Scrutinising the Scrutiny Process in the Courts

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Abstract

In every Australian jurisdiction, a dedicated parliamentary committee scrutinises delegated legislation. When interpreting delegated legislation, courts may make assumptions about the nature and quality of the scrutiny performed by these committees. We argue courts should be cautious about reaching these conclusions. The article uses the High Court of Australia's decision in *Disorganized Developments Pty Ltd v South Australia* as a case study. We show that, while a scrutiny committee might hold the promise of providing effective parliamentary oversight of delegated lawmaking, the reality may fall short of the ideal. With limited time and resources to scrutinise a large volume of instruments as well as to perform other functions, and with no guarantee of engagement from the Parliament or executive, scrutiny committees may not be able to scrutinise delegated legislation in a thorough or timely manner. Building on these insights, we consider the circumstances, and manner, in which a court might be justified in making findings about the process of scrutiny of delegated legislation.

I Introduction

Over the last few decades there has been a dramatic rise in delegated lawmaking across Australia.[1] Cheryl Saunders has dubbed this 'executive law-making creep'[2] but it may be that 'torrent' is a more apt description. Increasingly, the bulk of new

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1 The reasons for delegated lawmaking are canvassed in Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 6th ed, 2023) ch 1.

2 Cheryl Saunders, 'Australian Democracy and Executive Law-Making: Practice and Principle' (Pt 2) (2016) 66 (October) *Papers on Parliament* 71, 81.

laws are made by the executive pursuant to delegated legislative powers.[3] In New South Wales and South Australia, for instance, it has been reported that 70–90% of new laws are made by delegation.[4] The volume of delegated laws is compounded by the fact that such law is often very complex and, at least in some jurisdictions, accompanied by inadequate explanatory material provided by the executive.[5]

Delegated legislation raises concerns about the democratic legitimacy[6] of the lawmaking process and concentration of power in the executive branch.[7] Delegated legislation is often made 'behind closed doors' and is not subjected to 'the safeguards of the ordinary parliamentary processes': unlike Bills, it is never read out or debated on the floor of Parliament except on the rare occasion when there is a motion to disallow.[8]

Parliamentary scrutiny in the form of a dedicated legislative review committee is widely understood as one of the safeguards to mitigate these concerns regarding executive lawmaking.[9] Such committees have the role of examining the compatibility of delegated legislation with the enabling legislation and with standards such as 'personal rights and liberties' (and other common law principles) and to bring these potential incompatibilities to the attention of Parliament.

But the reality of legislative review committees does not always match the promise. This is not always well understood by the three arms of government, including the courts, as highlighted in the 2023 High Court case of *Disorganized Developments v South Australia* in which members of the Court expressed different

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3 By volume, about half of the law of the Commonwealth consists of delegated legislation, and since the mid-1980s tabled disallowable instruments have risen from approximately 850 to around 1,700 each year: Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (Report, 3 June 2019) 6 [1.15] ('*Parliamentary Scrutiny Report*').

4 According to an analysis submitted by Professor Lorne Neudorf, by volume, 87% of legislation enacted by the New South Wales Parliament in 2019 was delegated legislation: Regulation Committee, Parliament of New South Wales, *Making of Delegated Legislation in New South Wales* (Report No 7 of 2020, October 2020) 3 [1.11]. In regard to South Australia, see Lorne Neudorf, 'Time to Take Lawmaking Seriously: The Problem of Delegated Legislation in South Australia' (2021) 43(8) *Bulletin: Law Society of South Australia* 10 ('The Problem of Delegated Legislation in South Australia'). For example, 88% of all new laws in South Australia in 2020 were delegated laws.

5 Legislative Review Committee, Parliament of South Australia, *The Workload of the Legislative Review Committee* (Report, 3 February 2021) 2 ('*LRC Workload Report*').

6 See Denise Meyerson, 'Rethinking the Constitutionality of Delegated Legislation' (2003) 11(1) *Australian Journal of Administrative Law* 45, 53; Gabrielle Appleby and Joanna Howe, 'Scrutinising Parliament's Scrutiny of Delegated Legislative Power' (2015) 15(1) *Oxford University Commonwealth Law Journal* 3, 4.

7 Meyerson (n 6) 52–3.

8 Lorne Neudorf, Submission No 11 to Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into Exemption of Delegated Legislation from Parliamentary Oversight* (25 June 2020) 3; Lorne Neudorf, 'Strengthening the Parliamentary Scrutiny of Delegated Legislation: Lessons from Australia' (2019) 42(4) *Canadian Parliamentary Review* 25. Thilagaratnam points out that at the federal level the lack of robust scrutiny of delegated legislation is 'a troubling development, particularly as the government not infrequently seeks to give effect to controversial policies via delegated legislation': Renuka Thilagaratnam, 'Legislative Instruments: 2012–2014', *Human Rights Scrutiny Blog* (Blog Post, 23 December 2014) <https://hrscrutiny.wordpress.com/2014/12/23/legislative-instruments-2012-2014>.

9 Other safeguards include the requirement that the executive table delegated legislation in Parliament and various requirements as to when it can come into operation or continue in operation: see Pearce and Argument (n 1) chs 3–11.

views about the significance of legislative scrutiny of a pair of impugned regulations.[10]

In this article, we argue that *Disorganized Developments* highlights the gap between the promise and reality of legislative review committees. The article demonstrates that the courts should be cautious about making any assumptions or findings about the legislative scrutiny process.

Part II of this article analyses and explains the different views of parliamentary scrutiny articulated by the High Court in *Disorganized Developments*. Part III examines how legislative scrutiny works in practice, focusing on the work of the South Australian Parliament's Legislative Review Committee ('LRC'). It shows that the LRC lacks the resources and legislative framework to perform rigorous scrutiny of most regulations. It excavates the question raised by *Disorganized Developments* of whether the courts can understand legislative scrutiny and parliamentary oversight committees as safeguards that require or obviate the need for procedural fairness. Building on these insights, Part IV reflects on what weight courts might place on legislative scrutiny mechanisms when drawing conclusions about the process by which delegated legislation is made.

II *Disorganized Developments*, the High Court and Legislative Scrutiny

Disorganized Developments raises broad questions regarding the accountability, transparency and quality of delegated legislation. The case was a challenge to the validity of two regulations, known as the Cowirra Regulations, which purported to declare two portions of land as 'prescribed places' for the purposes of the *Criminal Law Consolidation Act 1935* (SA) ('*CLCA*'). The first appellant, Disorganized Developments, was the registered proprietor of the two parcels of land while the second and third appellants were the directors and only shareholders of Disorganized Developments and were the occupiers of the land. They were also members of the Hells Angels motorcycle club and so were 'participant[s] in a criminal organisation' within the meaning of the *CLCA*.[11] As the High Court noted, the appellants wished to access the land in order to exercise their property rights and, at times, to reside on the land.[12] It was common ground that if the regulations were valid, the appellants would commit an offence if they entered or attempted to enter the Cowirra land. This offence carried a maximum penalty of three years' imprisonment. It was also common ground that the appellants had not been notified or consulted prior to the making of the Cowirra Regulations.

In the High Court the appellants challenged the validity of the regulations on two grounds. The first, which all five Justices agreed was made out, was that the

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10 *Disorganized Developments Pty Ltd v South Australia* (2023) 410 ALR 508 ('*Disorganized Developments*').

11 *Criminal Law Consolidation Act 1935* (SA) s 83GD ('*CLCA*').

12 *Disorganized Developments* (n 10) 515–16 [27] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

Cowirra Regulations were not effective in declaring the parcels of land to be 'prescribed places' within the meaning of ss 83GA(1) and 83GD(1) of the *CLCA*.[13]

The second ground (and the more relevant for the purposes of this article) was that the Cowirra Regulations were invalid as they were made in breach of a duty to afford procedural fairness to the appellants. On this second ground, four members of the Court (Kiefel CJ, Gageler, Gleeson and Jagot JJ, writing together) held there was an obligation to afford procedural fairness: an obligation that had not been fulfilled in relation to the Cowirra Regulations. Steward J, dissenting, held that the statute impliedly excluded the obligations of procedural fairness.

Kiefel CJ, Gageler, Gleeson and Jagot JJ observed that there was an established and strong presumption that the exercise of a statutory power implied the affording of procedural fairness and that this common law presumption applies in the making of regulations where the exercise of the power adversely affects the interests of particular individuals.[14] Such a presumption operates 'unless clearly displaced by the particular statutory scheme'.[15]

This holding is significant for delegated legislation more generally. Challenges to delegated legislation on the ground of failure to comply with the rules of procedural fairness are rare.[16] *Disorganized Developments* appears to be the first time an Australian court 'has held that a regulation made by the Governor, upon the advice of Cabinet, is invalid by virtue of a failure to afford procedural fairness'.[17]

The rules of procedural fairness are presumed to attach to any statutory power 'the exercise of which is apt to affect an interest of an individual' in a 'direct and immediate' way, and not merely 'as a member of the public or of a class of the public'.[18] For this reason, the making of delegated legislation has often not been seen as conditioned on observance of the rules of procedural fairness.[19] Traditionally, delegated legislation creates rules of general application rather than affecting individuals in a direct way. As Brennan J explained in the seminal case of *Kioa v West*:

> The legislature is not likely to intend that a statutory power of a strictly legislative nature be conditioned on the observance of the principles of natural justice, for the interests of all members of the public are affected in the same way by the exercise of such a power.[20]

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13 On this first ground the High Court allowed the appeal, agreeing that the Cowirra Regulations were ineffective as they did not declare any place to be a prescribed place. The Cowirra Regulations were, therefore, not supported by the Governor's regulation-making power under *CLCA* (n 11) s 370 and were invalid by reason of their inefficacy.

14 *Disorganized Developments* (n 10) 584 [33]; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97]; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 205 [75] ('*SZSSJ*').

15 *SZSSJ* (n 14) 205 [75] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ), cited in *Disorganized Developments* (n 10) 584 [33].

16 See Pearce and Argument (n 1) 299–301.

17 South Australia, 'Respondent's Submissions', Submission in *Disorganized Developments Pty Ltd v South Australia*, Case No A22/2022, 25 November 2022, 20 [51] ('Respondent's Submissions').

18 *Kioa v West* (1985) 159 CLR 550, 584 (Mason J) ('*Kioa*').

19 See *Re Gosling* (1934) 43 SR (NSW) 312, 318 (Jordan CJ); Pearce and Argument (n 1) 299–300.

20 *Kioa* (n 18) 620 (citations omitted).

But, as *Disorganized Developments* shows, this is not true of all regulations. The Cowirra Regulations clearly affected the appellants (as owners and occupiers of the affected land) in a direct and immediate way, quite distinct from the effect on other members of the public. The High Court had no difficulty in holding that the making of the Cowirra Regulations was a decision that attracted the presumption that the rules of procedural fairness applied.[21]

The presumption that the rules of procedural fairness attach to such a power can be displaced by 'express words or necessary implication'.[22] At issue in *Disorganized Developments* was whether the presumption had been displaced by necessary implication. The State of South Australia argued that four textual and contextual features of the *CLCA* supported the displacement of the presumption. First, the regulation-making power was vested in the Governor-in-Council.[23] Secondly, the unfettered nature of the regulation-making power under the *CLCA* indicated that the power could be exercised by reference to general policy considerations rather than any specific statutory criteria or procedure.[24] Thirdly, the unusual history of the procedure for declaring places to be 'prescribed places' indicated that the making of the regulations was not intended to attract a duty of procedural fairness.[25] Finally, the bespoke scheme of parliamentary scrutiny was consistent with the absence of any implied duty to afford procedural fairness. For the majority of the High Court, these features were 'insufficient, individually and cumulatively, to establish an intention to displace the common law presumption' that the rules of procedural fairness applied.[26] Steward J dissented on this point.

The final factor identified by South Australia is most relevant to this article. South Australia argued that the regulation-making power was not impliedly conditioned by a requirement to afford procedural fairness because 'delegated legislation is commonly subject to parliamentary oversight'.[27] This argument asks the Court to reach conclusions about the quality and nature of parliamentary oversight of delegated legislation: the issue at the heart of this article. Steward J embraced South Australia's argument on this point but the majority did not.

The majority in *Disorganized Developments* offered only brief consideration of South Australia's argument regarding parliamentary oversight, referring to the 'general and limited' oversight of the Governor's regulation-making power that was provided for by a parliamentary committee and the ability to disallow regulations.[28] According to the majority, these mechanisms were 'not the source of an implication to exclude procedural fairness'.[29] In reaching this conclusion, the majority rejected

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21 *Disorganized Developments* (n 10) 518 [35] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

22 Ibid 516 [28] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

23 Ibid 519 [38]–[40] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

24 Respondent's Submissions (n 17) 12–13 [32].

25 Ibid 13 [33]. When the regime relating to prescribed places was introduced, an initial list of 16 prescribed places was included in regulations that formed a schedule to the *Statutes Amendment (Serious and Organised Crime) Act 2015* (SA).

26 *Disorganized Developments* (n 10) 518 [37] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

27 See Respondent's Submissions (n 17) [32]–[34]; *Disorganized Developments* (n 10) 518 [36] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

28 *Disorganized Developments* (n 10) 519–20 [42] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). Note the majority did not refer to the LRC specifically, but only to 'a Parliamentary Committee' in general.

29 Ibid.

South Australia's submission that the 'bespoke scheme of parliamentary supervision' that accompanied the regulation-making power in s 83GA(1) excluded an implied duty to afford procedural fairness.[30]

The majority did not delve into any of the detail of the legislative scrutiny process, either in terms of what was available or what actually occurred in this case. As discussed below, there is evidence that the LRC had little opportunity to scrutinise the Cowirra Regulations within the period of disallowance. For the majority, the mere existence of such oversight was insufficient to exclude procedural fairness. Thus, for the majority, the efficacy of the parliamentary scrutiny scheme for delegated legislation was not a consideration. It is unclear whether Kiefel CJ, Gageler, Gleeson and Jagot JJ drew any inference about the quality of that scheme. Their reasoning may, instead, have rested on the fundamental difference between procedural fairness and parliamentary scrutiny. As Andrew Edgar has pointed out, '[p]rocedural fairness applies to administrative decisions that affect a person directly and individually, and not to political or policy decisions that affect the public generally'.[31] Parliamentary scrutiny is suited to the latter type of decision: policy decisions with broad consequences, not decisions applying directly to specific individuals (even if such a decision comes in the form of delegated legislation). In short, the textual and contextual features identified by South Australia were not sufficient to exclude the obligations of procedural fairness.

For Steward J, in contrast, the existence of 'effective parliamentary supervision and oversight' was one of four considerations leading to the opposite conclusion.[32] Unlike the majority justices, his Honour ruled that there was a 'sufficient indication' of Parliament's intention to exclude any obligations of procedural fairness.[33] In reaching this conclusion, Steward J noted that the *Legislative Instruments Act 1978* (SA)

> obliges the Legislative Review Committee of Parliament to inquire into and consider the regulation. The Committee can, if it so wishes, form an opinion that the regulation ought to be disallowed and, if so, it must report that opinion to both Houses of Parliament.[34]

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30 Note that in making this submission South Australia pointed to the 'Statutory Review Committee' established under the *Subordinate Legislation Act 1978* (SA), as well as the 'further layer of parliamentary oversight' provided by the Crime and Public Integrity Policy Committee established by the *Parliamentary Committees Act 1991* (SA) ('*PCA*'). On this point the majority acknowledged that South Australia's submissions did not suggest that review by parliamentary committees was likely to afford procedural fairness to owners or occupiers or that such parliamentary scrutiny would involve consideration of matters that might be raised by an owner or occupier if procedural fairness was afforded: *Disorganized Developments* (n 10) at 519–20 [42] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). Furthermore, they acknowledged that the scheme of parliamentary scrutiny was not presented by South Australia as a means that 'might avoid the arbitrary exercise of the regulation-making power': at 520 [42].

31 Andrew Edgar, 'Administrative Regulation-Making: Contrasting Parliamentary and Deliberative Legitimacy' (2017) 40(3) *Melbourne University Law Review* 738, 743.

32 *Disorganized Developments* (n 10) 529 [82].

33 Ibid 527 [73].

34 Ibid (citations omitted).

Steward J also referred to a 'further layer of Parliamentary oversight' in the form of review by the Crime and Public Integrity Policy Committee.[35] The existence of both of these mechanisms, in Steward J's view, 'strongly suggests that Parliament intended for this to be the principal way of ensuring that regulations made [under the Act] are both effective and appropriate'.[36] In coming to this view, Steward J relied on the mere existence of these two mechanisms, with no regard to how they actually work in practice or the extent of the scrutiny that had in fact occurred in the making of the Cowirra Regulations. This is something we explore later in the article.

In addition, Steward J contrasted the procedure in place in the Cowirra Regulations for declaring property to be a prescribed place with the complex regime set out in the *Serious and Organised Crime (Control) Act 2008* (SA). Under that legislation, there is a complex procedure for declaring an organisation to be a 'declared organisation'. That procedure involves detailed requirements to inform the affected organisation of the grounds and material being relied upon. In other words, the legislation itself provides a 'clear statutory mechanism for the giving of procedural fairness'.[37] As Steward J noted, the absence of this kind of complex procedure from the Cowirra Regulations was a 'further indication of Parliament's intention of what was required' when declaring property to be a prescribed place.[38]

Disorganized Developments thus provides a useful case study of how courts draw inferences about parliamentary scrutiny mechanisms when determining the validity of delegated legislation. While for both the majority and minority justices the existence of scrutiny processes was only one factor that bore upon their consideration of whether Parliament intended to exclude procedural fairness, there were some differences in their approaches. Both the majority and minority referred to the existence of these oversight mechanisms but took different views as to their significance. While the majority justices noted the 'limited' oversight of delegated legislation, Steward J appeared to place more weight on the existence of parliamentary oversight mechanisms.

As explained above, Steward J appeared to assume that these mechanisms offered effective scrutiny, with no examination of how they operate in practice or whether they offer any meaningful check on the regulation-making power.[39] There was no consideration, by any of the justices, of the extent to which the Cowirra Regulations had in fact been subject to parliamentary scrutiny before being enacted. This was also not addressed in the written submissions.

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35 Ibid 593 [82], citing *PCA* (n 30) s 15O. The Crime and Public Integrity Policy Committee ('CPIPC') is a committee that undertakes public inquiry into the merits of the relevant state legislative scheme for serious and organised crime and how this scheme balances community safety with individuals' common law rights such as natural justice: see Crime and Public Integrity Policy Committee, Parliament of South Australia, *Legislation Pertaining to Serious and Organised Crime* (Report No 6, November 2021) 55 [6.7]. The CPIPC is an oversight committee but it is not a legislative scrutiny committee. As it does not scrutinise individual regulations, its role is tangential in this article's consideration of how the courts understand the legislative scrutiny process.

36 *Disorganized Developments* (n 10) 529 [82].

37 Ibid 529–30 [83] (Steward J).

38 Ibid.

39 Though, as we explain above, this was only one factor relied upon by Steward J and so was not, on its own, decisive.

The next Part questions whether the legislative scrutiny process actually performed by the LRC fits Steward J's description of 'effective parliamentary supervision and oversight'.[40]

III 'Effective Parliamentary Supervision and Oversight'?

In every Australian jurisdiction, a dedicated legislative review committee is responsible for scrutinising delegated legislation.[41] McNamara and Quilter explain that the rationale for such scrutiny committees is that they 'might curb (intended and unintended) infringements of rights and liberties arising from Parliamentary law-making'.[42] Pearce observes that such committees are 'more effective in regard to delegated legislation than primary legislation as government control of the parliament can secure the passage of what might be regarded as oppressive provisions in bills'.[43] The scrutiny process provides an opportunity upstream to correct any problems. Hence there is the potential for this scrutiny process to lift the quality of executive lawmaking as well as transparency and accountability.

It is worth noting that across Australia's scrutiny committees for delegated legislation, there is diversity in their composition, processes, powers and resources. This is made clear by Pearce and Argument's tome *Delegated Legislation in Australia* which also offers an understanding of the strengths and weaknesses of these committees. Producing this diversity is the varying size of parliaments in Australia, with South Australia, Tasmania, the Australian Capital Territory and the Northern Territory having the smaller parliaments. Where the scrutiny committee operates in a bicameral parliament, much depends on whether it is a joint committee drawn from both the houses of parliament. Bastoni and Macintyre explain:

> Most of the committees that exist at a State level are joint committees … This cripples the committees in terms of time, as lower house members have to devote a significant amount of time to electorate duties, and thus reduces the time in which the committees can sit. The use of joint committees can also

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40 *Disorganized Developments* (n 10) 529–30 [83].

41 In the Commonwealth, the Senate Standing Committee for the Scrutiny of Delegated Legislation was established by the Senate, *Standing Orders* (October 2022) ch 5; in the Australian Capital Territory, the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) was established by resolution of the Legislative Assembly on 2 December 2020; in New South Wales, the Legislative Review Committee was established by the *Legislation Review Act 1987* (NSW) pt 2; in the Northern Territory, the Subordinate Legislation and Publications Committee was established by the Legislative Assembly, *Standing Orders* (21 April 2016) ord 176; in Queensland, the Scrutiny of Legislation Committee ceased on 30 June 2011 and was devolved to seven 'portfolio committees' under the *Parliament of Queensland Act 2001* (Qld) ch 5; in South Australia, the LRC was established by the *PCA* (n 30) pt 4; in Tasmania, the Subordinate Legislation Committee was established by the *Subordinate Legislation Committee Act 1969* (Tas) s 3; in Victoria, the Scrutiny of Acts and Regulations Committee was established by the *Parliamentary Committees Act 2003* (Vic) ss 5, 6, 17; in Western Australia, the Joint Standing Committee on Delegated Legislation was jointly established by the Legislative Assembly, *Standing Orders* (29 November 2017) ord 296 and Legislative Council, *Standing Orders* (August 2023) sch 1 item 10.

42 Luke McNamara and Julia Quilter, 'Institutional Influences on the Parameters of Criminalisation: Parliamentary Scrutiny of Criminal Law Bills in New South Wales' (2015) 27(1) *Current Issues in Criminal Justice* 21, 23.

43 Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 10th ed, 2023) 244 [5.1]. It is possible that Pearce's observations are primarily based on the performance of the Australian Senate and its Standing Committee for the Scrutiny of Delegated Legislation.

> often result in governing party dominance of the committee system. … Committees at a State level are not always resourced appropriately.[44]

They flag that '[s]mall parliaments present problems in carrying out these key democratic functions', by which they mean the function of keeping the government of the day accountable.[45] For these reasons, it is not possible to evaluate the effectiveness of legislative scrutiny committees across the board by basing this evaluation on an understanding of Australia's pre-eminent committee for scrutinising delegated legislation, the Senate Standing Committee on Regulations and Ordinances ('SSCRO') — established by federal Parliament in 1932 and later renamed the Senate Standing Committee for the Scrutiny of Delegated Legislation ('SSCSDL'). It is more fruitful to examine the scrutiny mechanisms that exist in particular jurisdictions: in this case, South Australia. At the same time, it is worth noting that the operation and innovations of the federal scrutiny system can have a flow-on effect for legislative scrutiny across Australia, particularly in smaller parliaments.

The South Australian Parliament was the first of the state and territory parliaments to establish such a scrutiny committee, the Joint Committee on Subordinate Legislation, in 1938. The current LRC took on the functions of the Joint Committee via the *Parliamentary Committees Act 1991* (SA) ('*PCA*'). The LRC is a joint committee of six members, three from each house, with Ministers being ineligible.[46] The Presiding Member comes from the Upper House and has a casting vote.[47]

To evaluate the effectiveness of the LRC, Part III(A) of this article considers the LRC's workload, functions, powers and processes and seeks to gauge the strength of the legislative framework that supports its work. Part III(A) questions whether it is possible to understand a parliamentary committee for scrutinising delegated legislation to be 'effective' in terms of its capacity to offer a substitute to affording procedural fairness to adversely affected individuals, such as the owners and occupiers who were affected by the Cowirra Regulations.

A *The LRC's Workload and Functions*

A lack of time and resources is commonly identified by parliamentarians as one of the main constraints on the capacity of committees to perform legislative scrutiny.[48] This is compounded where a parliamentary committee has multiple functions. This is the case for the LRC which under the *PCA* has multiple functions which include conducting inquiries into a broad range of matters including law reform and

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44 Jordan Bastoni and Clement Macintyre, 'What's in It for Us? Why Governments Need Well Resourced Parliaments' (2010) 25(1) *Australasian Parliamentary Review* 177, 181 (citations omitted).

45 Ibid 177.

46 *PCA* (n 30) s 11.

47 Ibid ss 11, 24(4).

48 Carolyn Evans and Simon Evans, 'Messages from the Front Line: Parliamentarians' Perspectives on Rights Protection' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 329, 342.

petitions.[49] Relevantly, s 12(b) of the *PCA* provides that one of the LRC's functions is 'to inquire into, consider and report on subordinate legislation'. The process of performing this scrutiny function is set out in ss 10 and 10A of the *Legislative Instruments Act 1978* (SA) which provide that all regulations are to be laid before each House of Parliament within six sitting days of being made and that all regulations are referred to the LRC for scrutiny.[50]

The process of scrutinising delegated legislation involves a formidable workload. In August 2021, the Inquiry into the Effectiveness of the Current System of Parliamentary Committees reported that in the South Australian Parliament secondary legislation constituted 70% of all law made[51] which translates into 86% of total enactments in South Australia between 2018 and 2020. Each year the LRC scrutinises approximately 400 instruments based on its scrutiny principles. While the making of regulations for prescribing a place under the *CLCA* requires that each place be a separate regulation,[52] this is not the case with all instruments, some of which can be very complex.[53] In 2020, the year the Cowirra Regulations were laid before Parliament, the LRC considered 469 instruments which made up 91% of all legislation made that year by the South Australian Parliament.[54]

In terms of time, in practice the LRC generally meets for 1 to 1.5 hours each sitting week.[55] In 2020, it met on 21 occasions.[56] This equates to 21 to 30 hours in which to scrutinise 469 instruments and any petitions. In 2020, the LRC subsequently tabled 20 scrutiny reports in the Parliament in regard to these instruments.[57] The frequency of meetings and reporting is largely due to the time limit of 14 sitting days for the disallowance of regulations, which places pressure on the Committee.

The timeline for scrutinising the Cowirra Regulations illustrates this pressure starkly. The regulations were made (and commenced) on 17 December 2020: after the final sitting day of the year. The first sitting day of 2021 was Tuesday 2 February.

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49 These include 'any matter concerned with legal, constitutional or parliamentary reform or with the administration of justice … any matter concerned with inter-governmental relations' and any Act or subordinate legislation (or part of such legislation) having sunset clauses: *PCA* (n 46) ss 12(a)(i)–(iii), (matters referred), (ba) (petitions).

50 '"Regulation" means any regulation, rule or by-law made under an Act': *Legislative Instruments Act 1978* (SA) s 4 ('*LIA*').

51 Select Committee on the Effectiveness of the Current System of Parliamentary Committees, Parliament of South Australia, *Inquiry into the Effectiveness of the Current System of Parliamentary Committees* (Report, 25 August 2021) 66–7 ('*Effectiveness Inquiry Report*').

52 *CLCA* (n 11) s 83GA(2).

53 For example, the 2020 Uniform Civil Rules consisted of more than 1,000 pages. These were reviewed and scrutinised by the LRC which provided extensive comments: see Legislative Review Committee, Parliament of South Australia, *Annual Report of the Legislative Review Committee 2020* (Report, 18 May 2022) 18 ('*LRC Annual Report*').

54 Ibid 6. Commentators note that delegated lawmaking was at its height during the first year of the COVID-19 pandemic.

55 *LRC Workload Report* (n 5) app B, 2.

56 *LRC Annual Report* (n 53) 2.

57 Ibid 7. In addition, in 2020 the LRC conducted inquiries in regard to three petitions. Note that these reports are not publicly available on the LRC website <https://www.parliament.sa.gov.au/committees/lrc>.

Since the LRC meets on the Wednesday of a sitting week,[58] its first opportunity to consider the Cowirra Regulations was Wednesday 3 February, over six weeks after they commenced. While the LRC's agenda and minutes are not made public, the LRC tabled a report on 31 March 2021 advising that the Committee

> considers it necessary for a Notice of Motion for Disallowance to be given in relation to each of the Regulations in both Houses, before the expiration of 14 sitting days, to allow the Committee time to complete its deliberations.[59]

This suggests the LRC had not had time to scrutinise the Cowirra Regulations in the more-than-three months since they had been made. Seeking extra time in this way is an established practice of the LRC, albeit 'not preferred'.[60] On 5 May 2021 the LRC provided a further report advising it had resolved to take no action and to not proceed with the notice of motion to disallow the Cowirra Regulations.[61]

While it is difficult to draw conclusions in the absence of evidence of the LRC's substantive deliberations, the experience with the Cowirra Regulations does demonstrate the length of time the LRC can take to scrutinise even relatively straightforward delegated legislation. This, we surmise, is likely the result of the Committee's heavy workload and light resourcing. Delay is troubling in this context because regulations often commence before the LRC completes its scrutiny.[62] The Cowirra Regulations, for example, had been in force for more than five months before the LRC completed its scrutiny process. Once delegated legislation has commenced, that very fact may affect parliamentary scrutiny; potential confusion and uncertainty may weigh against disallowing a regulation that has already come into force.

The LRC performs its work with minimal personnel. As noted above, the LRC consists of six members of Parliament. Their work is supported by less than two full-time staff members, only one of whom is legally trained.[63] By way of comparison, the SSCSDL has five staff including an independent legal advisor, the New South Wales Parliament has four staff to assist its Legislative Review Committee and the Western Australian Parliament has three.[64] There is a real question whether the LRC is adequately resourced to deal with its onerous workload,[65] especially when we examine the breadth of the scrutiny principles against which regulations are assessed. In a bid to manage and reduce its workload, in mid-2020 the LRC tabled a detailed Information Guide on its 11 scrutiny principles and distributed this document to all parts of the executive, thus giving

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58 Legislative Review Committee, Parliament of South Australia, *Information Guide* (January 2022) 5 [1.7] ('*LRC Information Guide*').
59 Legislative Review Committee, Parliament of South Australia, *Report No 33* (31 March 2021) 1.
60 *LRC Workload Report* (n 5) 6.
61 Legislative Review Committee, Parliament of South Australia, *Report No 35* (5 May 2021).
62 See *LRC Annual Report* (n 53) 14–16.
63 Lorne Neudorf, 'The Problem of Delegated Legislation in South Australia' (n 4) 11.
64 See *LRC Workload Report* (n 5) 11. The 2021 Inquiry report noted Neudorf's recommendation of 'five staff members to do the technical scrutiny work in addition to administrative support for reporting': *Effectiveness Inquiry Report* (n 51) 72.
65 See *LRC Workload Report* (n 5) 8.

them notice of the explanatory material required by the Committee for each instrument.[66]

B *The LRC's Scrutiny Principles*

The LRC's 11 scrutiny principles are not set out in legislation or Standing Orders but they are set out informally in other documents such as the LRC's 2022 Information Guide ('*LRC Information Guide*').[67] The informal articulation of these principles has allowed for their expansion and contraction and also their close alignment with those principles used by other similar scrutiny committees in Australia, in particular the SSCSDL.[68]

Since mid-2020 the LRC's scrutiny principles cover 38 considerations. In common with other scrutiny bodies, this remit is 'extremely wide'.[69] The *LRC Information Guide* draws heavily[70] on the SSCSDL's first set of Guidelines.[71] The SSCSDL explains that these scrutiny grounds are underpinned by the protection and promotion of fundamental rule of law principles including procedural fairness, separation of powers and transparency and accountability.[72]

To evaluate Steward J's view in *Disorganized Developments* that the existence of the LRC suggests the declaration of a prescribed place is not subject to the rules of procedural fairness, it is relevant to examine those scrutiny principles that invoke procedural fairness. Until mid-2020, the scrutiny principles required direct consideration of whether instruments were 'inconsistent with the principles of natural justice' but amendments made in June 2020 removed this direct reference.[73] The *LRC Information Guide* explains that, in relation to each instrument referred to the committee, the LRC scrutinises whether, inter alia:

> (d) those likely to be affected by the instrument were adequately consulted in relation to it; and
>
> …
>
> (h) it trespasses unduly on personal rights and liberties; and
>
> …
>
> (k) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.[74]

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66 Legislative Review Committee, Parliament of South Australia, *Legislative Review Committee Information Guide* (June 2020). The explanatory material required by the Committee for each instrument is set out in the updated *LRC Information Guide* (n 58) 12–15 [4.1]–[4.6].

67 See also Department of Premier and Cabinet, Parliament of South Australia, *Referral of Subordinate Legislation to the Legislative Review Committee* (Premier and Cabinet Circular 34, October 2012).

68 See *LRC Annual Report* (n 53) 25.

69 Pearce and Argument (n 1) 194.

70 The *LRC Information Guide* (n 58) (dated January 2022) was presumably modelled on the first edition of the SSCSDL's Guidelines which were amended in February 2022.

71 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (February 2020).

72 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Annual Report 2021* (Report, 28 September 2022) 15–16 [2.19] ('*SSCSDL Annual Report*').

73 See *LRC Annual Report* (n 53) 5.

74 *LRC Information Guide* (n 58) 7 [3.2].

The *LRC Information Guide* explains that in regard to scrutiny principle (k), one consideration is 'whether an instrument referred to the Committee … is inconsistent with principles of natural justice'.[75] The affording of procedural fairness is thus within this consideration.[76] Further assessment of procedural fairness may also be caught by scrutiny principles (d) and (h).

1 *Adequate Consultation*

In relation to scrutiny principle (d), on adequate consultation, the *LRC Information Guide* explains that

> the Committee may consider, for example:
>
> (a) if adequate opportunity was given to persons likely to be affected by an instrument referred to the Committee in accordance with the spirit or intent of the Parliament, including by inviting submissions or encouraging participation in public hearings ...[77]

While this consideration can be useful in ensuring that the Parliament offers avenues of consultation to those persons or classes of persons directly and adversely affected by an instrument, it is clear that context is important. In the context of both the Cowirra Regulations and the *CLCA*, consultation via participation in public hearings would not be 'in accordance with the spirit or intent of the Parliament' which is to disrupt the sphere of organised crime.

South Australian legislation is silent as to whether consultation should take place. Given that the LRC draws on the processes of the SSCSDL, it is useful to consider how consultation is understood at the federal level where there is a stronger legislative framework that supports the scrutiny process. The overarching purpose of the *Legislation Act 2003* (Cth) ('*Legislation Act*') as articulated by s 3 'is to provide a comprehensive regime for the management' of legislation. The Act seeks to achieve this overarching purpose by, inter alia, 'encouraging rule-makers to undertake appropriate consultation before making legislative instruments' and 'establishing improved mechanisms for Parliamentary scrutiny of legislative instruments'.[78] Section 17(1) of the Act provides:

> Before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation that is:
>
> (a) considered by the rule-maker to be appropriate; and
>
> (b) reasonably practicable to undertake.[79]

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[75] Ibid 9 [3.3(12)]. In 1998 the LRC made public its scrutiny principles in the report *Committee's Policy for Its Examination of Regulations* tabled in the South Australian Parliament on 3 June 1998. The second principle relevantly provided that the Committee would examine: '(b) whether the regulations unduly trespassed on rights previously established by law or are inconsistent with the principles of natural justice …': at 3. This indicates that the LRC has long considered natural justice as part of its scrutiny process.

[76] Note that the terms 'natural justice' and 'procedural fairness' are commonly considered to be interchangeable: *Kioa* (n 18) 583 (Mason J).

[77] *LRC Information Guide* (n 58) 8 [3.3(5)].

[78] *Legislation Act 2003* (Cth) ss 3(b), (e) ('*Legislation Act*').

[79] In its 2019 Inquiry Report, the SSCRO (later the SSCSDL) noted that it had limited ability to assess whether those likely to be affected by the instrument were adequately consulted (scrutiny principle

Section 17(3) explains that 'such consultation *could* involve notification' of persons or bodies likely to be affected by the proposed instrument and furthermore that '[s]uch notification *could* invite submissions'.[80] Public consultation is not mandatory: a failure to consult does not affect the validity of the legislation,[81] but an explanation must be given.[82] These provisions in the *Legislation Act* set up a formal system. Section 17 is a 'substantive consultation obligation'.[83] While it gives the federal executive discretion as to the level of consultation conducted, s 17 produces a presumption, flagged in s 3(b), that consultation will take place in regard to federal delegated legislation.[84]

2 *Rights and Liberties*

Scrutiny principle (h) requires consideration of whether a regulation 'trespasses unduly on personal rights and liberties'. Since 1932 this broad scrutiny principle has been used widely across Australian scrutiny committees[85] as well as in Canada[86] and New Zealand.[87] At times this principle has been dismissed as being overly vague to the point of being 'meaningless'.[88] This criticism has presumably been one of the prompts for scrutiny bodies to produce an information guide or a set of guidelines in order to make public their detailed interpretation of these principles.

In regard to principle (h), the *LRC Information Guide* relevantly explains that 'the Committee may consider, for example, whether an instrument referred to the Committee contains: ... (g) provisions that interfere with property rights ...'.[89] In regard to this principle, there is some divergence between the *LRC Information*

(d)) because of the discretion given by *Legislation Act* s 17 to the rule maker regarding consultation and because s 15J can be satisfied with limited information: see *Parliamentary Scrutiny Report* (n 3) 42–8 [3.34]–[3.54]. The Legislation Act Review Committee has recommended that this subjective standard for rule makers be replaced with an objective standard: see Legislation Act Review Committee, *2021–2022 Review of the Legislation Act 2003* (June 2022) 62 (Recommendation 5.3) ('*LARC 2021–22 Review*').

80 *Legislation Act* (n 78) s 17(3) (emphasis added).

81 Ibid s 19.

82 Ibid s 15J(2)(e).

83 *LARC 2021–22 Review* (n 79) 60.

84 Other Australian jurisdictions with non-mandatory public consultation provisions are New South Wales (*Subordinate Legislation Act 1989* (NSW) s 5(2)), Tasmania (*Subordinate Legislation Act 1992* (Tas) s 5(2)) and Victoria (*Subordinate Legislation Act 1994* (Vic) ss 6, 12C). Besides South Australia, other jurisdictions without public consultation provisions are the Australian Capital Territory (*Legislation Act 2001* (ACT)), the Northern Territory (*Interpretation Act 1978* (NT)), Queensland (*Statutory Instruments Act 1992* (Qld)) and Western Australia (*Interpretation Act 1984* (WA)).

85 *Legislation Review Act 1987* (NSW) s 9(1)(b)(i); Legislative Council (NT), Standing Orders, April 2016, SO 176.3(b); *Legislative Standards Act 1992* (Qld) s 4(2); *Subordinate Legislation Committee Act 1969* (Tas) s 8(1)(a)(iii); Legislative Council (WA), Standing Orders, January 2019, sch 1, SO 10.6(b).

86 Standing Joint Committee for the Scrutiny of Regulations (Canada), Mandate, sub-s (9).

87 House of Representatives (NZ), Standing Orders of the House of Representatives, August 2017, SO 319(2)(b).

88 Standing Committee on Law and Justice, Parliament of New South Wales, *A NSW Bill of Rights* (Report No 17, October 2001) 127–8 [8.44].

89 *LRC Information Guide* (n 58) 9 [3.3(9)]. This aligns with the position of the SSCSDL at the time the *LRC Information Guide* was updated in January 2022. In February 2022 the SSCSDL amended its interpretation *Guidelines*.

Guide and the SSCSDL's *Guidelines* as the latter's interpretation of this scrutiny principle omits any reference to property rights but includes an explicit reference to 'procedural fairness'.[90]

The LRC's set of 11 scrutiny principles, with its 38 considerations, is laudable but it raises questions as to whether this extremely wide remit is feasible given South Australia's weak legislative framework for scrutiny and the LRC's resources and workload.

C *Provision of Explanatory Material to the LRC*

For the LRC to perform its scrutiny process, the *LRC Information Guide* indicates that the Committee is to receive explanatory material from the executive to accompany and explain the effect or purpose of each instrument. This requirement is set out as scrutiny principle (g).[91] In theory, the material should provide information about the consultations with those affected by the instrument and, if this is not provided, the Committee can request this information.[92] To do the latter, it may defer the instrument so as to complete its deliberations.[93]

Unlike the Commonwealth, South Australia does not have a legislative framework whereby explanatory memoranda or explanatory statements are provided either for Bills or for regulations.[94] At the federal level, explanatory statements are tabled in each House of Parliament. Section 15J(2) of the *Legislation Act* sets out the requirements for explanatory statements, including that they 'must … explain the purpose and operation of the instrument'.[95] For example, if consultation has taken place, a description of that consultation must be included.[96] Explanatory statements are also used by the Legislative Assembly for the Australian Capital Territory;[97] its scrutiny body, the Standing Committee on Justice and Community Safety ('JACS'), must consider whether an explanatory statement 'meets the technical or stylistic

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90 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (3rd ed, July 2024) 25. In mid-2021, the SSCSDL expanded its scrutiny principles from 11 to 13 via Standing Order 23 and this was reflected in the 2nd edition of the SSCSDL's *Guidelines* (February 2022) as well as the 3rd edition of the *Guidelines*.

91 'The Committee scrutinises each instrument referred to it as to whether: … (g) the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument …': *LRC Information Guide* (n 58) 7 [3.2].

92 See ibid 10 [3.4(3)].

93 Ibid 10 [3.5(4)(b)], 11 [3.7].

94 In federal Parliament, an Explanatory Statement is required for legislative instruments pursuant to *Legislation Act* (n 78) s 15J. House of Representatives Standing Order 141 provides that when a Bill (except an Appropriation or Supply Bill) is presented, the Minister must present a signed Explanatory Memorandum including an explanation of the reasons for the Bill. The Office of Parliamentary Counsel does not have any role in the drafting of Explanatory Statements: see *LARC 2021–22 Review* (n 79) 55.

95 See *Legislation Act* (n 78) s 15J(2)(b). For an analysis of this Act (before amendments were made in 2015) see Andrew Edgar, 'Deliberative Processes for Administrative Regulations: Unenforceable Public Consultation Provisions and the Courts' (2016) 27(1) *Public Law Review* 18.

96 See *Legislation Act* (n 78) ss 15J(1), (2)(d).

97 'All bills and subordinate legislation (including regulations and disallowable instruments) require an explanatory statement': *ACT Government Legislation Handbook* (March 2017) 27.

standards expected by the Assembly'.[98] In New South Wales, a regulatory impact statement must be forwarded to its parliamentary scrutiny committee as must 'all written comments and submissions received' as part of the required consultation process.[99] While the quality of these documents may vary[100] and there is no consequence for executive non-compliance, these formal systems may reduce the time spent by a scrutiny committee in seeking this information from the executive.

Despite the detailed *LRC Information Guide*, inadequate explanatory material from the executive continues to pose a major problem for the Committee.[101] The LRC has expressed concern that '[t]oo often the Committee receives supporting reports that insufficiently detailed the effect of provisions of legislative instruments or included extraneous information that is of little assistance'.[102] The varying 'quality of explanatory material that accompany those instruments'[103] can also compound the complexity of some of the instruments scrutinised. According to two (non-government) LRC members, '[o]ne of the greatest abuses in [the explanatory material] reports is the absence of information relating to any consultation the department and agencies have undertaken in drafting those regulations'.[104] They argue that the 'difficulty in obtaining information … can often prevent proper scrutiny by the Committee'.[105]

Inadequate information also hampers the scrutiny of federal delegated legislation.[106] Given the federal system of explanatory statements set out in the *Legislation Act*, the problem for the SSCSDL is predominantly one of the 'quality' of these statements, in particular whether they 'are drafted with sufficient care and precision'.[107] The level of care and precision is also relevant to information about consultation. In its guideline on consultation, the SSCRO explains that it

> does not interpret [s 15 of the *Legislation Act*] as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement … may be considered insufficient to meet the requirements of the [*Legislation Act*].[108]

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98 Legislative Assembly (ACT), Standing Committees — Establishment: Resolution of Appointment, 2 December 2020 [(10)(a)(vi)]. See also Legislative Assembly (ACT), Standing Committee on JACS, *Guide to Writing an Explanatory Statement* (March 2011).

99 *Subordinate Legislation Act 1989* (NSW) s 5(4). Note that s 6 provides the executive discretion in complying with s 5. On whether regulatory impact statements add value to the scrutiny process, see Simon Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes' (2005) 29(3) *Melbourne University Law Review* 665, 680–5.

100 See Alex Hickman, 'Explanatory Memorandums for Proposed Legislation in Australia: Are They Fulfilling Their Purpose?' (2014) 29(1) *Australasian Parliamentary Review* 116.

101 Legislative Review Committee, Parliament of South Australia, *SA Productivity Commission's Inquiry into Reform of South Australia's Regulatory Framework* (Report, 12 May 2021) 3 (Presiding Member Nicola Centofanti) ('*SA Productivity Commission Inquiry*').

102 *LRC Annual Report* (n 53) 25. See also *LRC Workload Report* (n 5) 5.

103 *LRC Workload Report* (n 5) 2.

104 Ibid app B, 3.

105 Ibid.

106 *Parliamentary Scrutiny Report* (n 3) 54 [3.76]–[3.78].

107 Ibid.

108 Senate Standing Committee on Regulations and Ordinances, *Report on the Work of the Committee in the 41st Parliament* (Report No 114) app 3, 2 ('Guideline for Preparation of Explanatory Statements: Consultation').

From reading the *LRC Workload Report*, it appears that the provision of 'bare or very generalised statements' may be the norm for the South Australian executive and that the *non*-provision of information may also be a problem. Via the *Legislation Act*, the federal framework for the scrutiny of delegated legislation offers a formal system of requiring the executive to provide information to Parliament, including on whether consultation has been undertaken.

In South Australia, the ongoing problem of the executive failing consistently to provide adequate explanatory material underlines two things: first, the executive is not taking sufficiently seriously the role of the LRC in performing this scrutiny role on behalf of Parliament; and second, the LRC has a legislative framework that is weaker than that under which the federal SSCSDL, the Australian Capital Territory's JACS and New South Wales's Legislative Review Committee perform. These dynamics impact on whether the LRC can effectively perform its scrutiny function. They also illustrate the diversity of practice across legislative scrutiny committees in different jurisdictions.

D *The LRC and the Power to Disallow*

Like other legislative scrutiny committees, the LRC does not have the power to disallow regulations. Where the Committee decides that an instrument should be disallowed, its representative in each House gives notice of a motion to disallow an instrument and provides the Committee's grounds for that opinion.[109] There is a period of 14 sitting days to introduce a notice of motion once a regulation has been laid before Parliament.[110] It is up to each House to determine by vote any motion to disallow the instrument in accordance with its standing orders. As the Lower House is controlled by government and there is strong party discipline in Australia, it is the Upper House which exercises this veto power over regulations. According to *Odgers*, in the Commonwealth Parliament, the Senate has never rejected a committee recommendation that an offending instrument be disallowed.[111]

In practice, such scrutiny committees generally take a less confrontational approach, by first seeking to engage in dialogue with the part of the executive responsible for the instrument and to request further information and thus encourage compliance and correction. This is demonstrated by the LRC's *2020 Annual Report* which details 13 regulations which raised concerns for the Committee, with only one set of regulations being disallowed by the Upper House.[112] This is similar to dynamics in the federal Senate where the potential for a disallowance motion notice means the executive understands that it must either seek to accommodate the

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109 *LRC Information Guide* (n 58) 11 [3.8].

110 *LIA* (n 50) s 10(5b)(a). This is the same in Queensland (*Statutory Instruments Act 1992* (Qld) s 50) and Western Australia (*Interpretation Act 1984* (WA) s 42). It is 6 sitting days in the Australian Capital Territory (*Legislation Act 2001* (ACT) s 65), 15 in New South Wales (*Interpretation Act 1987* (NSW) s 41) and Tasmania (*Acts Interpretation Act 1931* (Tas) s 47(4)), 12 in the Northern Territory (*Interpretation Act 2011* (NT) s 63) and 12–18 in Victoria (*Subordinate Legislation Act 1994* (Vic) s 23). On approaches in other jurisdictions, see *Parliamentary Scrutiny Report* (n 3) 118–20 [8.20]–[8.25].

111 *Odgers' Australian Senate Practice*, rev Harry Evans, ed Rosemary Laing (Department of the Senate, 14th ed, 2016) ch 15.

112 *LRC Annual Report* (n 53) 9–13.

concerns of the scrutiny committee or risk losing its legislation.[113] This 'behind the scenes' work by a scrutiny committee is not always apparent to the public or other Members of Parliament and can impact on the LRC's workload.

E *Evaluations of the LRC's Effectiveness*

There are three sources by which we can evaluate the LRC's effectiveness. The first is an evaluation offered by Professor Lorne Neudorf, a comparative law scholar who studies the scrutiny of delegated legislation across Westminster parliaments in the Anglosphere. In Neudorf's view, the process for making delegated legislation in South Australia is 'paper thin' because the process 'fails to impose adequate and meaningful controls on executive lawmaking'.[114] Neudorf pins a large part of the problem on the fact that the legislative framework does not impose 'robust accountability and transparency measures found in the ordinary parliamentary process'.[115] For example, the South Australia legislation does not impose any requirements on the executive to provide explanatory materials or to conduct consultation of any kind before new delegated laws are made.[116] Neudorf also points to the LRC's limited resources to handle its significant workload, and argues that it 'is in desperate need of additional staffing resources'.[117] Given its resourcing, he asks: 'How can you possibly be applying effectively 38 different considerations for 1,300 pages of new text every year, and then reading all that enabling legislation?'[118]

A second source for evaluating the Committee is an inquiry, conducted in 2020–21 by the South Australian Select Committee on the Effectiveness of the Current System of Parliamentary Committees, which reported that the functions of the LRC 'have become clouded with other unrelated functions' such as the function to report and inquire into petitions which was added in 2019.[119] The report of the inquiry, quoted by legislation experts Pearce and Argument, agrees that the workload of the LRC has 'increased to an untenable level … and takes away the important scrutiny focus of that Committee'.[120]

A third source for evaluating the Committee is the internal evaluations conducted in early 2021 by the Committee itself. In this evaluation, two LRC members (one opposition member and one crossbench member) publicly flagged the Committee's 'dysfunction'.[121] The two non-government members warn that '[t]he inherent risk in the Committee's current practice and time restraints is that despite its best intentions, issues of significance could easily be overlooked'.[122] They urge: 'There must be a change in approach to the Committee structure *to one of technical review* rather than perceiving this Committee as a *rubber stamp for the policy of the*

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113 See *Parliamentary Scrutiny Report* (n 3) 122 [8.33]–[8.34].
114 Lorne Neudorf, 'The Problem of Delegated Legislation in South Australia' (n 4) 11.
115 Ibid.
116 Ibid.
117 Ibid.
118 Evidence to Legislative Council Legislative Review Committee, Parliament of South Australia, Adelaide, 17 February 2021, 5 (Associate Professor Lorne Neudorf).
119 *Effectiveness Inquiry Report* (n 51) 7.
120 Ibid; Pearce and Argument (n 1) [3.73].
121 *LRC Workload Report* (n 5) app B, 2.
122 Ibid.

government of the day.'[123] This points to a divergence between the aspiration and reality of scrutiny committees taking a technical approach to scrutinising delegated legislation. The aspiration is set out in the *LRC Information Guide*: 'The Committee takes a non-partisan technical approach to its inquiry into and consideration of instruments referred to it.'[124] This is aligned with the statements of most scrutiny committees in bicameral Australian parliaments who style themselves as technical scrutiny committees that avoid scrutinising policy and adhere as strictly as possible to applying scrutiny principles.[125] The reality is indicated by a comment made by the two members that

> it has become common practice for successive chairs of the Committee to exercise their casting vote to wave through legislative instruments that clearly don't meet the scrutiny expectations of at least half of the Committee members.[126]

They express concern that Parliament may be unaware of these 'contentious votes' and that there is no system by which they can alert Parliament when this problem arises.[127]

As Presiding Members and Chairs of the LRC have always been government members,[128] we can gain a glimpse of the partisan dynamics that can dominate parliamentary committees. For government members, there may be a temptation to take a 'tick and flick' approach to the Committee's scrutiny function, while the Chair, who holds the casting vote, might be tempted to wave through regulations or to declare issues to be matters of policy and hence off limits.[129] At the same time, opposition and crossbench members might have more motivation to take a rigorous approach. These partisan dynamics might be motivating members to lose sight of the LRC's safeguard function of performing technical scrutiny on the behalf of Parliament as whole.

To sum up, the LRC's under-resourcing and multiple functions, combined with its weak legislative scheme and the half-hearted approach of the executive to supporting the scrutiny process, mean that the Committee is not positioned to offer

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123 Ibid 3 (emphasis added). This is consistent with the evidence given by LRC members Hon Nicola Centofanti and Hon Irene Pnevmatikos who emphasise that the focus of the LRC is not on the substantive content or merits of the policy or regulation but on 'its technicalities': *SA Productivity Commission Inquiry* (n 101) 2.

124 *LRC Information Guide* (n 58) 10 [3.5(1)].

125 For example, the *SSCSDL Annual Report* (n 72) explains that it performs 'technical legislative scrutiny … The committee does not consider the policy merits of delegated legislation, although the policy content of an instrument may provide context for the committee's scrutiny': at vii. In most circumstances, the NSW Legislative Review Committee is precluded from considering the underlying policy of delegated legislation: *Legislation Review Act 1987* (NSW) s 9(3). The NSW Legislative Council has established a separate parliamentary committee with an express policy scrutiny role in relation to delegated legislation: see Pearce and Argument (n 1) [11.15], [3.47].

126 *LRC Workload Report* (n 5) app B, 3.

127 Ibid.

128 At the federal level, the Chair of the SSCSDL is a government member while the deputy chair is an opposition party member. The converse is the case for the Chair and Deputy Chair of the Senate Standing Committee for the Scrutiny of Bills. The NSW Legislation Review Committee has a government Chair and Deputy Chair.

129 In an empirical study involving interviews with 55 Australian parliamentarians, party discipline and 'the necessity to compromise for political reasons' were raised by many interviewees as an obstacle to the effectiveness of scrutiny committees: Evans and Evans (n 48) 340.

'*effective* parliamentary scrutiny and oversight' to the extent that it could form the context for displacing the common law duty to afford procedural fairness. The effectiveness of the 'safeguard' provided by the LRC is dependent on many dynamics within both Parliament and the system of government.

Thus, the High Court majority's assessment of the parliamentary oversight offered by South Australian parliamentary committees being 'general and limited' is an apt characterisation, certainly more accurate than Steward J's sanguine reference to 'effective parliamentary supervision and oversight'.[130] Neither the majority nor Steward J, however, offer any explanation of how they reached their view about the efficacy of the scrutiny process. Both positions — that scrutiny of the Cowirra Regulations was 'general and limited' that it was 'effective' — reflect unexamined assumptions about the nature of the legislative scrutiny mechanisms.

IV Courts and Facts: Assumptions about Legislative Scrutiny

The disconnect discussed in Part III between judicial assumptions about legislative scrutiny and the realities of the limited oversight by Parliament that occurs in practice raises the question of how courts are, or ought to be, informed of the relevant factual matrix when considering the validity of delegated legislation. Of course, this question — about the facts that underpin judicial determinations — is by no means limited to delegated legislation. Similar difficulties arise in other contexts.[131] However, in this article we are focusing our enquiry on the process of making delegated legislation for two reasons. First, this is the context that arose in *Disorganized Developments* and the Court's approach in that case shows how different assumptions about these processes can have divergent results in terms of validity. Secondly, the particular factual matrix that underpins the making of delegated legislation will be quite different to other contexts, where more general legislative or social facts — including, where necessary, specialist expertise — may be required. We are not, in this article, concerned with investigating the factual bases of courts' decisions generally. Rather, we are concerned with the effectiveness of the existing legislative scrutiny processes, and the reliance that courts can and should place on these processes. The sheer volume of delegated legislation, as well as the impact it has on the lives of citizens,[132] suggests these questions deserve attention.

There are a number of circumstances in which a court might consider the effectiveness of a legislative scrutiny process in relation to delegated legislation. As *Disorganized Developments* illustrated, the existence and efficacy of legislative scrutiny mechanisms may be one consideration relevant to determining whether the making of delegated legislation attracts a duty of procedural fairness. Another example relates to the interpretation of delegated legislation. In *Environment Protection Authority v Condon*, Leeming JA explained that, when construing

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130 See text accompanying nn 28, 32.

131 For example, in determining constitutional disputes courts will sometimes have to make findings of 'constitutional fact': see Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart Publishing, 2021) ch 3.

132 Ruth Fox and Joel Blackwell, 'The Devil Is in the Detail: Parliament and Delegated Legislation' (Report, Hansard Society, 2014) 23.

regulations, '[i]t is legitimate to have regard to the fact that regulations are less carefully drafted, and less keenly scrutinised, than primary legislation'.[133] Therefore, 'minor divergences in wording'[134] or 'errors in language'[135] might not hold the same significance as they would in primary legislation. Applying this reasoning, in *Day v Harness Racing New South Wales*, an obvious error in the name of a prohibited substance listed in local rules made by a statutory authority was explained on the basis that the rules were

> not drafted by Parliamentary Counsel, nor scrutinised in the way that tends to occur of a Bill as it passes through Parliament and receives assent. It is legitimate to have regard to the fact that regulations are less carefully drafted, and less keenly scrutinised, than primary legislation. It is equally legitimate to have regard to the fact that [the relevant local rule] was drafted by Mr Sanders [Harness Racing NSW's Manager Integrity and Chairman of Stewards], and adopted by the five members of HRNSW. I mean no disrespect, but none of those men would profess to expertise in legal drafting. Their rules should be construed bearing as much in mind.[136]

Accordingly, the Court held that the reference in the local rules to 'cobalt chloride' was clearly intended to be a reference to 'cobalt'.

A variation on this theme appears in *Croc's Franchising v Alamdo Holdings*.[137] In construing regulations designed to give commercial tenants relief during the COVID-19 pandemic, the New South Wales Court of Appeal took 'judicial notice of the fact that many steps were taken in haste at the outbreak of the COVID-19 pandemic'.[138] Accordingly, the Court had 'greater than usual leeway in construing the language' of the regulations.[139]

The existence of parliamentary scrutiny may also be relevant to the interpretation of so-called 'Henry VIII' clauses: that is, clauses that allow delegated legislation to amend primary legislation. In *ADCO Constructions v Goudappel*, Gageler J considered the provision for committee scrutiny and disallowance when interpreting such a clause.[140] His Honour observed:

> That parliamentary oversight, together with the scope for judicial review of the exercise of the regulation-making power, diminishes the utility of the pejorative labelling of the empowering provisions as 'Henry VIII clauses'. The empowering provisions reflect not a return to the executive autocracy of a Tudor monarch, but the striking of a legislated balance between flexibility and accountability in the working out of the detail of replacing one modern complex statutory scheme with another.[141]

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133 *Environment Protection Authority v Condon* (2014) 86 NSWLR 499, 508 [44] ('*Condon*').
134 Ibid 510 [52].
135 *Liversidge v Anderson* [1942] AC 206, 223 (Viscount Maugham).
136 *Day v Harness Racing New South Wales* (2014) 88 NSWLR 594, 610 [79] (Leeming JA) (citations omitted). For another application of *Condon* (n 133) see *Lake v Municipal Association of Victoria* [2018] VSC 561.
137 *Croc's Franchising Pty Ltd v Alamdo Holdings Pty Ltd* [2023] NSWCA 256.
138 Ibid [203] (Basten AJA).
139 Ibid.
140 *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1.
141 Ibid 25 [61] (citations omitted).

On this reasoning, the requirement of parliamentary scrutiny justifies a more generous interpretation of the executive's regulation-making power.

Each of these approaches reflects underlying factual assumptions about the process of making delegated legislation. It is well accepted that the fact-finding role of courts is constrained. Judges are, on the whole, not permitted to simply conduct free-range inquiries in order to establish relevant facts or to acquire background information or context. With limited exceptions, the scheme of fact-finding before courts is party driven. As Mason CJ observed in *Cunliffe v Commonwealth* in the context of establishing a burden on the implied freedom of political communication, the 'relevant facts must either be agreed or proved or be such that the Court is prepared to take account of them by judicial notice or otherwise'.[142]

Judicial notice operates as a shortcut to formal proof. It enables judges to have regard to well-known facts without regard to evidence or making any further inquiries, as well as to those facts that can be ascertained by reference to authoritative works.[143] Although the boundaries of judicial notice are somewhat indistinct and have been subject to criticism,[144] it is not in dispute that judicial notice is an essential component of judicial decision-making. It would simply not be feasible for courts to require evidence on every factual matter.

When assessing the validity of delegated legislation, as occurred in *Disorganized Developments*, the relevant context concerns the processes of lawmaking. Courts are routinely called upon to assess the validity of legislation,[145] including delegated legislation, and it can be assumed that judges have knowledge of the processes by which laws are made. It is assumed that judges, in courts of all levels, have general knowledge of the passage of laws through Parliament as well as the general processes that attend the making of delegated legislation. Indeed, this might be seen as squarely within the expertise of courts, and something that courts routinely take into account when assessing legislation. It is common, for example, for courts to have regard to parliamentary materials such as second reading speeches when considering questions of interpretation or validity.[146] Whether or not the label of judicial notice is used, it seems unquestionable that courts can and do take notice of these basic facts about lawmaking processes.[147]

Less clear is the extent to which courts can and should scrutinise the *adequacy* of these lawmaking processes. In the context of primary legislation, there has been a longstanding British tradition which prevents the questioning of proceedings in

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142 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 304.

143 Note these two categories were developed by Dixon J in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 196. They are often referred to as 'judicial notice without inquiry' and 'judicial notice after inquiry': see further JD Heydon, *Cross on Evidence* (LexisNexis Butterworths, 12th Australian edition, 2020) ch 2.

144 See, eg, IR Freckelton, *Expert Evidence: Law, Practice, Procedure and Advocacy* (Thomson Reuters, 6th ed, 2019) 155 [2.30.40].

145 It is now routinely remarked that we live in an 'age of statutes': see Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982); Lisa Burton Crawford, 'The Rule of Law in the Age of Statutes' (2020) 48(2) *Federal Law Review* 159.

146 At the federal level, see, eg, *Acts Interpretation Act 1901* (Cth) s 15AB. See also Jacinta Dharmananda, 'Using Parliamentary Materials in Interpretation: Insights from Parliamentary Process' (2018) 41(1) *UNSW Law Journal* 1.

147 See also *Legislation Act* (n 78) s 15ZB.

Parliament. This prohibition, which emerges from art 9 of the *Bill of Rights 1689*, was designed to protect parliamentary privilege. While for many years it operated to prevent courts referring to parliamentary debates, this has been relaxed — both in the United Kingdom and Australia — and it is now commonplace for courts to rely on extrinsic material.[148] In addition, as Kavanagh has argued in the context of the United Kingdom, there is a distinction between courts analysing the quality of the decision-making *process* of a parliament, and a court analysing the substantive decision or outcome of the parliamentary process.[149] As Kavanagh explains, it is 'possible to assess the *quality of the decision-making process* without evaluating the merits of the individual arguments', meaning that this would 'fall outside the forbidden territory'.[150] In the context of secondary legislation, courts in the United Kingdom have assessed the adequacy of scrutiny processes,[151] both where incompatibility was pointed out but Parliament chose to proceed anyway, and also where there was simply insufficient scrutiny and debate.[152] In both types of cases the United Kingdom Supreme Court has concluded that the secondary legislation was incompatible with rights set out in the *European Convention on Human Rights*.[153]

Of course, here we are concerned with the adequacy of parliamentary scrutiny of delegated legislation rather than primary legislation. In this context, the relevant question is whether the mere existence of such measures is sufficient, or whether courts should assess the adequacy of these measures. In the context of the United Kingdom's *Human Rights Act 1998*, Richard Edwards has suggested that the level of deference to be accorded to Parliament should vary depending on the relevant lawmaking body:

> Moreover, the origin of the legal measure in question can to some extent colour the level of deference to be applied. The stronger the democratic pedigree of the measure the more appropriate deference may be. Clearly, rules promulgated by un-elected decision-makers and rules based on the common law should receive less deference than those made by Parliament.[154]

According to this reasoning, delegated and other subordinate forms of legislation should be subject to less weight — or deference[155] — because they have not been

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148 For instance, in Australia the *Acts Interpretation Act 1901* (Cth) was amended in 1984 to permit reliance on *Parliamentary Debates* (or 'Hansard') in certain circumstances.

149 Aileen Kavanagh, 'Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory' (2014) 34(3) *Oxford Journal of Legal Studies* 443, 465.

150 Ibid 465 (emphasis in original).

151 Note that in the United Kingdom the amount of scrutiny depends on whether the affirmative procedure or negative procedure is followed, with the bulk of secondary legislation following the negative procedure. This means that the instrument becomes law immediately once it is signed, unless it is actively annulled within a 40-day period.

152 Merris Amos, 'Law-Making in the Rights Hostile Environment of the United Kingdom' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australian Jurisdictions* (Thomson Reuters, 2020) 385, 395–6.

153 Ibid. Note that the context for reviewing delegated legislation is quite different in the United Kingdom compared to Australia due to the *Human Rights Act 1998* (UK).

154 Richard A Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65(6) *Modern Law Review* 858, 876 (citations omitted).

155 Although Australian courts have been uncomfortable with explicit references to the concept of 'deference', in the constitutional context it has been argued that when conducting proportionality

subject to rigorous Parliamentary debate. As we have shown in Part III above, the regulations in question in *Disorganized Developments* were, in practice, subject to a 'paper thin' level of scrutiny. It must be noted that in this context the High Court was not concerned with assessing whether the regulations infringed a protected right or freedom, and so the Court was not conducting a proportionality inquiry, which is often the context in which deference is applied. Instead, the Court considered parliamentary scrutiny processes as one factor in determining whether Parliament intended to exclude the obligation to afford procedural fairness. As we have explained in Part II above, both the majority and minority justices considered the *existence* of such processes might be relevant. For the majority, the 'general and limited' oversight did not support any implication to exclude procedural fairness. In contrast, Steward J appeared to place more weight on the existence of scrutiny mechanisms, suggesting that 'effective parliamentary supervision and oversight' supported an intention to exclude procedural fairness.

We suggest that courts ought to be cautious about drawing inferences regarding the quality of the scrutiny of delegated legislation from the mere existence of legislative scrutiny mechanisms. Just because mechanisms exist, such as the LRC in South Australia and analogous bodies in other jurisdictions, this does not mean there is 'effective' parliamentary scrutiny. In *Disorganized Developments* the majority's recognition of the 'limited' parliamentary scrutiny more accurately reflects the situation in practice. The consequence of the majority's view was, as we have explained, that they placed little weight on the existence of scrutiny in terms of assessing whether procedural fairness applied. We suggest that if courts *do* want to place reliance on the existence of parliamentary scrutiny, they would need to be satisfied that such scrutiny occurred.

We suggest two different vehicles by which courts could become informed of the relevant level of scrutiny. First, courts may take judicial notice of general facts about the effectiveness of parliamentary scrutiny. For example, a body of literature deals with the deficiencies of such scrutiny mechanisms,[156] and the work of these committees themselves is often documented in publicly available reports.[157] If courts were to take judicial notice in this way, it would be incumbent on them to afford procedural fairness to the parties by informing them that the court proposed to take judicial notice of certain matters and giving the parties the opportunity to respond to that proposal.[158]

Secondly, material about the adequacy of scrutiny that in fact occurred in relation to a particular legislative instrument could be the subject of submissions and/or evidence by counsel. Counsel could, for example, submit evidence about the actual scrutiny that occurred. This evidence may be included in submissions or

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analysis courts should assess the investigations and deliberations made by parliaments: see Appleby and Carter, who propose a 'spectrum of inter-institutional relations': Gabrielle Appleby and Anne Carter, 'Parliaments, Proportionality and Facts' (2021) 43(3) *Sydney Law Review* 259, 271. See also Gabrielle Appleby and Anne Carter, 'Parliaments and Facts: Deepening Deliberation' in Joe Tomlinson and Anne Carter (eds), *Facts in Public Law Adjudication* (Hart Publishing, 2023) 29.

156 See, eg, Evans and Evans (n 48).

157 See above Part III for examples.

158 Note that under *Evidence Act 1995* (Cth) s 144(4), a judge taking judicial notice is required to give a party an opportunity to make submissions or refer to relevant information.

appended to submissions, as commonly occurs in constitutional cases.[159] Although in proceedings for the judicial review of administrative action extrinsic evidence[160] is not routinely adduced,[161] at times such evidence will be relevant. For instance, evidence may be relevant to questions such as whether a regulation is unreasonable or disproportionate.[162] Evidence of questions asked in committees about, for example, the consultation that has taken place with affected parties might be relevant to whether the rules of procedural fairness have been complied with.[163] In practice, evidence about the adequacy of the scrutiny process is likely to be presented by those seeking to defend the validity of delegated legislation (often the state, as was the case in *Disorganized Developments*).

V Conclusion

In the 20th century, parliaments across Australia established legislative scrutiny committees as safeguards to counter the danger of Parliament having no direct control over regulations and to minimise the risk of regulations 'slipping through without any member being aware of its contents'.[164] It is hard to argue with the following assessment of this scrutiny work:

> Considering the number of regulations made each year, and the enormous variety of subjects, on which members generally have little information, the committee's work will be arduous.[165]

Both of these statements were made in 1938, when South Australia's Joint Committee on Subordinate Legislation was first officially established, and they remain pertinent. In the 21st century, scrutiny committees for delegated legislation continue to have an 'arduous' and onerous role in scrutinising the ever-increasing number of regulations, and, without adequate resources and support from the executive, there is much chance of more instruments like the Cowirra Regulations 'slipping through' without adequate scrutiny. This could be alleviated if Parliament were to enact a legal framework by which the executive was compelled to make public its explanation of the purpose of each regulation as well as its consultation process. Scrutinising the stream of 'executive law-making creep'[166] requires a more

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159 See, eg, Rosalind Dixon, 'The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term' (2015) 43(3) *Federal Law Review* 455, 470; Gabrielle Appleby, 'Functionalism in Constitutional Interpretation: Factual and Participatory Challenges — Commentary on Dixon' (2015) 43(3) *Federal Law Review* 493, 496.

160 In this context we use 'extrinsic evidence' to refer to material that was not before the primary decision-maker.

161 See, eg, *Changshu Longte Grinding Ball Co Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science [No 1]* [2017] FCA 1114, [6] (Griffiths J).

162 See, eg, *Australian Energy Regulator v Snowy Hydro Ltd* (2014) 8 ARLR 332, where Beach J refused to hear an interim application as the evidentiary foundation had not been established. See also *Comcare v Lilley* (2013) 216 FCR 214, 238 [103].

163 Noting, however, that public consultation through parliamentary processes can play a quite distinct role from the rules of procedural fairness: see text accompanying n 31 referencing Edgar.

164 South Australia, *Parliamentary Debates*, Legislative Council, 19 July 1938, 473 (Hon WG Duncan). The first report of the 'Honorary Committee on Subordinate Legislation', chaired by Baden Pattinson, in 1935 used the expressions 'danger' and 'safeguards': see South Australia, *Parliamentary Papers*, 1935 vol II no 52.

165 South Australia, *Parliamentary Debates*, Legislative Council, 19 July 1938, 474 (Hon H Homburg).

166 Saunders (n 2) 71, 81.

robust system in order for Parliament to retain control over its delegated legislative power. Given the executive's dominance of Parliament in our system of government, a shifting away from a largely informal and discretionary system is unlikely unless there is some incentive to follow the lead of federal Parliament via its *Legislation Act*.[167]

In this article, our examination of the work of the LRC shows the High Court majority were correct not to use the Committee's existence as a justification for procedural fairness being excluded, albeit without providing any clear reasons for this position. We suggest the Committee suffers from significant constraints, both in terms of resources and process, which mean it is ultimately hamstrung in terms of its ability to provide adequate scrutiny. Furthermore, the existence of parliamentary committees cannot be used to obviate the executive's obligation to consider individual common law rights when making delegated legislation.

In this article we question whether it is prudent for judges to make assumptions about legislative oversight committees in relation to delegated legislation. Using *Disorganized Developments* and South Australia as a case study, we argue that an idealised view of the delegated lawmaking process bears little resemblance to practice where there are serious concerns regarding the transparency, accountability and quality of delegated lawmaking. While some aspects of this case study are distinctly South Australian, our examination of delegated lawmaking elsewhere reveals both common challenges and jurisdictional variations. This underscores our point that courts should be cautious about drawing inferences from the mere existence of a parliamentary scrutiny mechanism.

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[167] For federal Parliament, one of the 'incentives' in setting out a formal system in the *Legislation Act* (n 78) was the comprehensive review of the practice of executive lawmaking at the federal level by the Administrative Review Council, *Rule Making by Commonwealth Agencies* (Report No 35, 1992). See also Legislative Instruments Act Review Committee, Parliament of Australia, *2008 Review of the Legislative Instruments Act 2003* (Parliamentary Paper No 98, March 2009).