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THE SENATE

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Seventy-Seventh Report

LEGISLATION CONSIDERED

July 1984 - June 1985

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Members of the Committee

THIRTY THIRD PARLIAMENT

First Session - Fourth Period

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

THIRTY FOURTH PARLIAMENT

First Session - First Period

Senator J. Coates (Chairman)
Senator A.W.R. Lewis (Deputy Chairman)
Senator the Hon. Sir John Carrick
Senator B. Cooney
Senator A.E. Robertson[1]
Senator M.C. Tate[2]
Senator A.E. Vanstone
Senator A.O. Zakharov

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[1]Discharged 31 May 1985

[2]Appointed 31 May 1985

<u>Principles of the Committee</u>

(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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CHAPTER 1

SUMMARY OF COMMITTEE'S WORK
JULY 1984 - JUNE 1985

1. During the period from July 1984 to June 1985 the Regulations and Ordinances Committee held 14 private meetings, 5 of which were attended by Government officers or members of statutory bodies.

2. The volume of business transacted by the Committee was considerable, comprising over 800 pieces of legislation.

3. The Committee examined the following types and numbers of instruments.

Statutory Rules	445
ACT Ordinances	83
ACT Regulations	26
ACT Determinations	19
Other Territory Ordinances[1]	6
Defence Determinations	118
Public Service Board Determinations	88
Commonwealth Teaching Service Determinations	5
Postal By-Laws	6
Telecommunications By-Laws	18

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[1]Australian Antarctic Territory Ordinances
Christmas Island Ordinances
Cocos (Keeling) Islands Ordinances
Heard and McDonald Islands Ordinances

Navigation Orders	10
Australian Meat and Livestock Orders	11
Agreements under Environment (Financial Assistance) Act	1

	836

4. A small proportion only of these instruments contained provisions which gave rise to concern that the Committee's principles may have been infringed. Nevertheless all items of delegated legislation are subjected to an individual scrutiny by the Committee's legal adviser, Professor D.J. Whalan of the Faculty of Law in the Australian National University.

5. During the past year, the Committee has examined and sought changes to provisions which -

- reversed the onus of proof;
- allowed unqualified use of force in the exercise of entry and seizure powers;
- conferred powers of entry, search and seizure on certain categories of public servants;
- failed to provide for independent review of the merits of administrative decisions;
- conferred discretions so widely drafted as to render expressed review rights ineffective;
- did not allow genuine conscientious objection to be taken into account in certain situations;

- were insufficiently protective of individual rights and liberties when extradition of fugitives is sought;

- failed to provide for adequate notification to an individual of his or her rights of appeal or review from administrative decisions;

- failed to provide for witnessing of signatures in circumstances where abuse and hardship could arise;

- did not provide that ministerial directions suspending the application of certain laws be made subject to tabling and disallowance in Parliament;

- permitted a statutory body to require a third party to serve witness summons documents vicariously for that body without the sanction of a judge or court.

5. Although the Committee was alert to the inequity which retrospective legislation can produce, it found none during the past year which it considered should have been disallowed on that ground.

6. To carry out its work the Committee engages in extensive correspondence with Ministers. This leads to many of the Committee's concerns being resolved without it pressing for disallowance or amendment of legislation.

7. During the past year the Committee received 5 undertakings from Ministers to amend the following delegated legislation -

Co-operative Societies (Amendment) Ordinance 1985;

Credit Ordinance 1985;

Supervision of Offenders (Community Services Orders) Ordinance 1985;

Extradition (Republic of South Africa) Regulations (Statutory Rules 1985 No. 14);

National Crime Authority Regulations (Amendment) (Statutory Rules 1985 No. 3).

8. Undertakings received from Ministers in the previous reporting periods were implemented during this year in respect of the Mental Health (Amendment) Ordinance 1984, the Dangerous Goods (Amendment) Ordinance 1984 and Norfolk Island Regulations.

9. From time to time the Committee's scrutiny reveals drafting inelegance, confusing transpositions of pages in Explanatory Memoranda, misleading citations and printing errors. The use of sexist language is also noted. It is the Committee's practice to draw such matters to the attention of Departments in the interests of clarity.

CHAPTER 2

PRINCIPLE (d) - GUIDELINES FOR THE FUTURE

10. The Committee's consideration of the Credit Ordinance 1985 (see below at paragraph 48) has lead it to accept certain clear criteria by which it will in future judge the propriety of substantive legislation being made in delegated form. The Committee will apply these criteria to ordinances, and indeed to other forms of delegated legislation, on the basis that the plenary grant of powers conferred on the Governor-General by the Seat of Government (Administration) Act 1910 to make ordinances for peace, order and good government, is subject to the unqualified powers of the Senate (or the House of Representatives) to disallow.

11. The Committee's concern is with the propriety of substantive legislation by-passing parliamentary procedures. It is reported that during a discussion about the role of the Regulations and Ordinances Committee between Senator Pearson and Sir Robert Garran, Sir Robert said that it was, in his opinion, the most important Committee in Parliament because "its duty was to see that Parliament ran the country with legislation not the Executive with regulations and ordinances". (Senate Hansard, 17 August 1971, page 195.) That sentiment, from a counsel who helped draft the Constitution, encapsulates the very principle which the Committee seeks to uphold when it applies principle (d) of its terms of reference. Until self-government comes to the Australian Capital Territory, ordinances should be subjected to this test because to do otherwise

would be to deny the community a protection it has long enjoyed through the operation of the Regulations and Ordinances Committee.

12. That is not to detract from the important role played by the Australian Capital Territory House of Assembly and the consultations which the Minister has with the Assembly about legislation. However, while the Minister generally consults, he is under no obligation to do so. While he generally listens to the Assembly's views, he is under no obligation to take them into account. While he generally refers legislative proposals to the Assembly, the Credit Ordinance itself presents an example where he did not do so at a time when that body could have had a determinative effect on it.

13. The Committee's role is independent of the Minister and the ACT Assembly. As a committee of the Senate it must decide whether a particular exercise of ministerial power constitutes an entry into an area more appropriate for parliamentary action. The Committee looks to principle (d) as an essential test to delineate the proper province of the Executive and of the Legislature.

14. Until the Australian Capital Territory obtains self-government the Committee has an obligation to scrutinize ordinances proposed in respect of it.

15. The Committee will look carefully at delegated legislation, including any ordinance, which -

- manifests itself as a fundamental change in the law, intended to alter and redefine rights, obligations and liabilities;

- is a lengthy and complex legal document;
- introduces innovation of a major kind into the pre-existing legal, social or financial concepts;
- impinges in a major way on the community;
- is calculated to bring about radical changes in relationships or attitudes of people in a particular aspect of the life of the community;
- is part of a major uniform, or partially uniform, scheme which has been the subject of debate and analysis in one or more of the State or Territory Parliaments but not in the Commonwealth Parliament; and
- takes away, reduces, circumscribes or qualifies the fundamental rights and liberties traditionally enjoyed in a free and democratic society.

16. Where any of these characteristics are present the Committee may recommend to the Senate that it disallow the delegated legislation. It will invite the Minister to introduce a Bill for debate and analysis. The more of these criteria that are present, the greater the likelihood that such a recommendation will be made.

17. However, these criteria are not exhaustive. The essential issue for the Committee to resolve under principle (d) is this:

'has the Executive made a regulation or ordinance on a matter or in circumstances which calls for parliamentary debate and decision?'.

CHAPTER 3

ACTS INTERPRETATION ACT 1901 - RETROSPECTIVITY AND DISALLOWANCE POWERS.

Retrospectivity in Regulations

18. The Committee has been corresponding with the Attorney-General advising that the Acts Interpretation Act 1901 be amended to clarify the meaning of sub-section 48(2) and in particular what effect it has on regulations purporting to operate retrospectively.

19. Sub-section 48(2) provides that

> "Regulations shall not be expressed to take effect from a date before the date of notification in the Gazette..."

if this would result in prejudice to the rights of a person other than the Commonwealth, or would impose retrospective liabilities on a person other than the Commonwealth. A regulation so expressed and having such effect is void and of no effect.

20. In the case of Australian Coal and Shale Employees' Federation v Aberfield Coal Mining Co. Ltd. (1942) 66 CLR 161 a majority of the High Court gave sub-section 48(2) a narrow reading, and in the course of a judgement with which Starke J. and McTiernan J. agreed, Latham C.J. said (at page 175)

> "If section 48(2) had simply provided that no regulation should be valid insofar as it prejudicially affected existing rights, the regulations would clearly be inoperative in relation to those rights. But section 48(2) does not so provide. It deals only with regulations <u>expressed to take effect</u> from a date before the date of notification. The regulation in this case does not purport to take effect from any date earlier than its date of notification. It applies, it is true, to awards and orders made before that date but only as from that date. The regulation is therefore not rendered invalid by section 48(2) of the Acts Interpretation Act." (Emphasis added.)

21. The consequence of this restrictive interpretation is that only regulations <u>expressed to take effect</u> retrospectively will attract the proscriptions in sub-section 48(2). However, a regulation which would be void if expressed to take effect from a date earlier than notification could achieve the same retrospective effects with simple alterations to the drafting. Thus sub-section 48(2) of the Acts Interpretation Act does not achieve what Parliament undoubtedly intended it should achieve - the proscription of retrospectivity in delegated legislation by regulations where prejudice to individuals will result.

22. In correspondence with the Committee, the Attorney-General has said that -

> "While there are valid reasons why sub-section 48(2) might be amended to clarify that retrospectivity in regulations is prohibited,

> there are practical considerations which give rise to a contrary conclusion if delegated legislation is to remain a viable alternative to Parliamentary enactment. So long as there is a body like the Regulations and Ordinances Committee to scrutinise delegated legislation and ensure that it does not impose unreasonable burdens on the public the present basis of operation of the sub-section would seem satisfactory.".

23. The Committee remains of the view that sub-section 48(2) should be amended. It takes the view that until sub-section 48(2) is amended it is difficult for it adequately to scrutinise delegated legislation which is retrospective in operation, when that retrospectivity is artificially distinguished from other retrospectivity, merely as a consequence of the form of words used and regardless of the identical nature of the consequences of the retrospectivity. Where such retrospective operation is in fact detected by the Committee within the time constraints on the Committee's procedures, the Committee must rely on principle (b) of its terms of reference and make a judgment whether that retrospective operation is an undue trespass on personal rights and liberties. On the other hand where regulations are "expressed to take effect" retrospectively this is immediately apparent on their face and Parliament has made a judgment, by virtue of sub-section 48(2), that they are void and of no effect if prejudicial to a person other than the Commonwealth.

24. The Committee recognises that an extension of the sub-section 48(2) invalidity provisions to regulations, the retrospective effects of which may not be immediately apparent, may give rise to practical

problems of administration if at the drafting stage their potential retrospective operation is overlooked. Sometime after they had been in operation and acted upon, such regulations could be declared void ab initio and give rise to problems of liability, indemnity and immunity. However, mindful of the existence of sub-section 48(2), the Committee considers that the imposition of retrospectivity by delegated legislation is of sufficient importance for these matters to be addressed and solved by instructing departments and Parliamentary Counsel against the background of an amended sub-section 48(2).

Partial Disallowance of Regulations

25. Sub-section 12(4) of the Seat of Government (Administration) Act 1910 provides that either House of the Parliament may disallow an ordinance "or a part of an Ordinance". This includes any part of an ordinance including a word (see paragraph 8(c) of the Acts Interpretation Act 1901). However, there is no similar power to disallow a part of a regulation. While a self-contained regulation may be disallowed, words or phrases may not (see sub-section 48(4) of the Acts Interpretation Act 1901).

26. In correspondence with the Attorney-General the Committee has requested that the power accorded to each House of Parliament to disallow regulations and other instruments be extended to include power to disallow part of a regulation or instrument. These matters are discussed in the Committee's 74th Report, March 1984, at paragraphs 22 to 24.

27. The Attorney-General considers that a number of issues should be resolved before extending the Parliament's powers in this area. For example questions arise as to -

(i) which tests are to apply in deciding what constitutes a self-contained part of a regulation;

(ii) who should determine that issue;

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

(iv) should there be any process by which the Senate and the House can consult on such matters and if so what should those processes be;

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

(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 proposes to disallow.

28. The Committee's view of the matter is that the sort of provision contained in sub-section 48(4) of the Acts Interpretation Act 1901 is appropriate and that there is no necessity for the Chambers to interact in any way.

The questions of arrangements between the Chambers does not arise. The further questions of how and by whom it may be established that a part of a regulation proposed to be disallowed is a self-contained part, do not require any answer outside the Parliament, for these are matters for the House considering a motion to disallow a part. In any subsequent dispute it is for the courts to give expression to Parliament's intention by construing legislation in accordance with the ordinary canons of statutory interpretation.

29. Where a House disallows part of a regulation, the provisions of section 49 of the Acts Interpretation Act should apply to preclude, for a period of six months, the remaking of a regulation, the same in substance as the part so disallowed, unless the disallowing House agrees. This procedure would not prevent the Government from repealing the regulation if it were dissatisfied with its form after partial disallowance.

30. In the interest of legislative scrutiny the Committee considers that the Parliament should extend the scope and precision of its disallowance powers in connection with legislative instruments emanating from the Executive. An example of the effectiveness of such a partial disallowance power can be seen in the *Committee's actions in considering* the Supervision of Offenders (Community Service Orders) Ordinance 1985 of the A.C.T. This is discussed at paragraph 152 below.

31. At paragraph 10 of its 73rd Report (December 1982) the Committee reported that the then Attorney-General had put forward a proposal that the disallowance power be extended to include partial disallowance of a regulation

or instrument. The Committee draws the Senate's attention to the fact that no progress has been apparent since that time.

CHAPTER 4

LEGISLATION CONSIDERED IN DETAIL

Business Franchise (Tobacco and Petroleum Products) Ordinance 1984 (Australian Capital Territory Ordinance No. 38 of 1984)

Forceful Entry

32. Sub-section 20(1) of this Ordinance provides that a magistrate may issue a warrant authorising an inspector to enter and search premises "with such assistance as he thinks fit and if necessary by force". Concerned about the possible use of force, the Committee sought from the Minister for Territories an explanation of how the provision containing this phrase might operate in practice.

33. In reply, the Minister explained that the expression "if necessary by force" is one in use in legislation dealing with search warrants. For example, it appeared in the search warrant provisions in respect of property, included as clause 62 of the draft Bill contained in the Law Reform Commission's Report on Criminal Investigation (1975). It appears again in sub-clauses 58(1) and (2) of the Criminal Investigation Bill 1981. Sections 10 and 82 of the Crimes Act 1914 are further illustrations of its use. Similar expressions occur in other legislation. There did not appear to be an alternative phrase which would encapsulate the same concept and would at the same time mean that the body of case law and practice which has arisen around the use of the expression continued to be relevant.

34. Since the terms in which warrants are commonly issued included on their face a reference to the use of force if necessary, an officer knows from those terms and from the relevant legislation that using an unnecessary amount of force means he is not acting "in the execution of his duty". The use of excessive force renders the officer liable to an action for trespass and might provide a defence for an owner of the property in an action by the officer for assault or other cause. Where the officer is a police officer, it probably means that he or she is guilty of a disciplinary offence.

35. The use of force in executing a search warrant is justified only if it is necessary, and even then only such force as is required in the circumstances may be used. As the search is undertaken in order to secure evidence, it is appropriate that the discretion the Australian courts have - namely to exclude evidence which has been obtained illegally or improperly - should exist.

36. The Committee expressed its thanks to the Minister for his account of this matter which assuaged its concern.

<u>Review of Discretionary Decisions</u>

37. The Committee noted that there were a number of important decisions open to the Commissioner for Business Franchises under the Ordinance not made subject to review as to their merits. There was no review of the Commissioner's refusal to grant a tobacco licence under sub-section 26(7) or a petroleum products licence under sub-section 27(7) or to renew such licences under sub-section 35(5) and paragraph 36(2)(b). The Committee asked the Minister for Territories if he might explain

the lack of review in these provisions when many other decisions were specifically made subject to review by the Administrative Appeals Tribunal.

38. It was considered that refusal by the Commissioner for Business Franchise to grant or renew a tobacco licence or a petroleum products licence was not an appropriate decision for review by the Administrative Appeals Tribunal because of the absence of any discretion in the Commissioner in relation to a decision of this kind. The Commissioner is required to grant or renew a licence if the application was in the approved form, the requisite particulars (if any) have been furnished and the correct fee had been paid. The fee was to be assessed in accordance with the principles set out in sections 28 and 31. The only issues which arose for the consideration of the Commissioner were issues of fact and in the normal course of events, if an error of fact or miscalculation had been made, this could be corrected in the usual course of sensible administration. Apart from this, there was also provision for an applicant or licensee to have an error in the assessment of his or her fee remedied through a re-assessment under section 33. Only in the unlikely event of a dispute still remaining would litigation be necessary and in that case, given that the relevant decision was not a discretionary one, the appropriate course would be for the matter to be taken to the Federal Court in accordance with the provisions of the Administrative Decisions (Judicial Review) Act 1977.

39. In the particular circumstances of this Ordinance the Committee accepted the Minister's explanation.

Co-operative Societies (Amendment) Ordinance 1985 (Australian Capital Territory Ordinance No. 4 of 1985)

Notification of Review Rights:

40. The Committee has a continuing concern with legislative provisions which allow administrative decisions subject to appeal to remain in force even though the people affected by the decisions and with a right of appeal are not notified of that right. A failure to notify may be deliberate, negligent or merely inadvertent. In any event, it can seriously prejudice an individual's rights. He or she may never learn of them or if he or she does, that knowledge may come only after a delay. Such delay can cause evidence which would otherwise have been available, to be lost or reduced in quality. The Tribunal's jurisdiction to extend the time within which applications for review may be lodged is not an adequate remedy for these difficulties.

41. In the Co-operative Societies (Amendment) Ordinance 1985 the provisions dealing with the notification of review rights were drafted more harshly than usual. Sub-section 80B(1) provided that when a certain decision was made, a statement of the decision and of the findings and reasons on which it was based were to be supplied to the society affected. Sub-section 80B(2) provided that this statement was to be accompanied by a notification of review rights. However, the Ordinance provided that the force of the decision was preserved notwithstanding a failure to comply with either of the sub-sections. Because the section preserved the decision even where no statement of it or reasons for it were notified or where misleading reasons were given, the

Committee considered it to be an unwarranted extension of a practice to which the Committee previously voiced objection.

42. The Committee, through the Chairman, gave notice of motion of disallowance of the Ordinance. It withdrew this when the Minister for Territories agreed that the section was unacceptably harsh and undertook to amend it to reflect the usual provision.

43. While the Committee remains unhappy with the usual provision it has deferred further consideration of this question until it has the report to come from the Administrative Review Council on the issue of notification of rights of review.

Wide Discretions

44. Sub-sections 25(3) and 37A(4) of the Ordinance provide that the Registrar of Co-operative Societies shall not give his or her consent to particular courses of action proposed by co-operative societies where "in his opinion" these "could be prejudicial to" or "would involve undue risk or prejudice to" the interests of the society's members or creditors.

45. The Committee considered that the drafting formulae adopted in these sub-sections made the discretions -

- unduly subjective;

- uninformed by any guidelines; and

- of such width (referring to mere "possibilities" of risk) as to render the right of review before the Administrative Appeals Tribunal virtually ineffective.

46. The Committee expressed its concern about these matters by giving notice of motion in the Senate to disallow the Ordinance. It was pleased to withdraw that notice when the Minister for Territories undertook to amend the legislation -

    (i) by introducing a criterion with reference to which the Registrar has to be satisfied when making decisions; and

    (ii) by making refusals to consent to certain transactions dependent on "probable" rather than mere "possible" risk.

47. It appeared not to be possible to predict in advance all the circumstances in which the Registrar might have to act to ensure that co-operative societies were conducted in the interests of members and without detriment to others. Thus the Committee, given the particular circumstances of this Ordinance and conscious of the availability of review by the Administrative Appeal Tribunal, accepted the Minister's proposed broad criterion of "expediency in the interests of members and others dealing with societies", as a sufficient guideline for the Registrar.

Credit Ordinance 1985 (Australian Capital Territory Ordinance No. 5 of 1985)

Introduction

48. The Credit Ordinance 1985 is the Australian Capital Territory component of a new legislative scheme for the uniform regulation of credit transactions. In its scrutiny of the Ordinance the Committee was concerned with five issues, namely -

    (a) whether the Ordinance contained material that should more appropriately have been placed in an Act of Parliament;

    (b) whether the Minister's wide power to declare, by notice published in the Gazette, that persons and transactions are exempt from provisions of the Ordinance, should instead be exercised through regulations subject to tabling and disallowance in each House of the Parliament;

    (c) whether powers of entry and search should be qualified by reference to objective and realistic standards;

    (d) whether signatures on important legal documents should be witnessed; and

    (e) whether changes should be made in the drafting of two of its sections.

49. The Chairman on behalf of the Committee gave notice of motion of disallowance of the Ordinance while correspondence was exchanged with the Minister for

Territories and discussions were arranged with his departmental officials. Initially the Minister for Territories rejected each of the Committee's requests in connection with the Ordinance. After three separate meetings between the Committee and relevent officials from both the Department of Territories and the Attorney-General's Department, the Minister agreed to make certain amendments to the Ordinance. The time within which the Committee's motion could have been dealt with had almost expired when this agreement was reached.

50. In the light of the protracted correspondence and discussions between the Committee and the Minister there may be value in setting out in more detail the background to the Committee's concern about the Ordinance.

(a) Ordinance or Bill

51. The Credit Ordinance 1985 is delegated legislation comprising 266 sections and 7 Schedules in a 167 page document. It represents a root and branch reform of relationships between borrowers and lenders of money. It introduces far reaching provisions establishing what information borrowers should receive about their rights and the nature and consequences of borrowing relationships. It establishes a licencing system for credit providers and finance brokers. It sets up a Credit Tribunal to review credit contracts and empowers the Tribunal to make alterations to otherwise binding contracts in order to mitigate the consequences of unjust conduct by credit providers. It creates an Inspectorate with wide powers to conduct investigations and to initiate proceedings before the Credit Tribunal, against providers who take advantage of borrowers. As described below, the Ordinance seeks to confer wide

discretionary powers on the Minister as to where, when and how provisions of the Ordinance might apply to credit companies or individuals. It allows an individual to sign another person's signature on legal documents of considerable moment as if the person signing were the person whose signature was inserted, without the need for witnesses or any express declaration of authority or agency.

52. Appearing as they did in an ordinance, these matters became law simply by executive action and by way of delegated legislation. Having studied the legislation in some detail the Committee came to the conclusion that this legislation was -

- highly significant in the history of credit regulation in a federal territory;

- demonstrably innovative when measured against the restrictive, sometimes unfair and outmoded Money Lenders or Hire Purchases Ordinances which it repealed; and

- extremely complex in the legal language used to convey the range and inter-relationship of sophisticated financial concepts and the obligations and consequences flowing from them.

53. The Committee shared the view of the acting Minister for Territories when he was reported in the press as stating that the Credit Ordinance was

> "among the most fundamental and far reaching reforms of the law undertaken in this country".

54. The Committee noted that from the outset the Minister considered that "paramount importance" should attach to uniformity with legislation in New South Wales and Victoria providing for identical reforms. As a requirement it apparently took primacy over all other concerns. As is described in detail below, this was an approach with which the Committee disagreed and it was prepared to express its disagreement to the Senate in a debate on a motion of disallowance.

55. It is a feature of the preparation of uniform legislation in a federal system that to the extent that it is practicable those whose actions will be governed by the legislation have some share in formulating it and in tailoring it to suit particular requirements.

56. For reasons which it is suggested were brought about by delay in achieving agreement with the Commonwealth authorities, the legislation which the Department of Territories transformed into an ACT Ordinance was drafted in its entirety by New South Wales Parliamentary Counsel and enacted in that State without regard for the situation in other jurisdictions. The Committee recognises that the Minister felt he had no option but to follow suit, make an identical ordinance and nail his colours to the mast of uniformity. While the Committee appreciated the dilemma the Minister apparently found himself in and his perception that it was necessary to bring legislation into force quickly, it was concerned that legislation such as this should be subject to parliamentary scrutiny as provided for in principle (d) of the Committee's principles.

57. Principle (d) provides that the Committee scrutinise delegated legislation to ensure that it does not contain matter more appropriate for parliamentary enactment. It

is difficult to see that a desire to achieve uniformity in the legislation of the various Australian states and territories is a reason for by-passing the Commonwealth Parliament by ordinance. This is particularly so where the legislation is significant, innovative and complex after the fashion of the Credit Ordinance. In a federal system it may have the effect of divorcing the Commonwealth Parliament from involvement in the making of uniform legislative schemes where the Australian Capital Territory was involved, regardless of its subject matter or how far reaching its effects. Indeed, in an area where the power of the Commonwealth under s.51 of the Constitution is lacking or inadequate this process would have the effect of negating or reducing the ability of the Commonwealth Parliament to debate and make decisions about such schemes.

58. In its examination of the Credit Ordinance the Committee had to consider whether principle (d) should be applied. The Committee considered that it should and that the Ordinance did contain matter more appropriate for parliamentary enactment in a Bill.

59. In applying principle (d) the Committee in reaching a decision on any particular ordinance has had to balance the requirement that the Minister exercise his wide powers under the Seat of Government (Administration) Act 1910 effectively and the requirement that the Senate be appraised by the Committee of ordinances dealing with matters more appropriate for resolution by the Parliament. Sometimes this is a difficult task. The Minister's power to make ordinances is expressed in terms of a plenary grant of power but it is a plenary grant which does not leave its exercise immune from disallowance. The plenary grant of power and the Parliament's power to disallow are both contained in the

Seat of Government (Administration) Act 1910. The Governor-General's power to make ordinances is subject to the Parliament's power to unmake them by disallowance. Thus, ordinances are not the equivalent of State legislation. The fact that a State may pass legislation in reference to a particular matter which is unassailable by the Commonwealth Parliament does not mean that the Minister is empowered to pass legislation similarly unassailable.

60. The Senate as a House of the Parliament has resolved that the Committee should bring to its attention ordinances deserving of debate which the Committee considers should be disallowed. When applying principle (d) to an ordinance, the Committee exercises a judgment in respect of the substance of the matter dealt with by the ordinance. It considers the propriety of the matter becoming law by virtue of ministerial decree rather than by parliamentary procedure. It is difficult, even if it were appropriate, to lay down an exhaustive set of rules by which it could be judged what was proper for legislation by ordinance or what by parliamentary enactment. However, it was quite apparent that the Credit Ordinance 1985, contained matter more appropriate for parliamentary enactment because the changes to credit law appeared to be quite fundamental.

61. In the final analysis however, the Committee did not recommend disallowance of the Ordinance. It contained many provisions protective of the rights of borrowers in the ACT. Its disallowance would have meant these people were deprived of those rights and would become subject to the previous unsatisfactory ordinances. These would have been revived by the disallowance of the Credit Ordinance. The Committee in scrutinising the Ordinance considered the interest of the ACT community paramount.

Accordingly, the Committee having successfully pressed for the changes discussed below declined to recommend disallowance. In informing the Senate of this decision, the Chairman of the Committee said,

> "While the Committee is of the opinion that the Ordinance does contain matter more appropriate for parliamentary enactment, its disallowance would not serve the pressing interests of consumers in the Australian Capital Territory who would be deprived of important rights if the Ordinance were disallowed". (Senate Hansard, 31 May 1985, page 2907.)

(b) Exemptions

62. The effect of section 19 of the Ordinance was to give the Minister an executive power to abrogate or to suspend, in any way, for any period, subject to any conditions, any provisions of the Ordinance, including those provisions which, being designed to protect borrowers, were regarded as central to the intent of the Ordinance. Indeed, fifteen exemptions had been made and notified in the Gazette before the matter came before the Committee. These were drafted with the precision and complexity normally associated with regulations. The Committee considered that a power of this kind should be exercised only in regulations subject to tabling and disallowance in both Houses of Parliament.

63. The Minister argued that the Ordinance was part of a uniform legislative scheme involving the States of New South Wales and Victoria. Since the ACT was a relatively small area within the larger commercial area of New South Wales the provisions of the Ordinance had to be, of

necessity, virtually identical in every respect, including the numbering of certain important sections. This uniformity was, in the Minister's argument, paramount. In his view regulations were a tardy and inflexible device to address the unpredictable contingencies which might arise with the new credit scheme. Departmental officers, who gave evidence to the Committee, argued that the Minister, in defending a regulation in a parliamentary debate for its disallowance, might be required to breach commercial confidentiality.

64. The Committee found difficulty in accepting their arguments. The Committee is obliged to scrutinise delegated legislation, of which ordinances are a part, on the basis of defined principles. Delegated legislation is executive or ministerial law-making which remains subject to the process of parliamentary analysis and debate. If that process falls into disuse the effectiveness of parliament is prejudiced. Given this the Committee considered the power conferred on the Minister to grant exemptions was too sweeping to be given by delegated legislation without Parliament having an opportunity to examine such exemptions. The Committee suggested the issue be resolved by the insertion in the Ordinance of a provision requiring that the Minister's power be exercised through regulations. This would mean that the exemptions would be subject to tabling and disallowance.

65. The Committee considered that problems arising from the confidentiality of any commercial information given to the Minister by an organisation seeking an exemption, were unlikely to occur through the application of the principles which guided the Committee's deliberations.

Further, the Committee was confident that should a problem of this nature arise it would be dealt with properly by either House of Parliament.

66. On the day the debate on the proposed disallowance was to take place the Committee was pleased to receive and accept the Minister's agreement to amend section 19 in line with the Committee's request. The Minister gave an undertaking to amend the Ordinance to provide that the ministerial power to exempt persons from the provisions of the Ordinance would be exercised by regulations subject to tabling and disallowance in Parliament. The Minister agreed not to exercise his power pending the making of this amendment. The Committee generally considers it appropriate for an undertaking to be given that a power granted by a regulation or ordinance and which is to be abrogated or modified at the suggestion of the Committee should not be exercised pending that abrogation or modification. If the Committee and the maker of a regulation or ordinance agree that it ought to be abrogated or amended then it is generally appropriate that it not be enforced pending that abrogation or amendment.

(c) Powers of Entry and Use of Search Warrants

Use of Force

67. Sections 233-236 of the Ordinance deal with powers of entry by search warrants given to investigating officers.

68. The Committee considered that in sub-section 235(1) the use of force or the degree of its use which an investigating officer "thinks necessary" to effect entry

to premises in execution of a search warrant, should be determined by reference to a standard of reasonableness. This is the case in sub-section 385C(3) of the Crimes Act 1900 (NSW) as it applies in the A.C.T. (see the Crimes (Amendment) Ordinance 1984, ACT Ordinance No. 32 of 1984). Further, the Committee considered that the degree of "assistance" that an investigating officer "thinks necessary" should also be qualified by a test of reasonableness. The Minister agreed to amend sub-section 235(1) to read "with such assistance as he thinks reasonably necessary and by such force as is reasonably necessary".

69. Regarding the grant of search and entry powers generally, the Committee is of the view that they should not be granted as a matter of course in any legislation. Nor should they be granted automatically to each authority to the same extent. Each case should be examined objectively on its merits so that the grant of any powers of entry, search and siezure which are essential for effective law enforcement do not unduly trespass on the personal rights and liberties of individuals.

70. In the case of the Credit Ordinance, the Committee considered that where a power of forceful entry into premises is to be conferred on public servants, the use of that power should be determined objectively. It should not be granted simply because the authority seeking the power demands it. The Committee was pleased therefore, to accept the Minister's undertaking to amend the provision.

Deemed Extension of Search Warrants

71. Section 235 of the Ordinance deals with a magistrate's power to issue search warrants. Sub-sections (1) and (3) are carefully drafted to preserve a balance between law enforcement and citizens rights by setting out criteria for, and restrictions on, the issue of warrants. The warrant itself is to state the purpose for which it is issued, the nature of the offence being investigated, the time during which entry on the premises is lawful and the description of the kinds of things sought in the search. These are protective measures available to the magistrate from whom the warrant is sought.

72. However, the Committee was concerned about the width of the power conferred by sub-section 235(4). That sub-section uses a deeming provision to extend the scope of a search warrant. It authorises an investigating officer to exercise powers to inspect and take copies of *records which were not specified in the warrant, if the* officer believes, on reasonable grounds, that the "things" are "connected with another offence against this Ordinance". This power confers on administrative officials greater powers than are available to a police officer in the execution of a search warrant under sub-section 358C(4) of the Crimes Act 1900 (NSW) as it applies in the A.C.T.

73. The Committee considered that the provisions of that Ordinance did not provide a happy precedent. The Committee took the view that each case should be examined on its merits to determine precisely what powers of entry, search and seizure are essential to

permit effective law enforcement by administrative officials without prejudice to the rights of individuals.

74. The Committee considered that with regard to "things" other than those specified in a warrant under paragraph 235(3)(c), a sealed envelope procedure could be used. Such a procedure would enable an investigating officer and the controller of "deemed" things and documents, jointly to lodge them with the Registrar of a court, with the proviso that they be returned to the controller within 24 hours if a further search warrant, particularising such material, had not been issued by a judicial officer. The Committee considered that, in contrast to the deeming provisions, such an amendment would keep responsibility for the lawful seizure of documents where it belonged, with the judicial officer issuing the warrant. In relation to the "deemed" documents, he or she would be able to exercise the protective measures referred to above. Otherwise the "deeming" procedure would make lawful "fishing expeditions" which might not otherwise be justified.

75. The Minister explained that the provision to which the Committee objected did little more than restate the position at common law as set out in the English decision of Chic Fashions (West Wales) Ltd v Jones [1968] 1 All E.R. 229. It is arguable whether this case is authority to justify the uncritical grant of police powers to administrative officials.

76. The case concerned police powers and in particular the powers of a constable to search and seize. The Court in arriving at its decision placed considerable emphasis on the similarity between a constable's power to seize

things without a search warrant, and his or her power of arrest without warrant. In the course of his judgment in the English Court of Appeal, Lord Denning M.R. said,

> "...So far as a man's individual liberty is concerned, the law is settled concerning powers of arrest. A constable may arrest him and deprive him of his liberty if he has reasonable grounds for believing that a felony (now an "arrestable offence") has been committed and that he is the man. I see no reason why goods should be more sacred than persons".

In the same vein, Diplock L.J. said (at page 238),

> "... I decline to accept that a police officer who is unquestionably justified at common law in arresting a person whom he has reasonable grounds to believe is guilty of receiving stolen goods, is not likewise justified in the less draconion act of seizing what he, on *reasonable grounds, believes to be stolen* goods in that person's possession".

Likewise Salmon L.J. said (at page 240),

> "If the preservation of law and order requires that a policeman shall have the power to arrest a man whom he believes on reasonable grounds *to be a thief or a receiver,* it is difficult to understand why the policeman should not have the power to seize goods on the man's premises which the policeman believes on reasonable grounds that he has stolen or received. If the man's person is not sacrosanct in the eyes of the law how can the goods which he is reasonably suspected of having stolen or received be sacrosanct?"

77. The Committee considers that an important point of principle was at stake in its objection to sub-section 235(4) and the Credit Ordinance because "inspectors" are not police officers. Authorities which justify police

actions should not be used to justify similar actions by administrative officials unless there is a clear intention that Parliament desires public servants to be vested with such police powers. Inspectors under the Credit Ordinance have no powers of arrest. It was by reference to the police power of arrest that the English Court of Appeal in Chic Fashions justified its decision that the seizure of documents, not specified in a search warrant, was lawful.

78. The Committee recognises the important and justifiable role of adminstrative officials in enforcing certain kinds of regulatory legislation. However, the Committee is concerned at the prospect of ever increasing numbers of public authorities other than police being given powers that do not appear appropriate. As the Committee noted above, police powers should not be conferred automatically and uncritically on any authority.

79. The Committee did not accede to the Minister's argument that the solution to the "deeming" provision, offered by the Committee (the sealed envelope procedure) should be restricted to the seizure of items in respect of which legal professional privilege was claimed.

80. In the final analysis the Committee and the Minister failed to agree on appropriate amendments to sub-section 235(4) of the Credit Ordinance. The Minister undertook to repeal the sub-section.

(d) Signature of Documents

81. Section 250 of the Ordinance provided that where a document is to be signed by a person,

> "it is not necessary that he [sic] should sign it with his own hand, but it is sufficient if his signature is written on the document by another person by or under his authority".

82. There was a protective proviso that a credit provider or a person associated with a credit provider should not be taken to have such authority to sign on behalf of the person seeking credit. The Committee considered that this proviso was insufficient to obviate the risk of quite grave problems including problems caused by dishonesty arising by reason of the terms of section 250.

83. The Minister considered that the need to have legislation uniform with that of the States was of paramount importance in the Credit scheme. In any event, since a vicarious signature could only be effective if made by or under the authority of the person seeking credit, no greater opportunity for abuse existed than if a personal signature were required. The provision, he contended, reflected the common law position.

84. Insofar as section 250 enabled a person to sign another person's name as if the person signing were the very person whose signature was written, without the need to qualify that vicarious signature by reference to any relationship of principal and agent, the provision in the Committee's opinion was objectionable and open to abuse. At common law the onus of proof rests on the agent to show that he or she had sufficient authority to sign any particular document that is in issue. Under section 250 as it came before the Committee the onus of proof would have rested on the person whose signature purportedly appeared on the document to show that the

"signature" was not in fact his or her signature and that the actual signatory did not in fact have authority to sign his or her signature.

85. Clearly section 250, as it came before the Committee, altered the position existing at common law. It effectively reversed the onus of proof. Accordingly, the Committee was concerned about the section and expressed that concern to the Minister.

86. The Committee also considered that a witness should be present, and that he or she should sign any documents giving rise to binding legal contracts under the Credit Ordinance. Unamended, the section could operate to the serious prejudice of borrowers, and in particular, certain pensioners or other persons in need of that special protection which the presence of a witness can give at the making of contracts capable of imposing hardship on the borrowing party. The protection afforded by section 124, which precluded a salesperson from executing a vicarious signature, while significant, did not provide sufficient protection from the kinds of problems which the drafting of section 250 made probable.

87. The Minister gave an undertaking that the section would be amended to meet the Committee's concerns.

(e) Drafting Matters

88. The Committee raised two matters of drafting. Firstly, sub-section 29(1) stated that a supplier who knows that a linked credit provider has given credit and who "becomes aware" that a contract of sale has been rescinded shall forthwith give notice of that recission to the linked credit provider.

89. The intention behind the sub-section was to oblige the supplier to inform a credit provider of the termination of a contract as soon as the supplier knew of the termination. This would enable the provider to take action to protect his or her legitimate interests.

90. The Committee considered that the expression "becomes aware" was unnecessarily subjective. The argument that it was uniform with the expression used in the New South Wales legislation did not make it less objectionable.

91. The Attorney-General's Department advised that the expression "becomes aware" expressed a concept which imported a temporal element into the acquisition of knowledge and imposed an obligation on the supplier from the very time he obtained the relevant knowledge. However, insofar as the section was intended to protect linked credit providers and create a criminal offence to achieve this protection, the expression was not as *precise as the word "knows", which is also used in* sub-section 29(1).

92. If the intention of using the expression "becomes aware" is really to identify the point in time at which a person who obtains knowledge of a relevant fact becomes obliged to notify a linked provider, this intention could be more clearly and more certainly conveyed by an expression such as "as soon as a supplier knows that ..."

93. The Minister undertook to amend the section as requested by the Committee.

94. Secondly, under section 135 of the Ordinance an exemption clause in an insurance contract taken out by a debtor, will not operate to the detriment of the debtor if "on the balance of probabilities" the loss insured against did not arise from defined circumstances which were likely to increase the risk of the loss occurring. The onus of providing "on the balance of probabilities" that the loss did not so arise was placed on the debtor. The question arose whether this express reference to the civil onus of proof (the standard which would apply in any case) brought into doubt what the onus was and on whom it lay under other sections of the Ordinance.

95. The Attorney-General's Department gave the Department of Territories oral legal advice that the express inclusion of the words "on the balance of probabilities" would not affect the issue of what the appropriate standard of proof was in other sections of the Ordinance. However, its deletion, in circumstances where the expression was used in State Legislation setting up a uniform scheme, could lead to the inference that the civil standard of proof was not to apply in section 135 of the Ordinance. While the Committee considered the advice was based on an unexpected interpretation, it did not further press its views on the drafting of the section.

Crimes (Amendment) Ordinance (No. 3) 1983
(A.C.T. Ordinance No. 55 of 1983)

Onus of Proof - Presenting a Firearm

96. This Ordinance was designed to amend the Crimes Act 1900 (N.S.W.) in its application to the A.C.T. Section 3(g) of the Ordinance provides as follows:

> "For the purposes of (the Crimes Act), a fire arm, air gun or air pistol that is unlawfully presented at a person shall, unless the contrary is proved, be deemed to be loaded arms."

97. This deeming provision placed on the accused the onus of proving that a firearm, air gun or air pistol he or she presented to another person was not loaded.

98. When the Committee sought information from the Attorney-General as to the basis for this reversal of onus, he said there were two reasons why the onus was placed on the accused. Firstly, where a weapon is unlawfully presented to a victim, he or she will assume, as the offender probably intends him or her to assume, that the weapon is loaded, and will be affected accordingly. Secondly, in the overwhelming number of cases brought under section 3(g), there will have been a delay between the commission of the crime and the questioning of the accused. Consequently, the only evidence available to the prosecution, is likely to be of such a nature that a tribunal hearing the charge could not reasonably draw the conclusion that the firearm in question was loaded. On the other hand, the accused would almost certainly know whether or not the firearm was loaded. Accordingly, the perpetrator of the alleged crime has peculiar knowledge of the state of the firearm at the time it was presented to the victim and therefore, it is argued, should be required to prove that state. Where the offender is apprehended at the time of the offence it would usually be a simple matter for the prosecutor to prove whether the firearm was or was not loaded. However, to have the onus of proof shift according to the time of apprehension of the alleged offender, is to have a situation likely to be *artificial, uncertain and capricious.*

99. It is relevant in this context to consider other sections of the Crimes Act 1900 (N.S.W.) and in particular sections creating offences for maliciously discharging or in any manner attempting to discharge loaded arms (see for example ss.33 and 33A of the Act). To prove offences under those sections, it is necesssary for the prosecution to prove that the accused believed the firearm was loaded.

100. The Committee accepted these justifications for the reversal of onus.

Onus of Proof - Intent to Defraud

101. A new section 178B was inserted into the Crimes Act by section 11 of the Ordinance. This makes it an offence to pass a cheque that is not paid on presentation. It is open for the accused to establish reasonable grounds for believing that the cheque would be paid on presentation and that he or she had no intent to defraud.

102. The Attorney-General explained that the reversal of the onus of proof was justified because the person passing the cheque was usually the only person able to establish the belief necessary to make out the defence. The offence related to a subject matter peculiarly within the knowledge of the defendant. The Attorney added that as a matter of practicality, where a person could establish a satisfactory explanation for his or her belief that a cheque would be met on presentation, it was unlikely that a prosecution would be brought. A prosecutor was likely to exercise his or her discretion to prosecute or not to prosecute in favour of the person concerned.

103. The Committee took the view that a discretion resting with a prosecutor was an unsatisfactory safeguard for people caught by the legislation. Under the legislation an accused person is required to prove his or her innocence by negativing intent to defraud. While it is open to debate whether there may be reversal of the usual onus in criminal cases where an accused has peculiar knowledge of the existence or otherwise of an element of the offence, the contrary argument that a person should not be required to prove an innocent intent to avoid a conviction for a serious crime is most convincing. As Lord Sankey said in the House of Lords in Woolmington v D.P.P. (1935) All E.R. Rep. 1 at p.8 -

> "No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.".

104. In The Queen v O'Connor [1979-1980] 146 CLR 64, at 118, Aickin J said

> "... Woolmington's Case ... established the proposition that the onus of proof of all ingredients of an offence, including the necessary mental element, rests on the prosecution ...".

105. This principle can be overriden by statute as in the case of the Crimes (Amendment) Ordinance. However, that course should be adopted only with great caution. Certainly it should occur only in exceptional circumstances in delegated legislation. The Committee can now report that on 6 September 1985 the Crimes (Amendment) Ordinance (No. 4) 1985 was made repealing section 178B.

Crimes (Amendment) Ordinance 1985
(A.C.T. Ordinance No. 11 of 1985)

Drafting of service of documents provisions

106. This Ordinance amends the Crimes Act 1900 (N.S.W.) in its application to the A.C.T., by adding community service orders to the range of sentencing options in the A.C.T. A new section 556S dealing with service of documents provides in effect that in addition to personal service, valid service can be affected by leaving a copy of the relevant document "at the last known place of residence or business of the person, with a person apparently resident or employed at that place and apparently over the age of 16 years". (Emphasis added).

107. The Committee considered it was not proper that the service of legal documents, including originating process, should be valid simply because it was left with a person apparently resident or employed at a particular place and apparently over the age of 16. A phrase such as "who is or who is reasonably believed to be" might go some way towards ensuring service was effective. The Committee recognised that in most cases it was unlikely that anyone would incur legal penalties arising out of defective service. However, service which, whether through deliberation, negligence of inadvertance, is ineffective can seriously prejudice an individual's rights. For example, delay or misunderstanding might arise. Evidence which might otherwise have been available becomes unavailable.

108. The Committee did not accept that previous practice was a conclusive answer to its concerns that the expression "apparently" is vague and subjective especially when contrasted with a formula such as "who is or who is reasonably believed to be".

109. The Committee noted that the formulation in section 556S is not always employed in other federal legislation.

110. Use of the word "apparently" as an element of an offence was objectionable within the Committee's principles. See, for example, in the Tobacco Ordinance 1927, section 10, where sale of tobacco to a person "apparently under the age of 16" is unlawful. Sale to a person who is in fact over 16, but who is "apparently" under 16, may also be unlawful: Craft v McNally, Ex parte McNally [1967] Qd.R. 515 per Hoare J., at 521; and Eccles v Richardson [1916] N.Z.L.R. 1090 per Denniston J., at 1094.

111. The Committee examined obiter dicta from Hoare J. in Craft v McNally, op. cit. which suggested that the words "apparently under the age of 21 years", connote honest and reasonable observation. By this interpretation Hoare J. sought to import into the expression "apparently" an element of objectivity. From dicta in Craft v McNally and Riggs v Grady, Ex parte Grady (1957) Q.S.R. 220, at 225, it appears that the expression "apparently" may mean "who is or who is reasonably believed to be".

112. However, the Committee considered that this possible objective interpretation of the expression could be made clear by discontinuing the use of the word "apparently" and substituting other words, making clear that the relevant test was objective.

113. Insofar as the matter involved not only legal interpretation but the administrative practice of process servers, the Committee left the issue with the Attorney-General. It raised the question whether in future regulations and ordinances, Parliamentary Counsel should employ words making clear that the relevant test was to be objective.

Extradition (Republic of South Africa) Regulations Amendment (Statutory Rules 1985 No. 14)

Definition of Extraditable Offences

114. These regulations were made under the Extradition (Foreign States) Act 1966 to enable persons to be extradited from Australia to South Africa. There are important protective provisions in the Act and the Regulations. However, there is no extradition treaty between Australia and South Africa. The Committee considered therefore, that in the absence of such a treaty, special care was needed to ensure that a person whose extradition was sought, had the benefit of provisions which are normally included in extradition treaties. (See for example the treaty with Sweden annexed to the Extradition (Sweden) Regulations Statutory Rules 1974 No. 27.) The Committee also considered that it was appropriate to seek additional protections against certain penalties which could be imposed on a person after extradition to South Africa.

115. In correspondence with the Attorney-General, the Committee raised questions concerning the absence from the regulations of provisions dealing with:

- reciprocal minimum penalties; (Under the Regulations extradition was permissible only where the alleged offence would attract a minimum penalty of not less than 12 months imprisonment in South Africa. This was regardless of whether a penalty of not less than 12 months imprisonment was also the penalty for a similar offence committed in Australia.)

- reciprocal maximum penalties; (Under the Regulations extradition was not possible where the alleged offence was punishable by the death penalty unless satisfactory assurances had been given to Australia that the penalty would not be imposed, or if imposed would not be carried out. However, this did not prevent extradition where cruel or inhuman punishment could be imposed, or, where, in South Africa, the maximum penalty of imprisonment unjustifiably exceeded that which could have been imposed for a similar offence committed in Australia.)

- the question of whether protections similar to those contained in existing extradition treaties could be inserted in the body of the Regulations (for example, to prevent extradition where political or military offences were involved, where

the Australian Statute of Limitations period had expired, or where trial would be before a provisional or special court).

116. In this matter the Committee, through its Chairman, gave notice of motion for disallowance of the Regulations. Since complex issues of extradition law and practice had been raised by the Committee's scrutiny it was decided to invite the Attorney-General to send his specialist officers to assist the Committee at a private meeting.

117. During these hearings and in subsequent correspondence, officials and the Attorney-General gave undertakings that the Extradition (Foreign States) Act 1966 would itself be amended to entrench the principle that a person shall not be extradited unless the alleged offence is one which, in Australia, would attract a minimum penalty of not less than 12 months had the offence been committed here.

118. Following the hearings, the Attorney-General gave the Committee assurances that the Extradition (Republic of South Africa) Regulations would be amended in an effort to meet the Committee's concerns. In reliance on these undertakings the Committee withdrew its notice of motion for disallowance of the Regulation.

119. A draft of the proposed amended Regulations was forwarded to the Committee and on 27 June 1985 the amending Regulations were made. They provide that before extradition is considered the offence in respect of which it is sought must carry a minimum penalty of 12 months imprisonment, not only in South Africa but also in Australia. They also include treaty-like protections

in connection with political and military offences, limitation periods and provisional or special courts. Requisitions motivated by religious, political or ethnic considerations will not be acceded to. A person will not be surrendered to South Africa if the relevant offence is punishable by any cruel, inhuman or unjustifiable penalty. Under the amended Regulations the Attorney-General <u>may</u> decline to issue a warrant for the surrender of a person to South Africa if the Attorney-General <u>is of the opinion that</u>, in the circumstances of the particular case, it would be unjust, oppressive or incompatible with humanitarian considerations to do so.

120. The fact that the Attorney-General maintains this discretion is not to be taken as evidence that the Committee endorses a situation where the Attorney-General has a wide discretion in an important area affecting the liberty and perhaps the life of someone in respect of whom extradition is sought.

<u>Land Rent and Rates (Deferment and Remission)(Amendment) Ordinance (No. 2) 1984</u>
<u>(Australian Capital Territory Ordinance No. 53 of 1984)</u>

<u>Retrospectivity</u>

121. This Ordinance was made on 26 September 1984. The Committee noted that by virtue of section 2, the commencement date was made retrospective to 1 July 1984. The Committee was concerned at the possibility that persons might be disadvantaged during the period 1 July 1984 to 26 September 1984, because new rates of interest, to be fixed under section 23 of the Ordinance,

on deferred land rates, might be higher than previous interest rates. The Committee also examined the risk that by empowering the Minister to "fix" interest rates rather than "determine" them, the provisions in the Seat of Government (Administration) Act 1910 providing for tabling a disallowance of "determinations" might be made inapplicable.

122. In responding to the Committee's concerns the Minister explained that as of that date there were no determinations deferring the obligation to pay rates in respect of the 1984/85 rating year. Such determinations would be forthcoming when Regulations were made prescribing the maximum rate of interest allowable. Interest would be payable only from the date of such a determination and consequently no one could be prejudiced by the retrospective operation of the amendment Ordinance. The primary purpose behind making the Ordinance retrospective to 1 July 1984 had been to extend to sewerage, water and excess water rates for a full rating year, the concession of deferment which previously applied only to land rates.

123. A power to "fix" interest rates was conferred since a power to "determine" applied only to "fees" and "charges" not to interest rates. Parliamentary supervision was preserved since the maximum rate of interest that could be fixed by the Minister was to be fixed by way of regulations and thus subject to tabling and disallowance by either House of Parliament.

124. The Committee was pleased to accept the Minister's explanations in this matter.

National Crime Authority Regulations (Amendment) (Statutory Rules 1985 No. 3)

Substituted Service of Witness Summons

125. Regulation 7 of these Regulations makes provision for the service of a summons to witness on a person requiring him or her to appear before the National Crime Authority and give evidence. The Committee was concerned about two aspects of the Regulations.

126. Legislative provisions for service of summons usually provide for personal service, postal service at a last known or usual place of residence or business, or service on a person found at such a place of residence or business and "apparently" over the age of 16 years.

127. The Committee has commented earlier in this report on the use of the word "apparently" (See paragraph 106 where the word was used in the context of Crimes (Amendment) Ordinance 1985.)

128. More importantly, sub-paragraph 7(1)(a)(iii) allows a member or acting member of the Authority to direct that service be effected either:

- by leaving the relevant documents with an identified person, other than the individual whose attendance as a witness is sought, being a person who, in the opinion of the member or acting member, is likely to bring the contents of the summons to the notice of the individual whose attendance is sought; or

- by sending it by registered post to an address that the member or acting member has reasonable grounds to believe to be a place <u>frequented</u> by the individual whose attendance is sought.

129. A direction enabling this kind of service to be affected shall not be given unless the member or acting member is satisfied, on information in writing by a solicitor employed by the Authority, that the normal modes of service of summonses described above have not been or are not likely to be successful, and that there is a likelihood of success using this special method of service.

130. The Committee considered that in the absence of some kind of independent judicial supervision, this kind of service put at risk the personal rights and liberties of the person whose attendance before the Authority is sought, and the third party through whom the service is to be communicated.

131. Personal service of summonses in the criminal law jurisdiction is a process of great antiquity. With the advent of complex modern government many institutions and bodies have been empowered to exercise investigative functions. The means by which service of documents is achieved have expanded to include service by post and service at the last known home or business address of the person sought.

132. The Committee considered that the regulations contained a considerable extension of the methods by which service could legally be effected. The Committee was concerned therefore that personal rights and liberties might be put at risk unnecessarily if service were to be effected

in the way described in the regulations without the sanction of a judge. An independent judiciary, long practised in the exercise of discretion according to law, is the best adjudicator of whether and by what means substituted service should be allowed.

133. The Authority, in a submission to the Committee pointed out that the courts, in exercising powers to order substituted service, do so in such manner as seems just. The Committee considered that the members or acting members of the Authority would act with total propriety in the exercise of any power to substitute service. However in exercising such a power which could place rights in jeopardy, a judge could be seen to be neutral and independent.

134. The Committee foresaw serious problems arising were the National Crime Authority to gain the powers it sought. The requirement that an application be made to a judicial officer before the relevant kind of substituted service becomes valid, addresses these problems identified by the Committee, including the following:

- The reputation of the person named in the summons may suffer because the information it contains may be revealed to the thrid party. Such information may suggest criminality. It may be defamatory.

- The reputation of the person named in the summons may also be affected because of an assumption made that he or she was deliberately avoiding service of process and "therefore" must have criminal or other unacceptable reasons for doing so.

- The person named in the summons will be exposed to risk of arrest for non-attendance because the person served, (the agent) may fail, deliberately or inadvertently, to pass on the summons. It is to be remembered that failure to attend a hearing exposes the person to liability to arrest.

- The agent, an innocent third party, may have his or her reputation damaged by people assuming that he or she is the associate of a suspected criminal sought by the National Crime Authority.

- The agent's situation may be adversely affected. For example, in order to serve, the agent may feel obliged to seek out family or friend and thus risk prejudicing important relationships.

- The agent may be required to give evidence by way both of evidence in chief and cross examination, possibly against the word of a criminal or potentially violent person. The agent may thereby be exposed to publicity and possible retaliation as a result of an administrative decision by a member or acting member of the Authority.

135. The Committee considered that a judge in chambers is better placed to balance the proper interests of the Authority against those of the citizen affected by the process involved in the service of the Authority's summonses.

136. Substituted service is necessary if the Authority is to function effectively. It is not, in the Committee's view, necessary that the Authority make the decisions associated with this unusual form of substituted service. Those decisions can be and should be made by a judge.

137. The Committee considered that judicial supervision would not involve undue delay for the Authority. The Authority could be enabled to apply to a Federal or State judge at any time of the day or night. There are precedents for such a course. Fundamental questions concerning the liberty of the subject and the issuing of arrest, search and seizure warrants are dealt with judicially. Neither the process of law enforcement nor the liberties of the subject are discontinued by the judicial process. Indeed search warrants are issued, orders for delivery up of passports are made, and warrants for arrest of witnesses are issued, by a judge under sections 22, 23 24 and 31 of the National Crime Authority Act.

138. The Committee formed the view that the exercise of discretions under sub-paragraph 7(1)(a)(iii) and sub-regulation 7(2) by a member or acting member of the Authority would breach the Committee's principles. Unchanged, the regulations would set an undesirable precedent in terms of the powers granted by delegated legislation.

139. The Special Minister of State with ministerial responsibility for the National Crime Authority, after discussions with the Chairman of the National Crime Authority, agreed with the Committee's request that an order for substituted service be obtained from a judge before it was validly effected. The Minister gave instructions that the Regulations be amended and assured

the Committee that the offending power would not be used by the National Crime Authority prior to the amended Regulations coming into force. The notice of motion of disallowance of the Regulation which the Committee had given was withdrawn by leave of the Senate, on the basis of the Minister's undertaking.

140. Subsequently the Chairman of the National Crime Authority, Mr Justice Stewart, wrote to the Committee asking the Committee to reconsider its position.

141. The Authority took issue with, inter alia :

- what it understood was the Committee's comparison of a hearing before the Authority with criminal proceedings;

- the Committee's view that the regulations dealing with service included powers which were novel and endangered civil rights;

- the Committee's description of the Authority members as "officials"; and

- the Committee's fear that a determination to pursue an investigation might reach such proportions in the mind of the Authority that it would lose objectivity in deciding whether substituted service was appropriate or not.

142. The Committee agreed to meet members of the Authority. Although it had already received and conveyed to the Senate the Minister's undertaking to amend the Regulations, the Committee was prepared to do this because of the functions and standing of the Authority.

143. After an in camera hearing with two members of the Authority, the Committee remained of the view that the Regulations should be amended in line with the undertaking previously given by the Minister. The Committee was not persuaded that the risks referred to above were insubstantial. It remained of the view that the protection of the rights and liberties of citizens would be best served by the involvement of a judge.

New South Wales Acts Application Ordinance 1984 (ACT Ordinance No. 41 of 1984)

Powers of Entry to Premises

144. The Ordinance reprinted some New South Wales legislation as it applies in the Australian Capital Territory. The Committee noted that in sub-section 15(2) and section 16 of the Games, Wagers and Betting Houses Act 1901 (N.S.W.) (the 1901 Act) police powers to effect entry to premises were drafted in a very wide and unqualified way. The Committee considered that it would be proper to limit to some objective standard the degree of force which might be used to gain lawful entry to premises.

145. The Minister for Territories agreed it was desirable to insert into the legislation some appropriate qualification and he undertook to consult the Attorney-General on the matter.

146. The Committee raised the question of whether similar provisions in other New South Wales Acts, in force in the A.C.T., should be reviewed by the Department of Territories. The Minister advised the Committee that he proposed to have the relevant provisions reviewed. That review was to take place by way of a general review of the legislation in issue or, if it appeared that a

general review was not in fact needed or was unlikely to occur for some time, the legislation would be reviewed over time as resources and other priorities permitted.

Public Trustee Ordinance 1985 (Australian Capital Territory Ordinance No. 8 of 1985)

Liability for Negligence

147. This Ordinance established the office of Public Trustee in the Australian Capital Territory with functions of acting as executor, administrator and trustee of estates of deceased persons and as trustee of monies from certain court proceedings.

148. Sub-section 10(1) of the Ordinance provides that a person who holds the office of Public Trustee is not liable personally for actions done in good faith in performance of his or her function. Sub-section 10(2) of the Ordinance provides that a Deputy Public Trustee or an acting Public Trustee is not liable for actions done in good faith. Section 12 provides that where as a result of the actions of the Public Trustee, or another acting in good faith for the Public Trustee, a person sustains loss or injury in compensable circumstances that person has a remedy against the Public Trustee in his or her corporate capacity.

149. The Committee sought the Attorney-General's advice as to whether the omission of the word "personally" in sub-section 10(2) which deals with the liability to an injured party of a Deputy or acting Public Trustee, had the effect of precluding an action for negligence where a Deputy or an acting Public Trustee had taken decisions on behalf of the Public Trustee.

150. The Attorney-General explained that since the Public Trustee had a capacity as an individual and a capacity as a corporation (being the office of Public Trustee) it was necessary to protect him or her from personal liability while permitting an appropriate right of action against the office. Since the individual who is the Deputy Public Trustee, or an acting Public Trustee, does not enjoy this dual personality no need arose to distinguish between personal and corporate liability. The only liability of such a person is through the corporation, the office of Public Trustee. Therefore there was no need to state in terms that such individuals bore no liability in a personal capacity.

151. The Committee was grateful to the Attorney-General for his assistance in clarifying this matter.

Supervision of Offenders (Community Service Orders) Ordinance 1985
(Australian Capital Territory Ordinance No. 10 of 1985)

Genuine Conscientious Objection

152. This Ordinance makes provision for the supervision of offenders on whom community service orders have been imposed under the Crimes (Amendment) Ordinance 1985.

153. An authorised officer may give directions to an offender to perform community service work. When doing so, paragraph 6(3)(a) provides that the officer shall "as far as practicable take into account the religious beliefs of the offender ...".

154. It appeared that use of the expression "as far as practicable" could allow an authorised officer in certain circumstances to require that an offender carry

out work which violated his or her religious beliefs if no other option was practicable. The Committee considered that such a situation should not be allowed to arise. It considered that as a matter of principle an offender should not be asked to compromise his or her religious beliefs.

155. Further the Committee considered that conscientious beliefs other than religious ones should be taken into account in allocating community service work. In this context the following are examples of situations where offenders might appropriately be exempted from performing particular community service work:

- where it is for a voluntary organisation, such as a church, the beliefs or policies of which are genuinely repugnant to the person asked to perform community service;

- where it is to be performed on a day on which a person's trade union is engaged in lawful industrial action;

- where it is on a day on which the trade union of other persons, whose paid work is done on the premises where the community service is to be performed, are engaged in lawful industrial action; or

- where it is at a hospital performing medical procedures which may be the subject of genuine conscientious (rather than religious) objections (for example, abortions, electro-convulsive therapy or experimental biological research with human embryos).

156. Conscientious objection might result in an offender disobeying a direction from an authorized officer or might cause him or her to experience moral distress if he or she did comply with such a direction.

157. The Chairman on behalf of the Committee gave notice of motion to disallow the Ordinance. To address in a direct way the two expressions giving rise to the Committee's concern, namely "as far as practicable" and "religious beliefs" in sub-section 6(3) of the Ordinance, the notice of motion was subsequently amended to give notice of motion of disallowance of those words only.

158. Having considered the issues the Minister for Territories decided to amend the Ordinance to remove the flaws identified by the Committee.

159. The words "as far as practicable" were deleted. The issue of genuine conscientious beliefs other than religious beliefs was resolved by an amendment which imposed on the authorised officer an obligation to consult the offender before giving directions about the performance of work, and to take into account any relevant matters raised by the offender in the course of that consultation. These amendments allayed the Committee's concerns.

CHAPTER 5

REPORT ON UNDERTAKINGS IMPLEMENTED BY MINISTERS TO AMEND OR REVIEW DELEGATED LEGISLATION

Listed in the 69th Report (September 1980)

Norfolk Island Regulations

160. In 1979 the Committee expressed concern that regulations under Norfolk Island enactments were not subject to disallowance either by the Parliament or the Legislative Assembly.

161. The then Minister for Home Affairs gave the Committee an undertaking that the Norfolk Island Act 1979 would be amended to provide for the tabling in, and disallowance by, both Houses of Parliament of regulations made by the Minister under enactments and that the Interpretation Ordinance 1979 would be amended to provide for tabling in, and disallowance by, the Legislative Assembly of regulations made by the Administrator.

162. The Norfolk Island Act 1979 was amended in 1982 and the Interpretation (Amendment) Act 1984 of Norfolk Island, which amends the Interpretation Ordinance 1979 received the Governor-General's assent on 24 January 1985. The amendments providing for the tabling in the Legislative Assembly of regulations made by the Administrator came into effect upon publication of notification of the Governor-General's assent in the Norfolk Island Government Gazette on 7 February 1985. This completes the undertaking given to the Committee in 1979.

163. The Committee expressed its disappointment that it took six years for this matter to be finalised. The Committee recognises the problems associated with this legislation. However, where rights of the citizen are affected it is appropriate that administrative measures to fulfil undertakings given to the Committee be taken as expeditiously as possible. In this case it was left to a Minister other than the one who made the undertaking to fulfil it some years after it was made.

Listed in the 74th Report (March 1974)

Mental Health Ordinance 1983 (A.C.T. Ordinance No. 52 of 1983) :

164. The Mental Health (Amendment) Ordinance 1984 (ACT Ordinance No. 50 of 1984) implemented the undertakings given to the Committee by the Minister in respect to the procedure for the appointment of prescribed representatives and the right of such representatives to be informed of certain restrictions on communications by persons in custody.

Great Barrier Reef Marine Park Plans

165. In 1983 the Committee considered the Cairns Section Zoning Plan and the Covenant Lease Section Zoning Plan made by the Great Barrier Reef Marine Park Authority. It noted that the legislation contained several provisions which stated that certain acts could be done in particular areas and that certain other specified acts could be done "only with the permission of the responsible agency". The Committee was concerned that no provision was made in the legislation for the review of the grant of such permission.

166. In response to the Committee's concern the Minister undertook to provide a right of appeal by way of Regulations. This undertaking was fulfilled by the Great Barrier Reef Marine Park Regulations (Statutory Rules 1983 No. 262), subsequently amended by the Great Barrier Reef Marine Park Regulations (Amendment) (Statutory Rules 1985 No. 169). The Regulations now provide for review by the Administrative Appeals Tribunal of grants of permission to engage in certain activities in zoned and unzoned areas of the Marine Park.

Listed in the 75th Report (September 1984)

Dangerous Goods (Amendment) Ordinance 1984 (ACT Ordinance No. 69 of 1984)

167. The Committee was concerned that the onus of proof was reversed in sub-sections 20(2), 25(2), 26(2), 36(2) and 41(7) of the Dangerous Goods Act 1975 (N.S.W.) as made applicable by the Ordinance in the A.C.T. The Committee was also concerned with the lack of detail in the Explanatory Statement and the absence of a consolidated print of the Dangerous Goods legislation as it applied in the A.C.T. The Amendment Ordinance had the effect of placing an evidentiary onus only, on a defendant while leaving the persuasive onus on the prosecution in sub-sections 20(2), 26(2), and 36(2).

168. The Committee accepted the Minister's explanation of the need for the reversal of onus in sub-sections 25(2) and 41(7).

169. The legislation was consolidated in a reprint dated 31 December 1984.

CHAPTER 6

REPORT ON UNDERTAKINGS NOT YET IMPLEMENTED

Listed in 75th Report (September 1984)

Workman's Compensation (Amendment) Ordinance 1983 (ACT Ordinance No. 69 of 1983.

170. The Committee was concerned that certain provisions in this legislation enabled a medical practitioner to issue a certificate that was "final" and constituted either "conclusive evidence that the injury did not result in such (facial) disfigurement" or "conclusive evidence that the injury resulted in such disfigurement". The Committee was concerned that a single medical referee could, by the issue of a certificate, determine the rights of an employee, an employer and an insurer without there being a right of appeal against that determination.

171. The Committee acknowledged the Minister's statement about the difficulty in finding an appropriate body to review the kind of determinations involved. The Minister pointed out that the Compensation (Commonwealth Government Employees) Act 1971 included provision for a medical board rather than a single referee. In the absence of a review mechanism, the Committee considered that the interests of those affected by the legislation would best be protected by the establishment of a medical board.

172. The Minister agreed to amend the legislation to accommodate the Committee's concerns. He gave an undertaking to amend the legislation to provide that

relevant decisions under the Ordinance would be made by a panel of medical practitioners. He indicated that because of a shortage of suitably qualified medical referees in the A.C.T., in some cases it would be necessary to rely on the certificate of a single practitioner. However, he undertook to amend the Ordinance so that such a certificate would become final and conclusive only when signed by all members of a medical panel.

173. The Committee accepted these undertakings and continues to await their implementation in legislation.

CHAPTER 7

RECOMMENDATIONS CONTAINED IN REPORTS (OTHER THAN THOSE FOR AMENDMENT OR REVIEW OF PARTICULAR REGULATIONS AND ORDINANCES)

Alteration of Entitlements by Regulation

174. In its 68th Report, November 1979, the Committee recommended that the Senate Standing Committee on Constitutional and Legal Affairs should consider the procedure of using regulations to alter people's entitlements.

175. Controversy arose from a provision in compensation legislation in 1979 which had the effect that future changes in the level of Commonwealth employees' compensation rates would be achieved by regulations rather than by Act of Parliament.

176. Some Senators objected that this device deprived the Parliament of the opportunity to debate and amend rates of compensation and left it with no more than the negative power to disallow. Disallowance meant that the pre-existing rates of entitlements, which were lower than those proposed, would revive, and Senators did not wish to deprive beneficiaries of any increase no matter how small.

177. The Regulations and Ordinances Committee reported on the issue in its 68th Report in 1979. The Constitutional and Legal Affairs Committee declined in 1985 to investigate the matter due to its pre-existing work load.

178. The Committee's role in scrutinising regulations affecting entitlements is limited. It appears that the only entitlements affected by regulations are student assistance payments and payments made to injured workers under Commonwealth compensation provisions. In both cases they were affected in terms of the rate at which they were paid. There appear to be no regulations that affect the rates of similar benefits such as benefits paid pursuant to Social Security legislation.

179. Though there is an issue of whether or not the criteria set out in principle (d) applies to the matters affected by these regulations, the situation is that the enabling Act gives clear and specific power for their making. Parliament has made clear its intention in this matter.

180. Where Parliament delegates specific power to a person or body to make subordinate legislation and that person or body makes such legislation within the limits of that power, the Committee would require the existence of unusual circumstances before it would consider reporting to the Senate. Such unusual circumstances might arise for example, in the very unlikely event that the Senate Standing Committee for the Scrutiny of Bills overlooked an unduly wide delegation of power in a provision of a Bill under which regulations are subsequently made.

181. However, the Scrutiny of Bills Committee plays the primary role in alerting the Parliament to legislation which might impinge on that Committee's principles. That Committee can and does draw attention to "inappropriate delegations" of legislative power.

CHAPTER 8

RETROSPECTIVITY IN DELEGATED LEGISLATION

182. The Committee scrutinises delegated legislation to satisfy itself that the proscription on retrospectivity in sub-section 48(2) of the Acts Interpretation Act is observed. It looks closely at any instrument which, while not expressed to act retrospectively, has the effect of doing so.

183. The following statement on retrospectivity made by the Committee in its 25th Report in November 1968 bears repetition:

> "Delay in the promulgation of regulations providing for the payment of moneys denies to either House of the Parliament the right to approve or disapprove of the expenditure at the time of the expenditure".

184. The 25th Report set out certain guidelines to which the Committee adheres in considering retrospective instruments. These are as follows:

    1. All regulations, of whatever character, having a retrospective operation will <u>prima facie</u> attract the attention of the Committee.

    2. Where the retrospectivity involved is in relation to payment of moneys, the Committe will view the retrospectivity as requiring close scrutiny.

    3. The Committee has particular concern with retrospectivity which operates over an extended period of time. Obviously some retrospectivity is

unavoidable given the nature of administrative procedures. The Committee believes that such retrospectivity should be as short as practicable.

4. Regulations involving retrospectivity in payment of moneys extending beyond two years, will almost certainly be the subject of report to the Senate and unless exceptional circumstances are established, will usually be the subject of a recommendation for disallowance.

185. Examples of exceptional circumstances are described in the Committee's 63rd Report at paragraph 12, the 68th Report at paragraph 20, the 69th Report at paragraph 14, the 70th Report at paragraph 32 and in the 73rd Report at paragraph 54.

186. Generally speaking, Departments are careful to offer full explanations for retrospectivity in delegated legislation. However, where a full explanation is not given, the Committee may and usually will, give notice of motion of disallowance of the instrument pending receipt of a satisfactory explanation. During the period under review this has not been necessary.

187. As far as Defence Determinations are concerned, the Committee is pleased with the new practice of the Minister for Defence of sending to the Committee a detailed explanation for any lengthy retrospectivity in such Determinations. The consequence of this new practice is that an explanation for such retrospectivity is now available to the Committee at the time the relevant instrument is first being scrutinised, rather than, as previously, at a later time.

CHAPTER 9

OTHER MATTERS

Legal Adviser

188. The Committee once again places on public record its indebtedness to its Legal Adviser, Professor Douglas Whalan, of the Faculty of Law, Australian National University. It expresses its appreciation for the insight and skill he has brought to his examination of the material that is later to come before the Committee.

189. With great acumen, dedication and refreshing good humour, he has advised the Committee on questions arising from the application of its principles to delegated legislation. The work of the Legal Adviser was referred to in some detail in the 74th Report (at paragraph 98). The standard of scholarship and scrutiny which has characterised Professor Whalan's legal reports has assured his place as a distinguished servant of the Australian Parliament.

Ministers and Officials

190. The Committee expresses its appreciation for the advice and assistance given to it by Ministers and their officials in responding to the Committee's many requests for explanations of ordinances and regulations coming before it. The Committee understands the burden these requests often cast upon them but emphasizes that the task it performs is essential to the work of Parliament and to the community generally.

191. **Staff**

Finally, the Committee thanks all the members of its small but dedicated secretariat for their contribution to its work of scrutinising delegated legislation.

Barney Cooney
Chairman
March 1986

APPENDIX

Senate Standing Committee on Regulations and Ordinances

INSTRUMENTS MADE UNDER ACTS AND SUBJECT TO DISALLOWANCE OR DISAPPROVAL BY EITHER HOUSE OF THE PARLIAMENT

Instruments	Enactments
regulations	various acts, subject to Acts Interpretation Act 1901.
ordinances of territories	Ashmore and Cartier Islands Act 1933 S.6 Australian Antarctic Territory Act 1954 S.12 Christmas Island Act 1958 S.10 Cocos (Keeling) Islands Act 1955 S.13 Coral Sea Islands Act 1969 S.7 Heard Island and McDonald Islands Act 1953 S.11 Norfolk Island Act 1957 S.28 Seat of Government (Administration) Act 1910 S.12
regulations of territories	Christmas Island Interpretation Ordinance S.15 Cocos (Keeling) Islands Interpretation Ordinance S.15 Norfolk Island Interpretation Ordinance S.8 Various Ordinances, subject to Seat of Government (Administration) Act 1910
rules of court	Family Law Amendment Act 1983 S.75
rules (bankruptcy proceedings)	Bankruptcy Act 1966 S.315
rules (records and inspection)	Bankruptcy Amendment Act 1980 S.172
rules (Tenure Appeal Board and Disciplinary Appeal Board)	Australian Broadcasting Corporation Act 1983 S.83

rules of procedure	Defence Force Discipline Act 1982 S.149
rules (punishments)	Defence Legislation Amendment Act 1984 S.36
by-laws	Aboriginal Councils and Associations Act 1976 S.30 Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978 S.10 Australian National Airlines Act 1945 S.69 Australian National Railway Commission Act 1983 S.79 Australian Shipping Commission Amendment Act 1983 S.21 Defence Acts Amendment Act 1981 S.9. Postal Services Act 1975 S.115 Postal & Telecommunications Amendment Act (No. 2) 1983 SS 27, 28, 29. Telecommunications Act 1975 S.111
Orders under regulations	Environment Protection (Nuclear Codes) Act 1978 S.15 Meat Inspection Act 1983 S.36 Protection of the Sea (Discharge of Oil from Ships) Act 1981 S.22 Protection of the Sea (Powers of Intervention) Act S.24
orders (export licenses and meat quotas)	Australian Meat and Live-stock Corporation Amendment Act 1982 S.16M(1)
orders (Broadcasting Tribunal, conduct of broadcasting)	Broadcasting and Television Act 1942 S.17
orders (planning, technical services)	Broadcasting and Television Act 1942 S.111D
orders (technical services, interference, examinations)	Broadcasting and Television Act (No. 2) 1976 S.15

orders (application of duties)	Customs Tariff Act 1966 S.36
orders (control and administration of rifle ranges)	Defence Act 1903 S.123G
orders (Minister for Defence, restricted areas)	Defence (Special Undertakings) Act 1952 S.15
orders (administrative procedures)	Environment Protection (Impact of Proposals) Act 1974 S.7
orders (codes of practice, nuclear activities)	Environment Protection (Nuclear Codes) Act 1978 S.10
orders (special situations, nuclear activities)	Environment Protection (Nuclear Codes) Act 1978 S.14
orders (handling of explosives)	Explosives Act 1961 S.16
orders (prescribed goods, inspection, seizure, trade descriptions)	Export Control Act 1982 S.25
orders (instruments of the the Attorney-General)	Foreign Proceedings (Excess of Jurisdiction) Act 1984 SS.15,17
orders (eligibility of immigrants and refugees)	Health Legislation Amendment Act 1983 S.8
orders (Minister for Transport, shipping law codes)	Navigation Amendment Act 1912 S.426
orders (navigation, construction stowage safety)	Navigation Amendment Act 1979 S.91
orders (under regulations and articles of international convention)	Protection of the Sea (Prevention of Pollution from Ships) Act 1983 S.34
orders (emergency prohibitions or restrictions on transmitters)	Radiocommunications Act 1983 S.41
emergency orders	Australian Capital Teritory Electricity Supply Amendment Act 1982 S.6 Radiocommunications Act 1983 S.42
declarations (grants of mining interest)	Aboriginal Land Rights (Northern Territory) Act 1976 S.42

declarations by Minister on significant areas and objects	Aboriginal and Torres Strait Islanders Heritage (Interim Protection) Act 1984 S.15
declarations that the Approved Defence Projects Protection Act 1947 applies	Atomic Energy Act 1953 S.60
declarations (Ministerial dispensation)	Crimes (Foreign Incursions and Recruitment) Act 1978 S.9
declarations of international instruments	Human Rights Commission Act 1981 S.31
declarations (imports and exports of wildlife)	Wildlife Protection (Regulation of Exports and Imports) Act 1982 S.9
determinations (release of information)	Census and Statistics Amendment Act (No. 2) 1981 S.10
determinations (terms and conditions of employment)	Commonwealth Teaching Service Act 1972 SS.20, 23
determinations (remuneration, benefits and allowances)	Defence Act 1903 S.58C
interim determinations (conditions of employment	Defence Amendment Act 1979 S.13
determinations (inconsistent regulations)	Defence Amendment Act 1979 S.14
determinations (import parity pricing)	Excise Tariff Amendment Act (No. 2) 1983 S.4
determinations (plans of management)	Fishing Legislation Amendment Act 1985 S.6
determinations (variations of tables)	Health Insurance Amendment Act 1977 S.4
determinations (health services)	Health Legislation Amendment Act 1984 S.9.
determinations (definition of "basic private" and "basic table")	Health Legislation Amendment Act 1985 S.13
determinations (wholesale LPG prices)	Liquified Petroleum Gas (Grants) Amendment Act 1984 S.5

determinations placed before Parliament	Public Service Arbitration Act 1920 SS.22, 86E
determinations (fees)	Quarantine Amendment Act 1984 SS.25, 86E
determinations (terms and conditions of employment)	Public Service and Statutory Authority Amendment Act 1980 S.38
determinations (fees)	Seat of Government (Administration) Act 1910 S.12 (9A)
determinations (salaries)	Trade Commissioners Act 1933 S.11A
directions (substitutes and limitations)	Customs Tariff Act 1982 S.25
directions (goods consisting of separate articles)	Customs Tariff Act 1982 S.26
directions (cost of goods, value of labour and materials)	Customs Amendment Act 1983 S.5
directions (registered organisations)	Health Legislation Amendment Act (No. 2) 1982 S.19
directions (Health Insurance Commission)	Health Legislation Amendment Act 1983 S.73
directions (functions and powers of Clerk)	High Court of Australia Act 1979 S.19
directions of Minister	Parliament House Construction Authority Act 1979 S.9
directions (variations in recurrent expenditure)	States Grants (Tertiary Education Assistance) Act 1984 S.31
directions (variations in state entitlements)	States Grants (Tertiary Education Assistance) Act 1984 S.36
directions (variations in state entitlements)	State Grants (Tertiary Education Assistance) Act 1984 S.42

directions (additional conditions)	States Grants (Tertiary Education Assistance) Act 1984 S.46
proclamation of property for listing	World Heritage Property Conservation Act 1983 S.15
notices (classification of machines)	Bounty (Computers) Act 1984 S.5
notices (diesel fuel rebate)	Customs Act 1901 S.164(1) Excise Act 1901 S.78A(SA) as amended by Customs and Excise legislation Amendment Act (No. 2) 1985
notices (application of Act to other countries)	Extradition (Commonwealth Countries) Act 1985 S.4
notices under fishing regulations	Fishing Legislation Amendment Act (No. 1) 1984 S.11
notices (acquisition of lands)	Land Acquisition Act 1955 S.12
zoning plans (marine parks)	Great Barrier Reef Marine Park Act 1975 S.33
plans of management	National Parks and Wildlife Conservation Act 1975 S.12
plans (frequency bands)	Radiocommunications Act 1983 S.20
principles (determination of quotas)	Dairy Industry Stabilization Act 1977 S.11A Dairy Industry Stabilization Amendment Act 1978 S.5
principles (approval of private hospitals)	Health Legislation Amendment Act 1983 S.31
principles (approval of nursing homes)	Health Legislation Amendment Act (No. 2) 1983 SS.48, 74
principles (scale of fees)	National Health Amendment Act 1983 S.3
guidelines (payment of Medicare benefits)	Health Insurance Amendment Act 1984 S.3

guidelines (allocation of fuel)	Liquid Fuel Emergency Act 1984 S.41
guidelines (transmitter licences)	Radiocommunications Act 1983 S.25
Suspension of member of statutory authority	Automotive Industry Authority Act 1984 S.21
Suspension of member of a statutory authority	Steel Industry Authority Act 1983 S.18
Suspension of Commissioner or Second Commissioner	Taxation Laws Amendment Act 1984 S.295
amendments of schemes (grants to states, petroleum prices)	States Grants (Petroleum Products) Act 1965 S.7A
modifications of variations of Canberra planning	Seat of Government (Administration) Act 1910 S.12A
instruments of revocation (guidelines for medical and hospital benefits plans)	National Health Act 1953 S.73E
instruments applying to relevant Acts	Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 S.4