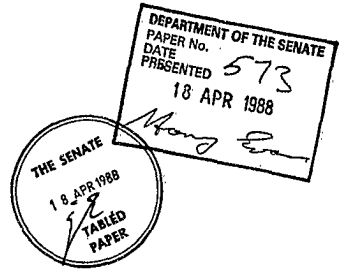

The Parliament of the Commonwealth of Australia

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

EIGHTY-THIRD REPORT

April 1988

Philosophy, Goals and Role of the Committee
Guidelines on the Application of the Committee's Principles
A Request for Better Explanatory Statements
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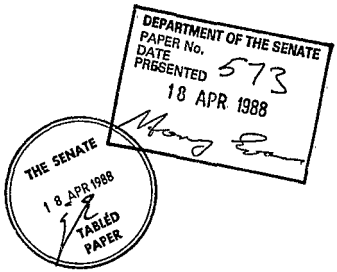

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CONTENTS

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

[T]he Committee is a focus for bipartisanship and concern about the rights of Parliament. It therefore fosters a spirit of bipartisanship and equity which is vital to the balanced and truly democratic operation of a House of Parliament.[1]

MEMBERS OF THE COMMITTEE

THIRTY-FOURTH PARLIAMENT

First Session
(until 5 June 1987)

Senator B. Cooney (Chairman)
Senator A.W.R. Lewis (Deputy Chairman)
Senator J. Coates
Senator P. J. Giles
Senator A.E. Vanstone
Senator The Rt Hon. R.G. Withers

- - - -

THIRTY-FIFTH PARLIAMENT

First Session[2]
(from 14 September 1987)

Senator R. Collins (Chairman)[3]
Senator B. Bishop (Deputy Chairman)[4]
Senator The Hon. A. T. Gietzelt[5]
Senator P. J. Giles
Senator R. F. McMullan[6]
Senator J. Stone
Senator K. Patterson[7]
Senator B. C. Teague[8]

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1. Senator R Collins, Senate Hansard, 17 December 1987, page 3267
2. Appointed by the Senate, 17 September 1987
3. Elected by the Committee, 8 October 1987
4. Appointed by the Chairman pursuant to Standing Order 36A(3B)
5. Discharged, 24 February 1988
6. Appointed, 24 February 1988
7. Appointed, 24 February 1988
8. Discharged, 24 February 1988

...in any political system, from the most systematic tyranny to the most enlightened democracy, the individual may sometimes feel himself caught up in an impersonal administrative machine. And unless he is assured both of formal safeguards and of the sympathy of vigilant neighbours the consequences for him may be tragic.[1]

PRINCIPLES OF THE COMMITTEE

(Adopted 1932: Amended 1979[2])

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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1. Peter Archer and Lord Reay, Freedom at Stake, The Bodley Head, London, 1966, page 7
2. Sixty-fourth Report, March 1979, Parliamentary Paper No. 42/1979

CHAPTER 1

SUMMARY OF THE COMMITTEE'S WORK

JULY 1986 - JUNE 1987

...each year the task of subordinate legislative scrutiny becomes more difficult because of the increasing numbers of delegated legislative instruments subject to parliamentary scrutiny, the ever increasing pressure of time on all parliamentarians including Committee members and the limited resources of the Committee's smaller than usual secretariat.[1]

Introduction

1.1 The main purposes of this Report are -

- to provide general information on the philosophy of the Committee's work as a legislative scrutiny Committee; and

- to give details of the Committee's examination of delegated legislation which contained, or was thought to contain, provisions that threatened rights or ignored proprieties.

1.2 In its Fifteenth Report (September 1959)[2] the Committee of that era described its position in this way -

> This Committee regards itself as charged with the duty of supervision of the powers of delegated legislation in this Parliament for the purpose of assisting the Senate in this aspect of its work as a House of Review. Witnesses before the 1929 Select Committee stressed that the Senate was the appropriate House for the careful supervision of

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1. Senator R. Collins, Senate Hansard, 17 December 1987, page 3265
2. Reprinted in Parliamentary Paper No. 188/1969, page 158, para. 13

> delegated legislation, and the Committee, in exercising that supervision, draws strength from the wording ... of the motion appointing the 1929 Committee to the effect that the appointment of a Committee to investigate the Standing Committee system was with a view to improving the legislative work of the Senate.

1.3 The Parliament does not, of course, "make" delegated legislation. It is made by suitably high-ranking delegates in whom the Parliament invests a measure of its own parliamentary power and authority. Yet, when government dons the apparell of Parliament, as it does in promulgating subordinate laws, it is Parliament that is called upon to justify itself. The statutory disallowance scheme provides that justification. The responsible exercise of powers of disallowance for policy reasons, and the establishment of a bipartisan, backbench Committee owing no obligations to Government in carrying out a task of technical scrutiny to protect rights and liberties, provides the Senate with the essential equipment for overseeing the development of extra-parliamentary laws. Although the Committee's task is a difficult one, the Committee endorses the remarks of its Chairman when he informed the Senate that -

> In spite of the large expenditure of effort needed to maintain its position, the present Committee will not be deflected from preserving (its) high standards.[3]

Statistics

1.4 During the period from July 1986 to June 1987 the Committee held 22 private meetings and considered 832 instruments of delegated legislation. This scrutiny was carried out with the assistance of 56 legal adviser's reports, initially from its Adviser, Professor Douglas Whalan, and later from its Acting Adviser, Professor Dennis Pearce, both of the

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3. Senator Collins, Senate Hansard, 17 December 1987, page 3267

Faculty of Law in the Australian National University. At 4 of its meetings the Committee took in camera evidence from Government officials who attended in order to assist with the examination of particular items of legislation.

Numbers of Instruments Scrutinised

1.5 The Committee examined the following types and numbers of instruments:

Statutory Rules	322
A.C.T. Ordinances	105
A.C.T. Regulations	30
Public Service Board and Commonwealth Teaching Service Determinations	94
Defence Determinations	109
Navigation Orders	15
Telecommunications By-laws	16
Others	141[4]
Total	832

1.6 Out of this total of 832 instruments considered, 91, or approximately 11 per cent, were of particular interest to the Committee under its Principles and were the subject of correspondence to Ministers and Statutory Authorities. Some 51 of these instruments, giving rise to particularly noteworthy issues, are reported on in this Report. Of these:

- 28 were of sufficient concern to the Committee for it to request and obtain ministerial undertakings to amend existing provisions or insert new provisions to protect personal rights and parliamentary proprieties;

- 23 gave rise to ministerial explanations or assurances

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4. See Appendix 1 for a classification of these instruments

which were accepted by the Committee and therefore warranted no further action;

- 16 other matters of lesser importance were also dealt with (e.g. drafting matters, presentation of instruments, inadequate explanatory statements and the like); and

- 24 matters were still being considered at the close of the present reporting period.

1.7 No legislation was disallowed at the request of the Committee, although 45 protective notices of motion of disallowance were given. Protective notices enable the Committee to protect its position while correspondence is considered by Ministers and their advisers. Thus, out of 832 instruments, Ministers agreed to amend 28, or approximately 3 per cent. However, that small residue belies the significance of the changes obtained through the intervention of the Committee. In addition, the salutary effect of the Committee's existence should not be ignored in assessing its impact. The standards which the Committee looks for are standards which all professional public servants, including legal drafters, now seek to attain.

Important Ministerial Undertakings

1.8 Among the more important ministerial undertakings obtained by the Committee during the year were the following:

- to provide for AAT review of unreviewable ministerial and bureaucratic discretions, particularly where the adverse exercise of such discretions affected a person's reputation or right to engage fully in a trade, business or profession;

- to correct invalid and unlawful provisions;

- to reinstate a sunset clause in the Blood Donation (Acquired Immune Deficiency Syndrome) Ordinance;

- to insert in a large number of provisions of the Children's Services Ordinance further and better protections for children in need of care or in police custody;

- to require that written reasons for an adverse decision, particularly a licencing decision, should accompany, or as soon as possible follow, the notification of such a decision, especially in circumstances where an applicant for a licence was required to submit an application which was costly to prepare, or where an adverse decision affected a person's right to engage in a trade, business or profession;

- to require that Government inspectors and officials with powers to enter private property and inspect documents while performing their official duties, should carry and produce official photographic identity cards;

- to ensure that sub-delegated instruments of a legislative or quasi-legislative character were subject to parliamentary supervision by means of tabling and a statutory right to move for disallowance;

- to prevent an employee suffering adverse professional consequences from mere "guilt by association" where an employer was in breach of professional ethics;

- to stress the legal limits of large and intrusive

powers, particularly those of the police, other law enforcers and public employers, by means of the express, declaratory inclusion of the qualifying adjective "reasonable" in empowering provisions;

- to insert a sunset clause which would provide that permanent exclusions from the scope of the Sex Discrimination Act would be reduced to mere temporary exemptions, while further consideration was given to bringing as many as possible of the exclusions within the jurisdiction of the Act.

Special Committee Report

1.9 On 4 December 1986 the Committee tabled in the Senate its Eighty-first Report concerning the application of Principle (d) of the Committee's terms of reference to A.C.T. laws.

1.10 Principle (d) requires the Committee to scrutinise delegated legislation to ensure that it does not contain matter more appropriate for parliamentary enactment. The Report discussed the application of this Principle to A.C.T. Ordinances which are often substantive instruments performing for the A.C.T. the legislative function performed by statutes in the States and the Northern Territory. The Committee concluded that since A.C.T. legislation was made by Ministers under delegations from Parliament, it should remain subject to Committee scrutiny under Principle (d). However, the Committee proposed that it would present special reports to the Senate on important Ordinances which, while not at variance with Principle (d) in its broad sense, contained matter which was substantial, socially innovative or made a marked change in the law of which Parliament should take special note.

The Role of Ministers

1.11 This Report refers to a number of amendments to delegated legislation made or proposed to be made by Ministers following representations from the Committee. Without the co-operation of these Ministers (and their advisers) the effectiveness of the Committee as a parliamentary watchdog would be reduced. The Committee expresses its appreciation to Ministers for their commitment to the protection of personal rights and the observance of parliamentary proprieties in their delegated legislation. The Committee acknowledges the readiness of Ministers to respect the Committee's role in drawing attention to departures from these standards. Their co-operation is not without appropriate reward the nature of which was aptly summed up by the Chairman of the Committee when he told the Senate[5]

> ...when the Committee remedies legislative flaws, the Government benefits because the Committee's preventative and curative work restrains bureaucratic over-enthusiasm. It presses caution on those who might seek unnecessary subordinate powers for themselves by means of unnecessary subordinate laws made by themselves. It seeks the removal from legislation or the inclusion in legislation of provisions whose presence or absence, as the case may be, could cause real public distress further down the track... the Committee in its role assists Ministers to avoid future problems with delegated law-making. The Committee is a safety-valve for Ministers, a lightning-rod to disperse potentially harmful public or parliamentary grievance over regulations which trespass on personal rights or create sub-delegated powers whose exercise might by-pass parliamentary processes.

1.12 This coincidence between the aims of the Committee and their beneficial consequences for enlightened Ministers has not always been recognised. Yet the formula which predicts its existence long pre-dates even the establishment of the Committee. In 1928 Mr Justice

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5. Senator Collins, op. cit. page 3267

Brandeis, dissenting in Olmstead v United States[6], said

> In a government of laws, the existence of the government will be imperilled if it fails to observe the law scrupulously.

1.13 The law that ceaselessly demands perfection is that which Thomas Jefferson called "the fundamental law of society",[7] namely justice. The Committee is in the business of ensuring, as far as it can do so, that regulatory laws are just laws which respect the personal rights and liberties of individuals.

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6. Olmstead et al v United States (1927) 277 US 438, at 485
7. Letter to Dupont de Nemours, 1816, in Thomas Jefferson on Democracy, ed. Saul K. Padover, Mentor, 1954, page 18

CHAPTER 2

PHILOSOPHY, GOALS AND ROLE OF THE COMMITTEE

... A committee ... has to know what it is about and it has to be committed to maintaining fundamental liberties ...It has to have some ability to defeat the Ministry, if need be ...It has to have the ability to realise that in this business, the Minister and the executive at this level are the enemy. If a committee does not adopt that approach, a number of defects will get through.[1]

Past Chairman

2.1 The legislation dealt with in this Report was considered by the Committee while under the Chairmanship of Senator Barney Cooney. On 4 June 1987, the day before the Thirty-fourth Parliament was dissolved, Senator Cooney, as the outgoing Chairman, made a personal statement to the Senate summarising for the record the bipartisan role of the Committee during that Parliament. (Senate Hansard, 4 June 1987, page 3524). The Committee regards this statement as a significant expression of its philosophy, goals and role and it is here reproduced in full for the information of those interested in delegated legislation.

Statement by Senator Cooney,
Outgoing Chairman of the Committee, 4 June 1987

2.2 "Since the commencement of the Thirty-fourth Parliament in February 1985, the Committee has examined over 2,000 instruments of delegated legislation. Just under 10 per cent of these were the subject of correspondence between the Committee and Ministers who gave undertakings to amend legislation, either to protect the rights of individuals or to uphold the proprieties of parliamentary government. The Committee's scrutiny directly brought about the

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1. Senator Barney Cooney, Conference of Australian Subordinate Legislation Committees, 4-6 June 1986, Report of the Proceedings, Parliament House, Brisbane, page 76

disallowance of 2 instruments; one involved a very serious potential trespass on rights of medical privacy and was disallowed with the agreement of the responsible Minister; the other involved a trespass on Parliament's right to exercise proper control over delegated legislation which repealed earlier legislation.

2.3 "The Committee is one of the Australian Parliament's oldest and most respected watchdogs of personal rights and freedoms. With learned legal advice from Professor Douglas Whalan and Professor Dennis Pearce of the Faculty of Law in the Australian National University, the Committee scrutinises each instrument of delegated legislation in the light of four Principles which are the Committee's terms of reference. Thus, the Committee asks itself:

- is the instrument of delegated legislation in accordance with the statute;
- does it trespass unduly on personal rights or liberties;
- does it make the rights and liberties of citizens unduly dependent on administrative discretions that are not subject to judicial and merits review; and
- does it contain matter more appropriate for a Bill in Parliament.

2.4 "Criteria almost identical to these were suggested by a Senate Select Committee in 1930 and adopted by the Committee in 1932. They have been viewed by the Committee, since its first appointment 55 years ago, as a miniature code of legislative propriety from whose general principles the Committee has creatively extracted and vigorously applied standards and prescriptions for the protection of individual rights that might be affected by delegated legislation.

2.5 "During the Thirty-fourth Parliament the application and interpretation of its Principles has taken the Committee through the task of scrutinizing hundreds of routine instruments to the very frontiers of the protection of ordinary people's rights. This progress through the undergrowth of subordinate law to important challenges against the conferral of excessive powers, is recorded in the 6 reports tabled by the Committee during the Thirty-fourth Parliament. It included successful Committee challenges to:

- unduly wide powers to search premises and seize documents;

- conferral of powers to issue telephone search warrants on magistrates and court officials when such remarkable powers should be reserved to superior court judges;

- insufficiently protective rules permitting extradition to South Africa;

- the enactment of a wide statutory defence for medical authorities sued for negligence by patients or workers who had contracted Acquired Immune Deficiency Syndrome from blood transfusions or from working with blood products;

- powers conferred on the Health Insurance Commission that would have allowed it to transfer to the Department of Social Security computer-coded data from which could be deduced the private medical histories of millions of Australians over more than a decade;

- criminal law provisions which greatly diminished a person's right to trial by jury for certain offences;

- amendments to a licencing scheme which ignored the need to protect the right to a livelihood by increasing licencing fees 300-fold, from a few hundred dollars to tens of thousands of dollars, before all existing applicants under the old fee structure had been properly dealt with;

- the continued avoidance of recommendations, made 7 years previously, to provide a right of appeal against certain administrative decisions adversely affecting the benefits of retired people or their dependents;

- regulatory provisions which inadvertently had the effect of discriminating against non-Christians;

- the regulatory conferral on certain boards of inquiry of powers to identify and punish contempt, which were greater even than those of a Royal Commission established by an Act of Parliament;

- the periodic conferral on Government officials of unreviewable discretionary powers, the unreasonable exercise of which could affect business reputations and remove or undermine the right to practice a trade or profession;

- attempts to create strict liability offences which might impose criminal liability without proof of criminal guilt;

- attempts to penalise acts or omissions for which no reasonable justification or defence would be permitted;

- regulatory provisions which failed to ensure that officials exercising power to enter business premises and private property displayed photographic identity cards and proceeded with freely-given consent where

appropriate;

- provisions concerning the treatment of young offenders and children in need of care, where the rights of parents to appeal to a magistrate for the release of a child were inadequate, and where police powers to detain children and take samples of body materials were wider than was necessary;

- regulations which would have enabled the doctrine of Cabinet secrecy to be used in an inappropriate way to prevent people from obtaining reasons for important licencing decisions affecting businesses and livelihoods;

- powers to make sub-delegated instruments which would not be subject to tabling and disallowance in the Parliament; and

- provisions providing for the parentage of artificially conceived children where the Committee strongly recommended that matters of such sensitivity and significance should, in future, be dealt with in legislation before the Parliament.

2.6 "In all but the last of these matters the Committee's intervention resulted in ministerial agreements to amend delegated legislation in order to protect those rights about which the Committee had resolutely expressed its concern. It should be borne in mind that the Committee encountered all of these issues of personal liberty and parliamentary propriety, not in Bills, but in subordinate legislation. There is, of course, widespread agreement that, because of the heavy responsibilities of Ministers in *managing public and political affairs and piloting major* legislation through Parliament, subordinate law-making is today, no less than in Lord Hewart's time,

departmentally-made law. The Committee, perhaps more than any other Senate Committee, is thus engaged in the oversight of the bureaucracy as a law-maker. The bureaucratic imperative is to organise and manage. The bureaucracy is thus a useful, indeed an essential, vehicle for the national administration of large and sophisticated Government programs and policies. Yet bureaucratic law-makers can wittingly and unwittingly overlook the problems and predicaments of individuals who may be affected more than marginally by the impersonal, mechanistic and discretionary methods of even the best intentioned bureaucratic organisation. Sometimes though the best of intentions are not always to the fore. Yet subordinate law is real law. Its obligations can be onerous and its penalties are enforceable by law enforcement agencies. Even where full access to Courts and Tribunals is provided for under regulatory law-making, the wisdom of Solomon cannot correct the deficiencies of bad laws that reflect insensitivity to the rights of ordinary people. Administrative efficiency is a tarnished goal if to attain it individuals must be treated unjustly through the agency of unjust regulatory laws.

2.7 "Unlike primary legislation which is enacted only after wide publicity, public discussion and Second Reading and Committee debates in two Houses of Parliament, the making of secondary legislation can sometimes involve only the privileged few behind the veil of Departmental confidentiality. Fortunately there is now an increasing tendency for subordinate law-makers to consult more widely and more publicly before making delegated legislation. This trend is to be welcomed and encouraged. Part of the Committee's support for this process has been its efforts over the past months to ensure that when delegated legislation is tabled in the Parliament there is available to parliamentarians and the community an explanatory statement detailing the purpose and effects of the new

rules and describing the consultative processes which have preceded their formulation. The Committee has a responsibility to the Parliament to ensure that the making of subordinate laws reflects adequate public and parliamentary participation.

2.8 "It should be stressed, however, that the Committee itself assiduously avoids questioning the policy or merits of delegated legislation. Its task is one of technical scrutiny in which it examines the justice, the fairness or the propriety of the way in which regulatory measures are determined and imposed. Properly limited by its narrow remit, it does not look for the political acceptability of the policy being pursued. That is the province of the Parliament itself. Rather the Committee looks for wisdom, fairness, justice and restraint in the regulatory procedures to be followed in achieving that policy. The Committee is concerned with the justice and propriety of ways and means. It is because of its avoidance of issues of policy that the Committee has traditionally been such a strong bipartisan force within the Senate. It is a backbench Committee whose members can temporarily set political differences to one side. The Committee's remit thus allows strongly held and shared principles of liberty and propriety to create and underpin that bipartisan spirit which is the source of the Committee's authority in the Chamber, and beyond that in the Government and the Public Service. Even though the pressures can occasionally be considerable, no Senator who has served on the Committee has ever been known to betray that bipartisan loyalty to principled scrutiny. Although it is traditionally a Committee with a very stable membership there are in the Thirty-fourth Parliament a large number of backbench Senators and Ministers who have, at some time, served on the Committee, lived up to its high ideals and who now continue to respect and support its work.

2.9 "In the application of its principles the Committee is in the business of setting standards for delegated law-making - *standards of prior consultation; standards of clarity in* drafting; standards of presentation to Parliament; standards of liberty and propriety. In setting standards the Committee always runs the risk that it will offend those whose standards are lower and less sensitive to the needs of ordinary people and busy parliamentarians. That is a risk that a strong bipartisan scrutiny Committee readily accepts. The Committee acts on the best legal advice it can obtain within the proper, but nevertheless short, time frames with which it scrutinises delegated legislation. It seeks the cooperation and advice of Ministers. However, though it endeavours to proceed to reasonable resolutions of its concerns, it is not for the Committee to make compromises if to do so would leave people prejudiced by or unprotected by legislative provisions in any dispute they might have with the powers of Government. The Committee's role is to scrutinise that which is intimidating in its bulk and complexity. Its method is to express concern and suggest remedies in order to prevent the erosion of rights and liberties. In doing this it is not intimidated even by institutions as powerful as the Government or the Public Service. Fortunately, the problem seldom arises because Ministers making delegated legislation are themselves parliamentarians who are sensitive to the preservation of parliamentary supremacy. This sensitivity is invariably combined with a deep commitment to the protection of personal rights in delegated legislation for which they are responsible to the public and accountable in the Parliament.

2.10 "Finally, in this Chairman's statement summarising the role of the Committee in the Thirty-fourth Parliament, I pay a sincere tribute to my present colleagues on the Committee, Senators Lewis, Coates, Giles, Vanstone and Withers who have made my membership of the Committee a pleasure, a

privilege and the occasion for satisfying parliamentary work."

CHAPTER 3

A REQUEST FOR BETTER EXPLANATORY STATEMENTS

The Committee has been concerned ... at the proliferation of instruments ... in a form other than regulations. The main reason for this would ... appear to be ... a belief in the Departments administering the relevant legislation that the regulation-making process has become cumbersome and lacks ... flexibility ... it considers the proliferation of substitutes for regulations to be undesirable ... it is much more difficult to ascertain whether a power to determine some matter by notice has been exercised and, if so, to find a copy of the relevant notice. The proliferation of such notices thus makes it more difficult for the public at large to ascertain what the law is in relation to a particular matter ... such notices, although they have legislative effect, are not prepared by the professional drafters in the Attorney-General's Department but by Departmental officers. They may thus lack the precision required in legislative instruments and, if found defective in subsequent litigation, may result in significant additional costs for the Commonwealth.[1]

The Need for Explanations

3.1 In its Seventy-sixth Report[2] the Committee discussed at some length its interpretation of the scope of Principle (a) of its terms of reference. Principle (a) requires the Committee to examine delegated legislation to ensure that it is "in accordance with the statute". The Committee has always acted on the basis that questions concerning the tabling and disallowance of delegated legislation fall within the scope of Principle (a). In that Report the Committee stated -

> The explanation for this (interpretation) is that in an enabling Act, which empowers the making of delegated legislation, the Committee assumes that it was Parliament's intention to preserve proper control over that delegated legislation. Delegated legislation which is not fully subject to such control is therefore viewed as not being in

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1. Senate Standing Committee for the Scrutiny of Bills, Annual Report 1986-87, para. 2.33
2. Parliamentary Paper No. 507/1985

accordance with the statute.[3]

3.2 It follows from this that the Committee has a proper concern to ensure that disallowable legislation is tabled in a form which facilitates proper parliamentary supervision. This concern about presentational aspects of subordinate law arises from what has been called "the less controversial but equally important and effective work carried on by the Committee in its general supervision of delegated legislation".[4] Delegated legislation is, of its very nature, technical, detailed and complex and it is only rarely that it is self-explanatory and easily comprehended by anyone other than the officials responsible for preparing it.

The Committee's Long-standing Concern

3.3 Since its earliest days the Committee has endeavoured to ensure that instruments referred to it for scrutiny are accompanied by proper explanatory statements that help busy parliamentarians to understand their legality and impact. The Minutes of the Committee's first meeting, on 4 May 1932, chaired by Senator Sir Hal Colebatch, record the Committee's resolution -

> That a circular be sent to each Department asking that when Regulations or Ordinances are sent for tabling, they be accompanied by a memorandum explaining their purpose.

3.4 In its Second Report (December 1933)[5] the Committee acknowledged "the great assistance it has received from the practice, instituted last year, of the department concerned in the issue of a new or an amending regulation supplying an explanation of the effect of, or the changes worked by,

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3. op. cit. page 18, para. 7
4. Nineteenth Report, May 1964, reprinted in Parliamentary Paper, No. 188/1969, page 177
5. Parliamentary Paper, No. 188/1969, page 15

such regulation".

3.5 In its Fourth and Fifth Reports (June 1938 and September 1942)[6] the Committee explained that its practice was to obtain from the department responsible for the issue of a regulation or an ordinance "a full explanation of it with the reasons for the making thereof". The Committee informed the Senate that -

> These explanations are considered by the Committee in conjunction with the regulation or ordinance under examination, and have been found helpful.[7]

3.6 In its Eighth Report (June 1952)[8] the Committee again referred to the way its work had been assisted by the departmental explanation which set out "first, the effect of the regulation and secondly, the reason for enacting it".[9]

3.7 In its Seventy-first and Seventy-third Reports (March and December 1982)[10] the Committee commented on the importance of explanatory statements. In the former report the Committee noted that -

> In pursuing its work of examining delegated legislation on behalf of the Senate, the Committee is dependent upon Explanatory Statements, provided with the instruments, for the reasons for making the legislation, and the effects it might have, in the same way as the Senate itself is dependent upon Ministers' Second Reading speeches and Explanatory Memoranda on parent legislation.[11]

3.8 The Eightieth Report (October 1986)[12] again noted that the Committee,

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6. Parliamentary Paper, No. 188/1969, pages 25 and 33
7. op. cit. page 26, para. 5
8. Parliamentary Paper, No. 188/1969, page 61
9. op. cit. page 62, para. 8
10. Parliamentary Papers, Nos. 47/1982 and 326/1982
11. op. cit. page 16,/para. 50
12. Parliamentary Paper, No. 241/1986

> "... faced with the task of scrutinising over 800 complex instruments annually, makes initial use of any accompanying Explanatory Statement. Such a Statement should accompany virtually all instruments. Prepared by expert officials familiar with the instruments, it should make express reference to the statutory authority under which the instrument is made. It should explain, as far as possible, in terms referable to the regulation-making power, the reasons why the instrument is necessary and how it gives effect to the objects of the Act. By taking time to do this, officials can avoid a later waste of ministerial time in responding to the Committee's requests for explanation and elucidation of issues that should have been dealt with in the Statement in order to dispel concern under the Committee's Principles."[13]

Regulations and Ordinances

3.9 For many years now regulations and ordinances sent to the Committee for examination have been accompanied by explanatory statements. Generally, though by no means always, these statements describe the legal authority under which legislation is made, the reasons for its enactment and the meaning of its provisions. The standard of these explanations is generally satisfactory though many statements give little information about the reasons for the legislation and its expected impact. Occasionally, the Committee has been disappointed with the quality of these explanations and has written to responsible Ministers to request improvements such as the inclusion of a more adequate explanation of why subordinate legislation was considered necessary, or the inclusion of adequate reasons for any retrospectivity or large fee increases in the instruments.

The Problem of New Types of Subordinate Legislation

3.10 Over the years the range of legislative instruments made

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13. op. cit. page 30, para. 3.13

subject to tabling and disallowance in Parliament has increased considerably. The Committee's Eightieth Report refers to 19 distinguishable categories of instruments considered by the Committee in 1985/86, other than regulations and ordinances. Indeed, Appendix 3 of that report lists over 90 legislative sources for different types of legislative instruments other than regulations or ordinances, which are the subject of scrutiny under Senate Standing Order 36A.[14] Paragraph (4) of this Standing Order provides that all regulations, ordinances and other instruments made under the authority of Acts of Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the Committee for consideration and any necessary report or action. An up-dated version of that 1985 Appendix appears in Appendix 2 of this Report listing over 100 legislative sources for different kinds of instruments other than regulations and ordinances. In its Seventy-first Report (March 1982)[15] the Committee listed over 30 sources for delegated legislative instruments other than regulations and ordinances. In its Sixty-second Report (September 1978)[16] that figure was only just over 20 sources. The drift towards less formal subordinate law-making is clearly evident.

3.11 A small number of these new categories of instruments is accompanied by explanatory statements of varying quality, for example, Public Service Board Determinations, Defence Determinations, Telecom By-laws, Postal By-laws, Primary Industry Orders and Environmental Plans of Management.

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14. The Committee has noted that in its Annual Report, 1986-87 (November 1987, para 2.33) the Senate Standing Committee for the Scrutiny of Bills has been critical of the increasing tendency for Bills to permit subordinate law-making powers to be exercised in increasingly informal ways through the mechanism of notices, determinations and declarations etc., with consequent problems of clarity, certainty and accessability.
15. Parliamentary Paper No. 47/1982
16. Parliamentary Paper No. 203/1978

However, many other instruments received by the Committee have not been accompanied by any explanatory note, for example, various *Determinations* made under A.C.T. Ordinances, Fisheries Notices, Remuneration Tribunal Determinations, various Health Legislation Determinations and Guidelines, various States Grants Determinations and Australian Meat and Live-stock Corporation Orders.

3.12 It is extremely difficult even for an expert Committee, let alone other busy parliamentarians, to understand the overall significance of specialist legislative instruments like these without some competently written explanation from the relevant Minister. The case for all instruments to be accompanied by expertly drawn and informative explanatory statements is overwhelming.

3.13 The Committee is pleased to report that since it first raised this question in 1986 many Ministers have given instructions to their officials to ensure that the Committee is supplied with adequate explanatory statements. The Committee thanks the Ministers who have adopted this helpful approach.

Standards for New Subordinate Instruments

3.14 Although the provision of formal ministerial explanations will assist the Committee's scrutiny, the Committee remains concerned about the implications for the rule of law of the increasing range of subordinate law-making options becoming available to Ministers. Like the Scrutiny of Bills Committee (see footnote 14) the Committee is concerned about the increasing drift of subordinate law-making away from formal to informal methods. On 28 May 1987 the outgoing Chairman of the Committee, Senator Cooney made the following statement to the Senate about this matter -

For some time now the Committee has been concerned about the implications of the perceived drift in delegated legislation, away from professionally prepared and presented instruments, to less formal documents of a legislative and quasi-legislative character. The Committee has understood that when delegated legislation is made in the form of, for example, Statutory Rules;

it is drafted by professionally skilled legislative drafters;

it is briefly annotated to identify previously related instruments;

it is printed and assigned a sequential number for citation and reference purposes;

it is considered by the Federal Executive Council and its attendant scrutiny processes;

it is tabled in Parliament with an explanatory statement indicating the authority under which it is made and briefly describing its purposes and impact; and finally

it is made available for wide dissemination to users and the public generally.

Each of these steps is an important part of the subordinate law-making process, designed to provide some procedural as well as some parliamentary supervision over the exercise of ministerial powers to make law outside the procedures of the primary law-makers in Parliament.

Apart from the involvement of the Federal Executive Council, which arises from the formal legislative empowering of the Governor-General to make delegated legislation, the Committee finds it difficult to accept that these procedural and presentational requirements should not be uniformly adopted for all delegated legislative instruments. That which may cause possible objection for financial reasons, namely the provision of a brief explanatory statement, should in reality have no significant resource implication at all. In practice a Minister, contemplating the making of a delegated instrument, will always insist on having before him or her a document or submission describing the purpose and import of the draft instrument he or she is considering. Such a document would, of course, with little redrafting,

qualify as an explanatory statement to inform and assist the Parliament, before whose members the signed instrument is tabled for approval or dissent.

The Need for a Re-examination of Modes of Law-making

3.15 It may be that for reasons of convenience and expediency there is a desire to avoid the formal procedural steps associated with the making of regulations and ordinances. Yet those very procedures often represent checks and balances which can serve to improve the quality, propriety and fairness of secondary law-making. A desire to avoid or downgrade these standards betrays a lack of appreciation of what Parliament expects of its Executive when it delegates widesweeping and important law-making powers. One of the most serious of the consequences arising from less formal subordinate law-making is that public and even professional access to the law becomes more difficult. Instruments are not printed, cited, annotated or bound as occurs with legislation in the Statutory Rules series. The Committee suggests that greater attention may need to be paid to clauses of Bills which exempt instruments from the Statutory Rules Publications Act 1903. The Parliament is not likely to go on accepting uncritically a practice of delegation which, wittingly or unwittingly, evidences a lack of concern, not only for the ultimate role played by Parliament in sanctioning subordinate law-making, but also for the access needs of the people directly and indirectly affected by such laws.

3.16 Executive law-making power is one of the least considered but in potential, one of the most dangerous sources of power in a parliamentary democracy. Those who wish to make use of that power have access to a growing range of different types of instruments which the Parliament and the public find difficult to keep track of. An effort should be made to reduce the categories of subordinate legislative instruments and bring about a greater degree of uniformity

in their presentation and publication.

Citation of Delegated Legislation

3.17 The Committee is also concerned about another problem which is related, to some extent, to the lack of forethought which allows numerous complicated instruments to be tabled in the Parliament without adequate, or sometimes any, explanatory statements. Various classes of instruments, made on a recurring basis, are often not sequentially numbered for ease of identification, citation and reference. They often contain no notes to enable users to trace the legislative history of previous provisions. Often these instruments can be cited only in a cumbersome and inconvenient way by reference to the enabling Act and the date of making. The case for sequential numbering and ease of citation of all delegated legislative instruments subject to tabling and disallowance in Parliament is no less overwhelming than is the case that they be accompanied by proper explanatory statements.

3.18 The Committee does not consider that improvements in the presentation of delegated legislation and its accessibility to the public would result in any significant increased costs. As noted above, the documentation prepared for submission to the Minister along with draft instruments for signature could be quite easily re-drafted to suit the requirements of an explanatory statement.

3.19 In the longer term, ease of public access, the provision of explanatory statements and sequential numbering of instruments could result in various significant savings if only in the time and effort presently expended by many parliamentarians, public servants, lawyers, journalists and members of the public in trying to find and understand delegated legislation. A greater openness in the administrative processes for making delegated legislation

could also reduce the overall volume of legislation and its associated expense by requiring delegates to focus more clearly and more immediately on the legal, practical and policy justifications for it.

3.20 There is a need for delegated law-makers to engage in wider consultation with groups affected by proposed laws, the drafts of which should be circulated more widely and more frequently.

CHAPTER 4

GUIDELINES ON THE COMMITTEE'S APPLICATION OF ITS PRINCIPLES

The process of subordinate law-making, apparently by Ministers but in reality by departmental bureaucrats, can be assisted only by their paying close attention to the kinds of flaws and problems in the law which the Committee brings to light.[1]

Dynamic Principles

4.1 The Committee scrutinises delegated legislation in accordance with four briefly stated Principles which appear at the beginning of this and every Committee Report. The Principles are formulated in a succinct format because they are intended to represent the broadest possible statement of rules of delegated legislative propriety. As such they are capable of evolutionary interpretation and application. This enables the Committee to meet the challenge of new trends and problems that arise from the evolution of delegated law-making itself. Over time new themes and interests emerge which are relevant to the protection of the rights of individuals to enjoy liberty, and the rights of Parliament to exercise definitive supervisory control over Executive legislation. These developments are perceived and responded to by successive panels of backbench parliamentarians who serve on the Committee in a bipartisan spirit and interpret and apply its Principles.

4.2 The consistency of the Committee's broad response to issues of rights in delegated legislation is not the limiting consistency of binding precedent and adherence to the letter of the "law" of previously defined rules of

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1. Senator Austin Lewis, Senate Hansard, 25 November 1987, page 2356

scrutiny. Rather it is the dynamic consistency of adherence to the spirit of democratic parliamentary government. This approach allows for innovation in the face of Executive measures which, unchecked, could undermine the rights of individuals or undermine the scrutiny opportunities of Parliament.

4.3 The Committee's four Principles therefore, may be seen as a distillation of the principles of the rule of law, fundamental human rights, natural justice and the supremacy of Parliament. The case histories reported on briefly here and in more detail in Chapter 5 evidence the Committee's concern to ensure that these broad principles and themes are reflected in the fine detail of all delegated legislation.

4.4 During the period under review the following illustrative applications of the Committee's Principles occurred.

Principle (a)

IS DELEGATED LEGISLATION IN ACCORDANCE WITH THE STATUTE?

4.5 During the course of the year under review this particular Principle has been applied in various ways.

Reasonableness of charges, fees and penalties

4.6 Where delegated legislation authorises large increases in charges, fees or penalties the Committee will invariably seek a personal explanation from the relevant Minister. The Committee's view is that Parliament in delegating powers would not expect any reasonable Minister to exercise those powers by imposing an unreasonably high charge, fee or penalty.

4.7 Thus, in examining the **Air Navigation (Charges) Regulations (Amendment)** the Committee queried the imposition of an additional landing charge of 15 per cent for heavy aircraft, in order to be satisfied that this fee truly represented a reasonable cost-recovery charge for services rendered and did not, in any sense, represent a form of taxation.

4.8 The Committee also examined the justifications for an increase in the fees for A.C.T. taxi licences from $250 to $80,000 under the **Motor Traffic (Amendment) Ordinance 1986**. While prima facie remarkable, the Committee concluded that the increase was not unreasonable since $80,000 represented the open-market value of a transferable taxi licence and the Minister desired to reduce the likelihood of profiteering in such licences if they could be obtained initially for only $250.

4.9 **The A.C.T. Electricity (Amendment) Ordinance 1987** increased by up to 10 times the penalties for certain offences arising from the sale or supply of defective electrical goods. The original lower penalties had been set less than 2 years previously. Given the magnitude of the increases the Committee expected that the explanatory statement would have offered some justification. It did not. Following correspondence with the relevant Minister, the Committee accepted his explanation that penalties had been made more severe to bring them into line with the sanctions available for similar offences under the Trade Practices Act.

Inadequate Information for Parliament
Numbering of Instruments and Provision of Explanations

4.10 Reference has already been made in Chapter 3 to the Committee's concerns regarding the need for better standards of presentation when delegated legislation is made and tabled in Parliament. A properly prepared

statement can often remove the Committee's uncertainty as to whether its Principles have been infringed by legislation. Occasionally, however, an explanatory statement will not be an adequate means of satisfying the Committee which will obtain relevant information by other means. The Committee is always willing to hold in camera hearings of evidence from Ministers or their officials as it did, for example, in the cases of the **A.C.T. Children's Services Ordinance 1986** (twice), the proposed **Imperial Acts (Repeal) Ordinance**, and the **Territory of Christmas Island Lands Ordinance 1987**.

4.11 In order to facilitate its continuing scrutiny of the **A.C.T. Blood Donation (Acquired Immune Deficiency Syndrome) (Amendment) Ordinance (No. 2) 1986** the Committee obtained from the Minister an undertaking that the Committee would be kept closely informed of developments affecting the rights of persons infected with AIDS through blood transfusions.

4.12 Unfortunately this particular undertaking has not been honoured and as a result the matter will be the subject of a special report to the Senate.

Unexpected Use of Delegated Powers

4.13 The **Sex Discrimination (Operation of Legislation) (No.1) Regulations** provided an example of an unexpected and therefore, prima facie unacceptable, use of delegated law-making power. The Regulations had the effect of indefinitely postponing the application of the Sex Discrimination Act 1984 to discriminatory decisions made under certain legislation. The particular decisions were permanently exempted from the need to comply with the Act, although other decisions, under other legislation, were the subject of temporary exemptions only, because a sunset clause would eventually terminate them. The

Attorney-General agreed to place a sunset clause in all of the regulations to terminate their operation within 2 years. The Committee took the view that in the absence of an express provision in the Act, Parliament would not have intended that a subordinate instrument should be used permanently to preserve the legality of certain discriminatory measures. Once again, the fundamental question for the Committee was whether this was the kind of regulatory provision which Parliament, in a bipartisan view, would have accepted had it become aware of it at the time an enabling Bill was passed.

4.14 In the **Children's Services Ordinance 1986** the Committee was surprised to find in subsection 13(2) a provision which enabled an indisposed member of the newly established Children's Services Council to appoint the proxy of his or her choice to attend and vote at meetings of the Council. The Council dealt with confidential child welfare matters of great sensitivity. The Committee considered that since the Ordinance set out in considerable detail a carefully balanced procedure for the nomination of properly qualified Council members, the proxies of those members should be no less carefully chosen under the express provisions of the Ordinance. In the Committee's view Parliament would have expected no less than this had its collective, bipartisan, mind considered the matter during the passage of an analogous enabling Act.

Sub-delegation of Law-making Power
Tabling and Disallowance of Instruments

4.15 Parliament's right to control delegated legislation is to be found in various specific enabling Acts, often in conjunction with the Acts Interpretation Act 1901 or the Seat of Government (Administration) Act 1910. Generally speaking, Acts do not expressly authorise the making, under regulations, of sub-delegated instruments. It is

appropriate that the few Acts which do so, should provide that the same parliamentary control may be exercised over any sub-delegated law-making as is exercisable over delegated law-making.

4.16 It is a singularly important function of the Senate Scrutiny of Bills Committee to ensure adherence to this principle of parliamentary control where Bills enable a Minister to "make", "declare", "notify", determine", "exempt" or "order" measures of a legislative or quasi-legislative character. Both the verb and the noun ("declaration", "notification", etc.) at least signal the possible conferral of a potential legislative power. The Committee applies the same principle and the same technique, particularly to A.C.T. and other Territory Ordinances which, in effect, allow the making of sub-delegated laws. For example, the **A.C.T. Nature Conservation (Amendment) Ordinance 1986**, itself a subordinate instrument under the Seat of Government (Administration) Act 1910, provided for the declaration of reserves and wilderness zones and the making of appropriate plans of management. The Committee requested and obtained the Minister's undertaking that the Ordinance would be amended to require that these declarations and plans would be subject to tabling and disallowance in both Houses of Parliament.

4.17 The Committee also required that Guidelines issued by the Minister under the **Christmas Island Lands Ordinance 1987** to regulate administrative aspects of the management of public housing and other Commonwealth property on the Island, should be made subject to tabling and disallowance in Parliament.

Tabling of Documents

4.18 On a number of occasions the Committee has requested

Ministers to amend delegated legislation to require that important documents which will come into existence under that legislation must be tabled in Parliament for public and parliamentary scrutiny where this would be in the public interest. Thus, agreements entered into between the relevant Federal Minister and State or Territory Ministers concerning the interstate transfer of children in need of care will be tabled under the **Children's Services Ordinance 1986** as a result of representations made by the Committee.

Ultra Vires and the Scope of Rule-making Powers

4.19 The question whether a subordinate instrument is ultra vires its enabling instrument is always a very difficult one for the Committee. Indeed the Committee noted in its Eightieth Report (October 1986)[2] that

> (A)lthough the Committee itself acts on the basis of skilled legal advice, it is not a court and, in difficult cases, validity can sometimes depend on finely balanced legal arguments.

4.20 In a case where the Committee clearly regards a provision as being ultra vires its enabling instrument, and where the Minister is unable to point to persuasive arguments as to why a court would not agree with this view, the Committee will pursue the matter to the point of recommending disallowance if the provision is not repealed or remedied. There should be no misunderstanding of the rationale behind this approach. It does not represent a conclusive finding by a "parliamentary court" that a provision is unlawful. Such a role is the exclusive perogative of the duly appointed judiciary. Rather it represents an opinion from a specially constituted and representative body of the very Parliament which delegated the law-making power that the legality of a provision may be so uncertain that Parliament would never have intended its delegated authority to be

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2. Parliamentary Paper No. 241/1986, page 32, para. 3.16

exercised in that way. The Committee is firmly of the view that an instrument is rarely, if ever, "in accordance with the statute" if its legality is so uncertain, its drafting is so vague, or its meaning is so unclear that there is a greater than normal likelihood that uncertainty as to the meaning of the instrument itself, rather than factual disputes, will precipitate costly and time-wasting legal challenges from those affected by it.

4.21 A wide variety of such cases arose during the year. For example, the **Apple and Pear (Conditions of Export) Regulations (Amendment)** prescribed a licence administration fee for services rendered by the Australian Apple and Pear Corporation in reviewing the export performance of a licencee. The relevant Act authorised the making of regulations prescribing such fees and permitting such reviews. However, the regulations omitted to provide for the conduct of the actual reviews and consequently the legality of collecting the fees was cast in doubt.

4.22 ***Fisheries Notice No. 174*** prohibited certain fishing activities other than in compliance with "any" Fisheries Notice made by the Government of Western Australia. Under the federal Fisheries Act 1952 and the Acts Interpretation Act 1901 only federal instruments could be incorporated by reference into federal law if the intention was to incorporate instruments "as in force from time to time". In this case the Committee informed the Minister that no future Western Australian notice could lawfully be incorporated into Commonwealth law.

4.23 The **Fisheries Levy (Northern Prawn Fishery) Regulations (Amendment)** prescribed a $10 levy on the allocation of certain fishing rights. The Minister's policy had been to prescribe $5, and $5 was in fact collected. New regulations were made to validate retrospectively the collection of the lower fee. In the circumstances the

Committee did not question the validity of the new regulations.

4.24 Finally, the Sex Discrimination Act 1984 provided for a settling-in period of two years or such longer period as may be prescribed, during which certain discriminatory decisions would not infringe the Act. After two years had elapsed the **Sex Discrimination (Operation of Legislation) (No. 1) Regulations** were made which indefinitely continued that exemption (see also paragraph 4.13 above). The Committee had serious doubts whether the regulations were lawful within the spirit and intention of the Sex Discrimination Act. The Attorney-General agreed to replace the indefinite exemptions with temporary exemptions.

Principle (b)

DOES DELEGATED LEGISLATION TRESPASS UNDULY ON PERSONAL RIGHTS AND LIBERTIES?

Sex Discrimination

4.25 In the previous illustration, even if the Committee had regarded the regulations as being in accordance with the Statute under Principle (a), they would probably have infringed Principle (b) by authorising an unjustifiably open-ended suspension of the operation of important laws designed to protect and promote rights to equality of treatment of men and women.

Protection of Religious Rights

4.26 The **A.C.T. Children's Services Ordinance** gave an officer an unreviewable discretion to take decisions affecting the religious welfare and upbringing of a ward of court. The Committee insisted that in such a sensitive matter an express right of appeal should exist to remedy any possibly

inappropriate decision taken by that official.

Identity Cards

4.27 The Futures Industry Act 1986 allowed a inspector to demand access to financial records provided that, if requested to do so, he or she produced prescribed evidence of authority to sight such documents. The Futures Industry Regulations merely prescribed a document issued by the National Companies and Securities Commission that stated the officer was authorised. Such a mechanism would have done little to deter prying impostors who might acquire or fake NCSC letterhead paper and "authorise" themselves. The obligatory production of a proper and secure official photographic identity card was seen to be a more reliable procedure.

4.28 A similar flaw appeared in the **A.C.T. Children's Services Ordinance** under which inspectors could gain access to private property on production of an "instrument" or "evidence" of appointment. Once again obligatory production of a proper and secure official photographic identity card was, in the Committee's view, a minimum requirement.

Lawful Trespass Against the Person

4.29 The **A.C.T. Children's Services Ordinance** allowed a police officer, with the permission of a Magistrate, to take "identifying material" from a child. The Minister agreed to the Committee's requirement that such physically intrusive actions be performed only by a duly qualified medical practitioner.

Compensation for Compulsory Acquisition of Property

4.30 Placitum 51(xxxi) of the Constitution empowers the

Parliament to make laws with respect to "the acquisition of property on just terms from any State or person". Acts, or regulations made under Acts, which permit the compulsory acquisition of private property interests, must do so only on "just terms". The **National Occupational Health and Safety Commission Regulations** enabled the Commission to make use of the name "Worksafe Australia" as a more easily recognised appellation within the community. The regulations did not expressly refer to the obligation to pay compensation to bona fide prior users of this adopted community name although they prohibited any future use of it by any person other than the Commission. Ideally the right to compensation should have been stated for declaratory purposes. However, the Committee accepted the Minister's assurances that extensive searches undertaken in registries throughout Australia, did not reveal the prior existence of any legal property right in the name or in an associated logo.

Detention of Children in Custody.

4.31 The Committee sought amendments to a provision of the **A.C.T. Children's Services Ordinance** which would have allowed a child who was to be charged with an offence, to *be detained for up to 48 hours before being brought before* a Magistrate. The Committee considered that this was a long period for a child to remain in initial police custody without judicial supervision. Generally speaking, it would not unduly impede law enforcement activity for the child to be brought before a magistrate within 24 hours.

Strict Liability Criminal Offences

4.32 The Committee will always seek from the relevant Minister information on, and justification for, the creation of criminal offence provisions in which it is not immediately clear that the prosecution must prove all of the essential

elements of the alleged crime, including mens rea or criminal intent. The preservation of the integrity of that "Golden Thread" has long been supported by the Committee. Of course, there may arise, from time to time, highly exceptional circumstances in which the Committee may be persuaded by a Minister that the imposition of strict liability is justified by compelling circumstances of public interest where the potential for serious injustice is reduced by the relatively low financial penalties. (See, for example, the **Air Navigation (Charges) Regulations (Amendment)**.) The Committee will not accept the imposition of a custodial penalty for a strict liability conviction under delegated legislation. Recourse to an expressly provided defence of "reasonable excuse" will usually be the Committee's minimum requirement in these cases.

Removal of a Child from a Child Minder

4.33 The Committee persuaded the Minister that provisions in the **A.C.T. Children's Services Ordinance 1986** should not authorise an official to remove a child from the care of a person who was not a licenced child-minder, unless the parents of that child had been warned in writing that this would happen if the child was returned to the care of that person. (Generally, under the Ordinance, only child-minders responsible for a certain minimum number of children, cared for on a commercial or community service basis, required licences.)

Retrospectivity

4.34 It is the Committee's policy to examine closely any resort to retrospectivity in delegated legislation and to seek ministerial justifications for any unexplained retroactive operation of laws. For example, the **Crimes (Amendment) Ordinance (No. 3) 1986** retrospectively removed a previous requirement that the Director of Public Prosecutions

must consent to a prosecution for incest where the victim was under 16 years of age. A previous Ordinance had intended to remove the need for such consent but, because of a drafting flaw, it had failed to achieve this. The Committee accepted the Attorney-General's assurances that no charges, improperly laid without the DPP's consent, had been thereby validated.

4.35 The **Motor Traffic (Amendment) Ordinance 1986** increased certain licence fees from $250 to $80,000. Although not expressly retrospective, the relevant Department intended to so apply the new law that it would have a prejudicially retrospective effect on licence applicants whose applications had been lodged but not fully processed prior to the Ordinance coming into force. The Committee requested that applicants should not be victimised by such administrative retrospectivity. The Minister remitted the fee that would otherwise have been charged to the only successful existing applicant. To have done otherwise would have been to put a premium of unfair and unjust administrative delay in processing existing bona fide applications when licencing systems are about to be changed. Generally speaking the Committee will not accept the retrospectivity that is implicit in this.

4.36 A similar kind of problem arose under various **Patent, Patent Attorney and Designs Regulations** where as a result of amendments higher fees were imposed on applicants whose applications for registrations were at various stages of *the lengthy patent approvals process. In this case,* however, because of the duration and complexity of the various progressive but often discrete steps for which fees were paid separately, each stage in the process could reasonably be regarded as distinct for the purpose of charging reasonable fees.

4.37 The Committee also closely examined **Public Service Board**

Determinations and *Defence Determinations* where retrospectivity (beneficial to public servants and Australian Defence Force personnel) exceeded 2 years. It was explained to the Committee that human errors and oversights had resulted in the omission of certain categories of personnel from entitlements to certain payments and allowances. The Committee accepted assurances that there was no inherent failure in the administrative and managerial systems and procedures designed to identify the many categories of personnel eligible for certain changed allowances. However, the Committee considered that Ministers and Departmental managers with delegated law-making powers must demand a high level of competence in the monitoring of possible changes to entitlements if the use of retrospectivity is not to be seen merely as a painless alternative to the demands of efficiency.

Principle (c)

DOES DELEGATED LEGISLATION MAKE RIGHTS UNDULY DEPENDENT ON ADMINISTRATIVE DECISIONS WHICH ARE NOT SUBJECT TO INDEPENDENT REVIEW OF THEIR MERITS?

Right to Practice a Trade, Business or Profession.

4.38 There are few more important rights in society than the right to earn a living. Often, delegated legislation of necessity interferes with the exercise of that right, requiring that certain standards of competence, behavior and control are observed in the public interest. Where, in order to uphold such standards, delegated legislation confers on Ministers, officials or others power to exercise discretionary judgments about eligibility which could result in the loss of a right to practice a particular livelihood, the Committee will carefully examine the legislation to ensure that -

(i) decision-making power is objectively and not subjectively formulated;

(ii) criteria are expressly set out to inform both the decision-maker and the citizen of the nature and scope of their respective responsibilities;

(iii) there is a right of appeal to the Administrative Appeals Tribunal (AAT) to review, in full, the merits of the decision, and if necessary, substitute for it the correct and preferable decision;

(iv) the decision-maker has an obligation to inform the person affected by the decision of the outcome as soon as practicable but usually no later than 28 days after the decision is taken;

(v) notifications are in writing and accompanied by a clear statement of the person's rights of appeal and, either a statement of the reasons for the decision, or a clear statement that reasons may be obtained free of cost under the Administrative Appeals Tribunal Act; there are special cases where because of the significance of the decision, the statement of reasons should accompany the initial notice of decision - see below under **Reasons for Decisions**;

(vi) circumstances do not arise in which, through no fault of their own, persons are not notified of decisions and appeal rights, and are, by that oversight, prejudiced in some significant way.

4.39 The Committee has applied these principles in various cases. In the **Co-operative Societies (Amendment) Ordinance (No. 2) 1986** the Registrar of Co-operative Societies could approve or not approve a person to be a valuer for the

purpose of valuing property offered as security for a loan. The Committee persuaded the Minister that an unjustified refusal to make an apparently reputable and competent valuer eligible for this source of professional business should be subject to challenge in the AAT.

4.40 **The Air Navigation Regulations (Amendment)** prohibited low flying unless a permit had been issued by Department of Aviation officials. Low flying is a dangerous activity in need of stringent controls. It is also a source of livelihood in aerial animal-culling, stock-mustering, crop-spraying, aerial-photography and aerial property inspections. The Minister agreed to provide for AAT review of refusals to issue permits.

4.41 The same regulation prohibited the discharge of firearms from aircraft without official written permission. In this case the Minister agreed to provide that refusals to grant permission would be subject to reconsideration by senior departmental officers not involved with the initial refusal.

4.42 Under the **Optometrists (Amendment) Ordinance 1986** the AAT could review decisions by the Optometrists Board to cancel the professional registration of an optometrist accused of unprofessional conduct. A decision by the Board to reprimand a practitioner for unprofessional conduct was not similarly reviewable although the Committee considered that it was a penalty that could seriously affect an optometrist's reputation and therefore his or her livelihood. The Minister agreed to provide for AAT review of this disciplinary penalty also.

4.43 **Navigation Orders**, made under regulations, made pursuant to the Navigation Act, conferred on a range of usually professional officials numerous technical discretions concerning the compliance of ships with safety standards.

Approval of equipment or exemption from compliance with standards could be granted or withheld with obvious commercial consequences for ship builders, owners and crews. Avenues of appeal against allegedly erroneous or unfair decisions were so limited and costly as to be for most practical purposes non-existent. Officials were, therefore, denied the advantage of an external quality-control procedure against which to measure their professional expertise in discretionary areas. Ship builders, owners and crews were denied the reassurance that the existence of an external review body would underpin and guarantee the quality of primary decision-making. The Minister agreed to amend the Navigation Act itself to provide for AAT review.

4.44 After scrutinising the **Apple and Pear (Conditions of Export) Regulations (Amendment)** the Committee considered that there should be a right to AAT review of the duration of an export licence if licences were not issued for a uniform period. The regulations had left specification of the duration of a licence in the discretion of officials. The Committee argued that an unduly limited licence, truncated without justification, could disrupt an exporter's business and place him or her at a commercial disadvantage with competitors who had obtained more durable concessions.

4.45 On examining the **Interstate Road Transport Regulations** the Committee accepted the Minister's advice that AAT review of ministerial certification of distance monitoring devices might not be appropriate because behind each certification lay broad policy considerations affecting Federal, State and Territory inter-governmental relations in the road transport area. However, in recognition of the Committee's concern about the commercial implications for inventors, manufacturers and suppliers of rejected equipment, the Minister undertook that complaints would be the subject of

special investigations.

4.46 The Committee persuaded the Minister that the **Children's Services Ordinance** should provide for AAT review of unilateral changes made by the Minister to a child carer's licence. The Committee also asked that parents required by the Director of Welfare to contribute sums of money for the upkeep of a child in care should have a right to seek review of too onerous or unreasonable a demand.

Remitting or Exempting from Charges or Penalties

4.47 Under the **Air Navigation (Charges) Regulations (Amendment)** penalties or charges could be remitted by the Minister or officials on an entirely discretionary basis. The Committee obtained the Minister's undertaking to provide for AAT review of this wide power. It could be viewed as one capable of being exercised in a discriminatory or inconsistent way giving rise to a sense of serious grievance.

Internal Reconsideration and Ministerial Appeals

4.48 Principle (c) of the Committee's terms of reference refer to the need to ensure that rights are not dependent on administrative decisions the merits of which are not amenable to independent review. The Committee will accept that an internal appeal mechanism is more appropriate than external merits review only in exceptional circumstances. The **Christmas Island Lands Ordinance** provides an example of a case where a unique combination of geographical, cultural, linguistic and technical factors persuaded the Committee to relax its requirement for AAT review of certain decisions in favour of ministerial review. The **Air Navigation Regulations (Amendment)** and the **Interstate Road Transport Regulations** concerning the use of firearms on aircraft and vehicle monitoring devices are two further

examples where the gravity of the issue and Federal/State relationships were, respectively, the reasons why the Committee agreed to leave appeal procedures in the hands of Ministers who would be answerable to Parliament for capricious decisions.

4.49 The Committee will not readily accept internal appeals as an alternative to independent merits review. In most cases the Committee will seek a further avenue of appeal to, for example, the Administrative Appeals Tribunal, to underwrite the fairness and integrity of in-house procedures. The Committee has noted with interest the remarks of His Honour Mr Justice Kirby, President of the New South Wales Court of Appeal who, in addressing the question of appeals to a Minister, said -

> "... I do not believe it sensible to infer that the Minister will conduct a hearing himself, unaided. Instead he would have to rely upon the preparation of a file of documents and submissions. It is inevitable that the (primary decision-maker) or some other senior officer ... would play a part in this preparation ...
>
> (T)he appeal is to the Minister, the involvement of the officers of the service is inevitable, there is no guarantee of a hearing de novo and nothing is said about procedure."[3]

4.50 The Committee considers that, generally speaking, in the interests of consistency, as an encouragement to quality decision-making and in the interests of administrative justice, the merits of discretionary administrative decisions impacting seriously on the lives, businesses or livelihoods of individuals should be subject to review by the Administrative Appeals Tribunal.

Review Rights in Welfare Matters

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3. Ackroyd v Whitehouse (1985) 2 NSWLR 239 at 250 and 252

4.51 The relevant Minister agreed to provide for rights to AAT review of a range of decisions affecting welfare entitlements under the **Seamen's War Pensions and Allowances Regulations (Amendment)**. Also under the **Veterans' Entitlements Regulations** the computation of certain travelling expenses associated with obtaining medical treatment required officials to exercise discretionary judgements about the propriety of a veteran's chosen method of transport. The Minister agreed to provide for a prompt internal review of any disputed decisions for a trial period of 12 months and to assess whether provision of an external review right would be more appropriate.

Reasonable Exercise of Powers

4.52 Following scrutiny of a number of instruments the Committee has recommended that Ministers make amendments to provide express reference to the "reasonable" exercise of powers. (See, for example, the **Children's Services Ordinance**, the **Domestic Violence (Miscellaneous Amendments) Ordinance**, the **Imperial Acts (Substituted Provisions) Ordinance**, the **Lands Ordinance** and **Public Service Board Determination No. 4 of 1986**.) The Committee, of course, recognises that, at law, the legitimate exercise of power is predicated on the reasonable exercise of power and that limitation will be implied by the Courts. The Committee considers nevertheless, that the declaratory use of this express limitation can help focus the attention of power-holders on the legislative origins and legal limits of their power. In a complex and sophisticated society the exercise of power under delegated legislation is frequent, usually necessary and occasionally traumatic for the law-abiding citizen. For these reasons the Committee finds considerable presentational and educational value in the practice of expressly limiting large administrative and law-enforcement powers by reference to their "reasonable"

exercise. In a letter to the Public Service Board concerning Public Service Board Determination No. 4, the Committee wrote -

> ... While appeals, reviews and complaints are a vital dimension of the modern protection of rights, the first and best protection remains the informed and conscious decision by a decision-maker not to trespass unduly on those rights in the first instance. In this respect the words of Lord Denning are today as accurate a commentary on the frailties of human nature as they were in 1949 when he told an audience in the Senate House of London University that "an official who is the possessor of power often does not realise when he is abusing it. Its influence is so insidious that he may believe he is acting for the public good when, in truth, all he is doing is to assert his own brief authority." (Sir Alfred Denning, Freedom Under the Law, Stevens and Sons, London, 1949, page 100)[4]

4.53 A consciousness of the need to act reasonably, reinforced by the presence of that very injunction in the text of the laws they administer and enforce, is a vital element in guaranteeing the lawfulness of the exercise of official power. The professional commitment of the vast majority of officials to uphold the rule of law is also supported by a declaratory statement in the direction of which they can point their less scrupulous colleagues.

Reasons for Decisions

4.54 From time to time delegated legislation requires a prospective licencee to go to considerable expense in preparing an application for a licence to conduct a business or otherwise earn a livelihood that is subject to regulatory controls. In these circumstances it is incumbent on the relevant decision-maker to give that person the reasons for rejecting such an application as soon as possible after the decision is made. Reasons for a refusal should ideally accompany the written notification

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4. Letter, Senator B. Cooney to Dr P. Wilenski, 29 May 1987

of the decision. The Committee's stance in this regard is well illustrated in its scrutiny of the **Export Control (*Unprocessed Wood*) *Regulations*** and the ***Meat Inspection* (General) Orders.**

4.55 Regarding the former Regulations the Committee wrote in a letter to the Minister for Primary Industry -

> An adequate statement of reasons provides an assurance that the decision has been properly thought out. It furnishes a public justification for an important public course of action and thereby promotes public confidence in the administrative process applied to export control. By doing so it removes potential sources of grievance both private, public and parliamentary. Professor Wade, one of the of the world's leading administrative lawyers, has said that "... the giving of reasons is required by the ordinary (person's) sense of justice and is also a healthy discipline for all who exercise power over others".[5]

Principle (d)

DOES DELEGATED LEGISLATION CONTAIN MATTERS MORE APPROPRIATE FOR PARLIAMENTARY ENACTMENT?

4.56 In its Seventy-seventh Report (March 1986[6]) the Committee stated that it would 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 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

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5. Letter, Senator B. Cooney to the Hon. J. Kerin, M.P., 22 August 1986
6. Parliamentary Paper No. 172/1986, page 12, para. 15

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.

4.57 During the year under review, the Committee made no recommendations that any instruments of delegated legislation should be disallowed because they infringed Principle (d). However, the question of the application of this Principle to A.C.T. Ordinances was the subject of the Committee's Eighty-first Report (December 1986).[7]

4.58 In that Report the Committee wrote -

(i) Principle (d) will be applied to Ordinances in the A.C.T. in the context of the Committee's recognition that these instruments perform the legislative function performed by statutes in other jurisdictions. Accordingly there could be instances where Principle (d) would not be applied to an Ordinance whereas it would be applied to a substantive regulation containing similar provisions. The Committee's Seventy-seventh Report discusses the guidelines which the Committee will follow in applying Principle (d) to Ordinances.

(ii) In those cases where the Committee's recognition of the role of Ordinances inclines it against applying Principle (d), the Committee may nevertheless report to the Senate on any Ordinance which is substantial, socially innovative or makes a marked change in the law.

(iii) Presently there are no statutory bodies in the Australian Capital Territory which provide an opportunity for the people of the Territory to influence the content of the law operating there. In these circumstances the Committee recommends that where possible discussion papers and the advice given to Government in

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7. Parliamentary Paper No. 434/1986, page 22, para. 4.4

respect of proposed legislation should be released to the public for discussion prior to the making of any important Ordinance.

4.59 During the year under review no special reports of this nature were made to the Senate by the Committee.

CHAPTER 5

LEGISLATION CONSIDERED IN DETAIL

We know, as the Ministers know, that the liberties of the people can be prejudiced most unfairly by the actions of departmental officers... but where the rights of an individual are unfairly trespassed upon it is necessary that some people in authority should stand up and say so. Therefore, when this Regulations and Ordinances Committee finds that regulations of the character we are discussing have trespassed unduly and unfairly on the rights of the people, it has a duty to bring the matter forward and state its case firmly and strongly...[1]

Introduction

5.1 The purpose of this chapter is to examine in detail aspects of the Committee's scrutiny of some of the more important instruments examined during the period under review. The legislation is discussed in alphabetical order and is listed in an alphabetical index in Appendix 3 of this Report. The themes reflected in these longer descriptions are summarised in Chapter 4. (The abbreviation "AAT" refers to the federal Administrative Appeals Tribunal.)

Air Navigation (Charges) Regulations (Amendment) (Statutory Rules 1986 No. 169)

5.2 Under Regulation 22 it was an offence to make a false or misleading statement about the use of an aircraft. There was no requirement that there be an intention to deceive before an error or mistake would give rise to criminal liability punishable by fine of up to $1,000. When the Committee drew this to the attention of the Minister for

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1. Senator I.A.C. Wood, Senate Hansard, 8 October 1959, page 1001

Aviation, the Hon. Peter Morris, M.P., his view was that a strict liability provision was essential to impose the *maximum obligation on those responsible for the provision* of essential information, the concealment of which could result in financial advantage to aircraft operators and loss to the Government. The Minister considered that it would be virtually impossible for the Commonwealth to gain a conviction, or even launch a reasonable prosecution, if it had to prove the existence, beyond all reasonable doubt, of a criminal mental element.

5.3 Although generally opposed to strict liability offences, the Committee was persuaded, on balance, not to object in this instance. The Committee noted that: any opportunity for successful evasion of the law would defeat the Minister's purpose; the offence and the penalty were regulatory in nature; the Attorney-General's prosecution guidelines could avoid needless prosecutions; and, as a last resort, the common law defence of reasonable and honest mistake of fact could protect an innocent operator from injustice.

5.4 New regulation 2B in the Regulations prescribed circumstances in which penalties or charges could be remitted in the unreviewable discretion of the Minister, the Secretary or some other authorised officer. When the Minister learned of the Committee's concern about the absence of any avenue for merits review to guarantee the quality and fairness of discretionary decisions, he undertook, subject to appropriate consultations, to amend the Air Navigation Act itself to provide for such a right.

5.5 The Committee awaits implementation of this undertaking given on 7 October 1986. The Committee's correspondence on this matter was tabled in the Senate on 16 October 1986, (Senate Hansard, 16 October 1986 page 1372).

Air Navigation (Charges) Regulations (Amendment) (Statutory Rules 1986 No. 211)

5.6 These Regulations required payment, for the period ending 30 June 1987, of an additional landing charge for domestic aircraft weighing more than 45,000 kilograms. The additional charge was 15 per cent of the amount of charge already payable under an existing regulation. No explanation was given in the Explanatory Statement of how or why the figure of 15 per cent had been arrived at. There was no indication whether it represented a cost recovery charge for services rendered. The absence of such an explanation gave rise to queries as to whether it went beyond the recoupment of administrative expenses and entered the realm of taxation.

5.7 In the absence of an explanation the Committee could make no judgement as to the reasonableness or otherwise of the proposal from the point of view of the general principle that no reasonable Minister would impose an unreasonably large fee or charge. The imposition of such a large and unexplained charge could, in the judgement of the Committee, infringe the Committee's Principle (a) as it might not be in accordance with the parliamentary spirit of the enabling Act. However, the Minister for Aviation, the Hon. Peter Morris, M.P, assured the Committee that the additional charge had been introduced only to enable recovery of a higher proportion of the costs incurred by the Commonwealth in providing aviation facilities and services. The Committee accepted the Minister's explanation.

5.8 The Committee's correspondence on this matter was tabled in the Senate on 16 October 1986, (Senate Hansard, 16 October 1986, page 1372).

5.9 These regulations were designed to improve controls over potentially dangerous aviation activities. Regulation 120B prohibited the discharge of firearms on an aircraft without written permission from the Department of Aviation. Regulation 133 prohibited low flying without a permit. The permissions were to be granted or refused in the unreviewable discretion of the Department. The Committee recognised that these were very dangerous activities which required strict control if public safety was to be protected. However, they were also, in certain circumstances, activities from which some people earned their livelihood, for example, in aerial animal-culling, aerial property inspections and aerial stock-mustering. An unreasonable or unjustified refusal to grant permission which could not be independently reviewed could cause considerable hardship and even result in a loss of livelihood. The Committee invited the Minister for Aviation, the Hon. Peter Morris, M.P., to provide for a right of appeal to the Administrative Appeals Tribunal to serve as a means both of underwriting the quality of primary decisions and of allowing for the correction of unjustified decisions.

5.10 The Minister agreed to provide for AAT review of refusals to issue low flying permits. However, in a submission to the Committee regarding the question of control over the use of firearms, the Minister suggested a different course. Because of the implications for safety and security arising from possession or use of firearms on board an aircraft, the Minister considered that he and his Department could best deal with the question of possible grievance by establishing a formal internal review process

in which adverse primary decisions would be reconsidered by senior officers not involved in the original decisions.

5.11 The Committee accepted the Minister's proposal on the basis of the special circumstances of this case including the following: firstly, the firearm permit discretion would affect commercial interests only in limited circumstances; secondly, licencing the use of firearms by aviators was a matter requiring the utmost care; thirdly, the Department had some experience of dealing with firearms licence applications and consequently had acquired some expertise with the type of applications that might be expected; fourthly, in the course of that experience no complaints had been made that a refusal to grant a licence was capricious or unfair; and finally, the great sensitivity the Minister felt about the serious potential dangers arising from the aerial use of firearms.

5.12 The Committee awaits implementation of the Minister's undertaking given on 5 November 1986. The Committee's correspondence on this matter was tabled in the Senate on 13 November 1986 (Senate Hansard, 13 November 1986, page 2096).

Apple and Pear (Conditions of Export) Regulations (Amendment) (Statutory Rules 1986 No. 219)

5.13 These regulations specified the conditions under which the Apple and Pear Corporation would issue and revoke export licences. They also prescribed an annual licence administration fee of $500 for services rendered by the Corporation for each review of the export performance of a licencee. It was intended that this fee would help defray the costs both of granting licences and of reviewing the export performance of licencees. The Australian Apple and Pear Corporation Act 1973 empowered the making of

regulations permitting the Corporation to review periodically licencees' export performance and charge a fee for that service as well as for the actual grant of a licence.

5.14 The Committee considered that a fee for reviews could not lawfully be imposed unless the regulations first actually provided for such reviews to be conducted. The regulations in question did not so provide and, therefore, the fee appeared to be an unlawful imposition. When informed of this by the Committee, the Minister for Primary Industry, the Hon. John Kerin, M.P., after receiving advice from the Attorney-General's Department, agreed to amend the regulations to provide expressly for the annual review of an individual licencee's export performance.

5.15 The Committee also queried the absence of any right to appeal against: a refusal to consider a late licence application; a refusal to approve particular ports and foreign importers; and a refusal to extend the duration of a licence. After considering representations from the Minister, the Committee concluded that, in this particular area, extension of time appeals would be disruptive of long-term planning; and the approval of ports and importers would involve fundamental policy issues concerning the coordinated management of Australia's export drive. The Committee agreed with the Minister that such matters were not appropriate for independent merits review by the AAT.

5.16 On the question of licence duration, however, the Committee urged the Minister to consider amending the legislation to provide, either that licences would be issued for uniform periods, or that the duration of a particular licence could be challenged in the AAT if it was viewed as unreasonably short. On 13 March 1986 the

Minister informed the Committee that he had no strong objection to providing for such a right of review by the AAT.

5.17 The Committee continues to await implementation of the Minister's undertakings. The Committee's correspondence on this matter was tabled in the Senate on 17 November 1986 (Senate Hansard, 17 November 1986, page 2272).

Blood Donation (Acquired Immune Deficiency Syndrome) (Amendment) Ordinance (No.2) 1986 (A.C.T. Ordinance No. 90 of 1986)

5.18 In its Eightieth Report,[2] the Committee reported on the Blood Donation (Acquired Immune Deficiency Syndrome) Ordinance. During its scrutiny of that Ordinance the Committee had learned that to obtain adequate indemnity insurance for the Red Cross Society, the Government had promised insurance companies that it would make an Ordinance which provided the Red Cross, hospitals and doctors with a statutory defence in an action by a person alleging the contraction of Acquired Immune Deficiency Syndrome (AIDS) from a transfusion of contaminated blood. The defence could be pleaded where it was shown that although AIDS had been contracted, the donated blood involved had been tested in accordance with prescribed methods.

5.19 The Committee considered that this defence was drafted so widely that it could have successfully barred even an action for negligence in testing and transfusing blood. At the request of the Committee, the Minister for Health, the Hon. Dr. Neal Blewett, M.P., undertook expressly to exclude negligence from the scope of the statutory

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2. Parliamentary Paper No. 241/1986, para 4.11

defence. However, the Committee, considering the entirely novel nature of the legislation and the serious implications of its circumscription of common law rights of action, also obtained the Minister's agreement to place a sunset clause in the Ordinance while the questions of insurance, negligence, compensation and fail-safe testing procedures were examined within his Department. The Minister also undertook to inform the Committee of progress with the review of these issues.

5.20 In spite of this in December 1986, without any consultation with the Committee, that sunset clause was repealed by the Amendment Ordinance now under discussion. In correspondence, the newly responsible Minister, the Minister for Territories, the Hon. Gordon Scholes, M.P., apologised to the Committee for this oversight and explained that no decisive outcome had been arrived at in the review of those questions raised by the Committee and of relevance to the continued operation of the legislation. The Minister explained that a Working Party of the National Advisory Council on AIDS (NACAIDS) had been examining the issue of compensation and common law recovery rights against the background of the Government's recognition that there was a case for blood-transfused AIDS victims to receive some form of compensation. An Inter-Departmental Committee on AIDS had received a report from NACAIDS recommending that a statutory, cause-based, compensation scheme, related as nearly as possible to common law benefits, be established. It was the Minister's intention to advise the Minister for Health to proceed with that scheme as soon as possible.

5.21 The Committee also learned from this latest correspondence that in the A.C.T. the Red Cross no longer had private indemnity insurance. It was totally dependent on a combination of the statutory defence in the Principal Ordinance and the promise of indemnification by the

Government, through the A.C.T. Health Authority, provided it complied with the blood-testing requirements of the Ordinance. Similar provisions had been enacted and arrangements made in the States and the Northern Territory. The Federal Government, in association with State and Territory Governments, had therefore, in effect taken over the role of insurer on the same legislative terms as those originally sought by the insurance companies. Now the Commonwealth, the States and the Northern Territory would jointly be underwriting the indemnity.

5.22 The Minister accompanied his explanatory correspondence to the Committee with a number of helpful background documents which the Committee, in keeping with its usual practice, later made public by tabling them in the Senate. (Senate Hansard, 11 May 1987, pages 2540-2545). These documents included Red Cross Society correspondence with the A.C.T. Health Authority explaining that the reliability of current blood-testing methods was limited by their inability to detect the AIDS virus (as opposed to developed AIDS antibodies). Thus, there was a period of between two to three months (and possibly up to 45 weeks) after infection during which the presence of the virus in the blood of an infected donor could go undetected. It was for this reason that the donor-declaration forms in the Principal Ordinance were required, under pain of legal penalty, to be accurately completed. These forms were vital to the continued protection of the Society's blood from contamination by persons at risk of knowingly or unknowingly having the AIDS virus.

5.23 As far as the present Ordinance was concerned the Committee noted that there had been a breakdown in communication between it and the relevant Minister, attributable partly to the transfer of responsibility for A.C.T. health matters from the Minister for Health to the

Minister for Territories. Nevertheless, the Committee remained concerned about a number of matters: the continued use of legislation that had originally been put in place at the request of insurance companies whose services were no longer applicable; the fallibility of the state-of-the-art testing technology; the consequent high level of dependence on the good sense and compassion of blood donors completing the donor declaration form; the use of delegated legislation to limit common law rights in the A.C.T.; and the continuing absence of a compensation scheme for blood transfused AIDS victims.

5.24 The Committee considered that the Commonwealth Parliament should remain closely involved with these issues and the best way this could be achieved was through the insertion of a further 12 months sunset clause which would ensure that the sensitive and complex issues surrounding blood donation, the Red Cross Society and AIDS would again be referred to the Parliament for reconsideration in due course. At the Committee's request therefore, the Minister undertook to renew the sunset clause. To place beyond doubt the Committee's acceptance of the critical importance of the donor declarations, the Committee proposed that the sunset clause not apply to those sections of the Ordinance dealing with the donor declaration. So that the Committee's scrutiny task could be more effective, the Minister also undertook to keep the Committee closely informed of developments affecting the statutory defence by supplying relevant documents for tabling in the Senate.

5.25 The Minister's undertaking to place a further sunset clause in the Principal Ordinance and keep the Committee informed of developments was given on 6 May 1987. It is with regret that the Committee reports that neither aspect of the Minister's undertaking has yet been complied with and this failure is the subject of current inquiries.

5.26 The Chairman's statement concerning the Committee's scrutiny, together with incorporated correspondence, appears in Senate Hansard, 11 May 1987, pages 2541-2545.

Children's Services Ordinance 1986
(A.C.T. Ordinance No. 13 of 1986)

5.27 This long and complex Ordinance was designed to produce a major reform of the law relating to the welfare of A.C.T. children. The new legislation was based on recommendations in the Australian Law Reform Commission's Report on Child Welfare[3] and on consideration of those recommendations by the A.C.T. House of Assembly. The Committee's detailed scrutiny of the Ordinance revealed a number of technical and drafting flaws which called for reconsideration by the Minister for Territories and his advisers. In its examination of the 177 sections of the Ordinance, the Committee identified several matters of concern to it. These are referred to below.

5.28 The Ordinance was the subject of considerable community interest and the Committee received a number of written representations about it from interested persons. After considering these, however, the Committee concluded that all but one were concerned with the merits of the Government policy embodied in the Ordinance. In keeping with its traditional bipartisan approach, issues of policy were not considered by the Committee. However, the written submissions concerning policy issues were conveyed to the Minister for his attention.

5.29 There was one written submission which did address certain issues of principle concerning the inadequacy of parents'

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3. Report No. 18, Canberra, AGPS, 1981

rights to apply to a magistrate to obtain the release of a child in custody. The authors of this submission were Mr R. J. Cahill and Mr C. J. Staniforth. At an in camera hearing they appeared before the Committee as private citizens although in his official capacity Mr Cahill is the Chief Magistrate for the A.C.T. and Mr Staniforth is a lawyer with a specialist's knowledge of child welfare issues. The Committee was very pleased to hear their evidence which carried considerable weight in view of their knowledge and expertise. They added an important and worthwhile dimension to the Committee's scrutiny and the Committee acknowledges their assistance in guiding it to a broader understanding of the implications of the Ordinance for the rights of parents and children.

5.30 At a separate in camera hearing legal and child welfare experts from the Attorney-General's Department and the Department of Territories assisted the Committee by describing the intentions behind the Ordinance and the meaning of certain of its provisions. The Committee was also assisted at this hearing by Dr John Seymour, of the Faculty of Law in the Australian National University, an expert in child welfare law and a former Australian Law Reform Commissioner. The Committee was grateful to Dr. Seymour for the decisive way in which he helped it to evaluate the implications of an additional right of appeal to a magistrate. The Committee commends all of those who attended before it for their skilful advice which was clearly based on their desire to ensure that the welfare of A.C.T. children was the paramount objective of the Ordinance. In correspondence with the Minister for Territories, the Hon. Gordon Scholes, M.P., the Committee raised the following issues.

THE ROLE OF THE YOUTH ADVOCATE

5.31 The Youth Advocate is a central figure in the child

welfare scheme and the Ordinance expressly confers certain onerous responsibilities on this person. However, under paragraph 9(2)(b) the Minister could add to these such other functions as he or she chose to specify either in an instrument of appointment or in some other instrument. There was no guarantee that any such additional responsibilities would become public knowledge. The Committee considered that, because of the sensitive nature of the Youth Advocate's role, additional functions, not already specified in the Ordinance, should be a matter of public record and be subject to parliamentary supervision. The Minister undertook to amend the Ordinance to provide that any additional functions of the Youth Advocate would be prescribed by regulations made under the Ordinance and therefore subject to tabling and disallowance in Parliament.

5.32 On the broader question of whether or not the Youth Advocate's complex and multifaceted role was likely to lead to conflicts of interest of a kind that might affect the administration of juvenile justice, the Committee concluded that the decision to appoint the Youth Advocate initially on a temporary basis would give an opportunity to examine the practical implications of that officer's role. (This matter was the subject of a disallowance motion moved by Senator Austen Lewis on policy grounds. The motion was defeated. The debate is recorded in Senate Hansard, 14 November 1986, pages 2256-2259.)

MEMBERSHIP OF THE CHILDREN'S SERVICES COUNCIL

5.33 Subsection 13(2) of the Ordinance provided in detail for the establishment of a representative Children's Services Council composed largely of nominated individuals. Paragraph 13(12) provided that if a member was unable to attend a meeting he or she could simply nominate another person to attend and vote as a proxy. Since the Council

was charged with considering important, sensitive and confidential issues of child welfare the Committee considered that the nomination of proxies required a more reasonable and responsible legislative prescription of eligibility. The Minister undertook to amend the Ordinance to require this.

CRIMINAL JURISDICTION BY REFERENCE TO AGE

5.34 The Children's Court may have regard to the age of a person in determining whether it should hear a case. Thus, sub-section 24(2) of the Ordinance provided that where a person was alleged to have committed an offence while under eighteen years, but was between eighteen and eighteen and a half years of age at the time of the first appearance in Court, the Children's Court should deal with the person as if he or she were a child. However, sub-section 24(3) provided that a person accused of committing an offence while a child but who first appeared in Court when over the age of eighteen and a half years should be dealt with as an adult. In the circumstances, this seemed to the Committee to be a somewhat arbitrary distinction to draw. The Committee considered that the Children's Court should have been empowered to exercise an appropriate discretion to hear a case under sub-section 24(3) to avoid any unfair effects arising from too strict an age classification of offenders. The Minister agreed to provide for this.

POWER TO APPREHEND PERSONS AND ENTER PREMISES

5.35 Sub-sections 56(3), 85(3), 113(2), 113(3) and 139(3) of the Ordinance conferred on various officials powers to enter private premises and apprehend certain absconding children. These provisions authorised the use of force. However, the use of such force was not qualified by express reference to its "reasonable" use in circumstances

of "reasonable" necessity. The Committee considered that, although the powers were necessary, their express qualification by reference to an objective standard of reasonableness could serve to remind officers that their authority was based on law only so far as was reasonably exercised. Subsection 253(1) of the Credit Ordinance 1985 (as amended following the Committee's scrutiny[4]), provided a drafting precedent that met this requirement, was protective of personal rights and did not hamper reasonable law enforcement. The Minister undertook to amend the Ordinance to follow this precedent.

CHILDREN NOT TO BE INTERVIEWED IN CERTAIN CIRCUMSTANCES

5.36 Section 30 provided that there would be circumstances in which children should not be interviewed unless a parent, a relative or a lawyer was present. However, subsection 30(2) provided that if *such a person was believed by* a police officer to be an accomplice, that belief could justify the exclusion of the person from an interview. The Committee was concerned that the police ofer's belief should be clearly based on reasonable grounds if the protective impact of the provision was not to be diminished. The Minister undertook to re-draft the subsection to accommodate this.

PARENTS TO BE INFORMED OF WHERE A CHILD IS LOCATED

5.37 Section 35 required a parent to be told that a child had been charged with an offence. The Committee considered that at the same time a parent should also be told where the child was physically located. The Minister undertook to insert this requirement.

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4. Seventy-seventh Report, Parliamentary Paper No. 172/1986, page 36, para. 68

IDENTIFYING MATERIAL

5.38 Section 36 allowed the taking of "identifying material" from a child provided a magistrate had given permission. Permission could be sought and obtained over the telephone by a quite junior officer on whom there was no obligation to prepare relevant documentation. It was obvious to the Committee that taking "identifying material" (for example blood or other body materials) from any person but particularly a child, could be physically intrusive. No provision was made for a medical practitioner to perform these medical procedures. This appeared to the Committee to be an extremely serious omission. Further, it seemed possible that subsection 36(3) would allow these procedures even where no criminal charge had been laid. There was no requirement that the child's parents be informed of what was taking place. There was no indication as to how "identifying material", such as finger prints, would be disposed of if a child was acquitted or not charged. The Committee considered that this provision seriously failed to provide adequate protection for a child. The Minister agreed to have it re-drafted to ensure that parents were properly informed and that only a medical practitioner could lawfully take samples of identifying material.

ARRESTED CHILDREN TO BE BROUGHT PROMPTLY BEFORE THE COURT

5.39 Section 39 (and by implication sub-section 33(7)) required that a child shall be brought before the Court within 48 hours or released "forthwith". Two days seemed to the Committee to be too long a maximum time for a child to be held in custody without the intervention of a judicial officer. The Committee considered that the Children's Court should become involved as soon as reasonably possible and that this would not impede reasonable law

enforcement. The Minister agreed to amend the Ordinance to meet this concern.

SUBJECTIVE ASSESSMENTS

5.40 Sections 72, 73 and 74 of the Ordinance empowered authorised officers to make what appeared to be unduly subjective judgements about the identity of children and their circumstances. On the basis of such judgements persons, who might not be children in the legal sense, could lawfully be taken into custody. While recognising the paramount interests of children in need, the Committee sought to balance the desire to protect such children against the possibility that persons who were not children might wrongly be taken into custody. The Minister undertook to make amendments that would require judgements to be based on reasonable grounds.

RELIGION AND WARDS OF COURT

5.41 Section 111 gave the Director of Welfare a wide discretion to make such decisions concerning religious matters as he or she considered to be in the interests of a ward of court. Since sensitive questions concerning the religious upbringing of wards could become very contentious, the Committee considered that it would be reasonable to provide for a right of appeal to the Court against the Director's decisions. The Minister undertook to provide parents with such a right.

IDENTITY CARDS

5.42 Section 11 provided that officers would be issued with photographic identity cards. This would deter impostors from attempting to gain access to premises by impersonating officials. However, in sections 112 and 125 references were made to the production of "the instrument

or evidence of appointment" when access to premises was sought. The Committee considered that production of a proper official identity card would be preferable to production of other, less persuasive, evidence of identity. The Minister undertook to provide for this.

REMOVAL OF A CHILD FROM UNLICENCED CARE

5.43 Section 124 conferred on the Director wide powers to remove children from unlicenced child care premises. For example, sub-paragraph 124(1)(b)(ii) provided that the Director could remove a child and deliver it to a suitable person prepared to care for it. It was only then, after the event, that the Director was obliged to notify the parents of the child's whereabouts. The Committee recognised that the licencing system was fundamental to the Government's child care policies and that the interests of children could require that they be removed from unsuitable care. However, the Committee considered that a reasonable exercise of such powers required that a parent should have been expressly warned in writing in advance. The Minister agreed to amend the section to provide that children may only be removed from care where the unlicenced child-minder and the parent had been expressly forewarned in writing. Cases of serious emergency could obviously be dealt with under the provisions of other laws.

REVIEW BY THE ADMINISTRATIVE APPEALS TRIBUNAL

5.44 The Ordinance provided that a number of discretionary decisions to be taken by officials would be subject to review by the Administrative Appeals Tribunal. However, there was no right to review of ministerial decisions under paragraph 123(1)(d) refusing to vary or revoke a condition in a child carer's licence. A wilful or unfair refusal could adversely affect the person. There was no

right to seek review of the inclusion of an onerous condition in a carer's licence in accordance with paragraph 123(4)(d). Finally, there was no right to review of a decision by the Director of Welfare determining the amount of money to be contributed by parents for the needs of a child in care under section 99(2). The Committee considered that since the adverse exercise of these decisions could prejudice individuals and even jeopardise a person's right to practice a livelihood as a carer, it would be appropriate for any alleged unfairness to be challengeable. The Minister undertook to provide for AAT review of each of the above decisions.

ENTRY INTO AGREEMENTS TO TRANSFER CHILDREN

5.45 Section 176 empowered the Minister to enter into agreements with State and Territory Ministers for the interstate transfer of children in need of care. The Minister accepted the Committee's suggestion that the Ordinance should provide for such agreements to be tabled in Parliament.

DETENTION OF A CHILD IN CARE WITHOUT JUDICIAL AUTHORITY

5.46 Under sections 73 and 74 a child in hospital or elsewhere, could be detained or taken into custody by an authorised officer to whom it appeared that the child was in need of care. If after 48 hours a magistrate had not authorised the detention of the child for a further period of up to 72 hours, the child would be released forthwith.

5.47 The Committee considered that as soon as a child was taken into custody in these circumstances the parents should not only be informed but they should also have the express right to apply to a magistrate to obtain the release of

the child. In adopting this view the Committee sought to find a proper balance between the welfare of children, the rights of parents and the responsibilities of the Youth Advocate to inquire into a welfare matter as quickly as possible. The Committee considered that it was objectionable in principle for the Youth Advocate to possess a power to detain a child for up to 48 hours without the parents having an express right to apply to a magistrate for that child's release. Having considered the matter in the light of the Committee's views, the Minister agreed to amend the Ordinance expressly to provide for such a right. To protect the rights of all concerned, the Court, in determining such an application, would not, of course, make an order if it would be inimical to the paramount interests and welfare of the child.

5.48 The Minister's undertakings were given to the Committee on 9 October 1986 and 13 November 1986 and were substantially implemented with the making of the Children's Services (Amendment) Ordinance (No. 2) 1987 on 13 September 1987. The Chairman of the Committee informed the Senate of its scrutiny of this Ordinance on 14 November 1986 when the Committee's full correspondence with the Minister was also tabled. (Senate Hansard, 14 November 1986, pages 2207-2208).

Commercial Arbitration Ordinance 1986
(A.C.T. Ordinance No. 84 of 1986)

5.49 Section 57 of this Ordinance provided for service of important legal notices. The section provided that in the absence of personal service documents could be served on "a person apparently over the age of 16 years and apparently residing at" a last known place of address. The Committee considered that the drafting of this

requirement was vague and imprecise, and that a more modern and objective formulation should be used requiring substituted service on "a person who is, or who is reasonably believed to be" both over 16 and residing at the relevant address. The Committee considered that this formula required and would be seen to require a more objective, and hence more reliable, assessment of who would be a proper person to take delivery and custody of important documents which, if not delivered into the hands of their intended recipients, could cause prejudice in legal and administrative proceedings. The Committee considered that although the risk of non-delivery of papers was reduced by the professional competence of servers, the consequence of too imprecise and subjective an obligation warranted tighter drafting.

5.50 The Committee's recommendation in this matter was accepted by the Attorney-General on 6 March 1987.

Co-operative Societies (Amendment) Ordinance (No.2) 1986 (A.C.T. Ordinance No. 10 of 1986)

5.51 This Ordinance altered the conditions on which registered credit societies could make loans. Under new section 14GA the Registrar could approve or not approve a person to be a valuer for the purpose of valuing property tendered to a society as security for a loan. The merits of a decision refusing to approve a person were not subject to review. The Committee considered that an unjustified rejection could jeopardise a person's livelihood since appointment as a valuer could be an important commercial asset to a person in professional practice. After the Committee had described its concerns to him, the Minister for Territories, the Hon. Gordon Scholes, M.P., agreed to provide a right of appeal to the Administrative Appeals Tribunal where a recognised valuer failed to obtain

approval under the Ordinance.

5.52 The Minister's undertaking was given on 23 October 1986 and implemented in Co-operative Societies Amendment Ordinance 1987 (A.C.T. Ordinance No. 7 of 1987). The Committee's correspondence on this matter was incorporated in Senate Hansard, 23 October 1986, page 1853.

Crimes (Amendment) Ordinance (No. 3) 1986
(A.C.T. Ordinance No. 37 of 1986)

5.53 This criminal law Ordinance was deemed to have come into operation retrospectively. As such it warranted and received close scrutiny by the Committee but in the final analysis the Committee was satisfied that it merely corrected an earlier drafting error and caused no prejudice to any individual.

5.54 Until 1986, prosecutions for incest could not commence without the written consent of the Director of Public Prosecutions. An amendment was made in 1986 which was intended to require such consent only in cases involving a victim over the age of 16. As a result of a flaw in the drafting of the amendment the legal situation remained unaltered and consent continued to be required in all cases. The present amendment was made to rectify the position as from the date in 1986 on which the flawed amendment was originally intended to operate. Thus, if between the making of the flawed Ordinance and the making of this correction a person had been charged with incest without the consent of the D.P.P. that charge, although improperly laid, would have been validated by the retrospective operation of the present Ordinance.

5.55 The Attorney-General assured the Committee that no such charges had been laid and that within a very short time of

the error having been identified judicial and legal authorities in the A.C.T. had been notified that a correction would be made. The Committee was impressed with both the speed and the scope of the Attorney-General's efforts to notify the legal profession of the error.

5.56 The Committee's correspondence on this matter was tabled in the Senate on 13 November 1986 (Senate Hansard, page 2097).

Customs Regulations (Amendment)
(Statutory Rules 1986 No. 176)

5.57 These regulations were designed to honour an undertaking given to the Committee by the Minister for Industry, Technology and Commerce, Senator the Hon. John Button, to correct a drafting error in previous regulations (Statutory Rules 1985 No. 126). The drafting failed to provide that persons affected by decisions must be told of their right of appeal to the Administrative Appeals Tribunal. Unfortunately the correcting regulations were also flawed. They expressly preserved the legal validity of a decision regardless even of a failure to tell the person about the decision. The usual drafting approach is to provide that only a failure to notify appeal rights will not vitiate the decision. This leaves open the possibility that a complete failure to notify a person of the actual decision may render such a decision invalid. The Committee had previously suggested to various Ministers that a complete failure to notify appeal rights should have no less an effect. In this case the Minister agreed to make a further appropriate amendment to ensure that at least notification of decisions was mandatory.

5.58 The Ministers' undertaking was given on 10 October 1986

and implemented by the Customs Regulations (Amendment) (Statutory Rules 1986 No. 368).

Defence Determination No. 46 of 1986

5.59 This Determination, made under the Defence Act 1903, increased the allowances payable to certain members of the defence forces who were obliged to hire domestic furniture. The allowance was to be the lesser of hire and insurance costs, or "an amount that is considered *reasonable by the approving authority having regard to the* costs which the member so incurs". An unjustifiably adverse exercise of this clearly subjective discretion could be difficult to remedy and could result in unfair treatment of service personnel. The Minister for Defence, the Hon. Kim Beazley, M.P., promised the Committee that he would amend the Determination to provide for a stricter set of guidelines to govern the exercise by the approving authority of the discretion in question. The Minister's undertaking was given to the Committee on *23 October 1986* and implemented on 24 September 1987 in Defence Determination No. 70 of 1987.

5.60 The Committee's correspondence on this matter was tabled in the Senate on 13 November 1986 (Senate Hansard, 13 November 1986, page 2097).

Defence Determinations Nos. 75, 93 and 94

5.61 *These Determinations* provided for the payment of certain increased allowances to various categories of the Australian Defence Force personnel. Some of these payments had to be made retrospective by up to two and a half years because the entitlements of the relevant personnel had been inadvertently overlooked for that long.

The Committee views as extraordinary the circumstances which give rise to a need for such lengthy retrospectivity. In its Twenty-fifth Report (November 1968) the Committee stated that:

> Regulations involving retrospectivity in payment of moneys, if extending beyond two years, will be the subject of report to the Senate and unless quite exceptional circumstances are established to the Committee's satisfaction, will be the subject of a recommendation for disallowance.[5]

5.62 In the cases in question, human errors occurred in the administration of the determination scheme. There were breakdowns in communications between the Department of Defence, and the Public Service Board which usually initiates increases in allowances for public servants which may then flow on to the defence force. The Committee accepted that retrospectivity was necessary if service men and women were to be treated uniformly and not financially disadvantaged by administrative mistakes no matter how serious or avoidable.

5.63 In keeping with its usual practice the Committee reported to the Senate on this use of extensive retrospectivity. In a statement, the then Chairman of the Committee, Senator Cooney, said -

> The Committee wrote to the Minister for Defence about Defence Determinations Nos. 75, 93, and 94 of 1986 because they contained significantly retrospective elements, going back as far as 1 September 1983 and 1 January 1984. In its 19th, and again in its 25th, Reports, in 1964 and 1968, the Committee, with the support of the Senate, formulated guidelines on how it would scrutinise retrospective instruments. While objecting to retrospectivity beyond a few months, the Committee has taken a very strong stand against retrospectivity exceeding 2 years where the payment of monies is concerned. The Committee requires exceptional circumstances to justify that.

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5. Parliamentary Paper No. 118/1969, page 225, para. 17

> Although I stress that, in these cases, the retrospectivity has not prejudiced any defence force personnel, it can prejudice the Parliament which is expected to approve of backdated expenditure in circumstances other than those prevailing at the time to which the expenditure relates. The Minister for Defence has written to the Committee pointing out that lengthy retrospectivity was needed here because Defence Determinations were based on precedent Public Service Board Determinations and human error resulted in applicable Public Service Board determinations being overlooked.
>
> The Committee has no interest in apportioning and casting blame. Our concern is simply to ensure that retrospectivity in Determinations is kept to a reasonable minimum. Although administratively convenient and sometimes genuinely necessary to avoid hardship or unfairness, the unquestioned use of retrospectivity for administrative purposes can lead to a decline in standards of administrative efficiency and money management. The Minister has assured the Committee that he does not consider the system for producing Determinations to be fundamentally flawed. The Committee has some confidence that the Minister will monitor the situation through his senior advisers to ensure that legislative retrospectivity is minimised.[6]

Domestic Violence (Miscellaneous Amendments) Ordinance 1986 (A.C.T. Ordinance No. 53 of 1986)

5.64 A more detailed report of the Committee's scrutiny of this Ordinance is contained in the Eighty-first Report (December 1986)[7] in which the Committee considered the question of how it should deal with important law reforming A.C.T. Ordinances under Principle (d) of its terms of reference.

5.65 The Committee examined the width of the powers in new section 349A of the Crimes Act, as contained in this Ordinance, which authorised police officers to enter premises to prevent a breach of the peace or protect life

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6. Senate Hansard, 12 May 1987, page 2628
7. Parliamentary Paper No. 434/1986

or property. While the law implied that these powers were to be exercised reasonably, the Committee has long argued that there are important educative and practical advantages in limiting the exercise of wide official powers by express reference to the qualifying standard of reasonableness. Such a course leaves no doubt in the minds of officials that while large and intrusive powers are necessarily available for law enforcement, they must be exercised in a reasonable way. In 1985 an acceptable precedent for this was worked out between the Committee and the Minister for Territories, the Hon. Gordon Scholes, M.P. It appears in section 235 of the A.C.T Credit Ordinance 1985. The Attorney-General undertook to amend the Domestic Violence Ordinance in line with that precedent.

5.66 The Attorney-General's undertaking was given on 29 October 1987 and the Committee awaits its implementation. The Committee's correspondence on this matter was tabled in the Senate on 13 November 1986 (Senate Hansard, 13 November 1986, page 2097).

Electricity (Amendment) Ordinance 1987
(A.C.T. Ordinance No. 5 of 1987)

5.67 This Ordinance was made to implement certain ministerial undertakings given to the Committee in 1985. However, the Ordinance also increased, very considerably, the penalties for offences under the legislation. The original, much lower, penalties had been prescribed less than two years previously. The offences, generally concerning the sale of defective electrical goods, were, of course, very serious. However, no reason was given in the Explanatory Statement for the very large penalty increases.

5.68 The Committee has previously expressed its concern about

the inadequacy of some explanatory statements. In this case some penalties for offences were increased to levels 20 times higher than those originally prescribed, a situation clearly calling for an explanation which should have appeared in the official explanatory document. The Committee requested an explanation from the Minister for Territories, the Hon. Gordon Scholes, M.P. The Minister pointed out that penalties had been increased to bring them into line with those imposed in relation to similar offences against consumers under the Trade Practices Act. The Committee accepted the Minister's explanation, regretting only that it had been necessary to ask for it in a case when penalties had been raised to such an extent.

5.69 The Chairman's statement on the Committee's scrutiny of this Ordinance was incorporated in Senate Hansard, 28 May 1987, page 3089. Committee correspondence was tabled on the same day.

Export Control (Unprocessed Wood) Regulations (Statutory Rules 1986 No. 79)

5.70 These regulations empowered the Minister for Primary Industry, or his or her delegate, to grant or refuse to grant licences to export wood chips. The Minister could also reconsider a delegate's decision and having done so the Minister was required to notify the applicant of the reasons for the decision. The regulations provided for review by the Administrative Appeals Tribunal of all decisions to grant or revoke licences. However, although reviewable by the AAT, a primary or initial decision taken by the Minister personally would not be accompanied by a statement of reasons.

5.71 Since an application could be made to the AAT for review

of the Minister's refusal to grant a licence, some kind of formal explanation for the decision would have to be given. It therefore struck the Committee as anomalous that reasons for the Minister's decision were not to be supplied in the first instance. This also appeared to be somewhat unfair since applications for these licences were detailed and costly to prepare and the outcome was a matter of considerable commercial significance to an applicant company and its shareholders and employees.

5.72 In correspondence, the Minister for Primary Industry, the Hon. John Kerin, M.P., (and the acting Minister, the Hon. Chris Hurford, M.P.) explained that, as an administrative practice, reasons for adverse ministerial decisions were in fact communicated to applicants. The Committee was informed that, in informal ways and through requests to the applicant to provide information leading up to a decision, the thrust of the Government's thinking on a particular application would be clearly conveyed. However, this could occur in a fashion that was likely to fall short, in legal terms at least, of a statement of reasons that would satisfy a legal tribunal.

5.73 The Minister explained that the need to preserve Cabinet secrecy was the single most important factor which prohibited the full formal disclosure of reasons for a decision taken by the Minister personally. Major policy decisions of a sensitive political nature would be referred to Cabinet and, in these circumstances, a requirement to give a formal statement of reasons could lead to an improper disclosure of the deliberations of Cabinet.

5.74 Having received this information the Committee faced an unusual dilemma. On the one hand these particular licencing decisions were of such importance to the commercial and livelihood interests of companies and their

employees that the prompt provision of a statement of reasons should have been a minimum requirement of administrative fairness. On the other hand, the Committee was confused by the proposition that, although no licence applicant had ever been or would ever be unaware of the reasons for the Minister's refusal to grant a licence, those very reasons involved considerations of Cabinet secrecy which could not be intruded upon by a legislative obligation to give reasons. Administrative practice seemed to undermine the theory of Cabinet secrecy, and Cabinet secrecy seemed to be at variance with the principles of natural justice. This was an illogical situation. In a letter to the Minister the Committee wrote -

> The Committee is really a little bewildered at the proposition that although no licence applicant has ever been or will ever be unaware of the reasons for an adverse administrative decision, those very reasons involve questions of absolute Cabinet secrecy which cannot be intruded upon by a legislative requirement to underpin the existing administrative practice. Such antecedent underpinning would legally guarantee it from interference from the pressure of administrative expediency throughout the whole life of the Regulations. The Committee has difficulty in accepting that a tenuous, informal and uncertain administrative system of the kind described to it could exist. It has difficulty in understanding how such a system could work honourably without a tendency, either to give reasons other than the real reasons, or to breach the very Cabinet secrecy that is of such apparent concern in answering the Committee.[8]

5.75 Left unchallenged, such a contradiction was a charter for grievance and suspicion. The Committee had difficulty in comprehending how such information feed-back procedures could work honourably without a tendency, either to give reasons other than the real reasons and thus preserve Cabinet secrecy, or to breach that vital Cabinet

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8. Letter, Senator B. Cooney to the Hon. J. Kerin, M.P., 26 August 1986

convention and give honest reasons. The Committee considered that important export licence decisions, whether taken by Cabinet collectively or the Minister alone, must be rational and capable of public scrutiny and evaluation since they were reviewable by the Administrative Appeals Tribunal. The policy or political considerations on which those decisions were based could not, therefore, be kept secret without arousing at least the suspicion of injustice or impropriety. The Committee was not unaware of the existence under the Administrative Decisions (Judicial Review) Act 1977 and the Administrative Appeals Tribunal Act 1975 of rights to seek reasons for administrative decisions. However, in correspondence with the Minister the Committee wrote -

> An organisation which has invested in the preparation of an expensive application should not be required to resort to legal avenues merely to *obtain full and proper reasons for adverse* decisions of the significance of those here under consideration. By combining an apparent willingness to give full reasons informally, with an insistence on the primacy of secrecy in Cabinet deliberations, current practices may, inadvertently, have called into question the nature of those very administrative procedures. An awareness of this may encourage applicants to use the A.A.T. Act or the A.D. (J.R.) Act to obtain a legally authenticated set of reasons but with two adverse consequences. Firstly, they may be met with the formal secrecy provisions in sections 28(2) and 36 of the A.A.T. Act or in section 14 of the A.D. (J.R.) Act. Thus, an aggrieved applicant may never know whether the informal reasons for rejection, which are, without exception, conveyed informally to such applicants by officials, were the real but apparently secret Cabinet reasons. Secondly, and more importantly however, even to pursue this course requires applicants to adopt a posture, vis a vis the Cabinet, the Minister and the Department which they might legitimately fear would be perceived as aggressive or confrontationist. They may consider that it will place in jeopardy their future commercial relationships with important decision-makers who are both challenged and

threatened by an unnecessary resort to law.[9]

5.76 Having further examined the issues, the Minister agreed to amend the Regulations to ensure that applicants refused a licence would be notified of the reasons for that refusal, subject to the protection of Cabinet secrecy by means of a provision similar to the standard protection of Cabinet included in, for example, paragraphs 28(2)(b) and 36(1)(b) of the Administrative Appeals Tribunal Act 1975 and paragraph 14(1)(b) of the Administrative Decisions (Judicial Review) Act 1977.

5.77 During the course of its scrutiny the Committee had also been concerned that the drafting of the Regulations appeared to make it possible for the Minister to delegate to an official the power to conduct a "ministerial" reconsideration of a primary or initial licencing decision that had been taken by that same official. This would clearly negate any opportunity for a fresh appraisal. The Minister agreed to amend the Regulations to remove this possibility. The Committee accepted this outcome and the Minister expeditiously implemented his undertakings in the Export Control (Unprocessed Wood) Regulations (Amendment) (Statutory Rules 1986 No. 327).

5.78 The Committee's correspondence on this matter was tabled in the Senate on 22 September 1986 (Senate Hansard, 22 September 1986, page 621).

Fisheries Levy (Northern Prawn Fishery) Regulations (Amendment) (Statutory Rules 1986 No. 397)

5.79 Regulations provided that the amount of levy to be paid on the allocation of fishing units under the Fisheries Levy

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9. Letter, Senator B. Cooney to the Hon. J. Kerin, M.P., 17 September 1986

Act 1984 would be $5 or $10 depending on the number of fishing units allocated to a boat. Due to a flaw in the drafting of certain Regulations $10 was prescribed when the intention was to prescribe only $5. However, levy had in fact been collected at the rate of only $5 per unit. The new regulations were made to correct the error and retrospectively validate the collection of this lower levy. The Committee noted the unusual situation that the levy regulations were contrary to the Minister's declared policy and the levy collections were contrary to the Minister's regulations. After examining the matter with the advice of the Minister for Primary Industry, the Hon. John Kerin, M.P., the Committee accepted his assurance that since only $5 had in practice been levied when $10 had been legally authorised the retrospective operation of the regulations would not operate to prejudice any individual.

5.80 The Committee's correspondence on this matter was incorporated in Senate Hansard, 3 April 1987, page 1807.

Fisheries Notice No. 174

5.81 Fisheries Notice No. 174 had the effect of prohibiting the taking of western rock lobster other than with fishing equipment that complied with Western Australian State Fisheries Notice No. 233 of 26 September 1986 or "any notice that may be published under the (State) Act in substitution for that notice" (paragraph 2(b)(ii)). Subsection 8A(1A) of the Commonwealth Fisheries Act 1952 provided that a section 8 Fisheries Notice may make provision for a matter by applying, adopting or incorporating

> "(a) a provision of any Act or any regulation made under an Act, of any determination made under subsection 7B(1) or of any other notice published

under section 8 as in force at a particular time or as in force from time to time; or

(b) any matter contained in any other instrument or writing as in force or existing when the notice comes into force".

5.82 By virtue of the Acts Interpretation Act 1901 the enactments and instruments referred to in paragraph 8A(1A)(a) as subject to incorporation "as in force from time to time" must be Commonwealth instruments. State Fisheries Notices fell within the terms of paragraph 8A(1A)(b) of the Act which permitted incorporation of other instruments only to the extent that they were already in force or in existence.

5.83 Paragraph 46(b) of the Acts Interpretation Act could perhaps have enabled a severance of paragraph 2(b)(ii) of Fisheries Notice No. 174 if that paragraph was invalid. Severance would have preserved the integrity of the remainder of the Notice as an instrument of ministerial policy.

5.84 Although the Notice ceased to operate on 1 June 1987 when a new Federal/State fishing arrangement came into force under section 12H of the Fisheries Act, the Committee invited the Minister for Primary Industry, the Hon. John Kerin, M.P., to seek advice from the Attorney-General's Department on the future legal implications of the use of State fisheries notices in order to minimise legal uncertainties.

5.85 The Committee's statement and correspondence on this matter was incorporated in Senate Hansard, 30 March 1987, pages 1433-1435.

Futures Industry Regulations
(Statutory Rules 1986 No. 150)

5.86 These Regulations prescribed an unsatisfactory form of official authorisation for inspectors with powers to inspect records. Subsection 13(4) of the Futures Industry Act 1986 provided that the National Companies and Securities Commission could authorise an inspector to demand production of financial records "on that (inspector) producing (if required to do so) such evidence of (his or her) authority as is prescribed". Regulation 12 simply prescribed "a document that is issued by the Commission... that states that the (inspector) may require the production of books". The Committee considered that inspectors exercising powers of this kind should produce proper, official, photographic identity cards rather than some lesser form of evidence of identity which impostors might more easily fabricate. The Attorney-General's undertaking to raise the matter with the Ministerial Council was given to the Committee on 30 September 1986 (Senate Hansard, 17 November 1986, page 2272). After consultations with the Ministerial Council for Companies and Securities the Attorney-General informed the Committee, on 5 June 1987, that in future inspectors using powers under the Futures Industry Act and Code would use photographic identity cards of a kind already in use by inspectors under the Companies and Securities Industry Code.

High Court Rules being Rules under the Judiciary Act 1903, As Amended, (Statutory Rules 1987 No. 46)

5.87 These Rules had the effect of increasing by 2.8 per cent the costs which solicitors could charge for the conduct of proceedings before the High Court. The increase was recommended by the Federal Costs Advisory Committee. The 2.8 per cent rise represented an across the board increase in charges for over 50 items of legal work which were

listed in a schedule to an earlier set of regulations made in 1986. This shorthand method of increasing legal costs had been used previously. However, while not objecting in principle to this convenient device, the Committee considered that, in the interests of public accessibility, a full schedule displaying the higher charges should be published in the statutory rule series on a regular *periodic basis*. *The Court, through the Chief Justice, the* Hon. Sir Anthony Mason, noted the Committee's comments and proposed in future to publish the amended Schedule in full.

Imperial Acts (Substituted Provisions) Ordinance 1986 (A.C.T. Ordinance No. 19 of 1986)

5.88 Shortly after making this Ordinance, in June 1986, the Attorney-General, the Hon. Lionel Bowen, M.P., wrote to the Committee pointing out that it terminated the operation of 26 Imperial Acts insofar as they may have been in force in the A.C.T., and substituted new provisions. The Committee has a general concern that any delegated legislative instrument which repeals another law should be capable of disallowance in a way which allows *the repealed law to revive*. At *the time of the* Attorney-General's letter, the Departmental view was that disallowance of an A.C.T. Ordinance repealing New South Wales Acts or Imperial Acts would not revive any such repealed Act.[10] Conscious of the Committee's concern abou this matter, the Attorney-General, on his own initiative, gave an undertaking that if the Senate disallowed a provision of the present Ordinance which terminated all or part of an Imperial or New South Wales Act, he would cause another Ordinance to be made which would expressly revive

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10. See the Committee's Seventy-sixth Report, Parliamentary Paper No. 507/1985, where this question is discussed in detail

all or part of the terminated Act in accordance with the wishes of the Senate. This undertaking was similar to that referred to in the Committee's Eightieth Report (October 1986)[11] and the Committee was pleased to receive it.

5.89 The Committee also drew the Attorney-General's attention to clause 1 of the substituted provisions concerning Seizure of Libelous Papers. This provided that where a person is convicted of publishing a blasphemous, obscene or seditious libel, the court may issue a search warrant "*authorising a person named in the warrant*, with such assistance as the person thinks necessary, to enter ... any house (etc) ... named or described ..., if necessary by force, and to seize any ... documents found ...". For some time now the Committee has been objecting to the use of this formula in authorising the issue of search warrants, because it does not expressly restrict the use of the powers granted, particularly the power to use force, to reasonable limits.

5.90 The Attorney-General agreed to make an appropriate amendment and this appeared in the Imperial Acts (Substituted Provisions) (Amendment) Ordinance 1987 (A.C.T. Ordinance No. 45 of 1987).

Imperial Acts (Repeal) Ordinance (Proposed A.C.T. Ordinance)

5.91 In October 1986 the Attorney-General, the Hon. Lionel Bowen, M.P., wrote to the Committee indicating that he proposed to make an Ordinance repealing all unnecessary and obsolete Imperial Acts thought to be still applicable in the A.C.T. However, because every one of those Acts could not be identified with absolute certainty, he

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11. Parliamentary Paper No. 241/1986, page 108, para 4.186

proposed to use a general repeal formula to effect these repeals. This would be at variance with the Committee's recommendation in its Seventy-sixth Report (December 1985)[12] that the names of all Imperial Acts to be repealed should be listed in full in a Schedule to the proposed Ordinance. The Attorney-General sought to be released from this recommendation because of the degree of uncertainty which could arise from an incomplete listing of the Acts which it was desired to repeal. As an alternative proposition the Attorney-General desired to use a drafting formula which would repeal all Imperial Acts in force except certain named acts. He was convinced that this method would inject the maximum degree of certainty into the law for the benefit of the A.C.T. legal profession and the community. In order to accommodate the potential concerns of the Committee or the Senate about the technical or policy implications of any particular repeal, he undertook, as he had done in the past, to make an Ordinance re-enacting any repealed Imperial Act if the Senate, by resolution, called upon him to do so.

5.92 Following an in camera hearing with a Deputy Secretary of the Attorney-General's Department and the consultant legal drafter involved with the Imperial Acts Repeal project, the Committee agreed to accept the Attorney-General's proposal. In a letter to the Attorney-General the Committee wrote -

> In the unique circumstances of this case the Committee will accept this proposal and when the Ordinance is tabled it will report to the Senate that its form is acceptable to it because of your undertaking. The Committee would, however, request that the accompanying Explanatory Statement should list all of the Acts to be repealed so far as they are known to your Department. It should also refer to your undertaking. The Statement might also indicate whether and if so, why, any recommendations of the A.C.T. Law Reform Commission have not been

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12. Parliamentary Paper No. 507/1985

followed in the Ordinance.

The Committee raises the point for you and your officials to reflect upon that, had the scheduling of Acts offered an adequate degree of certainty, *the resulting Ordinance may have been a most* noteworthy document in its own right from the constitutional, legal, historical and cultural points of view.[13]

Interstate Road Transport Regulations (Statutory Rules 1986 No. 291

5.93 Regulation 36 provided that after consultation with State and Territory vehicle registration authorities the Minister for Transport could certify that he or she was satisfied with a vehicle distance monitoring device to be used in recovering certain charges. The Committee considered that an unreasonable exercise of the Minister's discretionary power to refuse, vary or revoke a certificate of approval of a device could have significant commercial implications for manufacturers and others. Since the discretion was not independently reviewable by the Administrative Appeals Tribunal the Committee inquired what other protection would be available to an inventor, manufacturer or supplier.

5.94 The Minister for Transport, the Hon. Peter Morris, M.P., explained that because of the broad policy issues that lay behind his decisions in this area, including in particular the consideration of Federal/State/Territory inter-governmental relations, the possibility of intervention by the AAT could be disruptive. He told the Committee that suppliers and manufacturers of devices had been supplied with guidelines relating to the desired quality of devices. He also undertook that, where any grievance arose, an inquiry would be initiated by his Department, and conducted by a team of officers not involved in the

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13. Letter, Senator B. Cooney to the Hon. L. Bowen, M.P., 26 November 1986

initial decision giving rise to the grievance.

Lands Ordinance 1987
(Christmas Island Ordinance No. 1 of 1987)

5.95 This Ordinance made wide ranging provision for the control of leasehold land on Christmas Island. It overrode the terms of existing leases on the Island. It also conferred certain powers on the Administrator. These were to be exercisable in accordance with possibly secret ministerial Guidelines. The Administrator could make discretionary decisions to direct the level of rents, to grant rent reductions and to relieve from the terms and conditions of leases. The only avenue of appeal against the merits of the Administrator's decisions was to the Minister.

5.96 The Committee was concerned that the Guidelines would not be subject to parliamentary tabling and disallowance. It also had reservations about the use of a ministerial appeal system in connection with the important and sensitive issue of private housing in a territory where all land and buildings were owned and controlled by the Commonwealth Government. To obtain a better grasp of the background to the Ordinance the Committee held an in camera hearing with the Minister's legal and policy experts from the Indian Ocean Territories Branch of the Department of Territories. These officials were helpful in describing the social conditions on the Island, the practice of consultation with the Union of Christmas Island Workers and the important impact of industrial relations agreements and arbitration awards on the setting of residential rents.

5.97 The Committee accepted that, in the special circumstances of this case, its request that there be an independent right of review would have to be relaxed. The

geographical isolation of the Island and its language and cultural differences from mainland Australia made administrative reviews by the AAT rather than the Minister an ideal but difficult and complex remedy for grievances. Review by non-legally qualified lay magistrates resident on the Island did not seem to offer an adequate solution. The Committee accepted the assurances of the Minister for Territories, the Hon. Gordon Scholes, M.P., that he would be very closely and personally involved in the ministerial appeal process. The Committee is generally extremely reluctant to accept a ministerial appeal process where an AAT jurisdiction is in principle more appropriate. In this case the Committee reluctantly felt it had no alternative.

5.98 The power to issue ministerial Guidelines for the Administrator was intended to ensure that decisions on leases would be in accordance with Government policy. The Committee was told that Guidelines could contain sensitive information about minimum rent levels, premiums for commercial leases, the steps to be taken regarding rent appeals and responses to property damage. It was suggested that the advance publications of such Guidelines through their being tabled in Parliament could undermine commercial negotiations or aggravate other problems by revealing the confidential tolerances of the Commonwealth's administrative position regarding property on the Island. The Committee did not find this argument attractive since mandatory consultation with the Island Assembly and freedom of information rights could allow for publication of the Guidelines.

5.99 The Committee considered that it would be wrong in principle for it to approve an Ordinance under which a another binding, quasi-legislative instrument could be made, unless it and the Senate either knew the contents of that instrument or had the opportunity to know and

challenge the contents of it at a subsequent date. In its role as a protector of the Senate's right to exercise proper supervision over the legislative and quasi-legislative activities of the Executive, the Committee recommended that the Ordinance should be amended to ensure that the Guidelines would be subject to tabling and disallowance in Parliament. However, the Committee considered that Guidelines containing financial criteria for business lease negotiations need not be tabled. The Minister agreed to amend the Ordinance to provide for these changes. He also agreed to a drafting amendment that would expressly limit to a reasonable standard the degree of force which might be used by law enforcement officers to execute a magistrate's warrant of ejectment. This was an adjustment of a declaratory but nevertheless important nature.

5.100 The Minister's undertakings were received on 11 May 1987. The Committee continues to await their implementation. The Chairman's statement to the Senate on the Committee's scrutiny was incorporated in Senate Hansard, 11 May 1987, page 2619. Committee correspondence on this matter was tabled in the Senate on that day.

Long Service Leave (Building and Construction Industry) (Amendment) Ordinance 1986 (A.C.T. Ordinance No. 55 of 1986)

5.101 This Ordinance was made to restore to building supervisors their legal rights to long service leave entitlements. These had been unintentionally removed as a result of a drafting flaw in a 1984 amendment Ordinance. The error went unnoticed and employers continued to make long service leave contributions although under no strict legal obligation to do so. The remedial Ordinance corrected the flaw and was made retrospective to 1984 to validate the

previous employer contributions. The Committee examined whether the Ordinance had imposed on employers a retrospective obligation to make contributions. If it had done so then retrospectivity could have been prejudicial to those employers and therefore, objectionable to the Committee. Had this been the case protection of the rights of both the employers and the employees would have been needed. In the event, however, it appeared that all relevant employers had voluntarily made long service leave contributions and would not in practical terms be prejudiced by the retrospectivity.

5.102 The Committee's correspondence concerning this matter was tabled in the Senate on 13 November 1986 (Senate Hansard, 13 November 1986, page 2097).

Meat Inspection (General) Orders (As Amended)
(Meat Inspection Orders No. 4 of 1986)

5.103 Under these Orders an authorised officer could suspend or close down certain business premises which he or she believed to be in an unsanitary condition. This was a large but necessary power. Its exercise was subject to reconsideration by the Secretary and review by the Administrative Appeals Tribunal. However, there was no legal obligation on administrative officials at the time of closing down a business to give the proprietor any reasons for such a major decision. Although in practice the notice of decision issued to close down the business generally set out the relevant reasons, the Minister for Territories, the Hon. Gordon Scholes, M.P., accepted the Committee's suggestion that this protective requirement should expressly appear in the Orders.

5.104 The Minister's undertaking to amend the Orders was given on 20 March 1987 and implemented on 17 March 1988 by the

Meat Inspection (General) Orders as amended (Amendment) (being Meat Inspection Orders No. 2 of 1988). The Chairman's statement to the Senate and correspondence in this matter were incorporated in Senate Hansard, 30 March 1987, pages 1433-1435.

Motor Omnibus Services (Amendment) Ordinance 1986
(A.C.T. Ordinance No. 48 of 1986)

5.105 Previous A.C.T. regulations made under the Principal Ordinance (and therefore, subject to parliamentary supervision,) set out in detail the powers of A.C.T. bus inspectors and the obligations of bus passengers. The regulations were repealed and section 7 of the Ordinance provided that inspectors would henceforth have "such powers... as the Minister directs". In response to the Committee's expression of concern about the width of this new discretion, the Minister for Territories, the Hon. Gordon Scholes, M.P., explained that the provision had been intended as a means of conferring powers on inspectors to supervise the collection of newly determined fares. Since such supervision merely entailed inspection of tickets or proof of entitlement to concessional travel, he now regarded the provision as unnecessary.

5.106 The Minister's undertaking to repeal the provision was given on 11 November 1986 and implemented on 3 March 1988 in the Motor Omnibus Services (Amendment) Ordinance 1988 (A.C.T. Ordinance No. 12 of 1988). The Committee's correspondence concerning this matter was tabled in the Senate on 13 November 1986 (Senate Hansard, 13 November 1986, page 2097).

Motor Traffic (Amendment) Ordinance 1986
(A.C.T. Ordinance No. 3 of 1986)

5.107 The Motor Traffic (Amendment) Ordinance 1986 increased the fee for a taxi licence from $250 to $80,000. The Committee, in seeking an explanation for this 300-fold increase in fees, wished to determine that it was not so large or unjustified an increase that no reasonable Minister would have proposed it. An unreasonably large increase could constitute an infringement of the Committee's Principles. The Committee also sought an assurance that the Ordinance, the draft of which had been kept confidential to prevent a rash of licence applications before it came into effect, would not prejudice the rights of applicants whose applications had not been processed before the new law was made.

5.108 The Minister told the Committee that the policy behind the Ordinance was to recognise and impose an open-market value on transferable taxi licences and thus prevent profiteering in new $250 licences prior to making all licences transferable. The open-market value of the licences was $80,000. In these circumstances the Committee had no reason to further question the level of fee increase.

5.109 The Minister also told the Committee that one pre-existing applicant for a licence would be affected by the new law. Subsequently, that individual made a written submission to the Committee claiming that his application had not been fairly or expeditiously dealt with. The Committee cannot act on behalf of individuals since its role is to uphold certain general principles of liberty, fairness and propriety. In this case the Committee considered that it was contrary to general principle to impose a 300-fold fee increase on any licence applicant whose application had not been fairly and properly processed in time to avoid the effects of the increased fee. To allow a tardy or neglectful departmental response to result in a timely

application becoming caught up in later legislative changes would put a premium on departmental delay and inefficiency and create an implied prejudicial retrospectivity in legislation.

5.110 During the course of the Committee's scrutiny, the one remaining application for a licence was granted. To allay the Committee's concerns about retrospectivity the Minister agreed to use his powers under the Motor Traffic Ordinance to remit part of the applicable fee so that in this case the $80,000 fee was reduced to $250. The individual concerned was, therefore, saved from personal prejudice arising from the retrospective application of the Ordinance. He received the non-transferable licence to which he had been entitled prior to the legislative changes. This licence was capable of conversion to a transferable licence within 2 years of issue subject to payment of a fee of 75 per cent of the current market value at the time.

5.111 The Committee's scrutiny of these matters was reported to the Senate on 21 August 1986 when the Committee incorporated its correspondence. (Senate Hansard, 21 August 1986, page 190).

National Occupational Health and Safety Commission Regulations (Statutory Rules 1986 No. 206)

5.112 These Regulations provided that the special name "Worksafe Australia", and its associated emblem, would be used exclusively by the National Occupational Health and Safety Commission. However, the Committee noted the absence of any provision for compensation to be made to any organisation which might already be using the name and which, under the Regulations, would be prohibited from using it in future. The Committee was aware of a

provision in the Australian National Airlines Regulations (Statutory Rules 1986 No. 201) which prescribed the name "Australian Airlines" and went on expressly to confer a right to compensation on companies and bona fide users of that name who would henceforth be lawfully forbidden from using it.

5.113 The Minister for Employment and Industrial Relations, the Hon. Ralph Willis, M.P., assured the Committee that prior to the drafting of the Regulations searches were undertaken throughout Australia to ensure that "Worksafe Australia", or any similar name, had not been registered as a business name. Records in the Patents, Trade Marks and Design Offices were also checked to ensure that the logo adopted for use by the Commission was not employed elsewhere. The Committee accepted these explanations.

5.114 The Committee's correspondence on this matter was tabled in the Senate on 17 November 1986 (Senate Hansard, 17 November 1986, page 2272).

Nature Conservation (Amendment) Ordinance 1986
(A.C.T. Ordinance No. 65 of 1986)

5.115 This Ordinance provided for the declaration of reserved areas and the preparation of plans of management in the A.C.T. No provision was made for parliamentary scrutiny of these important instruments although, under other legislation, analogous conservation plans and declarations were subject to tabling and disallowance in each House of Parliament. The Minister for Territories, the Hon. Gordon Scholes, M.P., undertook to amend the Ordinance to provide for tabling and disallowance of declarations of reserved areas, declarations of wilderness zones, Plans of Management of reserved areas and instruments amending or revoking any of the foregoing. The Minister also agreed

to provide, as an optional alternative to disallowance, that either House could by resolution recommend amendments to a Plan of Management.

5.116 The Minister's undertaking was implemented in the A.C.T. Nature Conservation (Amendment) Ordinance 1987 (A.C.T. Ordinance No. 1 of 1987). The Committee's correspondence on this matter was incorporated in Senate Hansard, 19 February 1987, page 224.

Navigation Orders 5-12
(Navigation (Orders) Regulations Orders Nos. 5-12 of 1986)

5.117 These Orders dealt with complex technical matters relating to the safety of ships. The Committee's difficulty in comprehending their technical detail was compounded by the absence of any explanatory statements, an omission the Minister for Transport, the Hon. Peter Morris, M.P., undertook to rectify.

5.118 The Orders also conferred on various departmental officials numerous powers to take discretionary decisions. Many of these discretions involved the making of technical decisions concerning a ship's compliance with vital safety standards. Decisions could be taken in certain circumstances to give or withhold approvals or exemptions from the prescribed safety requirements. Such decisions could obviously have commercial significance for a ship builder or operator. The Minister recognised the possibility that decisions could be capricious or unmeritorious. He was also aware that the anachronistic right of appeal to a Court of Marine Inquiry was no longer an adequate avenue for the redress of certain grievances that might arise under the Orders. To remedy this problem he agreed to establish a departmental inquiry to examine, as a matter of priority, the question of administrative

discretions under the Orders. He planned to include review proposals in legislation to be introduced in the 1987 Budget Sittings of Parliament.

5.119 The Minister's undertaking was given on 3 November 1986. The Committee continues to await the implementation of the undertaking in the promised Bill. The Committee's correspondence on this matter was tabled in the Senate on 13 November 1986 (Senate Hansard, 13 November 1986, page 2096).

Navigation (Protection of the Sea) Regulations (Statutory Rules 1986 No. 300)

5.120 These regulations provided that service of important legal documents could be achieved by delivering them "to any person on board the ship who appears to be an officer of the ship." The Committee suggested, that from the point of view of precision and the protection of rights, this requirement was less satisfactory than an obligation to serve on a person who "is or is reasonably believed to be" an officer of the ship. The Minister for Transport, the Hon. Peter Morris, M.P., accepted the Committee's suggestion. (See also the discussion concerning the Commercial Arbitration Ordinance 1986.)

5.121 The Minister's undertaking was given on 8 December 1986.

New South Wales Acts Ordinance 1986 (A.C.T. Ordinance No. 91 of 1986)

5.122 Late in 1985 the Committee obtained ministerial undertakings to amend certain old New South Wales Acts applying in the Australian Capital Territory so that objectionable provisions would be removed, including:

strict liability offences, an inappropriate definition of an offence, unusual powers of arrest without warrant and some reversals of the onus of proof. When the Committee had occasion to study the progress made in addressing these matters it learnt that matters had not been advanced as quickly as was originally anticipated. The Minister for Territories, the Hon. Gordon Scholes, M.P., assured the Committee that its concerns would be the subject of special attention in his Department's legislation program for 1987.

5.123 The Minister's undertaking was given to the Committee on 28 April 1987. The Committee's correspondence on this matter was tabled in the Senate (Senate Hansard, 7 May 1987, at page 2448).

Northern Prawn Fishery (Special Provisions) Management Plan (Plan of Management No. 12)

5.124 The drafting of paragraph 9.1 of the Plan provided for certain courses of action affecting fishing rights. However, the drafting was in the form

(a) ...; and
(b) ...; or
(c) ...;

This form of drafting is ambiguous because it offers the reader two mutually exclusive sets of combinations and options. It can mean either: (a) and {(b) or (c)}; or {(a) and (b)} or (c). The Minister for Primary Industry, the Hon. John Kerin, M.P., agreed to correct this flaw to reflect as clearly as possible his intended options.

5.125 Paragraphs 9.3 to 9.5 of the Plan seemed to confer an unfettered and unappellable discretion on the Department

to transfer or refuse to transfer certain fishing rights. The Explanatory Statement for the Plan indicated that the Minister's policy was that all applications for transfer would be granted. The Committee suggested to the Minister that if this was to be the case there was no need for a unreviewable discretionary power to exist. The consequence of leaving the power in the Plan was that if circumstances changed there would be no legal obligation on the Department to grant applications and there would be no right of appeal against an unfair refusal. In expressing its concern the Committee wrote -

> Undoubtedly it is your policy and intention that proper applications will automatically be granted. Undoubtedly your officials, in all of the foreseeable and unpredictable circumstances with which they will be confronted, will consider themselves bound by the obligation of implementing your policy. However, you will appreciate that the Committee is concerned with issues of principles concerning the rights of individuals. Such issues must, of necessity, transcend administrative practices which cannot be underwritten into the future. Issues of principle find their security in the fixity of law.[14]

5.126 The Minister agreed to amend the Plan to require that transfer applications would be granted.

5.127 The Plan provided that certain certificates of fishing rights would become void and of no effect in 1990 and new certificates would then be issued. If certificates had been lodged with lending institutions as security for loans these would become void and worthless as collateral in the absence of an obligation on the borrower to lodge his or her new certificate. The Minister agreed to amend the Plan to require that certificates issued for a limited period would have this fact recorded on their face.

5.128 Finally, the Plan provided for the cancellation of certain

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14. Letter, Senator B. Cooney to the Hon. J. Kerin, M.P., 6 April 1987

fishing rights. No compensation was provided for nor were appeal rights available. However, these cancellations were the corner-stone of the Minister's policy to reduce the risk of over-fishing. Fishing rights could be assigned during the long lead time prior to cancellation. The proportion of total fishing units held by each unit holder in 1990 would, therefore, remain unchanged, apart from such transfers. If profits from the fishery remained unchanged the total value of units would also remain unchanged because a smaller number of units would enjoy an increased volume of fishing returns.

5.129 In deciding not to press the Minister on the issue of providing appeal rights against cancellations the Committee wrote -

> Although the Committee under its Principles has regularly sought advice from Ministers on legal issues such as the constitutionality, or the validity of various instruments of delegated legislation, it is not an ultimate adjudicator of issues of legality. Except perhaps where questions of invalidity are manifest, or where mounting a legal challenge to clearly questionable legislation would be onerous to an individual who was prejudiced, the Committee would generally eschew such a role. The question of the ultimate legality of complex subordinate legislation is a matter for the courts. That does not mean, of course, that the Senate may not, for policy reasons, consider whether a measure is so inappropriate and legally uncertain the it should be disallowed. However, the Committee's role cannot encompass any evaluation of the merits of a Minister's policy unless that policy is so manifestly at variance with the Committee's Principles that it should be enacted, if at all, only by the Parliament passing a Bill.[15]

5.130 The Minister's undertakings were given on 30 April 1987 and the Committee awaits their implementation. The Committee reported the outcome of its scrutiny and incorporated its correspondence at Senate Hansard, 30

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15. Letter, Senator B. Cooney to the Hon. J. Kerin, M.P., 6 April 1987

April 1987, page 2037.

Optometrists (Amendment) Ordinance 1986
(A.C.T. Ordinance No. 51 of 1986)

5.131 Under this Ordinance the Optometrists Board could cancel or suspend the registration of a practitioner for unprofessional conduct. In keeping with the serious nature of such disciplinary action, decisions were subject to review by the Administrative Appeals Tribunal. As an alternative punishment though, the Board could issue a reprimand to a practitioner. However, in this event an aggrieved person could not seek effective redress if he or she considered that the decision was unfair. The Committee considered that a reprimand could, in some circumstances, be almost as harmful to a person's professional career as other more serious disciplinary penalties. At the Committee's request the Minister for Territories, the Hon. Gordon Scholes, M.P., agreed to provide for AAT review of decisions by the Board to issue reprimands.

5.132 Under the Ordinance "unprofessional conduct" included associating with, or being employed by, an optometrist who engaged in improper advertising. The Committee was concerned about the prospect of "guilt by association" which appeared to be implicit in this provision. There was no requirement that an employee or other person should know of, connive at, or acquiesce in the actions of the advertising optometrist. The Minister agreed that it was desirable to redraft this provision to remove the possibility of a penalty being imposed on an innocent person or employee merely on account of an innocuous kind of "association".

5.133 The Minister's undertaking was given on 20 November 1986. The Committee continues to await its implementation. The

Committee's correspondence on this matter was tabled in the Senate on 27 November 1986, (Senate Hansard, 27 November 1986, page 2838).

Patent Attorneys Regulations (Amendment)
(Statutory Rules 1986 No. 260)
Patent Regulations (Amendment)
(Statutory Rules 1986 No. 259)
Trade Marks Regulations (Amendment)
(Statutory Rules 1986 No. 261)
Designs Regulations (Amendment)
(Statutory Rules 1986 No. 263)

5.134 The Committee noted that, of these Statutory Rules which varied the fees payable for processing patent applications, only the Trade Marks Regulations had a transitional provision ensuring that the new higher fees would not apply to any application for patent registration that had already been lodged. The Committee invited the Minister for Science, the Hon. Barry Jones, M.P., to explain why the other three sets of Statutory Rules did not contain a similar provision as a means of expressly avoiding an implication of retrospectivity in the legislation. The Minister explained that a separate fee was payable for each step in the process of patent registration. Such a procedure was advantageous to the applicant, but given the long time frames over which applications were processed it was not practicable to maintain a separate scale of fees for each of the pre-existing applicants whose applications were at various stages of processing. The Committee accepted the Minister's explanation.

Patent Attorneys Regulations (Amendment)
(Statutory Rules 1987 No. 12)

5.135 These regulations provided that members of the Board of Examiners of Patent Attorneys could be removed from office by the Minister for "misbehavior or incapacity". By contrast, members of the Patent Attorneys Disciplinary Tribunal could be removed for "inefficiency, misbehavior and physical or mental incapacity". At the Committee's invitation the Minister for Science, the Hon. Barry Jones, M.P., explained to the Committee that the Tribunal was constituted by a single person whereas the Board was constituted by 9 persons. Stricter criteria were, therefore, necessary for the single member body than for the larger body where a slight degree of inefficiency or physical incapacity might not be sufficient to disqualify a person from making a valuable contribution, bearing in mind the presence of the other 8 members on the Board. The Committee accepted the Minister's explanation for the distinction.

Postal (Staff) By-laws
(Amendment No. 1 of the Postal (Staff) By-laws 1986)
(Amendment No. 1 of the Postal (Staff) By-laws 1987)

5.136 The 1986 By-laws conferred on managers in the Australian Postal Commission a large number of discretions regarding the payment of certain allowances. These were clearly matters of internal management for a Commission which operated in a quasi-commercial environment with a unionised work-force. However, as delegated legislation was used to provide for these matters, the Committee had an obligation to satisfy itself that the legislation accorded with its Principles.

5.137 The Committee asked the Commission whether internal avenues of complaint and redress existed which could

reduce the possibility of unfair or capricious discretionary decision-making. The Commission informed the Committee generally of its grievance procedures and how these would operate. The Commission also undertook to amend a provision of the By-laws which erroneously defined Australian law without a necessary reference to the law of the Territories.

5.138 The 1987 By-laws were designed to provide the Commission's employees with avenues of appeal for the redress of employment grievances. The By-laws were technical descriptions of internal management procedures. The Committee considered that in a some respects they could operate fairly and effectively only if common sense rather than strict legality were applied to their interpretation. This was the case, for example, regarding the prompt giving of reasons for disciplinary decisions and in requiring aggrieved employees to supply documents already in the possession of the Commission. The Committee received assurances from the Commission that it would issue explanatory guidelines on the grievance procedure which would adequately explain the requirements of the appeal process.

Public Service Board Determination No. 33 of 1986

5.139 This Determination provided for a lump-sum payment in the nature of salary to be made to a particular officer for work done during a certain period. The explanatory memorandum indicated that the retrospective operation of the Determination did not prejudice the rights of that officer. However, the terms of the Determination did not disclose any retrospective effect. The Committee exercises particular vigilance in respect of prejudicial retrospectivity but in this instance it expressed concern that a lack of retrospectivity in the instrument may

possibly have frustrated its purpose and prejudiced an officer who was entitled to a back-dated benefit. The Public Service Board explained that no retrospective application was needed to benefit the officer and that the paragraph of the explanatory memorandum referring to retrospective application was misleading.

Public Service Board Determination No. 48 of 1986

5.140 This Determination amended Public Service Board Determination 1984/19 to provide for payment of a supplementary allowance to trainee technical officers in the Department of Defence. The intention was to bring their salaries into line with those previously earned while they were employed under the Naval Defence Act 1910 or the Supply and Development Act 1939. The Determination provided that a trainee officer would be paid an allowance equal to the amount by which the rate of the officer's new salary exceeded the previous salary. Since the new salary rate was lower than the previous salary it was clear that the phrase "is less than" should have appeared instead of the word "exceeded". An identical mistake had previously occurred in Public Service Determination 1985/62. The Public Service Board assured the Committee that no officer would be prejudiced by the error and an amending Determination was made.

Public Service Board Determination No. 81 of 1986

5.141 This Determination provided for the payment of certain allowances, made retrospective by 18 months. The accompanying explanatory memorandum failed to explain why such lengthy retrospectivity was necessary. The allowance was to be paid to certain employees of the Royal Australian Mint who were engaged in asbestos removal work.

The Board told the Committee that this aspect of their employment was not covered by any relevant Conciliation and Arbitration Commission award and assessment of the industrial and safety issues, coupled with administrative processing of the proposal, had taken some time. The Board undertook to ensure that future retrospective determinations would be accompanied by adequate explanations. The Board's undertaking was given on 9 December 1986.

5.142 The Committee's correspondence in this matter was tabled in the Senate on 19 February 1987. (Senate Hansard, 19 February 1987, pages 224-225.)

Public Service Board Determination No. 86 of 1986

5.143 This Determination, dated November 1986, provided for payments to employees in a remote locality, to be back-dated to August 1983. A full explanation for such unusual retrospectivity did not appear in the explanatory memorandum. The Committee has traditionally taken a serious view of any retrospective delegated legislation, all the more so where the retrospectivity involved exceeds 2 years. The Public Service Board told the Committee that in this case the need for retrospectivity had arisen from clerical oversights in 1983. When the legislative authority for allowances to be paid for remote locality work was transferred from regulations to determinations, the name of the remote locality in question was inadvertently omitted. The Committee, of course, accepts that human errors of this kind can arise. Only a managerial commitment to administrative excellence can help reduce their frequency. The Board assured the Committee that in future full explanations for retrospectivity would be given in explanatory memoranda.

5.144 Various clauses of this Determination conferred on departmental Secretaries important personal discretions whether to grant employees certain kinds of leave. The Committee was concerned about the subjective nature of these powers and suggested that an amending Determination should provide for the scope of personal powers to be qualified by express reference to their "reasonable" exercise.

5.145 The Board explained that in this area the avoidance of discretionary power was not desirable. It pointed out that the lawful exercise of personal discretions was impliedly predicated on their reasonable exercise. However, at the Committee's request it was agreed to amend the interpretation clause of the Determination to insert an express, declaratory requirement that powers must be exercised "reasonably". In a subsequent statement to the Senate the Chairman of the Committee said -

> The Committee considered that this initiative could have consequences beyond being a merely presentational gesture. It could assist the small number of Secretaries and delegates whom the Board acknowledges have not yet achieved that sophisticated grasp of administrative law concepts and the imperative to act reasonably attained by the majority of their peers and colleagues. Further it could underpin existing high standards of personnel management and reinforce employees' confidence in the integrity and professional judgement of Australia's most senior officials and their expert delegates.[16]

5.146 The Board's undertaking was implemented in PSB Determination No. 29 of 1987. The Committee's statement about this matter appeared in Senate Hansard, 28 May 1987, page 3091. The Committee's correspondence was also tabled on that day.

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16. Senator Cooney, Senate Hansard, 28 May 1987, page 3091

5.147 During its scrutiny of this Determination the general question of the extent to which the Committee should apply its Principles to Public Service Board Determinations which regulate employer and employee relationships was considered in some detail by the Committee. In the Chairman's statement to the Senate the essence of the Committee's approach was expressed in the following terms -

> In its frequent examination of delegated legislative instruments which embody conditions of employment of public service officers, Defence Force personnel or employees of statutory authorities, the Committee is careful to ensure that the performance of its role as a legislative scrutineer and watchdog does not unnecessarily interfere with the special relationship that exists between employers and employees. In this respect the Committee endeavours to ameliorate what is, sometimes wrongly, seen as its intrusive role, by applying its scrutiny principles in a way which ensures that excessive managerial zeal or discretion is properly checked rather than legislatively entrenched.[17]

Public Service Regulations (Amendment)
(Statutory Rules 1986 No. 130)

5.148 The Public Service Act 1922 contained provisions for equal employment opportunity programs (E.E.O programs) in the public service. It also empowered the making of regulations to modify those same provisions and apply them in an appropriate form to the employees of Commonwealth statutory authorities. Thus, subordinate legislation under the Act could make provision for the inclusion of modified provisions in the enabling Act itself. In this case the regulations empowered the Minister for Defence to issue declarations to the effect that the application of E.E.O. provisions could be suspended for reasons of defence or civil emergency. The Committee considered that

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17. op. cit.

such declarations should be subject to full parliamentary supervision through procedures for tabling and disallowance. The Minister Assisting the Prime Minister for Public Service Matters, Senator the Hon. Peter Walsh, agreed that such parliamentary oversight would be desirable. However, he pointed out that the declarations described in the regulations were provided for by a Senate amendment to the enabling Act.

5.149 The Committee accepted, therefore, that it was beyond the scope of its terms of reference to obtain express parliamentary control of these important ministerial declarations. Generally, however, the Committee advocates, and will seek to ensure, that sub-delegated quasi-legislative instruments are made subject to tabling and disallowance.

Public Service Regulations (Amendment)
(Statutory Rules 1987 No. 38)

5.150 Regulation 16 increased from $40 to $500 the maximum amount by which an employee's salary could be reduced by way of a disciplinary fine. The Committee was interested to know what protection existed to prevent too large a deduction over too short a period if this could cause undue personal hardship. The Minister Assisting the Prime Minister for Public Service Matters, Senator the Hon. Peter Walsh, explained that section 65 of the Public Service Act 1922 provided that a single deduction could not exceed 25 per cent of the periodic salary of an officer or employee. That section also allowed for deductions to be spread over more than one pay period. The Committee accepted the Minister's explanation.

Quarantine (Animals) Regulations (Amendment)
(Statutory Rules 1986 No. 283)

5.151 These regulations were intended to remove the status of "exempt exporter" from universities claiming fee exemptions for services provided by quarantine officers. Although the regulations removed provisions providing for rights of appeal against a refusal to grant exemption, they did not repeal the provisions actually conferring the right to apply for, and the power to grant, exemption status itself. The Minister for Primary Industries, the Hon. John Kerin, M.P., undertook to correct these drafting errors and agreed in the interim to administer the regulations as if there were no longer an exempt status. The Chairman, on behalf of the Committee, made a brief statement to the Senate on this matter on 1 December 1986 (Senate Hansard, 1 December 1986, pages 3040-3041).

5.152 The Minister's undertaking was given on 25 November 1986 and implemented in the Quarantine (Animals) Regulations (Amendment) (Statutory Rules 1987 No. 69).

Seamen's War Pensions and Allowances Regulations (Amendment) (Statutory Rules 1986 No. 98)

5.153 The Committee was concerned that these Regulations conferred on officials a number of discretions in respect of the grant of certain benefits and allowances which did not appear to be subject to any form of review. The Minister for Veterans' Affairs, Senator the Hon. Arthur Gietzelt, advised the Committee that he would seek an amendment to the Seamen's War Pensions and Allowances Act 1940 to provide for formal review mechanisms including a first tier of reconsideration by a senior official and a second tier of review by the Administrative Appeals Tribunal.

5.154 The Minister's undertaking was given on 12 August 1986 and implemented by amendment to the Seamen's War Pensions and

Allowances Act 1940 made by the Veterans' Affairs Legislation Amendment Act 1987.

Sex Discrimination (Operation of Legislation) (No. 1) Regulations (Statutory Rules 1986 No. 191)

5.155 These regulations provided for the continued application of certain provisions of the Sex Discrimination Act 1984 which would otherwise have ceased to operate two years after the Act became law. The provisions in question had the effect that decisions taken under certain Federal and State Acts and regulations would be exempted for two years from the anti-discrimination provisions of the Sex Discrimination Act. Regulations could prolong these exemptions. Under the regulations certain exemptions from the application of the Act would have operated indefinitely. The Committee objected to this.

5.156 The enabling power in the Sex Discrimination Act was clearly intended to allow for regulations to exempt decisions taken under certain Acts, but for a transitional period only. It seemed to the Committee that regulations which indefinitely suspended the application of the Sex Discrimination Act infringed Principle (a) of its terms of reference. Such an abrogation of the equality Act could hardly have been within the intention of Parliament when it passed the Sex Discrimination Bill, nor would a regulatory abrogation have been within the spirit of the Bill's enabling provisions. Other analogous sets of regulations had prolonged other exemptions, but for limited periods only.

5.157 The Attorney-General, the Hon. Lionel Bowen, M.P., in a detailed submission in response to the Committee's concerns explained that the costs involved in providing full equality in every instance had to be taken into

account. A number of the potentially discriminatory enactments that would, by virtue of the regulations, appear permanently to by-pass the Sex Discrimination Act, were in fact the subject of continuing departmental review. The Committee considered that this was all the more reason for the current exemptions to enjoy a temporary existence only. The Attorney-General agreed to place a two-year sunset clause in the regulations to guarantee the continuing review of all exemptions from the Sex Discrimination Act.

5.158 The Attorney-General's undertaking was given on 13 November 1986 and implemented on 30 January 1987 with the making of the Sex Discrimination (Operation of Legislation) (No. 1) Regulations (Amendment) (Statutory Rules 1987 No. 8.) The Chairman's statement concerning these Regulations was incorporated in Senate Hansard, 11 November 1986, page 2271.

States Grants (Petroleum Products) Act 1965
Amendments of the Schedule to the Subsidy Schemes

5.159 This instrument made an adjustment to the Petroleum Products Subsidy Scheme by retrospectively deleting reference to the Mitchell River Mission. The instrument also retrospectively inserted the location known as Kowanyama. The Committee was concerned that the retrospective removal of a location from the subsidy scheme could have operated prejudicially in contravention of the Committee's Principles. However, the Acting Minister for Industry, Technology and Commerce, the Hon. Barry Jones, M.P., told the Committee that Kowanyama was simply the Aboriginal name for Mitchell River Mission and the retrospective change of name had not resulted in any prejudicial operation of the instrument.

5.160 While satisfied with this explanation, the Committee noted it as another example of how the provision of a brief but informative explanatory statement to accompany the legislative instrument could have precluded the need for time-consuming correspondence between the Committee and the Acting Minister.

Veterans' Entitlements Regulations
(Statutory Rules 1986 No. 97)

5.161 Sub-regulation 9(3) provided that travelling expenses for veterans under medical care should not exceed an amount calculated by the Repatriation Commission as being "the cost of travel by the most appropriate form of transport over the relevant distance". The Commission would determine the most appropriate form of transport in accordance with guidelines set out in the regulations. The Committee had some concern that the absence of review procedures for the discretionary elements in these decisions could cause genuine grievances. The Minister for Veterans' Affairs, Senator the Hon. Arthur Gietzelt, assured the Committee that the Commission would make arrangements for a prompt internal review of travelling expenses decisions where that was necessary. The Minister also undertook to re-examine whether there was a need for an external appeal procedure after the proposed internal review scheme had been in operation for 12 months.

CHAPTER 6

REFORM OF THE ACTS INTERPRETATION ACT

...the Acts Interpretation Act as a whole may arguably be the single most important Act on the statute book after the Constitution itself. It provides for parliamentary control over secondary legislation that is much larger in volume than the primary legislation coming before Parliament. It also provides the vital code of interpretive rules for understanding all other legislation. It is quite simply an Act of supreme importance to the Parliament.[1]

6.1 In its Eightieth Report (October 1986)[2] the Committee reported that the Acts Interpretation Act 1901 (the Act) "contains a number of significant limitations which could result in the infringement of personal rights and the undermining of parliamentary supervision of legislation".[3] Progress with removing each of these flaws is discussed below.

Retrospectivity

6.2 It is unquestionably possible for a regulation to be drafted in such a way that it will have a lawful yet prejudicially retrospective effect on individuals. Unless "expressed to take effect" retrospectively, the regulation will be valid within the meaning of subsection 48(2) of the Act as interpreted by the High Court in The Australian Coal and Shale Employees Federation v Aberfield Coal Mining Company Limited and others.[4] In its Seventy-seventh Report (March 1986)[5] the Committee recommended that the Act be amended to outlaw

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1. Letter of 23 October 1987 from Senator Collins to Senator the Hon. Michael Tate, Minister for Justice, reproduced in the Committee's Eighty-second Report, November 1987, page 58
2. Parliamentary Paper No. 241/1986, Chapter 2
3. op. cit. page 11, para. 2.8
4. (1942) 66 C.L.R. 161
5. Parliamentary Paper No. 172/1986

retrospectivity in regulations where this was prejudicial to the rights or interests of individuals and not expressly authorised by the enabling Act. As noted in the Eightieth Report, the Attorney-General, the Hon. Lionel Bowen, M.P., had reservations about this approach and proposed instead an administrative scheme "under which a senior official of his Department would provide a 'certificate stating whether a proposed statutory rule appears, without clear and express authority ... to have a retrospective effect.'"[6] Within the period under review, no progress was reported to the Committee by the Attorney-General regarding either its recommendation or the Attorney's alternative proposal.

Tabling of Instruments

6.3 The Committee has previously reported that -

> ...it is ... possible for the Executive to make delegated legislation which will be effective for 15 sitting days after being made and, on the 16th sitting day, make a fresh instrument, repeating the cycle thereafter indefinitely. For each period of 15 sitting days the non-tabled instrument will have full effect and section 50 will ensure continuing effects.[7]

6.4 In his letter to the Committee of 23 September 1986, the Attorney-General agreed that such an abuse would be theoretically possible. Although the Attorney-General found it difficult to envisage a government taking advantage of this procedure, he agreed to amend the Act to remove the legal possibility that a government could re-make the same regulation indefinitely in the way described by the Committee. A similar amendment would also be made to the Seat of Government (Administration) Act 1910 under which Ordinances are made and tabled in

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6. Eightieth Report, op. cit., page 12, para. 2.11
7. op. cit., page 17, para. 2.25

Parliament. These amendments have not yet been made.

Revival of Instruments

6.5 The Attorney-General has implemented his undertaking to amend the Seat of Government (Administration) Act 1910 to ensure that, consequent on the disallowance of an Ordinance that repealed another Ordinance "or any other law", that Ordinance or law would revive. (See also the reference, in Chapter 7, to the Committee's Seventy-sixth Report (December 1985)[8].)

Repeal and Re-enactment of Instruments

6.6 In its Eighty-second Report (November 1987) the Committee recorded that it had received from the Attorney-General an undertaking to remove the legal loophole that allowed for the rapidly successive repeal and re-making of regulations to frustrate a disallowance motion. The relevant amendment has not yet been made.

Partial Disallowance

6.7 The Committee has requested that the Act should be amended to allow either House of the Parliament to enjoy the same right to move for partial disallowance of regulations as currently exists with respect to Territory Ordinances. The Committee considers that the question of powers of partial disallowance is one of considerable significance for the effective application of the doctrine of the supremacy of Parliament and Executive accountability. The Parliament has neither the power to amend delegated legislation nor the power to disallow partially any instrument other than Territory Ordinances. Although in 1982 the then Attorney-General (Senator the Hon. Peter

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8. Parliamentary Paper No. 507/1985

Durack) expressed his general willingness to provide for partial disallowance powers,[9] six years later the Committee and the Parliament are no closer to achieving this reform because of the reluctance of Executive governments to concede the propriety of a responsible Parliament enjoying such a right.

6.8 The Committee will continue with its efforts to persuade the Attorney-General to recognise the need for an extension to regulations of the same power of partial disallowance that has existed for many years with respect to Territory Ordinances.

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9. Seventy-first Report of the Committee, (March 1982) Parliamentary Paper No. 47/1982, pages 7-8, paras. 16-17

CHAPTER 7

MINISTERIAL UNDERTAKINGS IMPLEMENTED

More importantly, the work of the Committee has been recognised by Ministers as being of such a standard that nearly always when it takes a stand on a regulation the Minister concerned seems to recognise the merit of its viewpoint. The regulation is either altered or withdrawn. We do not have the tussles and fights we had in previous days.[1]

7.1 The ministerial undertakings described below arise from the Committee's scrutiny of legislation discussed in previous reports. A significant number of ministerial undertakings given during the period under review have already been implemented. Where this is the case it has been recorded at the end of each relevant case study in Chapter 5.

LISTED IN THE SEVENTY-FIFTH REPORT (SEPTEMBER 1984)[2]

Workmen's Compensation (Amendment) Ordinance 1983
(A.C.T. Ordinance No. 69 of 1983)

7.2 This Ordinance provided that a single medical referee could effectively adjudicate on an employee's right to compensation by issuing a final certificate determining whether the person had been disfigured by a work-related injury. At the Committee's request the Minister for Territories agreed to amend the Ordinance to provide that only a unanimous panel of medical referees could issue such a certificate. Later, the Minister decided to adopt a different approach by providing for compensation to be settled through the existing arbitration procedures under the Principle Ordinance. The Committee regretted that it took such an inordinate length of time for the Department of Territories to devise and eventually implement the

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1. Senator Wood, Senate Hansard, 7 June 1978, page 2475
2. Parliamentary Paper No. 303/1984

Minister's proposal in the Workmen's Compensation (Amendment) Ordinance 1987 (A.C.T. Ordinance No. 10 of 1987).

LISTED IN THE SEVENTY-SIXTH REPORT (DECEMBER 1985)[3]

New South Wales Acts Application Ordinance 1985 (A.C.T. Ordinance No. 25 of 1985 - disallowed by effluxion of time in the Senate on 28 November 1985)

7.3 This Report described the Committee's scrutiny of the New South Wales Acts Application Ordinance 1985 which brought about the repeal of scores of New South Wales Acts as they applied in the A.C.T. The Acts were repealed by operation of law following the inclusion in the Ordinance of an omnibus repealing clause which repealed all New South Wales Acts in force in the A.C.T. with the exception of certain named Acts. The Committee had requested the Attorney-General to amend the Ordinance to include a schedule that would actually list the names of the Acts to be repealed in order that a Senator so minded could move to disallow the repeal of any particular Act which would then revive. In the absence of such a precise disallowance capability the Senator would, in effect, have to invite the Senate to disallow the entire Ordinance to achieve his or her purpose.

7.4 The Attorney-General informed the Committee that *disallowance of the repeal of a New South Wales Act named* in such a schedule would not revive that repealed Act because of an unintentional drafting flaw made by an 1982 amendment to the Seat of Government (Administration) Act 1910. The Attorney-General undertook to correct that flaw. He did this by virtue of an amendment to the Act

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3. Parliamentary Paper No. 507/1985

included in Schedule 1 of the **Statute Law (Miscellaneous Provisions) Act (No. 2) 1986**. By virtue of that amendment, the disallowance of an Ordinance which repeals another Ordinance, "or any other law" (i.e. a law including New South Wales Acts or Imperial Acts) will have the effect of reviving the repealed Ordinance, or law, as if it had not been repealed by the disallowed Ordinance.

LISTED IN THE SEVENTY-SEVENTH REPORT (MARCH 1986)[4]

Credit Ordinance 1985 (A.C.T. Ordinance No. 5 of 1983)

7.5 Section 250 of the Ordinance provided that a person could sign another person's name to complete a credit transaction. The Minister for Territories undertook to amend this section to provide that such a vicarious signature would have to be witnessed. His undertaking was implemented in the **Credit (Amendment) Ordinance (No. 4) 1986 (A.C.T. Ordinance No. 72 of 1986)**.

7.6 Subsequently, both the Committee and the Minister received representations from credit organisations expressing concern that this amendment required not only agents but also principals seeking credit to procure an independent witness to the transaction. This was causing previously unforeseen difficulties for both consumers and the credit industry. On 20 March 1987, and again on 1 May 1987, the Committee wrote to the Minister indicating that it released him from his commitment to require independent witnessing of transactions other than those involving an agent. The Committee considered that the witnessing of an agent's signature would reduce, to some extent, the likelihood of fraud or undue influence affecting vulnerable credit seekers, and that such a protection,

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4. Parliamentary Paper No. 172/1986

limited though it was, should remain pending the enactment of more stringent procedures to attain this end. Although released from the major part of his undertaking the Minister has not yet acted to amend the Ordinance.

7.7 The Minister also undertook to amend section 19 of the Ordinance to ensure that the ministerial power to exempt credit providers from all or any of the provisions of the Ordinance would be exercised by an instrument subject to tabling and disallowance in Parliament. The Minister's undertaking was implemented in the **Credit (Amendment) Ordinance 1987 (A.C.T. Ordinance No. 4 of 1987)**. The Committee has noted that exemptions under section 19 will be made by disallowable Declarations rather than by Regulations. The Minister has said that this change was made because it had proved administratively burdensome for the various exemptions to be drafted as regulations.

New South Wales Acts Application Ordinance 1984
(A.C.T. Ordinance No. 41 of 1984)

7.8 This Ordinance applied to the A.C.T. certain sections of the Games, Wagers and Betting-houses Act 1901 (N.S.W.) which contained provisions conferring on officials powers of entry to premises. The degree of force which could be used to gain entry was not expressly qualified by a declaratory reference to reasonableness. The Minister's undertaking to provide for this was implemented in the Games, Wagers and Betting-houses (Amendment) Ordinance 1986 (A.C.T. Ordinance No. 35 of 1986).

LISTED IN THE EIGHTIETH REPORT (OCTOBER 1986)[5]

Christmas Island Assembly (Election) Regulations 1985
(Territory of Christmas Island Regulations No. 1 of 1985)

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5. Parliamentary Paper No. 241/1986

7.9 These Regulations contained two separate provisions to impose a penalty on an elector found guilty of voting more than once at an election. The Minister's undertaking to correct this error was implemented by the **Christmas Island Assembly (Election) Regulations 1986 (Territory of Christmas Island Regulations No. 2 of 1986).**

Defence Force Regulations (Amendment)
(Statutory Rules 1985 No. 88)

7.10 These Regulations provided that the Commonwealth would pay reasonable compensation for loss or damage resulting from military exercises on private property which had been declared to be a "defence practice area". The Committee expressed concern about the absence of AAT review of compensation decisions. The Minister's undertaking to provide review rights was implemented by the **Defence Force Regulations (Amendment) (Statutory Rules 1987 No. 113).**

Defence (Inquiry) Regulations
(Statutory Rules 1985 No. 114)

7.11 Regulation 57 conferred on a Court of Inquiry powers of contempt which appeared to be greater even than those of a Royal Commission. The Minister undertook to ensure that the powers of Courts and Commissions were broadly equivalent. His undertaking was implemented in the **Defence (Inquiry) Regulations (Amendment) (Statutory Rules 1987 No. 36).**

Electricity (Amendment) Ordinance 1985
(A.C.T. Ordinance No. 20 of 1985)

7.12 The Minister for Territories gave undertakings to amend this Ordinance to provide for independent review of

certain discretionary decisions, to eliminate strict liability offences, to limit to reasonable requirements powers of entry and to remove telephone search warrant powers from magistrates. The Minister's undertakings were implemented in the Electricity (Amendment) Ordinance 1987 (A.C.T. Ordinance No. 5 of 1987).

Excise Regulations (Amendment)
(Statutory Rules 1985 No. 141)

7.13 These Regulations conferred on the Collector of Customs certain discretions which were not subject to AAT review. The Minister for Industry, Technology and Commerce undertook to provide for rights of appeal. His undertaking was implemented in the Excise Regulations (Amendment) (Statutory Rules 1987 No. 28).

Export Control (Orders) Regulations Orders Nos. 1 and 6 of 1986
(Prescribed Goods (General) Orders and Grain, Plants and Plant Products Orders)

7.14 The Minister for Primary Industry undertook to amend these Orders to provide for the defence of reasonable excuse in prosecutions for failure to comply with unnecessarily onerous official directions, and failure to produce certain certificates or permits if these had been accidentally lost or destroyed.

7.15 The Minister's undertaking was implemented in the Prescribed Goods (General) Orders No. 8 of 1986.

Fisheries Notice No. 158

7.16 The Minister for Primary Industry agreed to correct this Notice which specified only a commencement date for the period or duration of a fishing prohibition. The Minister's undertaking was implemented in Fisheries Notice

No. 166.

Health Authority Ordinance 1985
(A.C.T. Ordinance No. 65 of 1985)

7.17 This Ordinance imposed no obligation on the A.C.T. Health Authority to give reasons for refusing to appoint a person as a visiting medical or dental officer. It also contained provisions dealing with personnel matters that were drafted in archaic language unlikely to be acceptable to a contemporary workforce of skilled professionals. The Minister for Territories undertook to amend section 44 to provide that reasons for decisions would be given. He also advised the Committee that a working party would assist the Authority on updating industrial relations provisions. The Minister's undertaking in respect to section 44 was implemented in the Health Authority (Amendment) Ordinance 1987 (A.C.T. Ordinance No. 23 of 1987).

Northern Prawn Fishery Management Plan
(Plan of Management No. 3, Northern Prawn Fishery)

7.18 The Fisheries Act 1952 vested in the Minister for Primary Industry a discretion to cancel a fishing licence where a contravention of a licence condition had occurred. The Plan appeared to fetter that discretion by stipulating that the Minister "shall" cancel a licence where the licence holder had two or more convictions for fishing offences. The Minister conveyed to the Committee the advice of the Attorney-General's Department that the subordinate Plan did not fetter the primary discretion. The Committee noted this advice. In the interests of fairness and clarity the Minister undertook to amend the Plan to provide that only previous convictions for serious fishing offences would be taken into account. The

Minister's undertaking was implemented by Plan of Management No. 8 - Northern Prawn Fishery Management Plan (Amendment).

Northern Prawn Fishery Management Plan (Amendment) (Plan of Management No. 4 - Northern Prawn Fishery)

7.19 A discretion conferred on the Director of the Australian Fisheries Service to replace certificates of entitlement to fishing units was not subject to AAT review. The Minister for Primary Industry undertook to amend the Plan to provide for such appeals. His undertaking was implemented in Plan of Management No. 7 - Northern Prawn Fishery Management Plan (Amendment).

Radiocommunications (Licencing and General) Regulations (Statutory Rules 1985 No. 195)

7.20 These Regulations made no provision for an inspector to produce a photographic identity card when engaged on official business. A regulation providing for court officials to issue telephone search warrants was also inappropriate. The Minister undertook to amend the Regulations to require production of a proper official photographic identity card and to cancel the power of officials to issue telephone search warrants. The Minister's undertaking was implemented in Radiocommunications (Licencing and General) Regulations (Amendment) (Statutory Rules 1987 No. 61)

Southern Bluefin Tuna Fishery Management Plan (Amendment) (Plan of Management No. 5)

7.21 The Minister for Primary Industry undertook to amend this Plan to provide for AAT review of discretions exercised by the Director of the Australian Fisheries Service in issuing replacement certificates of fishing units. The

undertaking was implemented in Southern Bluefin Tuna Fishing Management Plan (Amendment) - Plan of Management No. 9.

Student Assistance Regulations (Amendment)
(Statutory Rules 1985 No. 372)

7.22 These Regulations retrospectively omitted certain colleges from Schedules of approved institutions because it was believed the colleges had ceased to exist. The Committee noted a lack of clarity in the Explanatory Statement which suggested that some pre-existing rights may have been adversely affected by this retrospectivity. The Minister for Education confirmed for the Committee that one college could have been affected because it was still in existence after the date on which its omission from the Schedule took effect. The Minister undertook to amend the Regulations retrospectively to correct this error, while ensuring that the further retrospectivity would not prejudice existing rights. The undertaking was implemented in the Student Assistance Regulations (Amendment) (Statutory Rules 1987 No. 288).

Superannuation (Salary) Regulations (Amendment)
(Statutory Rules 1985 No. 326)

7.23 The Superannuation Act 1976 provided for AAT review of decisions of the Commissioner for Superannuation or his or her delegates made under the Act. No power existed in the Act to enable the Commissioner to delegate power to make decisions under Regulations. The office of "authorised officer" was, therefore, created to allow for the effective delegation of decision-making under Regulations. However, since an "authorised officer" was neither the Commissioner nor a delegate, the discretionary decisions of these officers were not subject to AAT review. The Minister for Finance undertook to amend the

Act to allow for decision-making under regulations to be delegated and thus fall within the existing jurisdiction of the AAT. Section 14 of the Superannuation Legislation Amendment Act (No. 2) 1986 implemented the Minister's undertaking.

CHAPTER 8

MINISTERIAL UNDERTAKINGS NOT YET IMPLEMENTED

...it is quite a simple matter for a regulation which, on its face appears innocuous, to be devastatingly dangerous. Perhaps, if the Ministers themselves exercised greater vigilance in the scheme of things, that would not happen.[1]

The Problem of Delay

8.1 The Committee views with disquiet the excessive delay which attends the implementation of some ministerial undertakings. An undertaking is a promise, given in writing, by a Minister of the Commonwealth Government to a Committee of the Commonwealth Parliament, to the effect that the concerns of the Committee about the objectionable effects of Executive law-making on personal rights or parliamentary proprieties will be allayed by means of an expeditious amendment. In its Eightieth Report (October 1986) the Committee stated that -

> ...no undertaking is viewed lightly by the Committee for the simple reason that an undertaking is accepted as an alternative to recommending disallowance.[2]

8.2 The Committee is concerned that it could undermine the whole basis of parliamentary honour on which the undertaking convention is based, if the implementation of undertakings is not expedited as quickly as possible after a Minister has given his or her word to act. To countenance excessive delay is not only a discourtesy to the Senate but it is also a continuing affront to principles of freedom, justice, fairness and propriety if objectionable provisions are left on the delegated statute

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1. Senator O'Sullivan, Senate Hansard, 4 September 1956, page 74
2. Parliamentary Paper No. 241/1986, page 125, para. 5.2

book in spite of parliamentary requests for amendments and in contravention of ministerial commitments to make amendments.

8.3 The Committee has become concerned about the lack of action by some Departments in preparing requisite amendments for the early approval of busy Ministers. This concern was reflected in a statement made to the Senate on 17 December 1987 by the Chairman of the Committee calling on Ministers to examine the state of outstanding promises to the Committee.[3] That statement was made after the close of the period currently under review. Nevertheless, the problem of certain undertakings having been left in abeyance by some Ministers and Departments is serious. The Committee wishes to draw it to the special attention of the Senate by including the full text of that statement in Appendix 4 of this Report.

8.4 The message in all of this is clear. If after the expiration of the statutory period for disallowance action the Committee is left to rely on ministerial undertakings which have in the past proved unreliable it will consider whether it should refuse to accept any further undertakings regarding future legislation. In this situation an option will be to report its predicament to the Senate and recommend that a salutary bipartisan motion of disallowance be passed in respect of a later instrument which also contains provisions of concern to the Committee. It will be a matter for the Senate whether in these circumstances any further action should be taken to censure undue delay in carrying out promises to protect rights.

Overdue Undertakings

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3. Senator Collins, Senate Hansard, 17 December 1987, page 3264

8.5 A number of undertakings referred to in Chapter 5 of this Report have already been implemented in amendments. Others have not yet been implemented. This chapter describes only those undertakings outstanding from previous reports. The list of undertakings appearing in the statement by Senator Collins (Appendix 4) is not a complete list as it refers only to promises the implementation of which, at that time, was considerably overdue.

LISTED IN THE SEVENTY-NINTH REPORT (APRIL 1986)[4]

Health Insurance Regulations (Amendment)
(Statutory Rules 1985 No. 290)

8.6 This Report described the course of the Committee's scrutiny of the Health Insurance Regulations (Amendment). By agreement between the Minister for Health, the Hon. Dr. Neal Blewett, M.P., and the Committee, these Regulations were disallowed by effluxion of time at the rising of the Senate on 10 April 1986. The Committee objected to the Regulations because they prescribed the Secretary of the Department of Social Security as a person to whom could lawfully be given any confidential information from the records of the Health Insurance Commission. The Committee was concerned under its Principles that, by this bald prescription, personal rights to medical privacy might be infringed. The Regulations made it lawful for any information to be made available to a large Department within the federal bureaucracy in circumstances where there was no legal definition of the nature of the information which could be released, nor any legal specification of the conditions under which it might be released.

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4. Parliamentary Paper No. 170/86

8.7 To make regulations which would overcome the deficiencies of the present Regulations, the Minister undertook to amend the Health Insurance Act 1973 to widen the regulation-making power so that future regulations could include these protections. This amendment appeared in section 9 of the Health Legislation Amendment Act (No. 2) 1986. The section inserted a new subsection 130(3A) into the Act as follows:

> "(3A) Notwithstanding anything contained in the preceding provisions of this section, (concerning obligations to observe secrecy) the Secretary or the General Manager of the Commission may divulge any information acquired by an officer in the performance of duties, or in the exercise of powers or functions, under this Act to an authority or person if -
>
> (a) the authority or person is a prescribed authority or person for the purposes of this sub-section; and
>
> (b) the information is information of a kind that may, in accordance with the regulations, be provided to the authority or person."

8.8 No regulations under this provision have yet been made.

LISTED IN THE EIGHTIETH REPORT (OCTOBER 1986)[5]

Australian Meat and Live-stock Orders MQ14-16 1985

8.9 These Orders, setting Export Performance Standards, provided that non-compliance with them could result in cancellation of a quota allocation. The Committee received an undertaking from the Minister for Primary Industry that discretionary decisions resulting in the cancellation of a quota allocation would be made subject

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5. Parliamentary Paper No. 241/1986

to review by the AAT. Subsequently, the Attorney-General's Department had advised that AAT review would not conform with guidelines laid down by the Administrative Review Council (the ARC). The Committee pointed out that the opinion of the ARC on review of discretionary decisions allocating a finite resource (e.g. a quota) was still evolving, and the possibility of providing for review by the Tribunal or another body should not be ruled out prematurely. Some time later the Minister informed the Committee that the Council had examined the matter and advised that there would be serious practical difficulties in implementing a satisfactory system of AAT review of quota allocations. The Committee accepted the Minister's reluctance to provide for review in these circumstances. However, the question of devising a suitable avenue for the redress of grievances in the allocation of finite resources should be addressed both by the Attorney-General's Department and the Administrative Review Council.

Blood Donation (Acquired Immune Deficiency Syndrome) Ordinance 1985 (A.C.T. Ordinance No. 27 of 1985)

8.10 *Following its scrutiny of this Ordinance in 1985, the* Committee obtained an undertaking from the Minister for Health to insert in it a sunset clause to terminate its operation at the end of 1986. Such a clause was intended by the Committee to ensure that the later Ordinance to repeal the sunset clause would come back to the Parliament and thereby allow for further technical and policy scrutiny in the light of developments with the spread of AIDS. The Committee's technical, legal concerns were focused on:

(i) the statutory defence which originally had granted virtual immunity from suit to the Red Cross Society, hospitals and doctors if sued by

a person who had contracted AIDS from a blood donation that had undergone prescribed tests which did not reveal the presence of AIDS;

(ii) the desirability of a compensation scheme for AIDS victims infected by contaminated blood transfusions; and

(iii) the need for Parliament to be kept fully informed of developments with the Ordinance and the disease.

8.11 Without informing the Committee, the newly responsible Minister for Territories repealed the sunset clause. The Committee requested that its concerns about this legislation should be respected. On 6 May 1987 the Minister gave an undertaking to insert a further sunset clause in the Ordinance to limit the life of the statutory defence provisions. Not only has that undertaking not yet been implemented, but no further information of any kind has been supplied to the Committee.

First Home Owners Regulations (Statutory Rules 1985 No. 267)

8.12 These Regulations provided for the transfer of confidential information from the office of the First Home Owners Scheme in the Department of Housing and Construction to the Commissioner of Taxation and the Secretary of the Department of Social Security. In the light of the Committee's concerns about the unrestricted transfer of personal and confidential information through the computerised networks of the public service, the Minister for Housing and Construction agreed to amend the Regulations to describe, and thereby limit, the type of information that could lawfully be divulged, and to specify the conditions under which those releases could lawfully occur. The Minister assured the Committee that, in the meantime, the powers conferred by the new Regulations would not be used. The Committee awaits implementation of this undertaking given on 19 March 1986.

Meat (Amendment) Ordinance 1985 (A.C.T. Ordinance No. 26 of 1985)

8.13 This Ordinance did not require inspectors and other authorized persons to carry a proper, official, photographic identity card when engaged in official business. The Minister for Health gave an undertaking to amend the Ordinance to provide for the use of identity cards rather than any less secure form of identification. The Committee awaits implementation of this undertaking given on 25 November 1985 and confirmed by the Minister for Territories on 27 May 1987.

Meat Regulations (Amendment) (A.C.T. Regulations No. 15 of 1985)

8.14 These Regulations empowered the Chairman of the A.C.T. Health Authority to issue permits to slaughter live-stock at an abattoir. There was no right to seek AAT review of a refusal or a conditional permit. On 4 October 1985 the Minister for Health undertook to refer the matter to the Attorney-General's Department for appropriate action to make the discretion subject to review. When the Minister for Territories assumed responsibility for A.C.T. health matters, he advised the Committee, on 27 May 1987, that the drafting of an amendment was proceeding. The Committee awaits implementation of the Minister's undertaking.

CHAPTER 9

OTHER MATTERS

The Committee... approaches its task after the regulation has been tabled, after it has obtained independent legal advice and after it has deliberated upon the regulation in an atmosphere in which there is not the heat of party politics.[1]

Review of Ministerial Decisions

9.1 In its Eightieth Report (October 1986)[2] the Committee noted that it had invited Professor J. L. Goldring, then Professor of Law at Macquarie University, to advise it on Administrative Appeals Tribunal Review of Ministerial Decisions. In a submission to the Committee Professor Goldring wrote -

> My advice is that neither the existence of review of an administrative decision by the A.A.T., nor the nature nor extent of that review adversely affects the doctrine of ministerial responsibility as it now operates, or is understood in Australia, and that the Committee ought not to change the principles it applies when considering Regulations, Ordinances, or other delegated legislation. There are strong grounds for considering that, indeed, the existence of a system of review of administrative decisions on their merits enhances and strengthens the role of Parliament in scrutinising and supervising the policy-making role of government in Australia.

9.2 Professor Goldring's summary of his views is included in Appendix 5 of this Report.

Legal Adviser

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1. Senator Spooner, Senate Hansard, 7 October 1959, page 947
2. Parliamentary Paper No. 241/1986

9.3 During the period under review the Committee's legal Advisers were Professor Douglas Whalan (until 31 January 1987) and Professor Dennis Pearce (from 1 February 1987) both of the Australian National University. Professor Whalan took leave from his post to study abroad for one year and Professor Pearce assumed responsibility as acting Legal Adviser. Professor Whalan resumed his position on 1 February 1988 from which date Professor Pearce was appointed Commonwealth Ombudsman.

9.4 Although the Committee's Legal Adviser receives an honorarium, the service performed for the Committee and the Parliament far exceeds in value that token reward. The Committee's first legal adviser was appointed in 1945. Since then several distinguished practising lawyers and academic lawyers have made their contribution to the Committee's effectiveness by reading delegated legislation and giving independent advice on the extent to which it complies with the Committee's Principles. This task requires a high dedication to parliamentary service, the time and energy to read a regular weekly batch of legislative instruments, currently totalling more than 800 each year, and exceptional legal skill and acumen to comprehend and analyse voluminous materials which unquestionably contain some of the most important and complex laws in the Commonwealth. While a small number of eminent lawyers possess these skills in no lesser measure than Professors Whalan and Pearce there are few who can rival their familiarity with the Senate as a House of Review, their knowledge of the 56 year-old history and traditions of one of its most important Committees, or their sensitivity and commitment to the role of Parliament in protecting the rights of individuals from trespass or erosion by Executive law-making. The Committee, and indeed the Parliament, is indebted to both of these distinguished legal scholars for the significant contribution they have made to the Committee's work.

Committee Staff

9.5 With a Committee Secretary, a typist, a clerical assistant and a part-time research officer, the Committee has the smallest staff of any Senate Standing Committee engaged in the continuous review of an activity of the executive government. The Committee is therefore thankful for the large efforts made by the following officers who, at various times throughout the year, have assisted it - Peter O'Keeffe, Jan Martin, John Carter, Jan Wood and Helen Reid.

Bob Collins
Chairman

April 1988

APPENDIX 1

CLASSIFICATION OF LEGISLATIVE INSTRUMENTS UNDER THE HEADING 'OTHER' IN PARAGRAPH 1.5

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National Health Act Notices	1
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Variations of the Canberra Plan under the Seat of Government (Administration) Act	2
Guide to the Assessment of Rates of Veterans' Pensions	1
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APPENDIX 2

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

Instruments	Enactments
regulations (statutory rules)	Various Acts, subject to Acts Interpretation Act 1901 SS.48, 49
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 1979 S.28A Seat of Government (Administration) Act 1910 S.12
regulations of territories	various Ordinances, subject to Acts of Territories as above various Ordinances, subject to Seat of Government (Administration) Act 1910
regulations (tax exemptions)	Australian Capital Territory Tax (Transfers of Marketable Securities) Act 1986 S.6
rules of court	Australian Capital Territory Supreme Court Act 1933 S.28 Family Law Act 1975 S.123 Federal Court of Australia Act 1976 S.59 Judiciary Act 1903 S.86 Commonwealth Electoral Act 1918 S.375
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
rules (proceedings of the Compensation Board)	Overseas Telecommunications Act 1946 S.73
by-laws	Aboriginal Councils and Associations Act 1976 S.30 Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 SS.15, 23 Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978 S.10 Australian National Airlines Act 1945 S.69 Australian National Railways Commission Act 1983 S.79 Australian Shipping Commission Amendment Act 1983 S.21 Defence Acts Amendment Act 1981 S.9 Federal Airports Corporation Act 1986 S.72 Postal Services Act 1975 S.115 Postal and 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 (administrative arrangements)	Acts Interpretation Act 1901 S.19BA
orders (export licences and meat quotas)	Australian Meat and Live-stock Corporation Amendment Act 1982 S.16M(1)

orders (Broadcasting Tribunal, conduct of broadcasting)	Broadcasting Act 1942 S.17
orders (planning, technical services)	Broadcasting Act 1942 S.125E
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.9
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, fees)	Export Control Act 1982 S.25
orders (instruments of the Attorney-General)	Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 S.5
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 (federal road safety standards)	Interstate Road Transport Act 1985 S.35
orders (production of standards, inspection, official marks, fees)	Meat Inspection Act 1983 S.37
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 (grant of permits)	Nuclear Non-Proliferation (Safeguards) Act 1987 S.73
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 Territory 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.41
declarations by Minister of 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 (classification of machinery and components, specification and value and percentages)	Bounty (Metal Working Machines and Robots) Act 1985 SS.6,7,8
declarations (recognised education institutions)	Bounty and Subsidy Legislation Act 1987 S.10
declarations (Ministerial dispensation)	Crimes (Foreign Incursions and Recruitment) Act 1978 S.9
declarations (rebate of diesel fuel duty)	Customs and Excise Legislation Amendment Act (No. 2) 1985 SS.9, 19
declarations (rebate of oil duty)	Excise Act 1901 S. 78B
declarations of international instruments	Human Rights Commission Act 1981 S.31

declarations of international instruments	Human Rights and Equal Opportunity Commission Act 1986 S.47
declarations (pharmaceutical benefits)	National Health Act 1953 S.85
declarations (equipment, material and technology)	Nuclear Non-Proliferation (Safeguards) Act 1987 S.4
declarations (exemptions and terminations)	Nuclear Non-Proliferation (Safeguards) Act 1987 SS. 4, 11
declarations (State law enforcement authorities as agencies)	Telecommunications (Interception) (Amendment) Act 1987 S. 21
declarations (imports and exports of wildlife)	Wildlife Protection (Regulation of Exports and Imports) Act 1982 S.9
determinations (approved home grants)	Aged or Disabled Persons Homes Act 1954 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 (training allowances)	Disability Services Act 1986 S.24
determinations (import parity pricing Bass Strait Oil)	Excise Act 1901 S.6A
determinations (plans of management)	Fisheries Act 1952 S.7B
determinations (variations of table of services)	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 (acute cases)	Health Legislation Amendment Act (No. 2) 1985 S.27
determinations (Medical services outside Australia)	Health Legislation Amendment Act (No. 2) 1985 S.40
determinations (Medical Participation Review Committee)	Health Legislation Amendment Act (No. 2) 1985 S.40
determinations (Pathology Services)	Health Insurance Act 1973 SS.4A, 4BA, 4BB, 23DC, 23DF, 23DN
determinations (Pathology Services Advisory Committee)	Health Insurance Act 1973 S.78C
determinations (wholesale LPG prices)	Liquified Petroleum Gas (Grants) Amendment Act 1984 S.5
determinations (fees)	Quarantine Amendment Act 1984 SS.25, 86E
determinations (terms and conditions of employment)	Public Service Act 1922 S.82D
determinations (parliamentary allowances, academic salaries)	Remuneration Tribunals Act 1973 SS.7, 12DD
determinations (fees)	Seat of Government (Administration) Act 1910 S.12(9A)
determinations (salaries)	Trade Representatives 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), additional conditions	States Grants (Tertiary Education Assistance) Act 1984 SS.36,42,46
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
fisheries notices	Fisheries Act 1952 S.8
notices (acquisition of lands)	Lands Acquisition Act 1955 S.12
notices (Minister's determination of rates)	Nursing Homes Assistance Act 1974 S.36
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 (spectrum plans)	Radiocommunications Act 1983 S.18
plans (frequency bands)	Radiocommunications Act 1983 S.19
principles (determination of quotas)	Dairy Industry Stabilization Act 1977 S.11A Dairy Industry Stabilization Amendment Act 1978 S.5

principles (administrative)	*Disability Services* Act 1986 S.5
principles (approval of private hospitals)	Health Legislation Amendment Act 1983 S.31
principles (approval of nursing homes)	Nursing Homes Assistance Act 1974 S.31A
principles (scale of fees)	National Health Amendment Act 1983 S.3
guide to assessment of rates of pension	Veterans' Entitlements Act 1986 S.29
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
standards (performance and compliance of devices)	Radiocommunications Act 1983 S.9
suspension of member of Commission	Aboriginal Development Commission Act 1980 S.17
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 or 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

proclamations (mining interests and operations)	Aboriginal Land Rights (Northern Territory) Act 1976 S.42
proclamations (property listing)	World Heritage Property Conservation Act 1983 S.15
rates of levy	Bass Strait Freight Adjustment Levy Amendment Act 1985 S.5

APPENDIX 3

LIST OF DELEGATED LEGISLATION CONSIDERED IN CHAPTER 5

A

Air Navigation (Charges) Regulations (S.R. 1986 No. 169)

Air Navigation (Charges) Regulations (Amendment) (S.R. 1986 No. 211)

Air Navigation Regulations (Amendment) (S.R. 1986 No. 141)

Apple and Pear (Conditions of Export) Regulations (Amendment) (S.R. 1986 No. 219)

B

Blood Donation (Acquired Immune Deficiency Syndrome) (Amendment) Ordinance (No.2) 1986 (A.C.T. Ordinance No. 90 of 1986)

C

Children's Services Ordinance 1986 (A.C.T. Ordinance No. 13 of 1986)

Commercial Arbitration Ordinance 1986 (A.C.T. Ordinance No. 84 of 1986)

Co-operative Societies (Amendment) Ordinance (No. 2) 1986 (A.C.T. Ordinance No. 10 of 1986)

Crimes (Amendment) Ordinance (No. 3) 1986 (A.C.T. Ordinance No. 37 of 1986)

Customs Regulations (Amendment) (S.R. 1986 No. 176)

D

Defence Determinations Nos. 75, 93 and 94

Designs Regulations (Amendment) (S.R. 1986 No. 263)

Domestic Violence (Miscellaneous Amendments) Ordinance 1986 (A.C.T. Ordinance No. 53 of 1986)

E

Electricity (Amendment) Ordinance 1987
(A.C.T. Ordinance No. 5 of 1987)

Export Control (Unprocessed Wood) Regulations
(S.R. 1986 No. 79)

F

Fisheries Levy (Northern Prawn Fishery) Regulations (Amendment) (S.R. 1986 No. 397)

Fisheries Notice No. 174

Futures Industry Regulations (S.R. 1986 No. 150)

H

High Court Rules
(Rules under the Judiciary Act 1903, As Amended)
(S.R. 1987 No. 46)

I

Imperial Acts (Substituted Provisions) Ordinance 1986
(A.C.T. Ordinance No. 19 of 1986)

Imperial Acts (Repeal) Ordinance
(Proposed A.C.T. Ordinance)

Interstate Road Transport Regulations
(S.R. 1986 No. 291)

L

Lands Ordinance 1987
(Christmas Island Ordinance No. 1 of 1987)

Long Service Leave (Building and Construction Industry)
(Amendment) Ordinance 1986
(A.C.T. Ordinance No. 55 of 1986)

M

Meat Inspection (General) Orders (As Amended)
(Meat Inspection Orders No. 4 of 1986)

Motor Omnibus Services (Amendment) Ordinance 1986
(A.C.T. Ordinance No. 48 of 1986)

Motor Traffic (Amendment) Ordinance 1986
(A.C.T. Ordinance No. 3 of 1986)

N

National Occupational Health and Safety Commission Regulations
(S.R. 1986 No. 206)

Nature Conservation (Amendment) Ordinance 1986
(A.C.T. Ordinance No. 65 of 1986)

Navigation Orders 5-12
(Navigation (Orders) Regulations Orders Nos. 5-12 of 1986)

Navigation (Protection of the Sea) Regulations
(S.R. 1986 No. 300)

New South Wales Acts Ordinance 1986
(A.C.T. Ordinance No. 91 of 1986)

Northern Prawn Fishery Management Plan (Amendment)
Plan of Management No. 6

Northern Prawn Fishery (Special Provisions) Management Plan
(Plan of Management No. 12)

O

Optometrists (Amendment) Ordinance 1986
(A.C.T Ordinance No. 51 of 1986)

P

Patent Attorneys Regulations (Amendment)
(S.R. 1986 No. 260)

Patent Regulations (Amendment)
(S.R. 1986 No. 259)

Patent Attorneys Regulations (Amendment)
(S.R. 1987 No. 12)

Postal (Staff) By-laws
(Amendments Nos. 1 to the Postal (Staff) By-laws) 1986 and 1987

Public Service Board Determination No. 33 of 1986

Public Service Board Determination No. 48 of 1986

Public Service Board Determination No. 81 of 1986

Public Service Board Determination No. 86 of 1986

Public Service Board Determination No. 4 of 1987

Public Service Regulations (Amendment)
(S.R. 1986 No. 130)

Public Service Regulations (Amendment)
(S.R. 1987 No. 38)

Q

Quarantine (Animals) Regulations (Amendment)
(S.R. 1986 No. 283)

S

Seamen's War Pensions and Allowances Regulations (Amendment)
(S.R. 1986 No. 98)

Sex Discrimination (Operation of Legislation) (No. 1) Regulations
(S.R. 1986 No. 191)

States Grants (Petroleum Products) Act 1965
Amendments of the Schedule to the Subsidy Schemes

V

Veterans' Entitlements Regulations
(S.R. 1986 No. 97)

APPENDIX 4

CHAIRMAN'S STATEMENT TO THE SENATE ON THE ROLE OF THE COMMITTEE AND MINISTERIAL UNDERTAKINGS - 17 DECEMBER 1987[1]

In 1932 the British Donoughmore Committee on Ministers' Powers observed that "Between liberty and government there is an age-long conflict". In Australia part of that conflict has been reflected for the past 55 years in the work of the Regulations and Ordinances Committee in scrutinizing delegated legislation in order to impose parliamentary standards of fairness and equity on that most significant power that Parliament devolves to the executive government - the power to make laws outside Parliament. Over 30 years ago Senator Nick McKenna described that as "an enormous power [which gives rise to] a responsibility upon every individual member of this Parliament to satisfy himself that that power is not abused [since] it is capable of very great abuse..." (Senate Hansard, 4 September 1959, page 59). Senator Lionel Murphy also considered that "the most dangerous encroachments upon the liberties of the people have occurred... under delegated legislation. (Senate Hansard, 28 October 1965, page 1291). These sentiments have been echoed time and again by those politicians who are sensitive to their historic parliamentary responsibilities. A particularly frank and graphic expression of this cautionary view was given by the Rt Hon. Edward Short, the former British Cabinet Minister, who said that "Delegated legislation is one of the worrying aspects of democracy. It is law made by civil servants. I know from experience that very often Ministers who sign the orders do not have time to scrutinise them. Frequently they are worded in completely incomprehensible gobbledygook which only lawyers understand and the Minister himself often does not know what laws are being made in his name. It is extremely important that Parliament should have the opportunity to scrutinise and debate these matters." (House of Commons Debates, 22 March 1973, page 686).

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1. Senator R. Collins, Senate Hansard, 17 December 1987, page 3264-9

Yet each year the task of subordinate legislative scrutiny becomes more difficult because of the increasing numbers of delegated legislative instruments subject to parliamentary scrutiny, the ever increasing pressure of time on all parliamentarians including Committee members and the limited resources of the Committee's smaller than usual secretariat. It is disconcerting today to be able to adopt words spoken almost 30 years ago by Senator Sir Reginald Wright who said that "The Senate would have a false idea of the scope and activities of the Regulations and Ordinances Committee if it believed that the Committee was able to scrutinise closely every one of the huge number of regulations and ordinances that are issued. Even with the aid of our legal adviser who makes reports upon all regulations and ordinances submitted, it is a very complex task to examine them in the setting of previous regulations and ordinances, the statutes authorising them, and the Constitution". (Senate Hansard, 8 October 1959, page 997). During the 10 sitting weeks of the Budget Sittings since 14 September 1987, the Committee has met 15 times, held one hearing of evidence with Departmental officers, considered 31 legal adviser's reports, had laid before it for scrutiny 622 instruments of delegated legislation, reported within the space of a few weeks on a complex reference from the Senate, only the second specific reference of a matter in the Committee's history, I have made 12 statements to the Senate about its activities, and the Committee has received some 20 undertakings from Ministers to amend delegated legislation. The following table gives some indication of the volume and variety of legislation scrutinised by the Committee during these Sittings.

Legislation Considered by the Committee during the Budget Sittings 1987

Legislation			Legislation
Statutory Rules	191	Meat Inspection Orders	4
A.C.T. Ordinances	67	Australian Meat and Livestock Orders	7
A.C.T. Regulations	13	Orders under Acts Interpretation Act	1
Christmas Island Ordinances	10	Orders under Environment Protection (Impact of Proposals) Act	1

Christmas Island Regulations	1
Cocos (Keeling) Island Ordinances	3
Public Service Board Determinations	90
Remuneration Tribunal Determinations	3
Defence Determinations	40
Commonwealth Teaching Service Determinations	3
Customs Notices	4
Excise Notices	4
Navigation Orders	12
Export Control Orders	11
Postal By-laws	4
Telecommunications By-Laws	2
Fisheries Notices	17
Pharmaceutical Benefits Determinations	1
Copyright Act Declarations	1
Aged or Disabled Persons Homes Act Certificates and Determinations	2
Orders under Broadcasting Act	1
Petroleum Products Freight Scheme Amendment	1
Notices under A.C.T. Credit Ordinance	26
Amendment to Schedules under States Grants (Petroleum Products) Act	15
Determinations (Bass Strait Oil) under Excise Act	5
Quarantine Act Determinations of Fees	2
Fees Determinations under A.C.T. Ordinances	32
Fees Declarations under A.C.T. Ordinances	1
Determinations under Health Authority Ordinance	2
Notices under Nursing Homes Assistance Act	2
Principles, Determinations and Approvals under Disability Services Act	3
Variation to the Plan of Management of the City of Canberra	1
Health Insurance Act Approval Principles Determinations	7
Principles under Nursing Homes Assistance Act	1
A.C.T. Determinations of Rates	8
National Health Act Determinations	3
Exemptions under Children's Services Ordinance	1

Exemptions under the A.C.T. Credit Ordinance	2	Excise Act Declarations	2
National Health Act Declarations	2	National Health Act Standards	1
National Health Act Notices	4	Approvals under States Grants (Tertiary Education) Act	8
TOTAL	622		

In applying its scrutiny Principles to this legislation, the Committee considered a range of matters and obtained a variety of important ministerial undertakings including the following:

1. The Minister for the Arts, Sport, the Environment, Tourism and Territories undertook to amend the Long Service Leave (Building and Construction Industry) Ordinance to provide for AAT review of certain discretionary decisions affecting rights and entitlements. (Senate Weekly Hansard, 22 October 1987, page 1096)

2. The Department of Industrial Relations undertook to amend Public Service Board Determinations to delete wide powers of Secretaries to take decisions in "the public interest" when what was meant was the narrower power to act "in the interests of the public service". (Senate Weekly Hansard, op.cit.)

3. The Australian Meat and Live-stock Corporation undertook to revoke an AMLC Order that the Committee had identified as being probably invalid because it incorporated future, non-legislative documents into the Orders in contravention of section 49A of the Acts Interpretation Act 1901. (Senate Daily Hansard, 14 December 1987, page 2969)

4. The Committee obtained from the Minister for Industry, Technology and Commerce adequate justifications for the very strict controls and unreviewable discretions conferred on the Minister by the Customs (Prohibited Imports) Regulations. The Committee also obtained the

Minister's undertaking to amend the Regulations to ensure that decisions to prohibit exports of dual-use technology and weapon-potential chemicals to certain prescribed countries would only be taken by the Minister personally and not by ministerial delegates. (Senate Daily Hansard, 23 November 1987, page 2188)

5. The Minister for the Environment gave the Committee certain undertakings concerning the Order containing the Administrative Procedures to be followed under the Environment Protection (Impact of Proposals) Act 1974, in particular: to ensure the Minister's personal involvement in certain decision-making, to produce public guidelines to govern the choice of alternative impact inquiries procedures, to ensure that certain matters about environmental impact are made public through publication in the Gazette, to ensure that written reasons for decisions are given, to facilitate public representations about proposed actions and to limit ministerial powers to exempt proposed projects from compliance with the Procedures. (Senate Daily Hansard, op. cit.)

6. The Minister for Immigration, Local Government and Ethnic Affairs undertook to amend the Australian Citizenship Regulations to provide a right of internal review for persons refused copies of extracts from citizenship registers. (Senate Daily Hansard, op. cit., page 2191).

7. The Minister for Primary Industries and Energy undertook to introduce a Bill to validate Wheat Tax Regulations which were probably invalid on a legal technicality because they had been made after consultation with a representative body other than the body specified in the enabling Act. (Senate Daily Hansard, 24 November 1987, page 2348)

8. The Committee agreed not to press the Minister for Aboriginal Affairs for AAT review of a ministerial discretion to refuse access to a register of declarations of preservations under the Aboriginal and Torres Strait Islander Heritage (Interim Protection) Regulations because access was to be dependent on a political process of consultation by the Minister with local Aboriginal communities. (Senate Daily Hansard, op. cit.)

9. The Minister for Science and Small Business undertook to amend Bounty (Ships) Regulations to provide, (in one case retrospectively) for AAT review rights where there is a refusal to reserve bounty and where sub-contractors are refused approval to perform certain work. (Senate Daily Hansard, 24 November 1987, page 2270)

10. The Minister for Territories undertook to amend the A.C.T. Remand Centres Ordinance to ensure that Official Visitors enjoy appropriate independence from Government and security of tenure. (Senate Daily Hansard, op. cit.)

11. The Minister for Resources undertook to amend Meat Inspection Orders to remove reference to the incorporation into the Orders of future instruments contrary to the powers in the enabling Act. (Senate Daily Hansard, op. cit.)

12. The Minister for Primary Industries and Energy undertook to amend Wool Marketing Regulations to remove reversals of the onus of proof, to confine to reasonable limits demands for information and ensure that inspectors use proper photographic identity cards and follow protective procedures when entering property by consent. (Senate Daily Hansard, op. cit.)

13. The Minister for Territories undertook to amend the A.C.T. Gaming Machine Ordinance to provide for the tabling and disallowance of certain ministerial determinations, to redraft certain strict liability offences, to ensure the use of photographic identity cards by inspectors and to provide a right of appeal to the AAT for review of certain discretionary decisions. (Senate Daily Hansard, op. cit. page 2271)

14. The Minister for Territories undertook to amend a number of A.C.T. Taxation Ordinances to provide additional AAT review rights regarding certain decisions taken after a tax assessment had been made, to remove an imposition of strict vicarious tax liability on agents and attorneys of companies, to redraft certain provisions in a more objective way to remove drafting that creates subjective discretions,

to confine the A.C.T. Tax Commissioner's subpoena powers to "reasonable" limits, and to improve the protection against self-incrimination to the use/derivative-use standard. (Senate Daily Hansard, op. cit. 2271)

15. The Minister for Territories has undertaken to amend the A.C.T. Cooperative Societies Ordinance to provide that when the Administrator takes over a Society, contracts of employment and service will not be terminated without compensation unless, in the opinion of the Administrator, this is necessary to ensure the viability of the Society (subject to the Constitutionality of this under placitum 51(xxxi)). The exercise of that discretion would also be made subject to AAT review. (Senate Daily Hansard, op. cit. page 2272)

16. The Minister for the Environment undertook to remove strict liability offences from the National Parks and Wildlife Regulations. (Senate Daily Hansard, op. cit.)

17. The Minister for Defence undertook to remove similar strict liability offences from the Defence (Public Areas) By-laws. (Senate Daily Hansard, 15 December 1987, page 3033)

18. The Minister for Territories undertook to amend the A.C.T. Lakes Ordinance to reduce to a more reasonable level a prescribed penalty of 6 months imprisonment for being a passenger in an unauthorised power boat. (Senate Daily Hansard, 16 December 1987, page 3136)

19. The Minister for Territories undertook to amend the Children's Services Ordinance to ensure that except in unforseeable *circumstances, a detained child would be brought before a magistrate* within 24 hours and not merely "as soon as practicable". (Senate Daily Hansard, op. cit.)

Certain features of these undertakings are worth noting. Firstly, there is a degree of repetition in the flaws identified by the Committee as compared to previous periods. When the Committee tabled its Eightieth Report in 1986, Senator Vanstone noted that "One frustrating aspect of our work arises when the Committee writes to a Minister to repeat a point which had already been

made to that or another Minister on an earlier occasion ...Although the Committee has adopted the practice of being as open as it can be about its work, making statements in the Senate and incorporating or tabling its correspondence, it still seems to take a very long time before particular flaws in delegated legislation are dealt with and weeded out." (Senate Weekly Hansard, 15 October 1986, page 1342). The Committee would again respectfully urge Ministers to ensure that problems identified by the Committee are not repeated.

Secondly, the Committee has had to expend considerable time and effort to obtain certain undertakings. It seems to be the case that where the Committee identifies an error or oversight in delegated legislation the existence of the flaw is conceded willingly enough and remedied quickly enough. That is not the case, however, where the Committee's scrutiny results in it substituting its parliamentary judgement about the effects of certain provisions on rights or proprieties for the judgement of the officials advising the Minister. In such cases, for example, where appeal rights have not been provided, or where the Committee perceives a role for Parliament to scrutinise sub-delegated instruments, the Committee seems to face an uphill struggle with officials before effluxion of time forces a busy Minister to become actively involved. At that stage Ministers, with their sensitivity to parliamentary proprieties and public rights, usually cut through the Gordian Knot by agreeing with their parliamentary colleagues on the Committee, and asking why officials did not agree in the first place. The Committee often asks that question also. A lot of the Committee's time and effort is occasionally taken by official advisers who wish to protect at all costs, including the cost of the Minister's valuable time and reputation before the Committee, their initial judgements about legislation found wanting by the Committee.

It should be realised that the Committee is a strictly bipartisan Committee which does not criticise the merits or policy of regulations but rather as Senator Cooney has pointed out "Its task is one of technical scrutiny in which it examines the justice, the fairness or the propriety of the way in which regulatory measures are determined and imposed". (Senate Weekly Hansard, 4 June 1987, page 3528).

This process is designed primarily to protect in advance people who might otherwise lose rights. But others also benefit. On the one hand, when the

Committee remedies legislative flaws, the Government benefits because the Committee's preventative and curative work restrains bureaucratic over-enthusiasm. It presses caution on those who might seek unnecessary subordinate powers for themselves by means of unnecessary subordinate laws made by themselves. It seeks the removal from legislation or the inclusion in legislation of provisions whose presence or absence, as the case may be, could cause real public distress further down the track. One of Australia's greatest public servants Dr H. C. Coombes reported in his Royal Commission into Australian Government Administration that "in the Commission's view, over the years the Committee has more than justified its existence... its compass is modest and well-defined and... the standards it applies have a settled core of meaning readily understood by most draftsmen". (Report, para 5.1.18). Whatever the attitude of the current public service chiefs to the Committee, the Committee in its role assists Ministers to avoid future problems with delegated law-making. The Committee is a safety-valve for Ministers, a lightning-rod to disperse potentially harmful public or parliamentary grievance over regulations which trespass on personal rights or create sub-delegated powers whose exercise might by-pass parliamentary processes.

On the other hand, the Committee is a focus for bipartisanship and concern about the rights of Parliament. It therefore fosters a spirit of bipartisanship and equity which is vital to the balanced and truly democratic operation of a House of Parliament. Senator Ian Wood said that "The Committee is concerned with the preservation of the rights of the Parliament and of parliamentarians. Whatever power belongs to parliamentarians should remain with them. The Committee exists as a custodian of the rights of the Parliament, not as an irritant. It has been delegated certain duties by the Senate and it tries to perform those duties in accordance with the highest parliamentary principles". (Senate Hansard, 4 October 1960, page 839). In 1973 Senator Wheeldon described the Committee as "probably the most important Committee of this Parliament. The role which it performs is a role which is essential to parliamentary democratic government." (Senate Hansard, 27 March 1973, page 575). In 1974, Senator James McClelland said that he regarded the Committee as "one of the most important institutions of this Parliament." (Senate Hansard, 31 July 1974, page 649). As long ago as 1962 Senator Lionel Murphy said "This Senate has done something by way of supervision of delegated legislation of which the people of Australia may be proud". (Senate Hansard, 23 October 1962, page 1076). In spite of the large expenditure of effort

needed to maintain its position the present Committee will not be deflected from preserving these high standards.

To do this it requires the cooperation of Ministers especially in regard to the implementation of ministerial undertakings. The following table lists a number of undertakings that are overdue for implementation:

LIST OF MINISTERIAL UNDERTAKINGS THE IMPLEMENTATION OF WHICH IS OVERDUE

Legislation and Undertaking	Date of the Minister's Undertaking
Meat Regulations (Amendment) (A.C.T. Regulations No. 15 of 1985) To provide for AAT review of certain discretions	4/10/85
Meat (Amendment) Ordinance 1985 (A.C.T. Ordinance No. 26 of 1985) To provide for proper I.D. cards for Inspectors	25/11/85
First Home Owners Regulations (S.R. 1985/267) Redraft provisions which permit a release of information which may amount to an invasion of privacy	19/03/86
Air Navigation (Charges) Regulations (S.R. 1986/169) To provide for certain AAT review rights	7/10/86
Navigation Orders 5-12 To provide for certain AAT review rights (A Bill for an Act is proposed)	18/11/86

Motor Omnibus Services (Amendment) Ordinance (A.C.T. Ordinance No. 48 of 1986) To repeal provisions that confer unduly wide powers	11/11/86
Air Navigation Regulations (Amendment) (S.R. 1986/141) To provide for certain AAT review rights	11/11/86
Optometrists (Amendment) Ordinance 1986 (A.C.T. Ordinance No. 51 of 1986) To provide for certain AAT review rights	11/11/86
Apple and Pear (Conditions of Export) Regulations (S.R. 1986/219) To provide for certain AAT review rights	13/11/86
Meat Inspection (General) Orders (Amendment) (Meat Inspection Order No. 4 of 1986) To provide that reasons for decisions be supplied	20/03/87
New South Wales Acts Ordinance 1986 (A.C.T. Ordinance. No. 91 of 1986) To progressively remove outmoded provisions	28/04/87
Plan of Management No. 12 - Northern Prawn Fishery (Special Provisions) Management Plan To amend various provisions to lend greater certainty to the scheme	29/04/87
Blood Donation (A.I.D.S.) (Amendment) Ordinance (No. 2) 1986	8/05/87

(A.C.T. Ordinance No. 90 of 1986)
To place a sunset clause in the Ordinance
to ensure that it is remade and re-examined
in the Parliament

Lands Ordinance 1987 11/05/87
(Christmas Island Ord. No. 1 of 1987)
To provide for tabling and
disallowance of guidelines

In its Eightieth Report the Committee stated "...It is difficult to foresee circumstances where more than 6 months would be needed to draft amending legislation and bring it into force. (para 5.4) The Committee also stated "It is the Committee's view, that in the absence of compelling justifications, where undertakings are not implemented within 6 months, Ministers could be invited to explain to the Senate why it is necessary for rights and liberties to remain in jeopardy when promises have been given to safeguard them. Alternatively where undertakings have not been implemented and fresh problems arise in new legislation the Committee could consider whether it would be justified in accepting any further undertakings in lieu of disallowance. The Committee has a responsibility to the Senate, to the citizen and to itself to ensure that rights having been infringed by legislation are not further undermined by administrative delays." (para. 5.7)

Undue delay in implementing undertakings will undermine the basis of honour on which the Committee accepts undertakings from Ministers and result in increasing pressures actually to disallow offending provisions. There was a time when the Committee's practice of declining to recommend disallowance in lieu of ministerial undertakings was sharply criticised in the Senate. In 1970 Senator Murphy said that "Once it is *recommended by the Committee* that a regulation be disallowed the Parliament should deal with the matter straight away. This would be one way of keeping a check on those who are not paying proper attention to the standards laid down by Parliament" (Senate Hansard, 19 March 1970, page 457). Later that same year Senator Murphy said "It seems clear to me that once the Senate is of the opinion that a regulation offends against the standards which have been set up, it should be disallowed. I should think that only in some very grave emergency or in some very special situation would a departure from that approach be permitted. The standards

have been adopted for many years. They should be well known by those in the departments who are responsible for the making of the delegated legislation. The standards should be observed. If they are not observed and if they are broken, I do not see why the Senate should bend over backwards to allow the regulations to continue and in effect to give the message that it does not matter if the standards which have been set out and which are well known are broken because if they are broken the Senate will not worry but will wait until the matter is adjusted by the introduction of some kind of legislation. It is important that the standards be observed." (Senate Hansard, 16 April 1970, page 863).

On another occasion Senator Murphy said "I believe that it is quite regrettable that when regulations are considered by the Senate's Committee an endeavour always is made, by means of this kind of assurance or that kind of assurance, to induce the Senate not to disallow the regulations and, in effect, not to perform its duty..." (Senate Hansard, 20 August 1970, page 147). As history shows this approach was not preferred by the Committee. The preferred view, at that time and now, is best summed up by reference to a statement by Senator Cavanagh who said "If I have been impressed by any one feature of the work of the Committee it has been the extent to which the Committee has been prepared to go from time to time to try to fit in and to meet necessary remedial action by discussions with Ministers and departmental officers, by calling witnesses from departments and from time to time by calling the Parliamentary draftsmen." (Senate Hansard, 16 April 1970, page 864). Since these debates Committees have maintained the practice of giving protective notices of motion and withdrawing them on receipt of satisfactory ministerial undertakings. However, the efficacy of that practice is almost exclusively based on honour and the assumption that promises given will quickly become promises fulfilled, notwithstanding that as soon as the notice of motion of disallowance is withdrawn there is absolutely nothing the Committee or the Senate can do to remedy the offending legislation. As Senator Harradine reminded the Senate recently, "the chamber has no power to amend delegated legislation" (Senate Daily Hansard, 25 November 1987, page 2412).

In its 80th Report the Committee reported in some detail on its attitude to ministerial undertakings. In that Report the Committee stated that "To give a ministerial undertaking, the implementation of which is not immediately

expedited could, without more, be viewed as a discourtesy to the Senate. This is so because the Senate has consented to the withdrawal of a notice of motion which would otherwise have resulted in disallowance of the instrument. It is equally a discourtesy to the Committee which, having received an undertaking in a sense publicly vouches for a Minister's bona fides by withdrawing a notice of disallowance. In common parlance, the Committee has gone guarantor for the implementation of the undertaking. To continue the metaphor, like any guarantor the Committee has confidence in the Minister and trusts that the promise will be honoured within a reasonable time." (para. 5.3, pages 125-126) The Committee went on to say that in most cases no more than 6 months would be a reasonable period within which to make amendments promised to the Committee. Even this was suggested by the Committee with some trepidation since the Committee could not always be certain that no prejudicial administrative actions and decisions were being made on the basis of the continued presence in the delegated statute book of provisions offensive to the Committee's Principles. In its 80th Report the Committee suggested that there could well arise a need to amend the Acts Interpretation Act to provide for the retabling of regulations which had remained unamended for 6 months after the Senate Committee had criticised them and obtained undertakings to amend them. On automatic retabling, the regulations could be disallowed if the undertakings were not implemented forthwith. The Committee respectfully requests Ministers to use their best endeavours to ensure that officials take the necessary steps to bring unimplemented undertakings to Ministers' attention for expeditious action.

Finally, throughout all of 1987 the Committee has been campaigning to ensure that all delegated legislative instruments that are subject to tabling and disallowance and therefore come before the Committee, are accompanied by an adequate explanatory statement which rather than merely repeating the text of the instruments, attempts to explain the background to the instrument, the consultations that preceded its making and gives some indication of its purpose and likely effects. It is somewhat ironic that this same subject was on the agenda of the Committee's very first meeting on 4 May 1932 when it was ordered that a circular should be sent to each Department asking that when regulations and ordinances are sent for tabling they should be accompanied by a memorandum explaining their purpose. As is shown by the foregoing list of instruments now subject to scrutiny by the Committee the scope of the Committee's inquiries extends far beyond regulations and ordinances. However,

the requirement for an adequate explanatory statement is if anything more pressing for the Committee today than it was for the first Committee half a century ago. Ministers are respectfully urged to ensure that skilled and knowledgeable officials are delegated the important task of preparing an explanatory statement to accompany all disallowable instruments.

In conclusion, a former Chairman of the Committee, Senator Lewis, succinctly summarised the role and philosophy of the Committee when he said that "the Committee, with a low-key profile and style, seeks to apply standards of agreed principles to delegated legislation and through the moral suasion of its bipartisanship, to persuade Ministers to amend instruments to remove possible infringements on personal rights or insert better or clearer protections of those rights." (Senate Daily Hansard, 9 April 1986, page 1523) That remains the Committee's goal. I thank Ministers for their cooperation which continues to make this approach possible. I also thank my colleagues on the Committee for their bipartisan commitment to the Committee's scrutiny role.

APPENDIX 5

Professor Goldring's Summary of his advice concerning AAT Review of Ministerial Policy Decisions

Ministerial Responsibility and the AAT

In Australia, "responsible government", to the extent that the term retains any practical utility, has developed a particular meaning or, perhaps, series of meanings, which may be summarised as follows:

a. Ministers must answer to Parliament **collectively** for the actions of the government, or face a lack of finance for government activities;

b. **Individual** Ministers are expected to provide an account of their actions, decisions and policies to Parliament, but this is an expectation only, and does not seem to be enforceable by Parliament; if it is enforceable at all, it is through the machinery of political parties, rather than through Parliament.

Therefore, the doctrine of Ministerial responsibility is important, but it has the limited importance specified, and it is a political, rather than a legal, notion.

The "new administrative law" consists of a "package" of separate pieces of legislation, all of which are directed to the provision of reasons for decisions, and a variety of mechanisms by which a person affected by an administrative decision may obtain not only the reasons for the decision, but also, in many cases, a review of aspects of the decision. The review afforded by the *Ombudsman Act* and the *Administrative Decisions (Judicial Review) Act* is limited.

The Administrative Appeals Tribunal (henceforth referred to as "AAT" or "Tribunal") may exercise powers, usually to make a decision in substitution for the decision made by a Minister or official under some Act or subordinate legislation, but only in cases where there is specific legislative warrant for it to do so. As some administrative decisions which may be subject to review by the AAT may depend, in whole or part, on a policy, that policy is also subject to review (and possibly to change by decision of the Tribunal) if it does not lead to the making of a decision which is the "best or preferable" decision in the circumstances.

While it is not possible to make a clear distinction between policy which can be described as "Ministerial" and other types of policy adopted by the government or by departments or agencies, even the notion of "ministerial responsibility" as it applies in Australia as a concept useful in understanding the practice of parliamentary politics requires that the Minister is answerable to Parliament for all policies applied by departments or agencies within his or her portfolio. Some policies will be more clearly identified as "Ministerial" than others.

It is not clear what is to be taken as "ministerial policy" but this term almost certainly includes directions, statements and documents (other than documents having the status of an "enactment" as defined in the AAT Act) issued by or with the authority of the Minister stating the wishes of the Minister (and therefore presumably of the government) as to the way in which certain classes of decisions are to be made and possibly also the objectives which the Minister wishes to achieve.

In determining whether a decision which it is entitled to review is the "best or preferable" decision in all the circumstances, even though the courts may have some doubts as to whether or not ministerial or government policy ought to be a factor leading to the making of the decision, the AAT must certainly consider it if, in fact, it has been taken into account by the primary decision-maker.

Since the AAT, as it were, "steps into the shoes" of the primary decision-maker when reviewing the decision, in the sense that its decision becomes the operative decision, the question arises whether it, like the

primary decision-maker, is obliged to take into account any ministerial or government policy which may be relevant to the decision.

In Drake's case, Brennan J has provided not only a general statement of the practice which he hoped would guide the Tribunal in future cases where it might have to consider a policy if that policy led to the making of a decision which was not the "best or preferable decision" in the circumstances. This statement not only reinforces the role of Parliament in deciding questions which are primarily political in nature, but also calls for a degree of restraint in the Tribunal which would emphasise its adjudicative role. The Tribunal is to be concerned more with the interests of individuals than with the correctness or otherwise of government or ministerial policy.

If Parliament is really concerned to ensure that bodies, such as the AAT, which are not elected, nor responsible directly to the people's representatives in Parliament, should not have the final say on decisions which may involve the correctness or otherwise of governmental policy, then the answer is to include provisions similar in form and effect to s 66E of the Migration Act in the legislation which confers jurisdiction on the AAT. A restricted review of this type appears preferable to none.

A decision or recommendation of the AAT which represents a departure from policy made or approved of by the Minister, especially if it also has the support of Parliament, will be extremely rare and probably would in any case constitute circumstances warranting parliamentary consideration. To the extent that AAT review of decisions affects only that type of policy which can be characterised as "administrative" rather than "Ministerial" or "governmental", review of decisions does not appear to affect the responsibility of Ministers; indeed, the publicity which is afforded to Tribunal decisions makes it more likely that the practice or policy will be drawn to the attention of the Minister.

My advice is that neither the existence of review of an administrative decision by the AAT, nor the nature nor extent of that review adversely affects the doctrine of ministerial responsibility as it now operates, or is understood in Australia, and that the Committee ought not to change the

principles it applies when considering Regulations, Ordinances, or other delegated legislation. There are strong grounds for considering that, indeed, the existence of a system of review of administrative decisions on their merits enhances and strengthens the role of Parliament in scrutinising and supervising the policy-making role of government in Australia."

APPENDIX 6

ISSUES ARISING IN DELEGATED LEGISLATION 1986-87

acquisition of property	National Occupational Health and Safety Commission Regulations (S.R. 1986 No. 206)
body searches	Children's Services Ordinance 1986
cabinet secrecy	Export Control (Unprocessed Wood) Regulations (S.R. 1986 No. 79)
classification of offenders by age	Children's Services Ordinance 1986
delegations of ministerial power	Export Control (Unprocessed Wood) Regulations (S.R. 1986 No. 79)
detention without judicial authority	Children's Services Ordinance 1986
dismissal from office, grounds for	Patent Attorneys Regulations (Amendment) (S.R. 1987 No. 12)
drafting errors	Crimes (Amendment) Ordinance (No. 3) 1986
explanatory statements, inadequacy of	Electricity (Amendment) Ordinance 1987 *Navigation Orders No.* 5-11 of 1986

	Trade Marks Regulations (Amendment) (S.R. 1986 No. 261)
	Designs Regulations (Amendment) (S.R. 1986 No. 263)
	Long Service Leave (Building and Construction Industry) (Amendment) Ordinance 1986
	Public Service Board Determination No. 33 of 1986
review of discretions (including the right to practice a trade, business or profession)	Air Navigation Regulations (Amendment) (S.R. 1986 No. 141)
	Apple and Pear (Conditions of Export) Regulations (Amendment) (S.R. 1986)
	Children's Services Ordinance 1986
	Lands Ordinance 1987 (Christmas Island)
	Co-operative Societies (Amendment) Ordinance 1986
	Defence Determination No. 46 of 1986
	Meat Inspection Orders No. 4 of 1986
	Navigation Orders Nos. 5-11 of 1986
	Optometrists (Amendment) Ordinance 1986
	Postal (Staff) By-laws (Amendment) 1986 and 1987
	Quarantine (Animals) Regulations (Amendment) (S.R. 1986 No. 283)
	Seamen's War Pensions and Allowances Regulations (Amendment) (S.R. 1986 No. 98)
	Veterans' Entitlements Regulations (S.R. 1986 No. 97)
sex discrimination	Sex Discrimination (Operation of Legislation) (No. 1)

	Regulations (S.R. 1986 No.191)
strict liability	Air Navigation (Charges) Regulations (S.R. 1986 No. 169)
sub-delegated instruments	Nature Conservation (Amendment) Ordinance 1986
sunset clause	Blood Donation (Acquired Immune Deficiency Syndrome) (Amendment) Ordinance (No. 2) 1986 Sex Discrimination (Operation of Legislation) (No. 1) Regulations (S.R. 1986 No. 191)
subsidy schemes	Amendments of the Schedule to the Schemes under the States Grants (Petroleum Products) Act 1965
tabling and disallowance of instruments	Children's Services Ordinance 1986 Nature Conservation (Amendment) Ordinance 1986 Public Service Regulations (Amendment) (S.R. 1986 No. 130) Lands Ordinance 1987 (Christmas Island)
ultra vires	Apple and Pear (Conditions of Export) Regulations (Amendment) (S.R. 19876 No. 219) Fisheries Levy (Northern Prawn Fishery) Regulations (Amendment) (S.R. 1986 No. 397) Fisheries Notice No. 176 Sex Discrimination (Operation of Legislation) (No. 1)

	Regulations (S.R. 1986 No.191)
unusual or unexpected use of powers	Sex Discrimination (Operation of Legislation) (No. 1) Regulations (S.R. 1986 No.191)
use of force	Lands Ordinance 1987 (Christmas Island)

APPENDIX 7

INDEX TO REPORTS 1986-87

Eighteth to Eighty-second Reports Inclusive

Notes: 1. Particular Acts, Regulations and Ordinances are entered under these headings. Other instruments are entered in the alphabetical list.

2. References are as follows: report no./paragraph or appendix.

3. The index for the First to the Seventieth Reports inclusive, is contained in the Seventy-first Report, and the index for the Seventy-second to the Seventy-ninth Reports inclusive, is contained in the Eightieth Report.

Blood Donation (Acquired Immune Deficiency Syndrome) Ordinance 1985	80/3.2, 3.32, 4.11 et seq.
Blood Donation (Acquired Immune Deficiency Syndrome) Ordinance 1985	80/4.17
Bookmakers Ordinance 1985	80/3.41, 3.50 4.20 et seq.
Credit Ordinance 1985	80/3.9, 3.22, 3.42 5.10, 6.4
Credit (Amendment) Ordinance (No. 2) 1985	80/4.31
Crimes (Amendment) Ordinance 1984	80/4.106
Crimes (Amendment) Ordinance (No. 3) 1985	80/3.21, 4.35 et seq. 81/2.2 et seq
Crimes (Amendment) Ordinance (No. 4) 1985	80/3.29, 3.43, 4.42 et seq., 81/2.13 et seq.
Crimes (Amendment) Ordinance (No. 5) 1985	80/3.54, 4.50 81/2.5 et seq.
Crimes (Amendment) Ordinance 1986	81/2.13 et seq.
Co-operative Societies (Amendment) Ordinance 1985	80/5.12
Domestic Violence Ordinance 1986	81/2.21 et seq.
Domestic Violence (Miscellaneous Amendments) Ordinance 1986	81/2.21 et seq.
Electricity (Amendment) Ordinance 1985	80/3.23, 3.25, 3.30 3.40, 4.101 et seq., 4.159
Evidence (Amendment) Ordinance (No. 2) 1985	80/3.54, 4.50, 81/2.5 et seq.
Health Authority Ordinance 1985	80/4.144 et seq.
Legal Practitioners (Amendment) Ordinance 1985	80/3.43, 4.155
Limitation Ordinance 1985	80/2.34
Meat (Amendment) Ordinance 1985	80/3.41, 4.159

APPENDIX 8

EXTRACT FROM SENATE STANDING ORDER 36A[1]

Senate Standing Order 36A

(1) A Standing Committee, to be called the Standing Committee on Regulations and Ordinances, shall be appointed at the commencement of each Parliament.

(2) (a) Unless otherwise ordered, the Committee shall consist of six Senators, three being members of the Government to be nominated by the Leader of the Government in the Senate, and three being Senators who are not members of the Government, to be nominated by the Leader of the Opposition in the Senate or by any minority group or groups or Independent Senator or Independent Senators.

(b) The nominations of the Opposition or any minority group or groups or Independent Senator or Independent Senators shall be determined by agreement between the Opposition and any minority group or groups or Independent Senator or Independent Senators, and, in the absence of agreement duly notified to the President, the question as to the representation on the Committee shall be determined by the Senate.

(3) The Committee shall have power to send for persons, papers and records, and to sit during Recess; and the Quorum of such Committee shall be three unless otherwise ordered by the Senate.

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1. As amended on 22 September 1987

(3A) The Committee shall elect a Government member as Chairman.

(3B) The Chairman may from time to time appoint a member of the Committee to be Deputy-Chairman and the member so appointed shall act as Chairman of the Committee at any time there is no Chairman or the Chairman is not present at a meeting of the Committee.

"(3C) In the event of an equality of voting, the Chairman, or the Deputy-Chairman when acting as Chairman, shall have a casting vote.

(4) All regulations, ordinances and other instruments, made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to such Committee for consideration and, if necessary, report thereon. Any action necessary, arising from a report of the Committee, shall be taken in the Senate on Motion after Notice.