Rosalind Croucher, reflecting on the encroachment of rights and liberties in the absence of parliamentary scrutiny, urged that ‘appropriate lessons are learned and that future emergency responses embed a strong and more effective human rights scrutiny process’.⁹¹ While acknowledging that review mechanisms may need to assume a lower priority during the immediate needs of an emergency, she cautioned that such decisions should not ‘permanently undermine the rule of law and core democratic values’.⁹² Scrutiny processes should be included in all emergency responses.⁹³ Comparative studies offered further insights into how parliamentary oversight might better adapt to emergency lawmaking. In considering the United Kingdom’s pandemic response, for example, Daniella Lock, Fiona de Londras and Pablo Grez Hidalgo identified a tension in the ‘constitutional bargain’ that presumes ‘the enablement of meaningful scrutiny by Parliament’.⁹⁴ They concluded that ‘patterns of excessive delegation and limited parliamentary scrutiny were neither inevitable nor universal’, and highlighted New Zealand as a positive example.⁹⁵ In New Zealand, the Regulations Review Committee reported a positive working relationship with government departments in relation to improving the clarity of pandemic-related regulations, which the authors attribute to the government’s ‘willingness to engage effectively with Parliament and of the broader constitutionalist mindset that Government exhibited throughout the pandemic’.⁹⁶

B. Restoring Democratic Legitimacy: Completing the Democratic Circuit

The democratic legitimacy of delegated legislation depends upon parliamentary oversight. In Australia, parliamentary scrutiny and the possibility of disallowance together play a critical role as a source of legitimation by bringing executive laws before the legislature. Oversight becomes even more important in an emergency where decisions impacting rights and liberties may, and in some cases must, be made quickly and on the basis of incomplete information. Exempting these laws from oversight and disallowance during the pandemic removed a democratic safeguard that would have helped sustain their legitimacy. Even when the lawmaking system is assessed as a whole, the exemption of these laws amounted to a departure from the standard expected in a democratic society because of their significant impact.

While the Senate’s Standing Orders now ensure all legislative instruments can be scrutinised by the Committee, scrutiny alone cannot compensate for the loss of legitimation supplied by the possibility of disallowance for an exempt instrument. While parliamentary scrutiny plays a critical role by identifying concerns and requiring ministers to justify their use of delegated power, it acquires much of its practical force from the possibility of disallowance. That possibility ensures that executive lawmakers remain conscious that delegated legislation is subject to review and ultimate control by the legislature. Together, scrutiny and disallowance

⁹⁰ Sarah Moulds and Anja Pich, ‘Reviewing Executive Decision-Making in Emergencies: Time to Consider a More Systematic Approach to Post-Legislative Scrutiny in Australia’ (2023) 41 2 *University of Tasmania Law Review* 43, 75.

⁹¹ Rosalind Croucher, ‘Human Rights in the Time of COVID: Ensuring Accountability in the Contemporary Public Health Context’ (2022) 41 *Medicine and Law* 475, 494.

⁹² Croucher (n 91) 494-495.

⁹³ Croucher (n 91) 494-495.

⁹⁴ Daniella Lock, Fiona de Londras and Pablo Grez Hidalgo, ‘Delegated Legislation in the Pandemic: Further Limits of a Constitutional Bargain Revealed’ (2023) 43 *Legal Studies* 695-696, 700, 703-705, 710-712.

⁹⁵ Lock, de Londras and Grez Hidalgo (n 94) 714.

⁹⁶ Lock, de Londras and Grez Hidalgo (n 94) 714.

sustain a vital relationship between the legislature and the executive, one in which executive lawmaking remains accountable to parliament as lawmaker-in-chief.

Government concerns about disallowance during an emergency lack a convincing foundation. The Committee explained in its Interim Report that disallowance operates prospectively. It does not impair the executive's ability to act quickly or decisively in urgent circumstances.⁹⁷ Rather, it ensures that laws made in such circumstances receive meaningful *ex post facto* review at a time when more information is available and the consequences of the law are better understood. It ensures that the legislature retains the capacity to correct overreach, respond to public concern or require additional justification for the law to continue. The Committee's consensus-based and non-partisan approach further underscores its value. Its focus on technical scrutiny principles rather than policy outcomes ensures that its interventions do not hinder urgent decision-making on the basis of political disagreement while at the same time protecting the public from laws that unjustifiably encroach on rights, liberties and rule of law values.

Exemptions from disallowance also disrupt the institutional expectations that guide the relationship between parliament and the executive. Delegated legislation and parliamentary scrutiny and control operate within a framework of institutional norms and expectations that shape how political and legal actors understand their roles. Scholars have emphasised that these unwritten norms are essential to maintaining stable constitutional relationships by guiding actors to behave in ways that preserve the integrity of the institutional order.⁹⁸ In Australia, there is a long-standing expectation that delegated legislation is subject to control. Odgers' *Australian Senate Practice* identifies this as a settled feature of delegated lawmaking, observing that '[t]his system, which has been built up over many years ... is founded on the ability of either House of the Parliament to disallow, that is, to veto, such laws made by executive office-holders'.⁹⁹ As discussed earlier, the judiciary has also noted the exceptional nature of disallowance, being a departure from the norm.¹⁰⁰ These entrenched expectations make scrutiny more meaningful by ensuring that the executive consistently approaches the task of making delegated legislation with a clear appreciation that its laws will be reviewed and may be disallowed. When that expectation is removed, the dynamic between the executive and parliament shifts. Ministers no longer face the same incentive to anticipate parliamentary reaction or to provide appropriate justification for the exercise of delegated power, particularly in relation to laws that impact rights and liberties.

The exemption of federal delegated legislation from disallowance during the COVID-19 emergency was incompatible with the standard of lawmaking expected in a democratic society. Exemptions deprived parliament of oversight and disallowance, disrupted institutional norms and further eroded the already limited democratic defensibility of laws that encroached upon rights and liberties. The key lesson is that the democratic legitimacy of delegated legislation depends on active and continuing parliamentary oversight. Emergencies do not displace this requirement. If anything, they heighten it. Scrutiny and the availability of disallowance remind all actors that parliament, and not the executive, is both constitutionally and democratically responsible for lawmaking. Even when delegated legislation must be made quickly and in the absence of complete information, such laws must still come before parliament for review,

⁹⁷ Scrutiny Committee, *Interim Report* (2 December 2020) 61.

⁹⁸ See, for example, Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1987).

⁹⁹ Harry Evans (ed), *Odgers' Australian Senate Practice* (14th edn, Department of the Senate 2016) ch 15.

¹⁰⁰ *Baker* (n 46).

justification and, where necessary, control. This connection to the legislature completes the democratic circuit and sustains the legitimacy of delegated legislation in Australia. Without it, delegated legislation loses the lifeblood on which its public acceptance depends.

V. Conclusion

COVID-19 represented a sort of ‘back to the future’ moment for delegated legislation. More than a century ago, Cecil Thomas Carr described executive laws as being used for dealing with plagues, pests and contagious diseases.¹⁰¹ While acknowledging the inevitability of delegated legislation, Carr also warned of its dangers and outlined a series of safeguards to protect against arbitrary or unreasonable laws.¹⁰² In Australia, those safeguards take the contemporary form of parliamentary scrutiny and control of delegated legislation. This chapter has sought to demonstrate that these safeguards are indispensable, even in times of emergency. Emergencies do not justify a retreat from democratic lawmaking. Parliamentary oversight is needed to ensure that delegated legislation remains democratically defensible.

There are few constitutional or legal doctrines in the Westminster tradition that limit the use of delegated legislation. Their absence places greater weight on parliamentary oversight as the primary democratic safeguard. If constitutional or legal doctrines required legislatures to clearly define the scope of delegated authority, and returned major policy decisions resting on unclear authority to the legislature, an argument might be made that delegated legislation could rely less on parliamentary oversight for its legitimation. In their absence, however, parliamentary oversight remains indispensable.

Since the pandemic, some reform has taken place in Australia. As discussed earlier, the Committee is now able to scrutinise all legislative instruments including those that are exempt from disallowance. However, despite the Committee’s recommendations,¹⁰³ successive governments have so far declined to amend the Biosecurity Act to remove exemptions for delegated legislation made under its enabling provisions.¹⁰⁴ Even so, the Senate Standing Committee for the Scrutiny of Bills has developed a practice of requiring justification for provisions in new bills that propose to exempt delegated legislation from disallowance. In its view, exemptions ‘are only justified in exceptional and limited circumstances’.¹⁰⁵ This approach seeks to prevent the problem at the front end by ensuring that any legislated exemptions from disallowance are justified.¹⁰⁶

While the insights from this chapter may be applied to other jurisdictions, it is important to recognise that the parliamentary scrutiny and control of delegated legislation is likely to take different forms across Westminster systems and must be understood within its respective domestic legal, political and institutional context. Committees may differ in their composition, operate with varying remits, or exist alongside other committees that share or overlap in terms of responsibilities. Some committees focus on technical scrutiny, while others undertake a

¹⁰¹ Carr (n 3) 23-26.

¹⁰² Carr (n 3) 27-41, noting that ‘If Parliament and the public are reasonably vigilant, the safeguards should be adequate’.

¹⁰³ Scrutiny Committee, *Interim Report* (2 December 2020) recs 2 and 5-9.

¹⁰⁴ Australian Government, *Response to the Standing Committee for the Scrutiny of Delegated Legislation Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Interim Report* (4 November 2021) 8-13.

¹⁰⁵ Senate Standing Committee for the Scrutiny of Bills, *Guidelines* (2nd edn, July 2022) 15.

¹⁰⁶ Although legislative instruments can also be exempted by regulation: *Legislation Act 2003* (Cth) s 44(2).

broader review that includes policy. Some examine proposed laws, while others consider laws only after they have commenced. Scrutiny timeframes differ, as do scrutiny intensity and consistency, and the availability and processes for repealing delegated laws. These differences highlight the value of comparative study to assess the effectiveness of different models. While the means to achieve it may differ, the overarching goal remains for parliament to exercise meaningful oversight of delegated lawmaking to complete the democratic circuit and fulfil its role as lawmaker-in-chief.

23 December 2021

Government of Australia
Attorney-General's Department
National Circuit
BARTON ACT 2600

SENT BY E-MAIL TO legislationactreview@ag.gov.au

Dear Attorney-General's Department:

Re: Review of the *Legislation Act 2003*

Thank you for providing me with the opportunity to write a submission in connection with your review of the *Legislation Act 2003* ('LA').

By way of introduction, I am an Associate Professor at Adelaide Law School, University of Adelaide. I am also a member of the University of Adelaide's Public Law and Policy Research Unit (although this submission is made on my own behalf). I have a research interest in the parliamentary scrutiny of delegated legislation.

This review of the LA provides a valuable opportunity to reflect upon and re-assess the LA's objects and effectiveness. The LA contains (among other things) a repository of rules related to the making and management of Commonwealth delegated legislation.

Lawmaking is a sacred trust. It is particularly important that principles of good lawmaking are applied to delegated legislation, which has become the principal form of lawmaking in Australia. Because delegated legislation is not made in the same way as primary legislation – namely, it does not benefit from the accountability and transparency of the ordinary parliamentary process that includes three readings in both Houses, public debate, committee study and a recorded vote by elected representatives – basic standards imposed by the LA for making delegated legislation are essential.

My comments below focus on select aspects of the LA relating to delegated legislation.

Objects of the LA

- **S 3(b) provides that the LA encourages rule-makers to 'undertake appropriate consultation' prior to making legislative instruments.**

Adequate and meaningful consultation prior to the making of a legislative instrument is essential to good lawmaking.

Rule-makers can only exercise legislative power delegated to them by Parliament. Parliament is the only institution constitutionally vested with the legislative power of

the Commonwealth.¹ It can be safely presumed that Parliament intends that its legislative powers be exercised by delegates reasonably and on an informed basis.

Information received from stakeholders through prior consultation stands to improve the quality of legislation. Consultation provides valuable insight into the relevant area of economic or social life that is the subject of the proposed law. It can reveal how draft laws might be understood and applied in practice, thereby helping rule-makers identify limitations or pitfalls in the legislative text. Adequate and meaningful prior consultation imposed by the LA is especially important in the context of delegated legislation as it is made outside the ordinary parliamentary process which enables participation in lawmaking by persons other than the proponents of the new law. Prior consultation is the only mechanism that facilitates the involvement of others in the lawmaking process for delegated legislation. Consultation also carries the benefit of increasing compliance with the law by providing advance notice of a change in the law to those most likely to be affected by it.

The LA should establish a legal standard for adequate and meaningful consultation, the breach of which should carry practical consequences. Currently, the object only encourages rule-makers to follow an ill-defined standard of what is 'appropriate'.² Non-compliance carries no significant consequences.³

In establishing a consultation standard, consideration must also be given to the interests of efficiency, flexibility and practicality. One key advantage of delegated lawmaking is that it is not as cumbersome as the ordinary parliamentary process. There are also scenarios, such as in the context of an emergency, in which prior consultation may not be desirable nor practical.

In my view, the balance that has been struck in the object is not the correct balance. I would suggest that the object be amended to the effect that the LA establishes an adequate and meaningful consultation standard for rule-makers prior to the making of a legislative instrument. The object would be realised in new provisions of the LA that flesh out this standard. I would suggest a comparative study be undertaken with other jurisdictions to develop a new approach to consultation in the LA. I would also suggest that the LA be amended to the effect that rule-makers be required to certify that adequate and meaningful consultation in accordance with the LA's consultation obligation was carried out in relation to the legislative instrument.

¹ Constitution of Australia, s 1.

² General words are used in legislation, like 'appropriate' or 'reasonable', as a device to allow for a flexible interpretation in light of new circumstances. In litigation, courts authoritatively determine the meaning of such words, gradually giving them a more focused meaning in the context of particular facts. In the case of the LA, however, there is no enforceable consultation requirement and thus no potential for the judicial development of a consultation standard. Moreover, the word 'appropriate' is further weakened in the LA as it is defined by reference to what is "considered by the rule-maker to be appropriate": s 17(1)(a).

³ Because of the no-invalidity clause in s 19.

- **S 3(c) provides that the LA encourages high standards in the drafting of legislative instruments.**

The Australian conception of the rule of law includes the notions that laws should be effective, clear and intelligible, all of which are expressly mentioned in the object. S 16 requires the First Parliamentary Counsel to promote the object through various means. In fulfilment of the object, the Office of Parliamentary Counsel ('OPC') provides drafting services and guidance to rule-makers.

It appears that there remain some challenges with the drafting quality of legislative instruments (which may be more significant when legislative instruments are drafted externally, that is, not by the OPC). In 2021, concerns relating to drafting clarity or errors were raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation (the 'Senate Committee') in relation to 29 instruments, five of which were not concluded.⁴ In its 2019 inquiry report, the Senate Committee observed that it 'frequently raises concerns relating to ... the drafting of an instrument or its explanatory statement'.⁵

In my view, the encouragement of high drafting standards does not set a sufficiently high bar to ensure the quality of drafting in relation to legislative instruments. I would suggest amending the object to the effect that the Act establishes and expects high standards to be achieved in the drafting of legislative instruments.

- **S 3(e) provides that the LA establishes 'improved mechanisms' for the parliamentary scrutiny of legislative instruments.**

This object is factually incorrect. The LA does not establish parliamentary scrutiny mechanisms for legislative instruments.⁶ Such mechanisms are established by the Houses of Parliament in their Standing Orders, notably the Standing Orders of the Senate establishing the Senate Committee and setting out its scrutiny principles.⁷ I would suggest amending the object to align it with what the LA actually delivers: e.g., disallowance as a mechanism for parliamentary control of legislative instruments.

It is not obvious what 'improved' in the object refers to. It may have been clear in 2003 what was improved by the LA, but this is no longer the case in 2021-2022. I would suggest that the object be amended to remove the reference to 'improved'.

⁴ Senate Standing Committee for the Scrutiny of Delegated Legislation, *Index of Instruments* https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Index.

⁵ Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation Final Report (2019)* at 70.

⁶ S 37 more accurately describes that the LA "facilitates the scrutiny by Parliament of registered legislative instruments" by establishing a disallowance procedure.

⁷ See Order 23 of the Standing Orders of the Senate (Scrutiny of Delegated Legislation).

The LA's current definition of legislative instrument

The definition of 'legislative instrument' is a critical definition in the LA. It is the gateway to the LA's principal accountability and transparency rules that relate to the making and management of delegated legislation. These provisions include consultation,⁸ tabling,⁹ disallowance,¹⁰ explanatory statements,¹¹ sunseting¹² and limits on enforceability if the instrument is not registered.¹³ Only instruments that are included in the LA's definition of a legislative instrument will be subject to these essential lawmaking requirements.

The Discussion Paper states that "[a]n instrument that is legislative in character should be properly characterised as a legislative instrument and neither exempted nor stated to be a notifiable instrument".¹⁴ I agree. Yet the LA does not itself require this to be the case. The achievement of this objective instead relies upon drafting guidance and the exercise of executive discretion.

The LA's current definition of legislative instrument is problematic. It is comprised of several 'passes', each of which sweeps certain instruments into the definition.¹⁵ In some passes, the definition requires a positive step to be taken by a specified actor (such as Parliament). At other times, the definition includes a deeming provision or a conceptual definition that purports to classify instruments by operation of law. The definition also contains exclusionary passes that remove certain instruments from the definition of legislative instrument. Ultimately, the mixed approaches in the different parts of the definition are confusing and generate uncertainty about what is, and what should be, a legislative instrument under the LA. As currently worded, the LA allows instruments that are legislative in character to be excluded from falling within the definition of legislative instrument with the effect that they are wholly exempt from the LA's basic rules that provide a minimum standard of accountability and transparency for making delegated legislation.

It is useful to read the OPC's Drafting Direction No 3.8 (the 'Drafting Direction') to obtain a more complete understanding of how the LA's definition of legislative instrument is intended to work. The Drafting Direction indicates that the LA currently allows for its classification system to be easily sidestepped, with its integrity resting upon the OPC and the Attorney-General. For instance, the Drafting Direction notes that the "OPC has an interest in ensuring that the LA is not unnecessarily displaced and that there is proper accountability and approval for any displacement".¹⁶ Guidance is provided to drafters that a total exemption from the LA by reclassifying an instrument "is ultimately a decision for the Attorney-General".¹⁷ Instead of relying on the OPC and the Attorney-General's

⁸ S 17 applies only to legislative instruments.

⁹ Ss 38 (tabling of legislative instruments) and 39 (tabling of explanatory statements) apply only to legislative instruments.

¹⁰ S 42 applies only to legislative instruments.

¹¹ S 15J applies only to legislative instruments.

¹² S 50 applies only to legislative instruments.

¹³ S 15K applies only to legislative instruments although s 12(2) provides some limits on retrospective operation that applies to both legislative instruments and notifiable instruments.

¹⁴ Attorney-General's Department, 2021-2022 Review of the *Legislation Act 2003* (2021), Discussion Paper at 11.

¹⁵ S 8(1).

¹⁶ Parliamentary Counsel, Drafting Direction No 3.8, Subordinate legislation at para 70.

¹⁷ Parliamentary Counsel, Drafting Direction No 3.8, Subordinate legislation at para 62.

interest in maintaining principles of good lawmaking for delegated legislation, the LA should itself establish clear and unyielding rules for classifying a legislative instrument and close off the possibility of wholesale exemptions. The LA should on its own terms maintain the integrity of its classification system and the basic standards it imposes on delegated lawmaking.

LA passes that include instruments as legislative instruments:

- **Where an enabling Act requires something to be done by legislative instrument, it is a legislative instrument (s 8(2)).**

This provision involves Parliament expressly including in an enabling Act a statement that a delegation of power is exercisable by legislative instrument. Drafters of Bills are instructed to follow this approach when it is intended that an instrument made under a delegated power is to be a legislative instrument: para 75 of the Drafting Direction.

- **Where an instrument made under an enabling Act is registered as a legislative instrument, it is a legislative instrument (s 8(3)).**

This provision would have effect when an enabling Act does not specify whether a delegated power is to be exercised by legislative instrument (or specifies that the instrument is a non-legislative instrument), but an instrument made under the power is registered by the rule-maker as a legislative instrument. This should be relatively rare because all new Bills are expected to expressly state their intention that an instrument is a legislative instrument: para 75 of the Drafting Direction.

- **Where an instrument made under an enabling Act is declared by ss 10 and 57A to be a legislative instrument, it is a legislative instrument (s 8(5)).**

No steps are required to be taken under this provision as the kinds of instruments specified in ss 10 and 57A become legislative instruments by operation of law. For example, regulations and proclamations made under powers delegated by an Act are included as legislative instruments by s 10. S 10(1)(c) also permits instruments to be declared as legislative instruments by the executive through regulation. This power does not appear to be used in practice as a search of regulations in the Federal Register of Legislation does not turn up instruments that have been declared to be legislative instruments under s 10(1)(c). S 57A relates to instruments made under enabling legislation enacted prior to 1 January 2005.

- **Where an instrument made under an enabling Act determines or alters the content of the law, instead of determining a particular case, and touches upon rights, privileges, obligations or interests, it is a legislative instrument (s 8(4)).**

This provision imposes a general test of legislative character. It distinguishes the LA from some other schemes related to delegated legislation. In South Australia, for example, the *Subordinate Legislation Act 1978* applies only to instruments

that are called a 'regulation, rule or by-law'.¹⁸ A formalistic approach is also taken in New South Wales.¹⁹

A general test of legislative character is valuable because it avoids a formalistic reliance on labels to identify legislation in favour of considering the true nature of an instrument. This part of the definition focuses on the actual substance of the instrument in question as opposed to what it is called.

It does, however, introduce uncertainty into the classification of instruments. How should the test of legislative character be applied in practice? What are the true hallmarks of legislation? Who is tasked with making this important assessment, the results of which trigger the LA's basic standards for delegated legislation?

To distinguish legislative from administrative decisions, courts consider a variety of factors as part of a holistic assessment: see *RG Capital Radio Ltd v Australian Broadcasting Authority* [2001] FCA 885. In that case, the Federal Court of Australia considered whether the challenged decision established a general rule or applied a general rule to a specific case, the degree of parliamentary control, relevant publication requirements, the consultation process, the extent of policy considerations, the availability of merits review, and the extent and significance of the decision's binding legal effects. The factors pointed in different directions. The Federal Court weighed up the factors and concluded that the decision was, on balance, legislative in character.

The LA's general test of legislative character is problematic when coupled with other parts of the LA's definition, which can lead to inconsistencies. To take an example: an instrument is not legislative in character under s 8(4) but is nevertheless declared by an Act to be a legislative instrument (s 8(2)). It might also be declared by the regulations to be a legislative instrument (ss 8(5), 10(1)(c)), registered as a legislative instrument (s 8(3)) or declared by the LA to be a legislative instrument (s 8(5)). In this case, an instrument that does not have the character of legislation is treated as a legislative instrument by the LA. While confusing, this result is not concerning from the point of view of good lawmaking as it provides enhanced accountability and transparency in relation to an instrument that is not legislative in character.

A more concerning example from the point of view of good lawmaking is where an instrument has a legislative character in the meaning of s 8(4) but is declared by an Act not to be a legislative instrument. Under s 8(6), the instrument will not be a legislative instrument under the LA even though it is legislative in character (provided it is not registered as a legislative instrument). The complete removal of delegated legislation from the definition of legislative instrument is problematic as it withdraws such laws from the LA's basic standards for making delegated legislation. There is very little accountability or transparency for the making of such instruments as they are made outside the safeguards imposed by the LA.

¹⁸ *Subordinate Legislation Act 1978* (SA), s 4 'regulation'.

¹⁹ *Interpretation Act 1987* (NSW), s 21(1) 'statutory rule'; *Subordinate Legislation Act 1989* (NSW), s 3(1) 'statutory rule'.

S 8(6) also authorises this form of exemption to be made directly by the executive through regulation, which is discussed further below.

The mischaracterisation of delegated legislation as being non-legislative as the means to provide a total exemption from the LA's basic lawmaking standards is not a fanciful risk. Earlier this year, the Senate Committee raised concerns about the classing of certain emergency instruments as notifiable instruments and not legislative instruments, despite having the character of legislation.²⁰ The Senate Committee's report demonstrates the potential for exemptions to undermine essential democratic safeguards provided by the LA.

Ultimately, the main problem of the LA's definition of legislative instrument is that it adopts incompatible mixed approaches based on substance and formalism, with formalism being given priority over the substance of an instrument. As noted, s 8(4) establishes a substantive approach that considers the character of an instrument. Read on its terms, s 8(4) imposes a conceptual boundary of what falls into the definition of a legislative instrument that is based on the true nature of the instrument. But once s 8(4) is read with other parts of the definition, it becomes clear that the character of an instrument is not actually determinative. Under the LA, exemptions and other parts of the definition are given priority over this general test of legislative character. The classification of an instrument under the LA – along with the application of the basic rules for delegated lawmaking – ultimately turns on how an instrument is defined by an enabling Act or in the regulations. The general test of legislative character in s 8(4) is undermined by parts of the definition that require an actor to declare the instrument's status while authorising exemptions that allow for a reclassification of the instrument which will not accurately reflect its true character. Instead of imposing a legal standard, s 8(4) is transformed into soft law or guidance. The result is an upside-down Alice in Wonderland scenario: instruments that legislate are legislative instruments except for when they aren't. Instruments that administer are not legislative instruments except for when they are. The very problem that the LA's general test of legislative character seeks to overcome – namely, a reliance on formalism – ends up being replicated through the mixed approaches in the LA's definition.

The manipulable nature of the LA's classification system is reinforced by s 9(1), which provides that the fact of an instrument being a legislative instrument (under ss 8(2), 8(3) or (5)) 'does not imply that the instrument is, or must be, of legislative character (within the ordinary meaning of that term)'. Further, s 9(2) provides that an instrument exempted from being a legislative instrument under s 8(6) 'does not imply that the instrument is not, or must not be, of legislative character (within the ordinary meaning of that term)'. In this way, the LA admits the potential for an instrument to be classed as the opposite of what it actually is by reference to its character. S 9 thus has the effect of limiting the Alice in Wonderland scenario only to the LA, preventing a spill-over into other areas of law where the same

²⁰ Senate Standing Committee for the Scrutiny of Delegated Legislation, Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight, Interim Report (2020) at ch 5 'Classification of delegated legislation in times of emergency'.

instrument can still be seen for what it really is. The most likely application of this provision would be in relation to judicial review.²¹

Exemptions from the LA's definition of legislative instrument can significantly alter the ordinary and expected operation of the LA. If the availability of exemptions is not limited, and their use is not subject to adequate scrutiny, exemptions can chip away at essential safeguards that provided a minimum standard of accountability and transparency for the making of delegated legislation. The LA does not specify any criteria, establish any conditions or identify any circumstances for the availability or use of exemptions (with one exception).²² In addition, the LA does not require any explanation or justification to be provided for the use of an exemption.

LA passes that exclude instruments as legislative instruments:

- **Where an instrument is declared by an Act or prescribed by regulations not to be a legislative instrument, it is not a legislative instrument (s 8(6)).**

This provision applies despite the general test of legislative character (s 8(4)) and the LA declaring in ss 10 or 57A that an instrument is a legislative instrument (s 8(5)). It does not apply, however, to an instrument that becomes a legislative instrument by way of registration (s 8(3)).

This wholesale exemption from the LA's basic rules for the making of delegated legislation requires either Parliament or the executive to declare an instrument not to be a legislative instrument. For Parliament, the declaration will be made expressly in an enabling Act (s 8(6)(a)). For the executive, the declaration will be made expressly in regulations (s 8(6)(b)). The regulations are currently titled the *Legislation (Exemptions and Other Matters) Regulation 2015* ('LEOMR'), although regulations additional to the LEOMR could be made under this power as acknowledged by para 71(b) of the Drafting Guidance.

Where Parliament declares in an enabling Act that an instrument made under a delegated power is not a legislative instrument, despite the fact that it would have a legislative character within the meaning of s 8(4), there is some accountability and transparency for this decision through the ordinary parliamentary process. In addition, the Drafting Directions require drafters to make such a declaration expressly and supply a standard form for the legislative text.²³ Drafters are also required to consult with the Attorney-General.²⁴ The Drafting Directions further encourage drafters to include a drafting note that will "give a detailed explanation

²¹ For example, the *Administrative Decisions (Judicial Review) Act 1977* applies only to administrative decisions and not legislative ones: s 3(1) 'decision to which this Act applies'. While delegated legislation is still judicially reviewable in the common law, the characterisation of a decision as being legislative as opposed to administrative can affect key issues like standing, the availability and content of the grounds of review and remedies. In working out whether a decision is legislative or administrative, courts apply a variety of factors: *RG Capital Radio Ltd v Australian Broadcasting Authority* [2001] FCA 885.

²² One limit is provided by s 8(7), which provides that the exemptions in s 8(6) do not apply to instruments registered as legislative instruments under s 8(3).

²³ Parliamentary Counsel, Drafting Direction No 3.8, Subordinate legislation at paras 82-83.

²⁴ Parliamentary Counsel, Drafting Direction No 3.8, Subordinate legislation at paras 62, 70, 88.

of the justification for that exemption” or risk questioning by the Senate Scrutiny of Bills Committee on whether the legislation is descriptive or operates to provide a substantive exemption by excluding instruments from the LA’s definition of legislative instrument.²⁵ The Drafting Directions note that the Attorney-General is available to assist in drafting the bill’s explanatory memorandum “in relation to issues raised by the LA”.²⁶ None of these requirements are set out in the LA.

There is significantly less accountability and transparency in the exercise of this exemption power by the executive in making regulations outside the ordinary parliamentary process. There are only minimal checks on the executive’s use of this exempting power. After being made, the exempting regulations (which are likely to be amending regulations to the LEOMR) can be scrutinised on technical criteria by the Senate Committee.²⁷ They will also be subject to most of the LA’s basic controls, including disallowance, assuming that the regulations are not themselves declared exempt (either fully or in part) from the LA’s rules relating to delegated legislation.²⁸ It should be noted that the LEOMR is already exempt from the LA’s sunseting provisions because of s 52(2)(b), which denies a further opportunity for parliamentary oversight of the complete set of regulations that is normally available for delegated legislation when it is re-made after its automatic expiration under the LA’s sunseting provisions.

In terms of the LEOMR, two tables relate to the exemption. The tables essentially operationalise the LA’s test of legislative character in relation to cases where the enabling Act does not expressly classify the instrument and the instrument is not intended to be a legislative instrument. The tables thus provide greater certainty about which instruments are to be excluded from the LA’s definition of legislative instrument. It is not apparent from the two tables that the LEOMR has been used to mischaracterise instruments as being non-legislative when they are legislative in character. Instead, exemptions tend to focus on instruments that are not likely to meet the LA’s general test of legislative character in s 8(4). That said, there is the potential for items in the tables to be used by the executive to later impose rules that are legislative, knowing that the instrument will not be treated as a legislative instrument under the LA. For instance, directions to delegates are exempted in the tables.²⁹ However, the Senate Committee observed in its recent report that directions to delegates had sometimes included important legislative provisions.³⁰

²⁵ Parliamentary Counsel, Drafting Direction No 3.8, Subordinate legislation at para 88.

²⁶ Parliamentary Counsel, Drafting Direction No 3.8, Subordinate legislation at para 89.

²⁷ Senate Standing Order 23(4A) now permits the Senate Committee to consider instruments that are exempt from disallowance, including whether it is appropriate for the instrument to be exempt (which could result from the instrument being exempted from the definition of legislative instrument or a particular exemption such as from disallowance).

²⁸ Query whether a newly made regulation exempting certain instruments from being classed as legislative instruments could also include within it a provision that exempts itself from being a legislative instrument under the LA (or from specific parts of the LA such as disallowance), thereby avoiding parliamentary controls. Under s 12(1A), delegated legislation is authorised to have retrospective commencement.

²⁹ E.g., items 1 and 2 in the LEOMR s 6 table.

³⁰ Senate Standing Committee for the Scrutiny of Delegated Legislation, Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight, Interim Report (2020) at 79.

The first LEOMR table at s 6 declares 68 kinds of instruments to not be legislative instruments.³¹ By way of example, item 19 seeks to harmonise the LA's definition with the *Administrative Decisions (Judicial Review) Act 1977* (the 'AD(JR) Act'). Under the AD(JR) Act, decisions of an administrative character are reviewable³² (unless otherwise exempted).³³ Item 19 adopts this definition to exclude any such instruments from being legislative instruments (including instruments that would be administrative but for an AD(JR) exemption and excluding instruments containing a provision having a legislative character). The second table at s 7 declares 57 kinds of instruments to not be legislative instruments.³⁴ Although the table is titled 'Particular instruments that are not legislative instruments', it does not actually list particular instruments. It instead lists particular enabling Acts or provisions of an enabling Act (e.g., 'A fair work instrument (within the meaning of the *Fair Work Act 2009*)'). More than ten compilations of the LEOMR that incorporate various amendments have been registered since it was first made in 2015, indicating that changes have occurred on a relatively frequent basis.

- **Where an instrument is declared by s 8(8) not to be a legislative instrument, it is not a legislative instrument despite any other provision in s 8.**

No steps are required to be taken under ss 8(8)(b) to (e) as the instruments listed in those provisions are automatically excluded from being legislative instruments by operation of law.

S 8(8)(a) includes instruments that are notifiable instruments because they are expressly declared as such in an enabling Act (s 11(1)), imposing a dividing line between these two forms of instruments. When an enabling Act declares a power to be exercised by notifiable instrument, it will not be a legislative instrument.

Instruments can become notifiable instruments in other ways, however:

- **S 11(2)(a) commencement provisions are notifiable instruments and are excluded from being a legislative instrument under s 8(8)(b).**
- **S 11(2)(b) an instrument may be declared by regulation to be a notifiable instrument if it is not a legislative instrument.**

Because this provision is limited to instruments that are not legislative instruments, regulations cannot be used under this provision to override the definition of legislative instrument in s 8(1).

Despite this approach, the LEOMR demonstrates that the opposite result is easily achieved. Item 36 in the s 6 table, which is made under s 8(6)(b), declares classes of instruments listed in the s 8 table not to be legislative instruments. The s 8 table then designates a class of instruments to be

³¹ Counting each entry in the table.

³² *Administrative Decisions (Judicial Review) Act 1977*, s 3(1) 'decision to which this Act applies'.

³³ *Administrative Decisions (Judicial Review) Act 1977*, s 3(1) 'decision to which this Act applies' (d) and Schedule 1; s 19 exemption by regulations.

³⁴ Counting each entry in the table.

notifiable instruments under s 11(2)(b). The effect is that the limitation of s 11(2)(b) is neutralised by the s 8(6)(b) exemption (except in relation to instruments registered as legislative instruments under s 8(3) because of the limitation in s 8(7)).

This concern might seem overstated as the one and only item in the s 8 table is 'An instrument that announces the day an international agreement enters into force for Australia', a class of instrument that is unlikely to ever include an instrument which is legislative in character.

But it is concerning that the s 11(2)(b) jurisdictional limitation can so easily be read out by using the s 8(6)(b) exemption, with limited accountability and transparency for that decision. The use of the exemption in this way flips the priority scheme established by s 11(2)(b) on its head: under the LEOMR, the designation of a notifiable instrument now takes priority over the s 8(1) definition of a legislative instrument (except for s 8(3)), because of the s 8(6)(b) exemption.

Of course, an instrument could simply be exempted by regulations under s 8(6)(b) without the added step of declaring it as a notifiable instrument. Having the instrument classed as a notifiable instrument does at least impose some barebones rules for the instrument such as the registration requirement. The purpose of raising this concern is not to critique the substance of what has been done but rather to demonstrate that the LA permits the easy manipulation of its classification system.

- **S 11(2)(c) an instrument that is registered as a notifiable instrument is a notifiable instrument if made under delegated statutory authority and it is not a legislative instrument.**

Like s 11(2)(b), this provision gives priority to the definition of legislative instrument that is set out in s 8(1). But as described above, an exemption is capable of reversing this priority (except in relation to instruments that are registered as legislative instruments under s 8(3)).

- **S 11(2)(d) an instrument including a provision amending or repealing another notifiable instrument is a notifiable instrument if it is not a legislative instrument.**

Like ss 11(2)(b) and 11(2)(c), this provision gives priority to the definition of legislative instrument that is set out in s 8(1). But as described above, an exemption is capable of reversing this priority (except in relation to instruments that are registered as legislative instruments under s 8(3)).

Exemptions from the LA's definition of legislative instrument are not appropriate as they allow the manipulation of the LA's classification system and enable the avoidance of the LA's basic rules for delegated legislation. These are minimum standards for lawmaking in a democratic society founded on the rule of law.

In my view, the LA should be amended with the effect that it:

- **Establishes a classification system for instruments based on a general test of their character, which properly captures in the definition of legislative instrument all instruments that are in substance legislation.**
- **Requires a determination to be made in each new Bill as to whether instruments made under delegated powers will be legislative instruments.**

In rare cases, as noted in the Discussion Paper,³⁵ the same power might authorise the making of a variety of instruments, including legislative and notifiable instruments. In such a case, the enabling Act should clarify when an instrument made under the power is a legislative or notifiable instrument (e.g., if the instrument is made in relation to a class of persons, it is a legislative instrument; if the instrument is made in relation to an individual, it is a notifiable instrument). If this kind of specificity is not possible in the context of a particular statutory scheme, the power should be broken down into more specific components so that a clear delineation can be made between legislative and non-legislative instruments.

- **Requires a determination to be made for delegated powers under historical legislation (where this has not been done in the enabling Act) through a schedule to the LA, which may include classes of instruments like those that currently appear in the LEOMR.**
- **Requires that the above determinations be based exclusively on the LA's general test of legislative character and not on any other considerations.**
- **Eliminates all classification exemptions to prevent any instruments from being classed as other than what they truly are according to their character.**

The suggested amendments stand to provide a coherent and consistent approach to the fundamental question of how instruments are classified in the LA. This approach is based on the substance of an instrument over formalism and labels. It will remove the invitation for Parliament or the executive to provide wholesale exemptions from the LA's basic rules for lawmaking that relate to consultation, tabling, disallowance, explanatory statements, sunseting and limits on enforceability if the instrument is not registered. If there is a compelling, justifiable need for an instrument to be exempted from one or more of the LA's basic lawmaking rules, a particular exemption can be considered. However, the availability of particular exemptions should be circumscribed by the LA, including by limiting their availability and by requiring a published explanation for the use of an exemption. The use of individual exemptions instead of wholesale exemptions provides significantly more accountability and transparency for choices that are made because the effect of any exemption will be made expressly and thus clearly, instead of being obfuscated by the reclassification of an instrument. For instruments that are not legislative in character but where increased lawmaking standards are thought desirable, the LA should include 'opt-in' provisions for its rules relating to delegated legislation.

³⁵ Attorney-General's Department, 2021-2022 Review of the *Legislation Act 2003* (2021), Discussion Paper at 11.

Changes to the Federal Register of Legislation

In its 2019 report, the Senate Committee recommended that the Federal Register of Legislation be changed to enable identification of instruments that had been exempted from disallowance.³⁶ The government supported this recommendation and anticipated that it would be completed by late 2020.³⁷ I have not yet been able to see this change on the Register's website. I would support and extend this recommendation to suggest that other information be published (and made searchable) on the Register, including information about any form of exemption (or 'opting in') of an instrument in relation to the LA's basic rules for lawmaking.

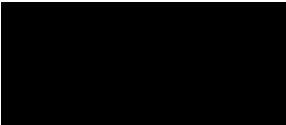
The current framework for exemptions from the operation of the LA

I previously made submissions to the Senate Committee in relation to its inquiry into the use of exemptions under the LA. These submissions set out my views in relation to the availability and use of particular exemptions under the LA, such as an exemption from disallowance, along with related matters. I have attached these submissions for your reference.

I would be happy to clarify or expand upon any aspect of this written submission.

Thank you again for the opportunity to contribute to this important review.

Yours sincerely,



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Associate Professor

³⁶ Senate Standing Committee on Regulations and Ordinances, Parliamentary Scrutiny of Delegated Legislation Final Report (2019), Recommendation 16.

³⁷ Australian Government Response to the Senate Standing Committee on Regulations and Ordinances Report: Parliamentary Scrutiny of Delegated Legislation (2019) at 5.