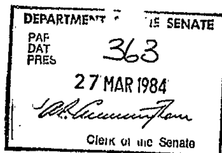


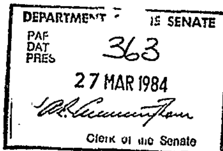
THE SENATE

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

SEVENTY-FOURTH REPORT

MARCH 1984

LEGISLATION CONSIDERED
MAY - DECEMBER 1983



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SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

MEMBERS OF THE COMMITTEE

Senator J Coates (Chairman)
Senator A W R Lewis (Deputy Chairman)
Senator the Hon. Sir John Carrick
Senator P F S Cook
Senator the Hon. P D Durack
Senator G F Richardson
Senator M C Tate

PRINCIPLES OF THE COMMITTEE

(Adopted 1932; Amended 1979)

The Committee scrutinises delegated legislation to ensure:

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

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

(d) that it does not contain matter more appropriate for Parliamentary enactment.

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OVERVIEW

A. During the 1983 parliamentary year, the Committee met on 15 occasions, always in private, and examined 793 statutory instruments, of which some 350 were Statutory Rules strictly defined: regulations made under a variety of Commonwealth Acts. The number of weekly meetings was slightly lower than recent averages, reflecting the effect of the February double dissolution in reducing the number of sitting days. In addition, the Committee has occasionally postponed meetings where, on first examination, a particular week's collection of statutory instruments has appeared not to contain matters of immediate interest to the Committee. However, it is still a telling indication of the enormous task facing the Committee that in 1983 each meeting examined on average 52 statutory instruments.

B. During 1983 the Committee examined the following types and numbers of instruments (some of which were actually made in 1982), which were subject to parliamentary disallowance or disapproval:

Instrument type	Number
A.C.T. Ordinances	76
A.C.T. Regulations	24
Commonwealth Teaching Service Determinations	10
Defence Determinations	35
Great Barrier Reef Marine Park Zoning Plans: Cairns/Cormorant Pass	1
Naval (Orders) Regulations Orders	8
Navigation (Orders) Regulations Orders	13
Norfolk Island Regulations	1
Postal By-laws	1
Postal (Staff) By-laws Amendments	3
Public Service Board Determinations	28
Statutory Rules	553
Telecommunications (Charging Zones and	8

Charging Districts) By-laws Amendments	
Telecommunications (Community Calls) By-law Amendments	8
Telecommunications (General) By-laws Amendments	5
Telecommunications (Staff) By-laws Amendments	6
Territory of Christmas Island Ordinance	1
Territory of Christmas Island Regulations	1
Uluru (Ayers Rock - Mount Olga National Park Plan of Management)	1
World Heritage Proclamations	10

C. The Committee's routine examination of instruments identified only a relatively small proportion as deserving closer examination in light of the Committee's principles. In selecting cases for closer examination, the Committee was frequently guided by the advice of the Legal Adviser, Professor Douglas Whalan, of the Australian National University. Approximately five percent of instruments (many with a number of provisions of interest to the Committee) were subject to closer examination, which in many cases meant no more than that the Committee sought a detailed explanation from the responsible Minister on the merits of the objectionable provision. Approximately half of these inquiries terminated in a simple if detailed explanation from a Minister. In some of these cases, the Committee may have retained reservations about the adequacy of a provision, yet thought it preferable to defer more detailed consideration until a later date - particularly in the case of a number of new instruments where it might be considered useful to see how the instruments operate in practice. (Compare the earlier figures in the _50th Report_, Parliamentary Paper No. 271/1974, pages 20-21.)

D. However, the other half of the cases identified for closer examination have required more sustained treatment: they include approximately a dozen Statutory Rules, eight A.C.T. ordinances and one Zoning Plan. In many of these cases, the Committee was interested in a number of provisions. On three occasions the Committee gave notice to disallow an instrument, yet in no case in 1983 did the Committee actually move to disallow any instrument. It is quite characteristic of the Committee's operations that if a Minister is either slow to answer a request from the Committee or provides an unsatisfactory response, the Committee protects its ability to continue (or indeed speed up) negotiations by giving notice that it will, within a specified period of sitting days, move to disallow the instrument. The onus is then on the Minister to respond speedily for, if at the expiration of fifteen sitting days a notice has not been withdrawn or otherwise disposed of, the instrument specified in the motion is deemed to have been disallowed (Acts Interpretation Act, section 48(5)).

E. The types of provisions that have been of serious concern to the Committee can be briefly summarized here, leaving the full report and analysis to subsequent chapters. In brief, the Committee has singled out for attention:

- retrospective provisions, which trespass unduly on personal rights and liberties (see reports in chapter two on Statutory Rules 1982 No. 365, and in particular A.C.T. Ordinance 1982 No. 95, and A.C.T. Ordinance 1982 No. 103);

- possibly defective appeal provisions, where failure by a decision-maker to notify a person of a right of appeal is held not to invalidate the original decision (see report in chapter two on Statutory Rule 1983 No. 38);

- subjectively based administrative discretions, in which the only criterion governing the exercise of discretion is "on such terms as the decision-maker thinks reasonable" or "in the opinion of the decision-maker", the effect of which is to introduce an unchallengeable discretion, thereby severely limiting the scope of any available review of decisions (see reports in chapter two on Statutory Rules 1983 Nos 49 and 70);

- sub-delegation provisions, in which a regulation confers a further delegation not in conformity with the Principal Act (see report in chapter two on Statutory Rule 1983 No. 88);

- unappealable administrative discretions (see report in chapter two on Great Barrier Reef Marine Park Zoning Plans);

- reversal of onus provisions, which impose an undue persuasive or evidentiary burden on defendants (see reports in chapter two on Statutory Rules 1983 No. 31 and A.C.T. Ordinance 1983 No. 8);

- miscellaneous provisions, which trespass unduly on personal rights and liberties (see reports in chapter two on A.C.T. Ordinances 1983 No. 52 and No. 53).

F. During the year, the Committee has achieved success in a number of important areas. However, the impact of the Committee ought not to be measured simply by a list of amendments achieved or promised, as the very existence of the Committee and its half century of scrutiny of delegated legislation has had a great, if immeasurable, influence on improved drafting practices. (See, for example, comments in Attorney-General's Department, Annual Report 1982-83 Canberra, 1983, p. 29.) A number of

the Committee's successful amendments or promised amendments result from inquiries begun in 1982 or earlier, and are treated in full in chapter one.

G. The types of amendments or promised amendments which the Committee has achieved in 1983 include:

- deletion of unrestricted rights of entry by officials (re Statutory Rule 1982 No. 194);

- introduction of expenses for witnesses before certain tribunals (re A.C.T. Ordinance 1983 No. 16);

- deletion of subjective basis for decision-making (re Statutory Rule 1983 No. 49);

- introduction of right of appeal of decisions (re Zoning Plans of Great Barrier Reef Marine Park);

- removal of persuasive burden on defendants (re Statutory Rules 1983 No. 31 and A.C.T. Ordinance 1983 No. 8);

- introduction of greater protection of rights and liberties of individuals (re A.C.T. Ordinance 1983 No. 52).

H. Although the Committee's principles under which it examines instruments were slightly modernized in 1979 to take account of the new administrative law-reviewing agencies, one can still find a reliable guide to the Committee's practical application of its principles and the type of objectionable provisions in the 43rd Report (Parliamentary Paper No. 220/1972, pages 14-16).

Chapter One: Matters Arising from Previous Reports

1.1 Statutory Rules

QUARANTINE (COCOS ISLANDS) REGULATIONS (STATUTORY RULES 1982, NO. 194)

1. The following comments draw heavily upon 73rd Report, paragraphs 32-34. On 25 May 1982, the Minister for Health wrote to the Committee, seeking its comments on draft Quarantine Regulations which were intended to provide the legislative framework for a scheme to keep the Cocos Islands free of animal and plant diseases. The Minister's request was made to the Committee towards the end of the 1982 Autumn sittings, and at that time the Committee had not reached a concluded view on its attitude towards consideration of regulations in draft (see 73rd Report, paragraphs 5-8). The Committee indicated to the Minister that it would be unlikely to meet until the 1982 Budget sittings of the Parliament, but that it would not wish the resultant delays in its deliberations to inhibit the Minister's making the proposed regulations if he wished to have them in place as soon as possible. However, the Committee requested that, if the Minister were in a position to withhold the making of the regulations until the Budget sittings, it would appreciate his doing so. On 30 June 1982, the Minister advised that, since the Quarantine Station at the Cocos Islands had already commenced operations, it was essential that quarantine controls be effected as soon as possible. He therefore proceeded to have the regulations made and took note that the Committee would examine them in accordance with its normal practice after they were made.

2. Subsequently, the Committee advised the Minister of the following concerns about the regulations. Firstly, regulations 14 and 19 provide for an unrestricted right of a

quarantine officer to enter premises. The Committee put to the Minister that such a right should be restricted so that the officer might do so only after obtaining prior approval from a magistrate or, at the least, a Justice of the Peace. Secondly, the Committee also noted that the right of a quarantine officer to destroy goods is unrestricted.

3. The Minister then agreed to amend regulations 14 and 19, to require that a warrant be issued by a Justice of the Peace before premises are entered by a quarantine officer without the owner's approval. So far as restrictions on the destruction of goods are concerned, the Minister pointed out that speed is essential in a quarantine control operation, and any delay could cause complications and spread of disease. He therefore considered it inappropriate that a decision to destroy an animal or other goods that are diseased or are a source of infection should be capable of being delayed or overruled. An alternative suggestion - that the approval of the Minister be sought before destruction occurred - was not considered appropriate because of delays necessarily involved in communications between the Cocos Island and Australia. The Committee accepted the Minister's views, and did not pursue the matter further.

4. However, the Minister has since advised the Committee that, as a result of discussions between the Department of Health and the Attorney-General's Department, the proposed amendments to the Regulations will not proceed. The Minister and the Attorney-General are now of the view that the powers in question should not continue to be included in subordinate legislation, but should be contained in the Quarantine Act itself.

5. The Minister therefore has advised that he will seek to have a suitable amendment - which would, inter alia, pick up the requirement for a warrant - included in the Quarantine Bill which he hopes to bring before the Parliament in 1984.

Regulations 14 and 19 of the Quarantine (Cocos Islands) Regulations could then be repealed. Furthermore, he has given an undertaking that during the interim period the existing powers of entry are not to be invoked unless the Minister has given express approval. Such approval will not be forthcoming unless the Minister is satisfied that it is necessary to quarantine security.

6. The Committee commends the Minister for his extensive review of these Regulations, and his co-operative attitude in finding a solution even more in keeping with the Committee's preference for parliamentary enactment of major regulations affecting civil liberties.

FREEDOM OF INFORMATION (CHARGES) REGULATIONS (STATUTORY RULES 1982 NO. 197)

7. In its 73rd Report at paragraphs 36-43, the Committee advised the Senate of the results of its investigation of the Regulations and accompanying guidelines under which certain applications for information are treated. In considering these regulations, the Committee noted that, under regulation 9, it is provided that charges may be fixed based upon estimates of time that are "in the opinion of the agency or Minister" likely to be necessary to fulfil the request of the applicant. The Committee also noted that regulation 10 enabled the charge to be readjusted, either upwards or downwards, when an estimate was found to be inaccurate. The effect of regulation 10 was to render the estimated charge under regulation 9 open-ended.

8. The Committee asked the Acting Attorney-General whether, when liability to a charge is significantly greater than the estimate originally given, some mechanism might not be possible, prescribed by regulation, to advise a person seeking information that the charge would be much higher

than originally estimated. The Committee suggested that, if such a provision were practicable, some consideration might also need to be given to the consequences of that advice, for example, whether a person could exercise the right not to proceed with the request for information without financial penalty; whether the discretion under section 30 of the Freedom of Information Act 1982 to waive all or some part of the charges could be automatically exercised under such circumstances; or whether an agency could make available to a person documents which could be produced for the cost originally estimated.

9. The Committee also suggested to the Acting Attorney-General that, in view of the subjective nature of the phrase "in the opinion of the agency or Minister" in sub-regulations 9(1) and (2), the phrase might be deleted. The Committee was aware that, the basis of the charging having been set by regulation 3 as the decision of the agency or the Minister, estimates are indeed a question of opinion, and, further, that adequate appeal provisions were included in the Freedom of Information Act in relation to charges. However, the Committee was concerned that an appeal from "an opinion" is always more difficult to mount than one from a decision based upon objective criteria.

10. The Committee reported on the initial results of the discussions with the Attorney-General in paragraphs 39-42 of the 73rd Report. The Committee concluded that the matters raised might at some future time more appropriately be the subject of regulations rather than guidelines. The Committee decided not to pursue amendment of the regulations, but to examine the matter again after twelve months' operation of the regulations and guidelines. As reported in the 73rd Report, the then Acting Attorney-General advised that he would welcome the Committee's further consideration of the regulations.

11. Towards the end of the 1983 Budget sittings, the Committee began by seeking the opinion of the Attorney-General on the operation and adequacy thus far of the regulations and guidelines. The Attorney-General has replied, drawing attention particularly to paragraph 4.9 of the Freedom of Information Act 1982 - Annual Report by the Attorney-General on the Operation of the Act, which he tabled in the Senate on 15 December 1983. The statistics in that Report reveal that during the first 7 months' operation of the Freedom of Information Act 1982 agencies showed little inclination to exercise their right to levy charges in respect of requests for information under the Act. Despite the fact that it is the Government's intention that charges should be levied in most circumstances, charges were notified in respect of only 3.7% of all requests where access was granted in full or in part.

12. The Attorney-General has suggested to the Committee that agencies "find the Regulations unduly complex, administratively cumbersome and costly in resource terms", referring to paragraphs 4.9.6, 4.11 and 7.5 of the Annual Report. Hence the importance of the guidelines: the Minister stated that they are an attempt to explain the scheme of charges, the general principles to be applied in deciding whether to levy a charge, and the steps involved in levying a charge in a comprehensive yet simple manner. The Committee was asked to liken them to Explanatory Memoranda which accompany the introduction of legislation, and to appreciate that it would never be appropriate to include that explanatory material as part of the proposed legislation. Similarly, the Minister argued, it would be inappropriate to include the guidelines in the Regulations: by their very nature they are not the sort of material which should, or could, be placed in the Regulations. It is the Attorney-General's view that while the Regulations might need revamping to make them less "intimidatory" to agencies, this will not be achieved by including the guidelines in the

Regulations. If agencies already find the Regulations overly complex or administratively difficult then this would only serve to exacerbate the problem.

13. The Committee welcomes the Minister's views and his offer of assistance, and hopes to report further to the Senate in the near future.

1.2 A.C.T. Ordinances

SALE OF MOTOR VEHICLES ORDINANCE (A.C.T. ORDINANCE NO. 29 OF 1977)

14. The Committee originally commented on this Ordinance in its 59th Report of 1977 (paragraphs 13-14).

15. This Ordinance provides in section 27 that the Registrar of Motor Vehicle Dealers may adjudicate in disputes between sellers and buyers of motor vehicles and may make such orders as he considers just, and there are penalties for enforcing his orders. Although there is an appeal to the courts against decisions of the Registrar, and the Registrar may not deal with disputes which are before the courts, the Committee considered that these provisions are in principle objectionable, in that they confer on an administrative official the powers and responsibilities of a court. The provision of penalties to enforce the orders of the Registrar violates the principle that civil orders should be enforced in the first instance by civil and not criminal remedies. The other provision that the Committee considered objectionable is in section 55 and is to the effect that persons who bring witnesses in hearings before the Registrar are liable for the expenses of those witnesses, notwithstanding that the witnesses may be material to the

proceedings. The Minister for the Capital Territory undertook to review and amend these provisions, which would not be brought into effect until that review has occurred.

16. In January 1981 the responsible Minister advised the Committee that draft amendments had been received by the Department, following completion of a review of the Ordinance, but that further discussions with officers of the Attorney-General's Department were required. The Minister advised the Committee in January 1982 that the proposed amendments to the Ordinance had been prepared and that he expected the draft Ordinance would be considered by the House of Assembly later that year, although it was not until the 1983 Budget sittings that the Committee examined the Sale of Motor Vehicles (Amendment) Ordinance 1983 (being A.C.T. Ordinance No. 16 of 1983), which repeals and substitutes provisions as to the giving of opinions on disputes by the Registrar of Motor Vehicles. The Committee is satisfied that the amending Ordinance fulfils the undertaking given by the Minister in 1977, and commends the Minister for the resolution of this long-standing problem.

. .

PLUMBERS, DRAINERS AND GASFITTERS BOARD ORDINANCE 1982 (A.C.T. ORDINANCE NO. 74)

17. The purpose of this Ordinance is to establish a Board to license plumbers, drainers, gasfitters and liquefied petroleum gasfitters in the Territory. In the 73rd Report, the Committee expressed its concern with sub-section 33(2), which provides that the validity of a decision of the Board to cancel or suspend a certificate or licence is not 'to be affected by a failure to include in a statement under sub-section (1) a notification in accordance with paragraph 1(b)'.

18. The Committee appreciates that technical failures should not usually invalidate decisions. However, it would expect that notification of cancellation or suspension would attract a routine form which should include a reference to the right of appeal which would be the same in every case. As the Committee has pointed out to the Minister for the Capital Territory, the cancellation or suspension of a licence is such an important matter for the person concerned that it could be argued that the person should be fully informed of the appeal rights without exception. The Minister advised that although he was awaiting comments from the Attorney-General's Department on the drafting policy involved, he unreservedly assured the Committee that notification of appeal rights would routinely be made to persons affected by a decision of the Board. On the basis of that assurance, the Committee withdrew, on 16 December 1982, a notice of motion to disallow the Ordinance.

1.3 General

UNIFORM COMPANIES LEGISLATION

19. As commented upon in the 71st and 73rd Reports, the Committee has been corresponding with the Chairman of the Queensland Subordinate Legislation Committee concerning the amendment of State Companies Acts by regulation, rather than by amending Act. The Queensland Committee argued that the Ministerial Council should agree to amend the 1981 uniform companies legislation so that it does not contain provisions enabling the amendment of substantive legislation by regulation ("Henry VIII clauses"). The Committee has since received correspondence from the Attorney-General, who advised the Committee that there are two types of regulations that are at issue:

(a) those of particular concern to the Queensland Committee; and

(b) "translator" regulations made in order to effect necessary modifications to Commonwealth amending legislation, which legislation has automatic effect in participating jurisdictions.

20. As the Queensland Committee was primarily interested in (a) - State laws under the co-operative companies and securities scheme - the Attorney-General commented more specifically on (b) - "the unusual method of amendment" in the "translator" regulations:

> ... this aspect of the co-operative scheme is an example of the shortcomings of the scheme referred to in the Business Regulation Policy. The Government considers however, that the co-operative scheme should be retained while it demonstrates progress in the achievement of its aims. In the longer term, we would prefer to move to a national system of companies and securities regulation administered by the national Parliament.

21. The Committee notes the Attorney-General's comments on the difficulties posed by the search for uniformity. The Committee is also aware of the experience of such delegated legislation committees as that in Queensland, which face (to resort to the language of the Committee's 71st Report, paragraph 54):

> relative impotence in considering Regulations made under the uniform Companies legislation, in that any suggestions for change, made under the Committees' principles, would need to be considered further by the

Ministerial Council which must agree to such changes. Thus, the pressure on Committees to agree to the Regulations without comment is great indeed.

COMMITTEE PROCEDURES

Partial Disallowance of Instruments

22. Under this heading in the 73rd Report, the Committee gave an account of its examination of a range of alternative procedures used in other jurisdictions in connection with delegated legislation. Amongst those procedures was the power to amend delegated legislation (see also 71st Report, paragraphs 16 and 17). The Committee reported discussions with the Attorney-General in which he had put forward a proposal that the power accorded to each House of Parliament under the Acts Interpretation Act to disallow regulations and other instruments be extended to include power to disallow part of a regulation or instrument rather than the entire regulation or instrument, as at present. The Committee endorsed the suggestion, and looked forward to an amendment to the Acts Interpretation Act along the lines, for example, of the disallowance provisions with respect to A.C.T. Ordinances contained in the Seat of Government (Administration) Act.

23. The Attorney-General has recently pointed out to the Committee a number of issues which need to be considered in depth in developing proposals for partial disallowance:

(i) how does one determine what is a self-contained part of a regulation;

(ii) who should determine such a matter;

(iii) what should be the situation if one House wishes to disallow part of a regulation and the other House does not;

(iv) should there be any consultation processes between the Houses in such matters and, if so, what processes are required;

(v) should there be a consultative arrangement between the Houses and the Minister in such matters; if so, what is the appropriate arrangement and should that affect the time-frame within which disallowance can occur;

(vi) what powers should be available to the Government to withdraw, either in whole or in part, a regulation that either House of the Parliament proposed to disallow.

24. The Committee is currently examining these issues and hopes to report to the Senate in the near future. The Committee welcomes the Attorney-General's offer to assist with this examination.

Retrospectivity in Ordinances

25. Another procedure examined in earlier reports concerns the possible amendment of the Seat of Government (Administration) Act 1910 with the aim of prohibiting retrospective provisions in A.C.T. Ordinances, in terms similar to those prohibiting retrospective provisions in regulations as contained in section 48(2) of the Acts Interpretation Act. Section 48(2) reads:

(2) Regulations shall not be expressed to take effect from a date before the date of notification in any case where, if the regulations so took effect -

(a) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) existing at the date of notification, would be affected in a manner prejudicial to that person; or

(b) liabilities would be imposed on any person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification,

and where, in any regulations, any provision is made in contravention of this sub-section, that provision shall be void and of no effect.

26. The Attorney-General advised the Committee that he did not favour the extension of such a provision to A.C.T. Ordinances. The Attorney-General raised a number of arguments which certainly deserve close scrutiny. There is the possible breadth of sub-section 48(2), which is not necessarily limited in operation to cases where the legislation expressly takes away a right or prevents its further enforcement - as in the case of the Law Reform (Miscellaneous Provisions) (Amendment) Ordinance 1982 (see below, chapter 2.3). Legislation retrospectively validating action often affects the rights of a person prejudicially by depriving that person of a right of action founded on the invalidity.

27. It can also be argued that a provision similar to sub-section 48(2) would create a substantial exception from the Governor-General-in-Council's existing power to legislate for the A.C.T. There are several fundamental distinctions between regulations and Ordinances. Most importantly, regulations are made under a limited grant of power to effect the purposes of the particular Act under which they are made. Regulations are essentially ancillary

and subordinate to the principal legislation contained in an Act. By contrast, the power to make Ordinances derives from a grant, by the Parliament, of plenary legislative power: the power to make Ordinances 'for the peace, order and good government of the Territory'. The Governor-General-in-Council has legislative responsibilities and functions for the A.C.T. similar to those of a State Parliament. Except in unusual circumstances those responsibilities and functions are discharged in close consultation with the elected representatives of the Territory - the A.C.T. House of Assembly.

28. Thus, the Minister argued that it would be a severe restriction of powers if the Governor-General-in-Council were unable to make retrospective Ordinances. Further, it would pose significant difficulties in the administration of the A.C.T. Equally, where retrospectivity was required, it would cause the national Parliament to have to be involved in passing legislation of purely local significance and, perhaps, of a very minor nature.

29. The Committee is currently examining these and other issues which revolve around the question as to the possible amendment of the Seat of Government (Administration) Act 1910. The Committee hopes to report to the Senate in the near future.

Chapter Two: Legislation Considered, 1983

2.1 Statutory Rules

RULES OF THE SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY (AMENDMENT) (STATUTORY RULES 1982 NO. 365)

30. These Rules retrospectively increase certain amounts relating to plaintiffs' claims for tax-free legal costs and disbursements. The Rules were made on 15 December 1982 with retrospective effect to 4 October 1982. The Committee wrote to the Chief Justice of the Supreme Court of the A.C.T., expressing its concern that the retrospectivity could be prejudicial to, or impose liabilities upon, a person other than the Commonwealth or an authority of the Commonwealth in terms of sub-section 48(2) of the Acts Interpretation Act 1901. The Committee noted, in this context, that previous amendments to the Rule had been prospective, and not retrospective, in operation. By way of illustration, the Committee drew attention to Rule 6(4)(a). If there were a writ affected by the retrospectivity of the Rule and judgment were entered "in default of appearance to a writ endorsed in accordance with this rule" then "the plaintiff shall be allowed without taxation not more than $255 for costs and disbursements ...". If there had been no retrospectivity, then the maximum that would have been allowed without taxation would have been $230. Thus, in these circumstances, the retrospective effect of the change would appear to be operating to the prejudice of, and imposing an increased liability upon, the defendant.

31. The Chief Justice advised the Committee that the increased amount ($255) could have been allowed only after the amendment came into force (21 December 1982); that is to say, only where judgment in default was entered on or after that date. Before that date the amount claimed and allowed for such costs could not have been more than $230. The

defendant has no liability until judgment is entered. Consequently the amendment did not impose liabilities on any person in respect of anything done or omitted to be done before the date of notification of the amendment. The amendment is therefore not within section 48 of the Acts Interpretation Act 1901. While the Committee continued to entertain some reservations about the potential of the Rules, as made, to have the effect of prejudicing a person other than the Commonwealth, it was persuaded by the Chief Justice's reasoning that further action in relation to the Rules would be inappropriate. It also noted that, even if the Rules clearly imposed a liability, the High Court interpretation of section 48(2) of the Acts Interpretation Act, as evidenced by the Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd (1942) 66 CLR 161, would ensure that the Rules were not invalidated. The Committee had previously had some concern with the narrow interpretation of section 48(2) as applied in that case: see, for example, 19th Report and 25th Report, and D.C. Pearce, Delegated Legislation in Australia and New Zealand (Sydney 1977), paragraphs 641-50.

WORLD HERITAGE (WESTERN TASMANIA WILDERNESS) REGULATIONS (STATUTORY RULES 1983 NO. 31)

32. The Committee examined these Regulations very closely and drew two matters to the attention of the Minister for Home Affairs and Environment. The first matter concerned Regulation 5(3) which provided that, if someone does any of the acts specified in Regulation 5(1), then the person in whom the area is vested or who occupies the area is guilty of an offence "and is punishable upon conviction by a fine not exceeding $5,000 unless he proves that he took reasonable steps to prevent the doing of the act". (Emphasis added.) The Committee was concerned that this exoneration provision placed the onus of proof on a defendant.

33. The second matter was in relation to Regulation 8, which provided that a document bearing a certificate and a statement that it is "a true copy of the plan referred to in regulation 2 is evidence of that plan". (Emphasis added.) The Committee argued that this provision appeared to be a conclusive evidence provision and not merely a prima facie evidence one.

34. Once again, the Committee was able to make use of the Report by the Senate Standing Committee on Constitutional and Legal Affairs on The Burden of Proof in Criminal Proceedings. On behalf of the Government, the Attorney-General responded with an explanation of the reasons behind the original reversal of onus provision, but also stated that the Government had noted the Committee's criticisms and would seek an amendment Regulation 5(3) at the earliest opportunity. The Attorney-General outlined that the amended provision will place the onus on the prosecution to prove that reasonable steps had not been taken to prevent the doing of a prohibited act.

35. The Attorney-General gave a detailed explanation of the necessity for Regulation 8, which the Committee accepted. The Attorney-General explained that Regulation 8 was a provision enabling the prosecution to give evidence of the plan referred to in Regulation 3 without producing that plan in court. Without this provision the plan referred to in Regulation 3 could need to be produced at each prosecution for an offence under the Regulations, which would cause considerable difficulties. Proof of the plan is a formal matter and does not itself relate to any conduct on the part of the defendant. Also, Regulation 8 does not state that the document signed by the officer is "conclusive evidence" of the plan. It would be open to a defendant to subpoena the plan, or to call other evidence to show that the signed document was not a true copy of the plan.

36. The Committee has also sought the Minister's advice on whether, in light of the substantial penalties which could be imposed under the Regulations, it might not be more appropriate for the matters to be made subject of an Act of Parliament. The Committee accepted the Attorney-General's comments in defence of this use of the Regulations, and did not pursue the matter further.

37. It may be of some interest to note that the Committee's examination of these Regulations, its correspondence with the Ministers, and the final resolution of all matters took place within 12 days. Despite this, some of the effect of the Committee's work was nullified by the ruling of the High Court of Australia on 1 July 1983 in the Tasmanian Dams Case that section 69 of the National Parks and Wildlife Conservation Act 1975 does not enable the making of the World Heritage (Western Tasmania Wilderness) Regulations. However, the Committee's interest in the type of provisions contained in the Regulations is of more general significance than their legality in any particular case, and the Committee continues closely to examine similar provisions in other statutory instruments.

CUSTOMS (CINEMATOGRAPH FILMS) REGULATIONS (AMENDMENT) (STATUTORY RULES 1983 NO. 38)

38. The purpose of these regulations is to waive the requirement for censorship examination of films in circumstances such as screenings at a recognised film festival. The regulations provide that the Attorney-General may approve organizations and events to benefit from the relaxation and may revoke the approval. Regulation 34 provides for an appeal to the Administrative Appeals Tribunal against a decision of the Attorney-General. While Regulation 34(3) provides that the notice:

> ... shall include a statement to the effect that, subject to the Administrative Appeals Tribunal Act 1975, application may be made to the Administrative Appeals Tribunal for review of the decision to which the notice relates by or on behalf of a person whose interests are affected by the decision.

Regulation 34(4) provides:

> (4) A failure to comply with the requirements of sub-regulation (3) in relation to a decision shall not be taken to affect the validity of the decision.

39. Not for the first time, the Committee expressed its concern that the effect of this now-standard "saving clause" might be to nullify the legislative provision which should ensure that notification of rights is automatically made to persons affected by decisions which may be subject to appeal.

40. The Committee is aware that the usual appeal body, the Administrative Appeals Tribunal, is granted the discretion to entertain late applications. However, the Committee is concerned at the increased use of the standard "saving clause" and at the effect this might have on the decision-maker's performance of the apparent statutory obligation to notify persons of their appeal rights. The fact that the appeal body can entertain late applications should not be used as an excuse for the failure by decision-makers to notify persons of appeal rights. The important requirement is that aggrieved persons be notified at an early stage of the rights of appeal.

41. The Committee now has decided that, in relation to such provisions, there is little that it can do beyond, in relation to each provision, seeking an assurance from each Minister that persons affected by decisions reviewable by the Administrative Appeals Tribunal will be sent routinely a

notification of their right of appeal. An alternative would be for the Committee to seek a more general assurance from each Minister so that the Committee would not need to raise the issue specifically on each occasion. The Chairman of the Committee made a detailed statement to the Senate on this matter on 15 September 1983, alerting the Senate to the widespread nature of the "saving clause".

STATUTE LAW (MISCELLANEOUS AMENDMENTS) (PATENTS) REGULATIONS (STATUTORY RULES 1983 NO. 49)

42. These regulations prescribe provisions for applications for licences, and fees relating to those applications, concerning certain patents. They make provision for a hearing on the application by the Commissioner under the Patents Act 1952.

Regulation 3(6) provides:

> The Commissioner shall hear the application for the licence and, if satisfied that the application should be granted, may grant to the applicant a licence on such terms as the Commissioner thinks reasonable but, if not so satisfied, the Commissioner shall dismiss the application (emphasis added).

The Committee was concerned that the appeal provisions under Regulation 4 could be limited to appeals against a subjective judgment of the Commissioner, rather than against decisions made on objective criteria. Drafting of this nature has been a matter of concern to the Committee in the past, and the Committee therefore sought the Minister's advice as to whether the substitution of a phrase importing objective judgment might not be more appropriate than the present "thinks reasonable" provision.

43. The Minister advised the Committee that he would be concerned if the wording of the regulation enabled appeals only against the subjective judgment of the Commissioner rather than on objective criteria. In supporting the Committee's interest, the Minister informed the Committee that there were other provisions similarly worded in the Patents Regulations. He therefore asked the Commissioner of Patents to review all such provisions, seeking advice from the Attorney-General's Department, with a view to having any necessary amendments drafted. The Committee expresses its appreciation of the comprehensive response made by the Minister, and looks forward to examining any relevant amendments.

QUARANTINE (ANIMALS) REGULATIONS (AMENDMENT) (STATUTORY RULES 1983 NO. 70)

44. The regulations give effect to a Government decision to introduce changes to recoup 50% of the cost to the Commonwealth of providing the animal export inspection service in conformity with policy adopted generally for export inspection services. Exporters pay a fee for service on animals inspected for export, for which a certificate of health is granted. The Regulations confer a benefit on a person classified as a recognised exporter, who is granted an extension of time in which to pay the required fee for service. The Committee was interested in the apparently subjective process by which applications for recognised exporter status are approved or rejected; more particularly, the Committee was concerned over the effect such subjective judgment might have on the appeal mechanism included in the regulations.

45. As reported above, the Committee has a history of interest in the practical operation of appeals mechanisms in delegated legislation. The Committee advised the Minister

that although decisions of the Director under Regulations 86B(1), 86B(3), 86C(1) and 86F(8) are reviewable by the Administrative Appeals Tribunal under Regulation 86G, there was room for concern in that the scope of the review is effectively constrained by resort, in these provisions, to use of the language "where the Director is satisfied".

46. The Committee did not, of course, question the need for administrative discretions; nor did it suggest that specific criteria needed to be listed. However, the Committee strongly believed that any such discretion should have to be, as a proper legal test, objectively determined, rather than allow the possibility of a subjective judgment. This proper legal test requires the use of some such standard legal terminology as "is satisfied on reasonable grounds". The Committee therefore asked the Minister to consider the desirability of amending these provisions along these lines, which in no way ought to interfere with the administration of the scheme.

HEALTH INSURANCE COMMISSION REGULATIONS (AMENDMENT) (STATUTORY RULES 1983 No. 88)

47. These regulations conferred certain additional functions on the Commission relating to the establishing of the Medicare universal health insurance scheme. The regulations include a provision that these functions shall be performed in such a manner as to comply with any directions given from time to time by the Minister for Health. The Committee wrote to the Minister seeking his advice on the effect on the validity of the regulation of any possible sub-delegation contained in the regulations. (See in general Pearce, Delegated Legislation, ch. 25).

48. The Committee noted that section 8E of the Health Insurance Commission Act 1973 provides for the making of regulations. Section 8E(1) states that "the Commission shall perform such functions in relation to health insurance as are prescribed". Section 8E(2) states that "the regulations may prescribe the manner in which the Commission is to carry out a function prescribed under sub-section (1)".

49. The Committee drew attention to the regulation issued pursuant to section 8E(2), which would appear to involve a sub-delegation. Regulation 3(2) states: "the Commission shall perform the functions prescribed in sub-regulation (1) in such a manner as to comply with any directions given from time to time by the Minister". The Committee was concerned that the power conferred on the Commission by this provision might possibly be fettered by the requirement to comply with any directions given from time to time by the Minister, and that this provision might therefore amount to a sub-delegation of the power vested in the Commission to the Minister. The regulation does not so much prescribe the manner of carrying out the function, but instead states that the manner of execution is to be in accord with the directions of the Minister.

50. The Minister replied that the conferring of the planning and establishment functions on the Health Insurance Commission was a necessary interim measure to permit the Commission to embark on essential preparatory work on the Medicare scheme, pending the expected enactment of legislation by Parliament. He further stated that if there was any question of the validity of the regulation, it has been overtaken by the coming into effect on the date of Royal Assent of section 67 and sub-section 71(2) of the Health Legislation Amendment Act 1983 which received Royal Assent on 1 October 1983.

Sub-section 67(2) of that Act provides that:

> All payments made, and other acts and things done, by or on behalf of the Commission or the Commonwealth on or after 29 June 1983 and before the commencement of this section in relation to the planning and establishment by the Commission of the organization required to administer a health insurance scheme to provide benefits in respect of medical, optometrical, dental and pathology services to all Australian residents, being Australian residents within the meaning of the Health Insurance Act 1973, shall be deemed to have been lawfully made and done.

Sub-section 71(2) of the Act, in turn, provides for the repeal of Regulation 3 of the Health Insurance Commission Regulations.

51. The Committee has therefore declined to pursue this instance of possible sub-delegation. However, the Committee maintains a keen interest in sub-delegation provisions, and undertakes to report to the Senate any further instances of such provisions.

2.2 Zoning Plan

GREAT BARRIER REEF MARINE PARK - CAIRNS SECTION ZONING PLAN AND THE CORMORANT PASS SECTION ZONING PLAN

52. These Plans contain several provisions under which decisions are made by an officer of the Authority and there is not yet provision for any appeal from those decisions. The typical pattern is that certain acts can be done in an area and certain other specified acts can be done only "with the

permission of the responsible agency". The relevant provisions are paragraphs 4 (a general provision), 5.2(i), 6.2(i), 7.2(g), 9.2(f), 10.2(e), 10.3, and 11.2(c).

53. The Committee noted that the Minister's tabling statement of 1 June 1983 included the comment:

> The tabling of these Zoning Plans is but the first step in the establishment of management arrangements for the Cairns and Cormorant Pass Sections.

54. The Committee wrote to the Minister, seeking an assurance that the additional regulations would contain appropriate appeal provisions. The Committee received an assurance that appeal provisions will be made in the proposed regulations, to operate in a manner similar to those in the Great Barrier Reef Marine Park (Capricornia Section) regulations. The Committee welcomes the Minister's plans and looks forward to examining the additional regulations as soon as they are made.

2.3 A.C.T. Ordinances

LAW REFORM (MISCELLANEOUS PROVISIONS) (AMENDMENT) ORDINANCE 1982 (A.C.T. ORDINANCE NO. 95 OF 1982)

55. The Committee noted from the Explanatory Statement that the purpose of the Ordinance is to exclude the estate of a deceased person from recovering damages for loss of earning capacity during the years lost to that person by his premature death. It further noted that the amending Ordinance nullifies the so-called "lost years" decision in Fitch v. Hyde-Cates (1982) 39 A.L.R. 581, determined by the High Court on 6 April 1982.

56. The Committee made no comment on the prospective operation of the amending Ordinance, other than to observe that it negates a right the High Court has held to exist. However, a question of primary concern to the Committee, under its principles, derived from section 4 of the amending Ordinance. This section appeared to the Committee to make the amendment retrospective in operation, with the consequence that existing rights and existing claims were rendered nugatory. It had been drawn to the Committee's attention that the estate of a deceased person had had a course of action for lost earning capacity since the enactment of the principal Ordinance in 1955, and that section 4 destroyed the rights to claim under the previously-existing law.

57. It was the Committee's initial view that if the Ordinance were to be made only prospective in operation, this would leave in place a finite number of existing legal claims, which the High Court has recently confirmed as being proper. If the normal rule against retrospectivity were applied, the settlement of this limited number of existing claims would be a once-only matter.

58. The Committee advised the Attorney-General that it had long held the view that extensive retrospective provisions in subordinate legislation - even when they are conferring a benefit - are *prima facie* undesirable. The Committee's views are all the more strenuous when the retrospectivity is designed to remove an existing right, with the possibility of severe financial penalty, of those who, apparently but for section 4 of the Ordinance, would otherwise have a legitimate claim.

59. The Committee had extensive correspondence with the Attorney-General, primarily on the issue of whether existing legal rights should be or indeed were being destroyed by retrospectivity. The amending Ordinance was examined in

detail by the Committee over the course of several meetings. It was the majority view of the Committee that, on balance, the Committee should not proceed to move for disallowance of the amending Ordinance.

60. With respect to the Committee's traditional objection to retrospective provisions, the Committee put its view strenuously to the Attorney-General, demanding an explanation of the importance and necessity of a retrospective provision which removes the right to the additional action identified by the High Court decision in Fitch v. Hyde-Cates. The Committee noted that the amending Ordinance does not affect any existing right to damages for actual loss suffered either by dependants of the deceased under the Compensation (Fatal Injuries) Ordinance 1968 or by the estate under the Law Reform (Miscellaneous Provisions) Ordinance 1955.

61. The Committee learned that the effect of the amending Ordinance is to place on an equal footing all cases under the Principal Ordinance by denying anyone the advantage of the duplication of liability uncovered by the High Court decision. The Committee acknowledged that the aim of the amending Ordinance is to take away what a number of Judges of the High Court and the Attorney-General describe as an unfair advantage. However, the Committee was particularly concerned that the retrospectivity did not penalise financially or otherwise disadvantage those who had already begun legal action under the "lost years" rule - particularly those whose claim might be in the course of being enforced in the Court, but also those entitled to enforce a claim who had not yet done so. The Committee was informed that all actions begun at the time of the introduction of the Ordinance had been settled on the basis of payment of the plaintiff's costs, and that there are now no outstanding claims before the Court.

62. A minority of the Committee was of the view that the circumstances surrounding the introduction of the amending Ordinance did not excuse the reliance on retrospectivity, which is in principle objectionable. The question before the Committee was whether the retrospective operation of section 4 offends the established principles and criteria under which it examines subordinate legislation. Most relevant was the second of the Committee's principles: whether section 4 of the amending Ordinance did "trespass unduly on personal rights and liberties" (emphasis added). If the Committee were to find that the provision did unduly trespass, it could move for disallowance and perhaps in so doing, suggest a remedy pursuant to principle (d), under which the Committee examines matters of subordinate legislation which go beyond administrative detail and "amount to substantive legislation which should be a matter for parliamentary enactment". The Committee has been recently examining principle (d) as it relates to A.C.T. Ordinances. In this particular case, it entertained the possibility of seeking to have the retrospective provision included in a Bill for parliamentary determination.

63. The Committee appreciated the need to balance claims about the social need for the retrospective provision against its legal effect, particularly the effect on any claims that might be in the course of being enforced in the courts, and on any others where proceedings might be in preparation or contemplation but not yet issued at the time of the making of the Ordinance. The majority of the Committee decided, on balance, not to move for disallowance of the Ordinance. Although retrospective provisions are prima facie objectionable, the majority view was that in this instance the circumstances were such that there was no undue trespass on personal rights and liberties.

WORKMEN'S COMPENSATION (AMENDMENT) ORDINANCE 1982 (A.C.T. ORDINANCE NO. 103 OF 1982)

64. The purpose of the Ordinance is to correct an oversight following a change in the methods of calculation of benefits to compensation recipients in line with changes made by the Commonwealth Statistician, with retrospective effect to 1 July 1982.

65. While the Committee appreciated that the Ordinance restores the pre-existing rights of recipients of benefits, it followed that this retrospectivity must impose additional liability upon employers and their insurers, that is, persons other than the Commonwealth or an authority of the Commonwealth. To that extent, the Committee would normally consider, under its principles, that the retrospective imposition of a financial burden on a person or persons was not acceptable.

66. Given the unusual circumstances, however, the Committee decided to take no action other than to draw this to the attention of the Minister. The Committee advised the Minister that it was unfortunate that co-ordination of the changes did not occur, so that the rights of recipients would automatically have been protected, without the concomitant difficulty of imposing a retrospective financial burden on other individuals.

67. The Minister informed the Committee that it was indeed regrettable that his Department was not notified in advance of the Australian Bureau of Statistics' intention to review and, if necessary, change the base for index calculation used in the legislation. The resultant change necessitated urgent action: the Minister considered it "unfortunate but essential" to make the amendments to the Ordinance

retrospective. The Committee reports this incident as an example of an avoidable departure from correct legislative procedure.

FIREWORKS (AMENDMENT) ORDINANCE 1983 (A.C.T. ORDINANCE NO. 8 OF 1983)

68. This Ordinance brings the law relating to the sale, manufacture and use of fireworks in the A.C.T. into line with that applying in New South Wales. The Committee was particularly concerned at section 4 of the Ordinance which inserts a new section 3 in the Principal Ordinance, containing new sub-sections 3(2) and (3) which provide as follows:

> (2) A person shall not sell fireworks (other than caps, confetti bombs, model rocket propellant devices, snaps for bon-bon crackers, sparklers and streamer cones) to a person under the age of 18 years.
> Penalty: $500.
> (3) It is a defence in proceedings for an offence against sub-section (2) if the defendant establishes that he believed on reasonable grounds that the person to whom the fireworks were sold was of or above the age of 18 years.

The Committee was concerned that the defence provided by sub-section (3) places on the defendant the onus of establishing that he or she believed on reasonable grounds that the purchaser was aged 18 or more. The Committee raised the possibility of revising this provision so as to minimise the onus placed on the defendant, and wrote to the Minister for Territories and Local Government seeking his opinion.

69. It was at one stage suggested to the Committee that the onus in question was merely evidential in nature, as distinct from persuasive, and as such permissible. The Committee had extensive correspondence with the Minister, much of which turned on different interpretations of the Senate Standing Committee on Constitutional and Legal Affairs Report The Burden of Proof in Criminal Proceedings (1982) upon which the Committee relied from the beginning for its interpretation of the character of the onus in question. It was the opinion of the Committee - eventually agreed to by the Minister - that sub-section 3(3) involved a persuasive burden of proof. The Committee stated its support for the recommendations of the Report of the Constitutional and Legal Affairs Committee to reduce wherever possible persuasive burdens to the more acceptable evidential burdens. The Committee was of the view that it might be possible to redraft the provision so as to minimise the onus placed on the defendant. (Paragraphs 4.9 to 4.20 of the Burden of Proof in Criminal Proceedings Report illustrate the general issues which concerned the Committee, originally raised in the Committee's 66th Report, paragraphs 15 to 25).

70. The Minister accepted the Committee's interpretation of the character of the onus involved in the provision, and promised to amend the provision. The Committee is grateful to the Minister for his attention, and welcomes the promised amendment.

71. More recently, the Minister advised the Committee that the former undertaking had been "somewhat overtaken by events". A new Dangerous Goods Ordinance which has been introduced will repeal the Fireworks Ordinance. However, the Dangerous Goods Ordinance as originally drafted contained two provisions in the form which the Committee found objectionable in the Fireworks (Amendment) Ordinance 1983. The Minister has advised the Committee that these provisions have now been amended so as to ensure that they cast only an

evidential onus on the defendant. The Committee appreciates the Minister's consistent application of the Committee's principles, and looks forward to examining the proposed Dangerous Goods Ordinance, relevant sections of which it has seen in draft form.

MENTAL HEALTH ORDINANCE 1983 (A.C.T. ORDINANCE NO. 52 OF 1983)

72. This Ordinance replaces existing legislation on mental health in the A.C.T. in relation to the treatment of persons suffering from mental dysfunction. There were two matters which the Committee raised with the Minister, and on both matters the Minister promised to amend the Ordinance.

73. First, the Committee noted that in sections 22 and 31 the Director of Mental Health Services shall appoint a person nominated by the person detained or, under section 22(1)(b) and section 31(1)(b), if the detained person "... refuses or fails, or is unable to nominate a person or where the person so nominated does not consent to the appointment - a person chosen by the Director".

74. The Committee recognised that the prescribed representative has very substantial responsibilities looking after a detained person's rights, and therefore sought the Minister's opinion on whether there should be an alternative procedure to the appointment by the Director. To the extent that a person chosen by the Director may not be at "arm's length" from the Director, it might be thought preferable if the court were to be involved in such an appointment in these exceptional circumstances, as it is under the appointment of a minor's next friend in section 76 of the Ordinance.

75. On the second matter, the Committee had some concern about the operation of section 41 which deals with the restriction of communication by the person in custody. The Committee noted the contrast between section 41(2) in which the need for the restriction is to be explained to the person detained, and section 41(3) in which, when "in the opinion of the Director or a medical practitioner" the person would be unable to understand, the explanation is to be given to the prescribed representative. Given that a restriction on communication with the outside world is such a major deprivation, the Committee sought the Minister's opinion as to whether the prescribed representative should be informed in every instance where there is a restriction placed on the detained person.

76. On the first point, the Minister informed the Committee that two administrative alternatives were being developed by the Capital Territory Health Commission. The first is the appointment of social workers employed by the Department of Territories and Local Government as prescribed representatives and secondly, in appropriate cases, the appointment of persons from relevant voluntary organisations.

77. The Minister did not consider that empowering the court to make these appointments to be necessarily the most desirable solution. There would be difficulty in the court carrying out this role in emergency situations. In addition, investigation may be necessary to locate a person suitable for appointment. The Committee was told that the Chief Magistrate of the Australian Capital Territory considered that the function of appointing prescribed representatives is not a suitable one for the courts. The Chief Magistrate is reportedly prepared to accept that the court should have a supervisory role where the Director chooses a prescribed representative. In circumstances where the court decided the prescribed representative chosen by the Director was

unsuitable, it would cancel his appointment and require the Director to appoint a different person. This procedure would be acceptable in the administration of the Ordinance and, while not exactly what the Committee suggested, would appear in principle to satisfy the difficulty raised by the Committee.

78. On the second point, the Minister agreed with the Committee that a person's prescribed representative should be informed in every instance where there is a restriction on communication placed on a person who is subject to a treatment order. The Minister promised to introduce amendments to the Ordinance at the earliest opportunity.

79. The Committee appreciates the co-operative response from the Minister and looks forward to examining the amendments when they are introduced.

CASINO CONTROL ORDINANCE 1983 (A.C.T. ORDINANCE NO. 53 OF 1983)

80. This Ordinance provides for the establishment, ownership and control of a casino, as part of a complex providing hotel, convention, office and other facilities in the Territory. The Committee examined very closely several provisions in the Ordinance, which was subject to a notice of motion for disallowance given by an Opposition Senator.

81. On 17 November, before that motion came up for debate in the Senate, the Committee had already decided to pursue only one relatively minor matter with the Minister. That matter arose in relation to section 49, which deals with search and seizure by inspectors. The Committee noted that under section 49(4) a magistrate may issue a warrant authorising an inspector to search persons, to enter premises and if necessary to seize anything "with such assistance as he thinks necessary and if necessary by force".

82. The Committee had some concern about the unqualified use of the phrase "if necessary by force". The Committee sought the Minister's view on the desirability of inserting a qualifying phrase so as to limit the degree of force by reference to some objective standing taking account of the requirements of each case.

83. The disallowance motion was debated in the Senate on 29 November 1983, with the result that the Ordinance was disallowed. During that debate, the Chairman of the Committee stated:

> As Chairman of the Standing Committee on Regulations and Ordinances, I am not entering into the policy question of the casino, but I wish to report briefly that the Regulations and Ordinances Committee examined the Casino Control Ordinance and decided not to give notice to disallow the Ordinance as, from the Committee's point of view, there are no provisions which offend the established principles of the Committee and which would justify disallowance. I also add that the Committee, on one minor point, agreed to write to the Minister for Territories and Local Government (Mr Uren) seeking his views on the desirability of qualifying one particular provision in section 49(4) under which an inspector can be authorised by warrant to use force in search, entry and seizure operations.

84. As a result of the Senate's disallowance of the Ordinance, the Committee clearly has had no opportunity or need to pursue the matter, although similar provisions in other delegated legislation will continue to attract the Committee's attention.

Chapter Three: Retrospectivity

85. The Committee's classic statement on retrospectivity was delivered in the 25th Report (November 1968). The Committee continues to accept the view that "delay in the promulgation of regulations denies to Parliament the right to approve or disapprove of expenditure at the time of expenditure". Consistent with earlier undertakings, the Committee in 1983 examined all instruments involving retrospectivity, paying particular attention to retrospectivity in the payment of moneys extending beyond two years. However, retrospectivity of even a few months is considered as deserving close scrutiny, and the Committee is pleased to note the full and detailed explanations which the Minister for Defence now routinely forwards to the Committee.

86. The Committee reports to the Senate on Defence Determination 0509 (Defence Determination No. 55 of 1982) which included a retrospective provision longer than two years.

3.1
DEFENCE DETERMINATION 0509 EXPENSE ALLOWANCE PAYABLE ON PURCHASE OR SALE OF A DWELLING (DEFENCE DETERMINATION NO. 55 OF 1982)

87. On 9 June 1983 the Minister Assisting the Minister for Defence advised the Committee on the reasons for this Determination being made retrospective to 17 July 1980, the date upon which Cabinet approved the development of the allowance for the Defence Forces.

88. In his letter the Minister pointed out that as a result of the introduction of the allowance having effectively taken two years, members of the Defence Forces who had not purchased or sold a dwelling during the period 17 July 1980 to 22 June 1982 were in violation of part or all of the eligibility periods described in the Determination.

89. It was agreed in September 1982 that the original application provisions were unnecessarily limiting and should be amended so that members who were potentially entitled to the allowance after it became effective on 17 July 1980, were not unduly penalised by the time which elapsed between the date of effect and the date of making the Determination on 23 June 1982. The Committee was satisfied with this explanation and noted that no other person other than the Commonwealth would be prejudiced by the retrospectivity, as stipulated by section 48(2) of the Acts Interpretation Act.

Chapter Four: Other Matters

4.1 SECOND COMMONWEALTH CONFERENCE OF DELEGATED LEGISLATION COMMITTEES

90. It will be recalled that the first Commonwealth Conference of Delegated Legislation Committees was held in Canberra in 1980 (see 73rd Report, paragraphs 69-71). That Conference concluded that there should be a continuing dialogue between the Committees of Commonwealth Parliaments and Legislatures involved in scrutinizing delegated legislation. It was also the view of the Conference that every effort should be made to encourage the scrutiny of delegated legislation throughout the Commonwealth and to enlist the interest of parliamentarians in those jurisdictions which had not at that time set up machinery for the scrutiny and control of delegated legislation. In order to further these objectives the Conference established the Commonwealth Delegated Legislation Committee consisting of representatives from the five geographical groupings of countries represented at the Conference. This Committee was charged with the promotion of a Second Conference in another Commonwealth country at an appropriate date within the span of two to three years from the Canberra Conference. The Committee was successful in securing the agreement of the Canadian Standing Joint Committee on Regulations and Other Statutory Instruments to sponsor the Second Conference. The Canadian Committee, in conjunction with the Canadian Branch of the Commonwealth Parliamentary Association, agreed to organize the Second Conference in Ottawa in April 1983.

91. On 1 December 1983, the Committee Chairman (Senator John Coates) presented to the Senate the three volumes of Report, documents and transcript of proceedings of the Ottawa Conference, which the Senate ordered to be printed in the parliamentary paper series. Senator Coates stated in part:

In April this year the Regulations and Ordinances Committee sent a delegation, consisting of Senators Lewis, Missen and Tate, to the Second Commonwealth Conference on Delegated Legislation, which was held in Ottawa, with the Canadian counterpart of the Regulations and Ordinances Committee as the host...

It was fitting that Australia should have been the host for the first conference, because we have at the federal level the oldest and one of the most advanced systems for the parliamentary control of delegated legislation, through the Regulations and Ordinances Committee. It was the first such committee to be established in the Commonwealth, in 1932, and through the statutory provisions for the disallowance of delegated legislation which have been built up over the years. One only has to look at some other countries, where delegated legislation is subject to little or no parliamentary control and has got completely out of hand, to realise how fortunate Australia has been.

The Ottawa conference was pronounced by those who participated in it as an outstanding success in continuing and extending the exchange of information and co-operation between the various committees throughout the Commonwealth. The report, which has been produced by the Canadian committee, is a valuable statement of the determination of parliamentarians throughout the Commonwealth to ensure proper parliamentary accountability of delegated law-making.

92. A former Chairman of the Committee and delegate to the Ottawa Conference, Senator Alan Missen, spoke of the general value of such Conferences:

> As one who chaired the Senate Standing Committee on Regulations and Ordinances between the last Conference and this one, it was not always easy to keep in complete contact with parliaments, especially as one member of the last conference was in a parliament which disappeared during the three years between meetings and he was not heard of again by us. But the continuation of this process of consultation among the parliaments, all of which are struggling with the problem of delegated legislation, its control and the relationship between government and parliament and the rights and abilities of the Parliament to scrutinise and to disallow, are matters I think of continual interest.
>
> The next Conference will probably be held in India in two or three years' time. I believe the development of such conferences is well worthwhile. Australia has given a lead by providing, among other things, the printing of the various journals of the conferences. The Senate has taken on that task and is continuing with it for the moment. It is a valuable exchange of information between all parliaments.

93. Another former Chairman of the Committee and fellow delegate, Senator Austin Lewis, drew attention to one of the central themes of the Conference by quoting from the first paragraph of the Report:

> ... most Commonwealth governments are unwilling to countenance disallowance of a regulation by Parliament or the failure of an affirmative resolution on a regulation. Some governments are even unwilling to accept the adoption of a scrutiny committee's report critical of a regulation. Most governments feel, or purport to believe, quite unnecessarily and erroneously, that their life, or at least its standing, is at stake. Delegates expressed their realisation that parliamentarians were being thwarted by a twisted representation of the doctrine of responsible government. It is no part of that doctrine that a government must win every vote on every issue in both Houses. The loss of a vote on a motion in one House, or even in a unicameral parliament, to disallow a regulation ... can very, very rarely amount to a question of confidence in the Ministry.

94. Senator Lewis then went on to state that:

> The paragraph ends by stating that delegates left the conference determined to free their parliaments and legislatures from the tyranny of this unwarranted extension of the doctrine of responsible government. I hope that honourable Senators, and the media also, will note that observation in particular. Fortunately, in Australia, as a result of the activities of the Senate Regulations and Ordinances Committee, governments do not really take that to heart so much, although from time to time we have heard Ministers appear to argue that the disallowance of a regulation would mean the end of the Government, that the Government would have to fall.

> As has been indicated in the report, that is absolute nonsense. Of course a disallowance motion does not represent a vote of confidence or otherwise in the Government. I do wish that journalists and media representatives would understand that these are Houses of a parliament, not Houses of an executive government, that Parliament must be able to retain powers to disallow or amend legislation, even to throw it out, on the one hand, and, to disallow regulations and ordinances in full or in part - without a government being at risk, as if it were subject to a confidence vote.

95. Among those elected by the Ottawa Conference to the Commonwealth Delegated Legislation Committee are Senator Lewis, representing Australasia, and Senator Missen, as immediate past president. The Hon. Perrin Beatty P.C. M.P. of Canada is the Committee's Chairman. In the interim until the Third Conference, information will continue to be circulated among the participating Committees via the medium of the Commonwealth Delegated Legislation Bulletin, published by the Canberra Secretariat originally established by Senator Missen in the Department of the Senate.

96. Finally, the Committee welcomes the extensive coverage which the Conference Report gives to the Senate Standing Committee for the Scrutiny of Bills, whose first and second Chairmen - Senators Alan Missen and Michael Tate - attended the Conference. The Committee notes the statement in the Report that: "One of the highlights of the Conference was a paper delivered by Senator Michael Tate on the Australian Senate's Scrutiny of Bills Committee", and applauds the further statement that: "... the new Australian Committee represented a triumph for initiative, enterprise, hard work, backbench participation and the refusal to be dominated by the executive" (pp. 13-15).

97. The Committee reminds the Senate that on a number of important past occasions, Reports from the Regulations and Ordinances Committee have highlighted the need for a Senate Committee to examine Bills according to civil liberties criteria similar to those under which this Committee examines delegated legislation. Important documents in this regard are the 15th Report (1959, paragraphs 2 to 13), the 62nd Report (1978, paragraph 13), and the 68th Report (1979, paragraphs 4 to 7). Reference should also be made to the related observation made by the Senate Standing Committee on Constitutional and Legal Affairs in its 1978 Report on Scrutiny of Bills (paragraphs 4.4 to 4.7). The Regulations and Ordinances Committee and the Scrutiny of Bills Committee are clearly complementary in intention and operations. This Committee wishes to place on record its appreciation of the new Committee which has given added strength to the Senate's committee system.

4.2 LEGAL ADVISER

98. The Committee places on record its deep appreciation of the excellent work performed by its current Legal Adviser - Professor Douglas Whalan, of the Law School, Australian National University.

99. Included among the Official Documents of the Second Commonwealth Conference on Delegated Legislation is a note on the origin and role of the Committee's Legal Adviser (Volume 2: 57-8). That note records that the duties of the Legal Adviser were established with the appointment of the original Adviser in 1945, and have remained unchanged. When an instrument of delegated legislation is made by the Government, it is immediately sent to the Committee, together with an explanatory statement of its purposes and provisions. The Committee forwards all instruments received each week to the Adviser, who examines them under the

Committee's principles and makes a written report to the Committee. The task is demanding: in 1983, for example, the Adviser examined and reported on more than 793 instruments. The Adviser is paid an honorarium, although this does not adequately compensate for the level and responsibility of the work.

100. As stated in the Official Documents, it is clear that much of the success and authority of the Committee has derived from the recognition by Ministers and Departments of the quality and independence of the advice the Committee has received from its Legal Advisers. Professor Whalan has advised the Committee since 1982, immediately establishing a reputation for excellence, benignly imposing on the Committee an immense debt for the speed, clarity and accuracy of his advice.

4.3 MINISTERS AND OFFICIALS

101. The Committee also wishes to express its thanks to the Ministers and officials who have assisted the Committee with its inquiries in 1983. Much of the Committee's work takes place behind the scenes, and many outsiders would not appreciate the help provided to the Committee by those many Ministers and public servants who co-operate with the Committee in its inquiries and routine examination of instruments.

102. The Committee also wishes to thank a number of other Senate Committees, such as the Constitutional and Legal Affairs Committee, which published the excellent report on The Burden of Proof in Criminal Proceedings (Parliamentary Paper No. 319/1982); and also the Scrutiny of Bills Committee, which has repeatedly drawn the Senate's attention to a range

of provisions in Bills similar to those examined by the Regulations and Ordinances Committee with respect to delegated legislation.

John Coates

APPENDIX 1

Report on Undertakings by Ministers to Amend or Review Delegated Legislation

A Listed in the 66th Report (June 1979)

1. Regulations under the Customs Act: rights of appeal against administrative acts: undertaking given 16 March 1976. This matter is still partly under consideration by the Administrative Review Council. In August 1979 the Council reported that it had sent to the Government the Report on the Customs (Import Licensing) Regulations. In February 1982, the then Minister for Business and Consumer Affairs indicated that further consideration of the Council's Report on Review of Import Controls and Customs By-laws Decisions would be deferred until the Industries Assistance Commission had reported on the Customs by-law system. The Commission's Report, which was tabled in the Senate on 11 November 1982, includes a recommendation that the Administrative Review Council's recommendations for administrative review of by-law decisions be adopted. In November 1979 the Council reported that it would be "well into 1980" before the remaining matters were concluded. A further letter from the Council advised that considerable delays had occurred in concluding the reference. It is expected, however, that a report on the remaining matters will be completed during 1984.

2. A.C.T. Sale of Motor Vehicles Ordinance: powers of registrar to determine disputes: undertaking given 20 October 1977. In January 1981 the responsible Minister reported that draft amendments had been received by the Department, following completion of a review of the ordinance, but that further discussions with officers of the Attorney-General's Department were required. The Minister advised the Committee

on 9 January 1982 that the proposed amendments to the Ordinance had been prepared and that he expected the draft Ordinance would be considered by the House of Assembly soon thereafter.

During the 1983 Budget sittings the Committee examined the Sale of Motor Vehicles (Amendment) Ordinance 1983 (A.C.T. Ordinance No. 16 of 1983). The Committee is satisfied that the amending ordinance fulfils the undertaking given by the Minister in 1977.

B Listed in the 69th Report (September 1980)

1. A.C.T. Poisons and Narcotic Drugs Ordinance: offences and penalties: undertaking given 19 July 1979. The responsible Minister undertook to amend some provisions of the ordinance and review others. The Committee has already examined the draft Drugs and Dangerous Substances Ordinance, made available to it in accordance with undertakings given by previous Ministers, and is now examining the new Dangerous Goods Ordinance.

2. Norfolk Island Regulations: power of Parliament to disallow regulations not made by the local responsible executive: undertaking given 9 October 1978. In May 1980 the responsible Minister advised that the amendments were being drafted and on 29 May 1981 the then Minister for Home Affairs and Environment advised that a draft Bill had been sent to Norfolk Island with a view to its introduction into the Legislative Assembly. In a letter dated 3 March 1982, the former Minister advised that consultations with the Assembly were continuing and that the Assembly is prepared to introduce the amendments.

The undertaking was fulfilled in an amendment to the Norfolk Island Act 1979 which was included in the Statute Law (Miscellaneous Provisions) Act No. 1 1983. In his Explanatory Memorandum the Attorney-General indicated that the amendment would require all subordinate legislation made by the Minister to be tabled in Parliament where it would be subject to possible disallowance. He further advised that subordinate legislation made by the Administrator would be made subject to disallowance by the Norfolk Island Legislative Assembly and that this would be achieved by a local enactment.

3. Cocos (Keeling) Islands Immigration Ordinance: entry of persons into the Territory: right of appeal: undertaking given 1 June 1979. In September 1980 the then Minister for Home Affairs and Environment advised that the ordinance would be redrafted in the light of the recommendations of the Administrative Review Council. A further letter from the then Minister for Home Affairs and Environment indicated that complex policy issues had been identified, necessitating further consultations with the Attorney-General's Department. On 3 March 1982, he further advised that the Department is examining suitable guidelines for the exercise of necessary discretionary powers, and appeal procedures recommended by the Administrative Review Council, and that the Department was also examining the alternative solution of extending the Migration Act 1958 to the Islands. The present Minister advised on 29 September 1982 that the solution to this question will in some considerable part be determined by the future status of the Territory as chosen by the residents in an act of self-determination.

4. Overseas Students Charge Collection Regulations: question of appeals to be reviewed by the Administrative Review Council: undertaking given 17 May 1980. The Council is at present considering these Regulations in the context of its

examination of the Migration Act 1958 and Regulations. Its Annual Report for 1980-81 indicated that some delay had arisen because it had taken longer than expected to obtain the views of the Department of Immigration and Ethnic Affairs. In correspondence with the Committee, the Chairman of the Council advised that the difficulties it was experiencing were likely to be overcome. An Interim Report was transmitted to the Attorney-General on 4 August 1983 and was tabled in the Parliament on 15 September 1983.

C Listed in the 73rd Report (December 1982)

1. Quarantine (Cocos Islands) Regulations (Statutory Rules 1982, No. 194): unrestricted right of a quarantine officer to enter premises: undertaking given 13 October 1982. In 1982 the then Minister agreed to amend regulations 14 and 19, to require that a warrant be issued by a Justice of the Peace before premises are entered by a quarantine officer without the owner's approval. After discussions between the Department of Health and the Attorney-General's Department, the Committee has now been informed that the proposed amendments to the Regulations will not proceed, but that an amendment to the Quarantine Act incorporating the requirement for a warrant would be brought before Parliament in 1984.

2. Building (Amendment) Ordinance (No. 2) 1982 (A.C.T. Ordinance No. 70 of 1982): the conferral on the Building Controller of a wide immunity from criminal and civil liabilities: undertaking given 17 November 1982. The Committee was concerned that section 7(3A) appeared to absolve the Building Controller from all liability in respect of any act or thing done by him, provided only that it was done in good faith. On 17 November 1982 the then Minister advised that the Committee's interpretation of the effect of the Ordinance was correct. An undertaking was

given to amend the ordinance and to make the amendment retrospective to the date of the making of the _Building (Amendment) Ordinance (No.2) 1982_. The undertaking was fulfilled in the _Building (Amendment) Ordinance (No. 2) 1983_, contained in Australian Capital Territory Ordinance No.66 of 1983.

APPENDIX 2

Recommendations contained in Reports (other than those for amendment or review of particular Regulations and Ordinances)

1. The Acts Interpretation Act should be amended to remove the uncertainty about the position of a notice of motion for disallowance remaining on the Senate notice paper at the end of a Parliament when the House of Representatives is dissolved but the Parliament is not prorogued (50th Report, December 1974).

2. A statutory provision to the same effect as section 12(6) of the Seat of Government (Administration) Act should be applied to instruments made under Acts of the Parliament, so that the disallowance of a repealing instrument would revive the repealed provisions, and so that the present doubtful position with regard to the effect of disallowance and repeal would be clarified (66th Report, June 1979).

3. The Senate Standing Committee on Constitutional and Legal Affairs should investigate the matter of the alteration of important entitlements by regulation (68th Report, November 1979).