



The Parliament of the Commonwealth of Australia

DEPARTMENT OF THE SENATE	
PAPER No.	3432
DATE PRESENTED	15 JUN 1989
<i>Mary Evans</i>	

SENATE STANDING COMMITTEE  
ON  
REGULATIONS AND ORDINANCES

EIGHTY-FIFTH REPORT  
JUNE 1989

Overview and Future Directions  
Explanatory Statements and Citation Requirements  
Guidelines on the Application of the Committee's Principles  
Legislation Considered 1987-1988

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**SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES**

**MEMBERS OF THE COMMITTEE**

**THIRTY-FIFTH PARLIAMENT**

**First Session - First period  
(until 18 December 1987)<sup>1</sup>**

**Senator R. Collins (Chairman) 2  
Senator B. Bishop (Deputy Chairman) 3  
Senator The Hon. A.T. Gietzelt 4  
Senator P.J. Giles  
Senator R.F. McMullan 5  
Senator K. Patterson 6  
Senator J. Stone  
Senator B.C. Teague 7**

**First Session - Second period  
(until 3 June 1988)**

**Senator R. Collins (Chairman)  
Senator B. Bishop (Deputy Chairman)  
Senator P.J. Giles  
Senator R.F. McMullan  
Senator K. Patterson  
Senator J. Stone**

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

PRINCIPLES OF THE COMMITTEE

(Adopted 1921; Amended 1979<sup>1</sup>)

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. Sixty-fourth Report, March 1979, Parliamentary Paper No 42/1979

## CHAPTER 1

### SUMMARY OF THE COMMITTEE'S WORK

JULY 1987 - JUNE 1988

#### Introduction

- 1.1 Since 1932, the Senate has had a Standing Committee to scrutinise Commonwealth delegated legislation to ensure that it complies with principles of personal freedom and parliamentary propriety. With a government Chairman and an opposition Deputy Chairman, the six-member Committee has traditionally aspired to a high degree of bipartisanship in conducting a technical scrutiny of delegated legislation. Such scrutiny, by definition, avoids criticism of, or support for, matters of policy.
- 1.2 The Committee has characteristics which make it unique in the Australian Parliament. The sheer endurance of its role has given it an authority based on historical precedents which lends force and credibility to its recommendations. It has a reputation for robust independence and bipartisan unity. In 57 years the Senate, regardless of its political composition, has never rejected a Committee recommendation that an offending instrument should be disallowed because a Minister appeared unwilling to amend it to protect rights.
- 1.3 Because of its role as a scrutineer of a form of legislation that is made beyond the rigorous processes of parliamentary debate, the Committee has been described as one of the most important Standing Committees in Parliament, 'a Committee in which this Senate takes a particular interest and a certain

pride.<sup>1</sup> There is no doubt that the Committee plays an important supporting role in maintaining the reputation of the Senate as a house of legislative review.

- 1.4 The Committee scrutinises delegated legislation in accordance with terms of reference which are tests or principles of legislative propriety designed to ensure that legislation is in accordance with the statute; that it does not trespass unduly on personal rights and liberties; that it provides adequate avenues of appeal against discretionary decisions; and that it does not contain substantive provisions which should more appropriately appear in Bills before the Parliament.

#### The reporting period 1987-1988

- 1.5 During the first half of the reporting period the Committee was advised by Professor Dennis Pearce of the Australian National University. Professor Pearce's appointment as Commonwealth Ombudsman coincided with the return from sabbatical leave of the Committee's regular legal adviser since 1982, Professor Douglas Whalan, also of the Australian National University.

#### Statistics

- 1.6 Basic statistics about the Committee's work provide a measure of the task it performs each year. During this reporting period, the Committee met 25 times (including 1 in-camera hearing with government lawyers and officials) and considered 52 reports from its independent legal advisers relating to 1,035 separate instruments of delegated legislation.

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1. President of the Senate, Senator the Hon. Kerry Sibraa, Senate Hansard, 28 April 1988, p. 2028.



## Numbers of Instruments Scrutinised

- 1.7 The Committee examined the following types and numbers of instruments<sup>2</sup>.

Statutory Rules	345
A.C.T. and other Territory Ordinances, Regulations, Determinations and Notices	197
Public Service Board and Commission Determinations and Defence Determinations	257
Plans of Management, Fisheries Notices, Export Control Orders and Meat Orders	82
Health Legislation Determinations, Declarations, Approvals, Principles and Notices	31
Statutory authority By-laws	16
Navigation Orders	10
Customs and Excise related instruments	22
Other miscellaneous instruments	75
	<u>1035</u>

- 1.8 This is the largest number of legislative instruments ever scrutinised by the Committee during a reporting period. The number of instruments, 1035, was an increase of 203 over the 832 instruments scrutinised in 1986-87 (Eighty-Third Report paragraph 1.5) (a 24% increase) and 178 over the 857 instruments scrutinised in 1985-86 (Eightieth Report paragraph 1.4).

- 1.9 This is possible evidence of a trend to increased regulation by delegated legislation, placing considerable responsibility on the Committee to maintain vigilance in its scrutiny to ensure its Principles are upheld and give it sufficient scope to monitor possible infringements of personal rights and liberties.

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2. For detailed breakdown according to the type of instrument of delegated legislation, see Appendix 1.

1.10 The Committee wrote to Ministers and heads of statutory authorities seeking advice regarding some 130 instruments of delegated legislation which appeared to require further scrutiny to determine whether the Committee's Principles had been infringed. While awaiting replies to this correspondence the Committee gave 67 protective notices of motion of disallowance to safeguard its freedom to make an appropriate recommendation to the Senate if, after an exchange of views, a Minister was unable to agree to necessary amendments to protect rights.

1.11 The Committee received Ministerial and other undertakings to amend 56 instruments to conform to the Committee's requirements. Some matters were the subject of outstanding correspondence at the end of the reporting period, others were resolved by satisfactory explanations from Ministers and others. No fewer than 36 ministerial undertakings, given both before and during the period, were implemented in amending regulations, ordinances and other instruments.

#### Committee Reports

##### Special Committee Report

1.12 The Committee also tabled two reports on its activities. The Eighty-Second Report (November 1987) was prepared after certain proposed amendments to the statutory disallowance scheme contained in the Acts Interpretation Act 1901 were referred to the Committee by the Senate for inquiry and report, the second reference to the Committee in its history. The Report recommended that the Act should be amended to eliminate the legal possibility that the statutory disallowance scheme could be by-passed by a sequence of regulations, each one repealing and remaking its predecessor. Amendments designed to achieve this are contained in the Statutory Instruments (Tabling and Disallowance) Legislation Amendment Act 1988 (No. 130 of 1988) assented to 2 December 1988.

## General Report

- 1.13 The Eighty-Third Report (April 1988) is a general report recording the work of the Committee during the period August 1986 to June 1987. This Report is one of the most comprehensive in the Committee's history. Detailed guidelines on how the Committee applies its four Principles first appeared in Chapter 2 of the Eightieth Report<sup>3</sup> and the Eighty-Third Report further develops these guidelines. The Report also makes a strong recommendation that all delegated legislation that is subject to tabling and disallowance in Parliament should be accompanied by adequate Explanatory Statements for the information of Parliament and the public.<sup>4</sup> This theme is continued and expanded in this Report.

### Important ministerial undertakings

- 1.14 Although the existence of the Committee has a normative effect in setting standards of liberty and propriety in delegated legislation, the Committee's significance is also measured by the nature and scope of the ministerial undertakings it receives. A number of important Ministerial undertakings to amend legislation were given to the Committee during the year under review.

### Personal rights and liberties

- 1.15 In matters affecting personal rights and liberties there have been Ministerial undertakings to protect the independence and security of tenure of Official Visitors to

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3. October 1986, Parliamentary Paper No. 241/1986

4. Senate Hansard, 18 April 1988, p.1651 et seq., and 18 May 1988, p.2407.

Remand Centres; to remove unnecessary immunity from civil suit conferred on certain government officials; to ensure that inspectors with powers to enter private property carry official photographic identity cards; to reduce to a more reasonable level the pecuniary and custodial penalty for being a passenger in an unlicensed boat (\$1,000 or 6 months imprisonment had initially been prescribed); to ensure that a child in custody was brought before a magistrate within 24 hours of arrest unless this proved impracticable; to limit regulatory information demands to expressly 'reasonable' limits; and to delete the discretion of a public official to release confidential information 'in the public interest' when specific criteria for release would be more appropriate.

#### Administrative review

- 1.16 In the administrative law area there have been undertakings in a large number of instances to provide rights of appeal to the Administrative Appeals Tribunal for review on the merits of important discretionary decisions; to ensure that individuals are properly notified of their appeal rights; to provide that in the absence of independent review rights, Ministers personally, rather than delegates or officials, should take certain decisions prohibiting the export or import of certain goods; to improve opportunities for more effective public involvement in the development of Environmental Impact Statements and Public Environmental Reports; to remove unnecessary discretionary powers from parts of regulations that were, for all practical purposes, spent; to ensure that important administrative decisions, provided for in delegated legislation and taken at ministerial or other higher levels, were lawfully exercisable only in writing; to remove a reference to an 'absolute' discretion purportedly exercisable by a statutory authority; and to amend environmental protection legislation to specify a reasonably adequate period for public submissions to be lodged.

## **Criminal law**

- 1.17 In the criminal law area there have been undertakings to amend unjustifiable strict liability offences by providing for reasonable excuse and other defences; to amend other strict liability offences in order to require a wilful element before criminal liability arises; and to provide adequate defences against certain forms of vicarious strict liability imposed on employers and others where the need for stringent criminal liability was justified on policy grounds.

## **Parliamentary scrutiny**

- 1.18 In the area of parliamentary control over government power there have been undertakings to make various subdelegated legislative instruments subject to the same parliamentary oversight as their enabling delegated legislation; to facilitate the Committee's scrutiny of documents which become legislative in nature by virtue of their incorporation by reference into delegated legislation; to introduce a Bill to ensure that Proclamations establishing a quarantine scheme will be replaced by regulations subject to parliamentary disallowance; and to reduce a Minister's power to withhold from Parliament all information about the commercial activities of a tertiary institute by requiring publication in the Institute's annual report of the fact that information was being withheld for commercial reasons.

## **Other matters**

- 1.19 In matters concerning the legal validity of government actions, there have been undertakings to introduce into Parliament a Bill to validate the collection of wheat tax under regulations that were technically invalid (Wheat Tax Regulations (Validation) Act 1987); and to rectify invalid subdelegations of legislative powers.

### Committee activities

- 1.20 In April 1988 the Committee hosted a two day briefing for the newly established Parliamentary Joint Committee on Delegated Legislation of the Western Australian Parliament. The Delegation attended the meeting of the Committee on 28 April 1988, and discussed with Committee members and the Legal Adviser, Professor Douglas Whalan, general matters relating to the theory and practice of scrutiny of delegated legislation. A similar briefing for the N.S.W. Parliament's Regulation Review Committee was also prepared for presentation later in 1988.

### Committee staff

- 1.21 The Committee's secretariat, one of the smallest in the Senate, comprised during the period of this Report, a Secretary, a clerical officer and a typist. It had part-time help from a research officer. The Committee completed an examination of an increased volume of federal Commonwealth delegated legislation in the context of concern to maintain scrutiny activity at an acceptable level of efficiency in spite of the amount and complexity of the background work that must be done by such a small staff. The Committee Chairman wrote to the President of the Senate, Senator the Hon. Kerry Sibraa, seeking his approval for the employment of a full-time Principal Research Officer to assist the Committee with its work. The President gave his approval and an officer was appointed during the 1988 Budget Sittings.

## CHAPTER 2

### OVERVIEW AND FUTURE DIRECTIONS

- 2.1 One aspect of the operations of the Committee over the period of this Report is that it is possible to say there may be signs, although hesitant and tentative, that its efforts are appearing to bear fruit in some areas of concern. The number of items of legislation scrutinised by the Committee is at a high level but the provisions of the legislation with respect to safeguards of personal liberty and parliamentary propriety are more acceptable.
- 2.2 This raises the question whether the trend is a mere temporary aberration or a continuing process. The Committee believes it may be the latter, and it is therefore possible to say that the work of the Committee has resulted in an improvement.
- 2.3 This is particularly noticeable in areas affecting individual rights and liberties, where the Committee has always been vigilant. Perhaps more importantly, however, departmental officials now acknowledge that the efforts of the Committee are appropriate. Matters which previously may have been opposed by administrators now tend to be included in delegated legislation as a matter of course.
- 2.4 Allied to this is an apparent change in the attitude of departmental officials towards the operations and inquiries of the Committee. A former tendency was for officials to regard the Committee as an interference with what was seen as executive prerogative, and view the power to make delegated legislation as a power to provide for unfettered discretionary procedures.

2.5 The Committee is pleased to report that this attitude is being replaced by one that is more constructive. At present, an administrator is more likely to perceive the operational value of the quality control represented by the Committee's scrutiny. Departmental officials are today more familiar with the standards and precedents of the Committee and tend more readily to incorporate them into legislation during the initial planning period.

2.6 Much of the delegated legislation which now comes before the Committee, although lengthy and complex, tends to reflect the standards of procedural and substantive propriety set by the Committee over many years. At the present time a particular instrument of delegated legislation may incorporate a number of principles protecting individual liberties and parliamentary propriety, each of which was initiated originally by the Committee. Thus, for example, in a lengthy piece of legislation, the reader will come across AAT review rights of discretionary administrative decisions, particularly those which could have an impact on the practice of a trade, business or profession; objective criteria for official discretionary decision-making will be set out; its preamble will make clear that it is a proper exercise of the regulation making power and that all mandatory consultation processes have been gone through; various kinds of official documents provided for by the instrument will be subject to tabling in both Houses of Parliament, for example, annual reports, ministerial directions issued to statutory office holders, official guidelines for action or decisions; any instrument that is prescriptive or quasi-prescriptive in nature will likely be made subject not only to tabling in Parliament but also to the possibility of Parliamentary disapproval through the power of disallowance; strict liability offences will be noticeable by their absence; offences will require the proper mental element to create criminality; adequate and reasonable defences will be available; officials and



inspectors with powers of entry onto private property will be required to obtain search warrants and proceed with consent, and will display proper photographic identity cards; search warrant provisions themselves will not be invitations 'to fish'; and the principle that a person will not be compelled to incriminate himself or herself will be protected.

2.7 A related aspect here is the willingness of departmental officials to accept not only established principles, but also the need for new safeguards identified and sometimes developed by the Committee. The areas of concern of the Committee are not static and definitive, but evolving and expanding, as the practice of lawmaking itself evolves and expands to meet the requirements of complex modern administration. Even established principles are honed and refined. The new and higher standards expanded and adopted by the Committee do tend to be accepted by officials and become internalised features of the policy advising, instruction-giving, and legislative drafting processes of government.

2.8 The relationship between the Committee and Ministers of State is crucial to the promulgation of delegated legislature that is acceptable to the Parliament and the Committee. The formal correspondence of the Committee is normally carried on between the Chairman and the Minister responsible for administering the delegated legislation. Indeed, it will often be the Minister or his or her delegate who formally makes the delegated legislation, or who submits a draft to the Executive Council and the Governor-General.

2.9 As parliamentarians themselves, Ministers readily understand the role and significance of a parliamentary committee. Thus, it has been a continuing theme of Committee reports that Ministers tend to be positive in their attitudes and assistance to the Committee. This relationship is facilitated by the fact that the Committee does not deal with policy issues. Rather it confines its inquiries to

issues of rights and parliamentary propriety. In these areas, Ministerial support for the work of the Committee continues and is valued.

- 2.10 There does remain, however, room for some improvement in the way in which civil liberties and parliamentary proprieties are protected in delegated legislation. In particular, the processes followed within Departments to initiate, consider and draft delegated legislation reflect some deficiencies and shortcomings.
- 2.11 These flaws include advising and drafting lapses from the high technical scrutiny requirements of the Committee. The general types of provision which the Committee regards as unacceptable should by now be clear to departmental senior management, policy areas, legislation sections, Ministerial liaison offices and legislative drafters. The tabling and incorporation in Hansard of statements about particular scrutiny activities of the Committee, the comprehensive statements given by the Chairman to the Senate before a long adjournment and the detailed Reports tabled by the Committee all give important guidelines and indications of what is expected. Departmental practice should (and obviously often does) include a close monitor of this information, coupled with procedures to translate these indicators into any proposed new delegated legislation under consideration. A matter too frequently overlooked is the need to amend existing instruments to conform to the requirements of the Committee. These requirements are not fixed but are being constantly refined. What may have been an acceptable standard of personal rights or parliamentary propriety some years ago may no longer be satisfactory. For example, the Committee now insists on officials with powers of entry or seizure being provided with proper photographic identity passes; ministerial directions to statutory bodies should always at least be tabled - occasionally their nature calls for a power of disallowance to be available also.

- 2.12 Better procedures need to be established to avoid the inadvertent or deliberate inclusion of provisions in delegated legislation which offend basic, long held and often expressed principles of the Committee. Where such problems arise in the future, it may be necessary for the Committee to call officials before it to examine the departmental practices which allow the more obvious infringements of the Committee's principles to occur.
- 2.13 The Committee has in the past resorted to hearings with officials when it has felt that a serious technical issue has arisen or the possible obstruction of its activities calls for a sanction. The kind of hearings referred to in the previous paragraph reflect the fact that the Committee has never been merely reactive, but has always emphasised the preventive and pre-emptive aspect of its activities. The Committee believes that effective managerial control of the process of making delegated legislation could and should eliminate those technical flaws and lapses reported by the Committee as undesirable.
- 2.14 The Committee is particularly concerned about the procedures (or lack of them) for dealing with ministerial undertakings given to the Committee to amend delegated legislation or to take other action. The role of the departmental official in the prompt, efficient and complete implementation of these undertakings is as important as that of observing the requirements of the Committee in new delegated legislation. There is a high duty upon departmental officials to ensure that their Minister fulfills undertakings given personally to a Committee of the Parliament. The Committee expects that here also procedures should be in place so that delay does not occur. Any necessary drafting instructions should be dispatched quickly, with an indication that the matter is to receive suitable priority. In the case of undertakings which do not involve amendment of delegated legislation, the Committee similarly expects administrative action to commence at the same time as the undertaking.

2.15 Finally, the extent to which instruments of delegated legislature have been the subject of proper consultation with interested parties in the community, whether such consultation is made mandatory by the enabling Act or not, is an issue which the Committee intends to examine in the future. When law-making powers are delegated by Parliament to a Minister there is often an assumption that such proper consultation will take place. A failure to engage in adequate consultation prior to giving drafting instructions or prior to final drafting could well constitute a breach of Principle (a) of the Committee's terms of reference - the resulting instrument may not have been made in accordance with the spirit or intent of the Parliament.

## CHAPTER 3

### EXPLANATORY STATEMENTS AND CITATION REQUIREMENTS

#### Introduction

- 3.1 Chapter 3 of the Eighty-Third Report outlined the reasons for frequent requests to Government departments to ensure that informative Explanatory Statements accompanied delegated legislation. The Committee reiterated its long-standing concern that 'instruments referred to it for scrutiny are accompanied by proper Explanatory Statements that help busy parliamentarians to understand their legality and impact'. The increase in the volume and complexity of delegated legislation coming before the Committee<sup>1</sup> makes this appeal all the more urgent.
- 3.2 The purpose for Explanatory Statements to accompany delegated legislation is to ensure that both the Committee and other parliamentarians have available an adequate, plain English, explanation of (i) the authority for what is a subordinate but also a legislative instrument; (ii) the reasons for making the instrument; (iii) its likely impact and effect; and (iv) any unusual aspects of the matter calling for special comment - for example retrospective effects, prior consultations, and other particular legal or practical issues which the drafter of the notices had to take into account.
- 3.3 On many occasions, the inadequacy of the information contained in Explanatory Statements was highlighted by the Committee's need to seek further background information

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1. See the statistics at paragraphs 1.7-1.8

and detail from Ministers. It is more efficient, effective and in the interests of 'good government' for informative Explanatory Statements to accompany the legislation into the Parliament initially, rather than,

ex post facto, on the insistence of the Committee.

- 3.4 In seeking Explanatory Statements the Committee has been mindful of cost. The preparation of such documents need not result in any significant increase in costs or administrative effort since they can be largely prepared from the briefing papers provided to Ministers or the Executive Council before the making of an instrument.
- 3.5 In addition, appropriately detailed Explanatory Statements would, in many cases, have entirely removed the necessity for the Committee to seek information from the relevant Minister. Such action by the Committee requires an exchange of correspondence and procedural motions which frequently involve a wide range of both costs both for Parliament and the Minister's department.
- 3.6 During the period under review the Committee examined a number of Explanatory Statements which were inadequate. The following comments are intended as a guide to those responsible for the drafting of delegated legislation and the accompanying Explanatory Statement to assist in meeting the requirements of the Committee. It goes without saying that no instrument of prescriptive or quasi-prescriptive effect should be tabled in a House of Parliament without an explanation from the responsible Minister.

#### **Explanatory Statements**

- 3.7 It might be useful to describe some of the problems the Committee has encountered with Explanatory Statements.

3.8 The Explanatory Statement accompanying the Radiocommunications (Certificates of Proficiency) Regulations (Amendment) (Statutory Rules 1987 No. 152) did not mention the rationale behind the repeal of a regulation which abolished the requirement to pay a particular licence fee. Only after enquiry to the Minister did the Committee discover that the fee had been abolished because the cost of collecting it exceeded the revenue it generated. The omission of any reference to this in the Explanatory Statement was said to be due to an administrative oversight which the Minister hoped would not arise again.

3.9 The Explanatory Statement accompanying the Nursing Homes Assistance Act 1974 Notice for the purpose of subsection 13(A) of 28 June 1987 stated that fees fixed pursuant to paragraph 13(1)(a) of the Act were the same as those fixed by the preceding Notice of 3 June 1987. Another paragraph, however, in the same Statement justified an increase in certain other fees as being necessary to bring them into line with 'the increases' determined under paragraph 13(1)(a). This was clearly misleading. The Minister for Community Services and Health, the Hon. Dr Neal Blewett, M.P., advised that the Explanatory Statement should have indicated that the increase in fees was pursuant to another paragraph. The simple, but unnecessary, error in the Statement had confused not only the Committee, but more importantly, the private users of the instrument and the Statement.

3.10 When the Committee considered the Family Court of Australia (Delegation of Powers) Rules (Amendment) (Statutory Rules 1988 No. 10) it was concerned with the inadequacy of the accompanying Explanatory Statement. The Chief Justice of the Family Court of Australia, the Hon. Justice Alastair Nicholson pointed out that the Court lacked the resources to prepare more detailed Explanatory Statements. The Committee was concerned about the

- implications of this in an area of the law where there is considerable interest. Accordingly, the Committee supported the Chief Justice in his request to the Attorney-General to make arrangements for proper Explanatory Statements to accompany amendments to the Rules.
- 3.11 In the past, Explanatory Statements to describe the legislative authority, nature and effects of Variations to the Schedules made under the States Grants (Tertiary Education Assistance) Act 1984, have not been provided. The preparation of such documents need not result in any significant administrative cost increase as they could largely be prepared from the briefing papers supplied to the Minister before any draft instrument is signed. The Minister undertook to ensure that his Department would prepare Explanatory Statements in the future.
- 3.12 The Committee sought clarification of the status of the Notes appearing in the text of the Export Control (Fresh Fruit and Vegetables) Orders, Export Control Orders No. 9 of 1987 relating to inspection methods. They were worded in such a way that they appeared to create obligations rather than merely act as guidelines to the meaning of the Orders. The then Minister for Resources, the Hon. Peter Morris, M.P., undertook to revise the Orders to clarify the informal status of the Notes as mere guidelines.
- 3.13 Similarly, the Minister responsible for Navigation Orders Regulations No. 5 of 1987 agreed that Notes which summarized definitive provisions in the International Maritime Dangerous Goods Code might have been thought to have a legislative rather than merely an explanatory status. He undertook to ensure that the Notes would be more precisely expressed when next the Orders were amended.



- 3.14 During the course of the year the Chairman of the Australian National Railways Commission undertook to ensure that Explanatory Statements would in future accompany ANRC By-laws. This was in reply to the Committee's concern that the Australian National Railways Commission By-law Amendment No. 1 of 1988 had been presented to Parliament with no Explanatory Statement.
- 3.15 Once finalised and approved by the Governor-General, the Code of Practice on Radiation Protection in the Mining and Milling of Radioactive Ores 1987 made under the Environment Protection (Nuclear Codes) Act 1978 becomes a matter for each State and the Northern Territory to implement by incorporation into its own legislation. In response to the Committee's concerns the Minister undertook to provide Explanatory Statements for future Codes, variations and revocation of Codes. This important instrument had been presented to Parliament without an accompanying ministerial explanation.
- 3.16 The importance of Explanatory Statements was emphasised by the Committee when it questioned the magnitude of increases in fees and penalties under the Lakes (Amendment) Ordinance (A.C.T. Ordinance No. 49 of 1987). The Explanatory Statement made no attempt to justify the changes. In practice, the Committee places considerable reliance on Explanatory Statements to assist it not merely in understanding the meaning of delegated legislation but in assessing its purpose and reasonableness. They are documents which greatly facilitate the Committee's scrutiny work. This is apart from their crucial use and value to other persons and their role as aids to interpretation of the instrument to which they refer.
- 3.17 Until the Committee's intervention during the course of the period under review, Fisheries Notices had for some years been presented to Parliament without an accompanying ministerial explanation.

- 3.18 The then Minister for Resources, the Hon. Peter Morris, M.P., provided brief explanations of the Notices, and explained that the Australian Fisheries Service was initiating a system of explanatory bulletins designed to explain the implementation of the new fisheries legislation to the fishing industry. This welcome development served to reinforce the Committee's serious concern that legislation must be accompanied by ministerial explanations of its meaning and purpose to enable the community as well as the Parliament to understand what was proposed.
- 3.19 The Committee has noted, however, that the detail in the Australian Fisheries Service Bulletin fall below the Committee's requirements and standards and are not adequate for their purpose.
- 3.20 Explanatory Statements were sought regarding National Health Act Determinations BPT 1 and 2/1988, and the Health Insurance Determination (not numbered) dated 17 February 1988. The Committee emphasised to the Minister for Community Services and Health the Hon. Neal Blewett, M.P., the importance of such statements which might briefly summarise the background and significance of each new instrument. In these cases, the instruments in question were very complex.
- 3.21 The following instruments, considered elsewhere in this Report, also lacked adequate Explanatory Statements.

**Export Control (Fees) Orders As Amended  
(Amendment) (Export Control Orders No. 19 of  
1987)**

**Export Inspection (Quality Charge) Regulations  
(Amendment) 1987  
(Statutory Rules 1987 No. 251)**

**Migration Regulations (Amendment)**  
**(Statutory Rules 1987 No. 313)**

**Migration Regulations (Amendment)**  
**(Statutory Rules 1987 No. 314)**

- 3.22 The Committee hopes that this issue is one which will feature less in future reports as Ministers and officials respond positively to the foregoing comments and provide adequate Explanatory Statements for Parliament and the public.

**Citation requirements**

- 3.23 Certain instruments of delegated legislation (eg. Determinations, Directions) frequently do not have continuous identifying features such as consecutive numbering and uniform titles. Such instruments are often those which are drafted not in the Attorney General's Department but within the Departments which administer the relevant enabling legislation. Thus, they may not be subject to the more rigorous standards of professional legal drafters. Often such instruments are not accompanied by Explanatory Statements, and do not have Notes incorporated detailing the previous history and purpose of the series. Invariably they do not appear in a format or publication that is readily accessible by the legal profession and also by the general community. This is in marked contrast to Statutory Rules which have consecutive numbers, uniform title format, and are part of an accessible and retrievable series published in consolidations. The Committee considers that all other forms of delegated legislation should meet this minimum presentation standard.

- 3.24 In the past the Health Authority Ordinance 1985 Determination of Fees and Charges have been tabled without Explanatory Statements or citation details. However, following the Committee's intervention such instruments will in future be sequentially numbered and accompanied by Explanatory Statements. Both of these initiatives facilitate parliamentary and public access and scrutiny.
- 3.25 The Nuclear Non-proliferation (Safeguards) Act 1987 Declaration was unnumbered and lacked an Explanatory Statement, and a similar undertaking was made by the Minister for Primary Industries and Energy, the Hon. J. Kerin, M.P.

#### Drafting errors

- 3.26 From time to time, the Committee has drawn to Ministers' attention drafting errors in delegated legislation. In some cases errors are mainly typographical. In some instances, however, the error may have a substantial unwanted effect. While the Committee appreciates the positive response from Ministers anxious to correct technical errors, it should be of concern to legislative drafters and departmental officials responsible for delegated legislation that such errors have 'escaped' attention.
- 3.27 For example, in the Long Service Leave (Building and Construction Industry) (Amendment) Ordinance (No. 2) 1987 (A.C.T. Ordinance No. 74 of 1987) a reference to a paragraph '(a)' should have been a reference to a paragraph '(2)(a)' as there were two paragraphs (a) in that section.
- 3.28 In another instance the intent of the Meat Inspection (Modification) Regulations (Amendment) (Statutory Rules 1988 No. 34) was to define the word 'meat' in relation to the State of Victoria for the purposes of the Meat Inspection Act 1983. The regulations inserted a new subsection 4(8) into the Act. However, that subsection number had

previously been used to insert other matter into the Meat Inspection Act 1983 (by means of the Statute Law (Miscellaneous Provisions) Act 1987). The confusion could have had serious implications for the interpretation of the subsections 4(8).

3.29 Thus, the Committee believed that a problem of judicial interpretation could have arisen and a court could have ruled that the new subsection had repealed the initial subsection. The latter had dealt with the cessation of the application of the Act in the Northern Territory.

3.30 Generally speaking, the Committee considers that the standard of technical drafting of instruments is high, particularly those prepared in the Attorney-General's Department. However, unless all legislative drafting is done by professional drafters in that Department there is a higher than usual risk of technical errors.

## CHAPTER 4

### GUIDELINES ON THE COMMITTEE'S APPLICATION OF ITS PRINCIPLES

#### Introduction

- 4.1 In this Chapter, the four Principles which are the Committee's terms of reference and which appear at the beginning of this and every Committee report, are discussed. Their interpretation and development is illustrated by reference to legislation which has been subject to Committee scrutiny. This approach may assist those responsible for drafting delegated legislation to understand better the Committee's requirements.

#### PRINCIPLE (a)

##### IS DELEGATED LEGISLATION IN ACCORDANCE WITH THE STATUTE?

#### Reasonableness of fees

- 4.2 The Committee queried the eleven fold increase in the fees to be charged for the inspection of solipeds, made under the **Export Control (Fees) Orders As Amended (Amendment) (Export Control Orders No. 19 of 1987) and the Meat Inspection (Orders) Regulations, (Meat Inspection Orders No 1 of 1988) Meat Inspection (Victoria) Orders.** The accompanying Explanatory Statement offered no reasons for the increases. Fees and charges must of course be for services rendered and not constitute any kind of taxation. The Minister for Resources, Senator the Hon. Peter Cook, wrote to the Committee explaining that the increased charges included a component to defray the cost of necessary technology used in the testing of meat for chemical residues under the National Residue Survey.

- 4
- 4.3 A similar concern arose regarding the Migration Regulations (Amendment) (Statutory Rules 1987 Nos. 313 and 314). The visa fee for migrants seeking entry to Australia under the Business Migration Program was significantly higher than that charged for other migration categories. The then Minister for Immigration, Local Government and Ethnic Affairs, the Hon. Clyde Holding, M.P., explained that the fee represented a closer approximation of the full cost of processing visa applications at an overseas post. The removal of the outdated \$2 maximum fee chargeable by a migration agent reflected a policy decision that it was inappropriate for a Government agency to regulate this market activity. The Minister agreed that the Explanatory Statement should have explained these issues.
- 4.4 The Committee considered it needed to know the general basis for variations in fees in order to exercise effective review of increases under the Navigation Regulations (Statutory Rules 1987 Nos. 229-233). The Committee told the Minister that the purpose of the Committee's review in these circumstances is to determine firstly, that fee increases are not impositions in the nature of a tax and secondly, that they are not so unreasonably large that no reasonable Minister would have imposed them.
- 4.5 The Explanatory Statements accompanying the regulations indicated the fees were based on a cost recovery policy, but gave limited guidance as to how that policy was to apply in each particular case.
- 4.6 The then Minister for Land Transport and Infrastructure Support, the Hon. P. Duncan, M.P., explained that the fees related primarily to the provision of marine survey services to the maritime industry. These had been substantially under-recovered in the past. The Regulations were therefore the first step in implementing the recommendation of a departmental review conducted in 1985/86. Where fees for individual services had been over-recovered, the level of

fees was reduced, and in other cases fees were partially increased, to a maximum of 40%, towards meeting the policy objective of full cost recovery.

- 4.7 Once again, the Committee noted that much of the background information should have appeared in the Explanatory Statement. The Committee was surprised that it was not included as it represented the fundamental justification for making the new law contained in the Regulations.

#### Court fees

- 4.8 Solicitors' fees were increased approximately every six months by an instrument which provided for a percentage increase over old fees rather than by a re-publication of the actual fees as increased. The Committee noted this device in relation to the Schedules of the Magistrates Court (Civil Jurisdiction) (Solicitors' Costs) Regulations (Amendment) (A.C.T. Regulations 1987 No. 14) and the Rules of the Supreme Court of the Australian Capital Territory (Amendment) (Statutory Rules 1987 No. 93). It was felt that it would be difficult for legal practitioners or the general public to know the current costs of legal services. The Minister for Justice, Senator the Hon. Michael Tate, and the Chief Justice of the Supreme Court of the A.C.T., Justice the Hon. J. Miles, were both of the view that in trial courts where cases may take 2 to 3 years to finalize, it was simpler for practitioners to work out fee adjustments on a percentage basis. The Minister undertook to publish complete Schedules (as amended) at least once every three years, or at shorter intervals if re-structuring of the fee scales occurred sooner.

#### Incorporation by reference

- 4.9 The Committee has paid particular attention to the increasing practice of using instruments of delegated legislation to incorporate by reference into federal law



certain extrinsic documents, for example, departmental manuals. By virtue of incorporation, such documents take on a legislative character. Formal parliamentary oversight of this form of legislation is as necessary as the scrutiny of the incorporating instrument itself.

4.10 The Committee has therefore requested the Attorney-General to ensure that incorporated instruments are presented to the Committee with the subordinate instrument in which they are incorporated. Accompanying Explanatory Statements should summarize the nature and effects of the incorporated document and indicate where members of the legal profession or the community may obtain copies. In the Committee's view this is a minimum measure designed to provide some measure of accessibility by the Committee, other parliamentarians and the public.

4.11 Defence Determination No. 70 of 1987 was a case in point. This Determination referred to the payment of a particular furniture allowance under a standard specified in the Manual of Overseas Property published by the Department of Local Government. The then Minister for Industrial Relations, the Hon. R. Willis M.P., agreed to the Committee's request to ensure that documents and instruments (other than Federal Acts and Regulations) which are applied, adopted or incorporated by reference into Defence Determinations be supplied to the Committee with the relevant Determination.

4.12 The Australian Meat and Livestock Corporation revoked Australian Meat and Live-stock Order No. M33/87 and replaced it with Australian Meat and Live-stock Order No. M38/87, because the previous Order had 'contained provisions contrary to the requirements of the Acts Interpretation Act'. The Act permits an Order to apply the provisions of another instrument only if the other instrument was in existence at the time of making the Order. Clause 3 of the Order in question had incorporated the Aus-Meat Operations Manual 'as amended from time to time'. This form of

incorporation would have allowed the incorporation of future manuals. This would have been contrary to the Act.

#### Consolidation

- 4.13 The difficulties associated with tracking down which Regulation was being repealed within the Australian Military Regulations (Amendment), Naval Forces Regulations (Amendment) and Air Force Regulations (Amendment) (Statutory Rules 1988 Nos. 38, 39 and 40) led the Committee to request the Minister that a long-overdue consolidation of Australian Military Regulations might be made.
- 4.14 The Minister for Defence Science and Personnel, the Hon. Ros Kelly, M.P., advised that the Attorney-General's Department had been asked to give priority to the publication of consolidated reprints of the legislation.
- 4.15 Public Service Determination No. 1 of 1988 referred to some 150 amendments of the principal Determination. The Department of Industrial Relations was able to refer the Committee to the loose-leaf volume of Amendment Advices contained within the Department's Personnel Management Manual (Volume 2) which enables Public Service Determinations to be maintained in a consolidated form and which is freely distributed to Australian Public Service Departments.
- 4.16 These examples may serve to illustrate the Committee's concern that a failure to consolidate delegated legislation results in the totally unacceptable situation where only those who make the law and enforce it have easy access to full, complete and accurate statements of it.
- 4.17 The Committee expresses its serious concern that delay in consolidating complex and voluminous laws could itself by implication amount to a breach of personal rights and liberties.

## Annual Reports

- 4.18 The Committee queried whether the Australian Capital Territory Gaming and Liquor Authority Ordinance 1987 (A.C.T. Ordinance No. 31 of 1987) placed the A.C.T. Gaming and Liquor Authority under any obligation to report annually to the Parliament on its activities, especially on its funding and staffing.
- 4.19 The then Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon. J. Brown, M.P., explained that under subsection 63(H)(3) of the Audit Act 1901 the report, financial statements and Auditor-General's report of the Authority was to be tabled within 15 sitting days of its receipt.
- 4.20 The Housing Assistance Ordinance 1987 (A.C.T. Ordinance No. 36 of 1987) provided for an annual report of the A.C.T. Commissioner for Housing, but did not indicate whether the operation of some other legislative provision provided for tabling. As there was no other operative legislative provision, the then Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon. J. Brown, M.P., undertook to include an appropriate tabling requirement.
- 4.21 The Committee considers that the activities and functions of statutory authorities are such that the Parliament should be made aware of them through the tabling in Parliament of annual reports. Such action often provides information in a public document for the community at large as well as parliamentarians.

## Retrospectivity

- 4.22 The Committee has looked at a number of matters in which retrospectivity was an issue. The Committee's long

established policy is to seek ministerial justification for any unexplained retroactive operation of laws.

4.23 Defence Determination No 25 of 1987 made on 24 March 1987 backdated increases in certain additional recreation leave entitlements to 22 November 1985. The Minister explained that the Determination had rectified an earlier administrative oversight in identifying certain beneficiaries entitled to allowances. However, the Committee's view remains that retrospective law-making must be kept to a minimum in order to ensure that instruments coming before the Parliament represent, as far as possible, authorisations for contemporaneous, and not historical, expenditure.

4.24 Defence Determination No. 52 of 1987 made on 26 June 1987 increased Representation and Entertainment Allowances for members of the Australian Defence Force (ADF) serving overseas. Some increases were retrospective to 1 July 1985. Such lengthy retrospectivity arose because of the time taken to review the continuing usefulness of the link between Defence Force allowances and those paid in the Department of Foreign Affairs and Trade which adjusts its rates annually. When the ADF review finally confirmed the overall desirability of maintaining the nexus it was then necessary to make retrospective arrangements.

4.25 Student Assistance Regulations (Amendment)  
(Statutory Rules 1987 Nos. 288 and 304).

Statutory Rule No. 288 provided for backpayment of a concession which had been made to assist unsupported students in 1986 and 1987, while Statutory Rule No. 304 put into effect a number of minor policy issues. The Committee, in both cases, was concerned to know the reasons for the lengthy periods of retrospectivity. The Minister for Employment and Education Services, the Hon. P. Duncan, M.P., explained that a small group of secondary students had received an allowance in 1986 as unsupported students. They were paid allowances during 1987 in expectation of

subsequent validating legislation. The Minister had drawn to his Department's attention the Committee's wish that retrospective legislation should be kept to a minimum.

4.26 The issue of retrospectivity arose in the Remuneration Tribunal Determination No 10. of 1987, Remuneration and Allowances for Holders of Public Offices, which fixed the rate of the fee of the Deputy Chairman of the Australian Wheat Board. The fee was expressed as one figure 'from date of appointment', and another from 10 March 1987, with no indication of the extent to which it may have operated retrospectively. There was no accompanying Explanatory Statement.

4.27 When the Tribunal determined remuneration for newly established public offices, it was customary for the first Determination to be effective from 'date of appointment', as the actual date a person was appointed was usually not known. Thus, a first Determination could be either retrospective or prospective; in this instance it was retrospective to February 1987 (date of the first appointment).

4.28 The Committee accepted the explanation and drew to the attention of the Chairman of the Tribunal the guidelines for examination of retrospective instruments contained in its Twenty-Fifth Report<sup>1</sup> (November 1968). The Committee invited the Tribunal to adopt the practice (as is the situation now with the Minister responsible for making Defence Determinations) of stating relevant dates of retrospective effect either in the text of the Determination, in the notes, or in the accompanying Explanatory Statement.

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1. Parliamentary Paper No. 188/1969

## Tabling and Disallowance

- 4.29 The provisions requiring tabling and disallowance of certain instruments, for example, determinations of rates, duty, tax, fees and charges, are not infrequently to be found in legislation or delegated legislation other than that before the Committee.
- 4.30 For example, the Committee queried whether determinations of certain rates of duty made by the Minister under the Financial Institutions Duty Ordinance 1987 (A.C.T. Ordinance No. 43 of 1987) had to be published in the Gazette. The Minister advised that section 99 of the Taxation (Administration) Ordinance 1987 provided for the administration of the Ordinance in question as well as other A.C.T. taxation legislation, and required that all determinations of rates or amounts of duty or tax must be tabled in Parliament in the same way as ordinances and regulations.
- 4.31 On the issue of the tabling of fee determinations made pursuant to subsection 7B(1) of the Schools Authority (Amendment) Ordinance 1988 (A.C.T. Ordinance No. 2 of 1988), the assurance of the Minister was sought that the Determinations of fees described in that subsection would be legally subject to parliamentary supervision through tabling and disallowance.
- 4.32 Subsection 7B(1) provided:

The Minister may, by notice published in the Gazette, determine fees in respect of the attendance by persons at pre-schools.

This provision did not follow the language used in subsection 12(10) of the Seat of Government (Administration) Act 1910. That provision could be interpreted as requiring

that a disallowable determination is only one made by a Minister 'pursuant to a provision of an Ordinance', which provision is to be expressed in empowering terms identical to those used in subsection 12(10) of the Act namely 'to determine, by notice in writing published in the Gazette, fees (or charges) for the purposes of the Ordinance'.

4.33 The then Minister for the Arts and Territories, the Hon. G. Punch, M.P., advised that determinations made under subsection 7B(1) did fall within subsection 12(10) of the Act, notwithstanding the difference in phrasing of subsection 7B(1), and undertook to request drafters to adhere to words previously adopted when conferring power to determine disallowable fees. A valuable element of certainty of approval was therefore introduced into this area.

4.34 A similar question arose concerning the tabling of Fees determinations in the Canberra Institute of the Arts Ordinance 1988 (A.C.T. Ordinance No. 1 of 1988). The then Minister for the Arts and Territories, the Hon. G. Punch, M.P., assured the Committee that the Fees determinations in question were subject to parliamentary tabling and disallowance.

4.35 The Quarantine (Animals) Regulations (Amendment) (Statutory Rules 1987 No. 303) repealed certain regulations which had established an importation scheme for the landing in Australia of meat and blood products. The regulations were replaced by Quarantine Proclamations Nos. 134A and 135A made under section 13 of the Quarantine Act 1908 and gazetted on 23 December 1987. The explanatory statement accompanying the regulations stated that 'Regulations cannot prohibit the importation of plants, animals or goods; only proclamations made under section 13 of the Act can.'

4.36 The Committee's concerns related, not to the regulations, but to consideration of the terms of the Quarantine Act. Proclamations made under section 13 were not subject to

tabling and disallowance in Parliament. Since in this case the Proclamations were almost certainly legislative in nature and resembled regulations in virtually all respects except format the Committee considered that they should have been subject to formal parliamentary control.

- 4.37 Even though subsections 13(2A) and (2B) of the Act empowered proclamations to establish a permit scheme, the instruments contained a number of provisions which, had they appeared formally in regulations, would have infringed the Committee's Principles, for example, unreviewable discretions of commercial and livelihood significance, and sub-delegation of legislative or quasi-legislative powers.
- 4.38 The Committee considered that the powers conferred by the Proclamations should have been conferred by regulations made consequent on an appropriate amendment to section 87 of the Quarantine Act 1908. Alternatively, an appropriate amendment should have provided that such Proclamations are subject to tabling and disallowance procedures.
- 4.39 Although the Proclamations as such were not subject to Committee scrutiny the Minister, as an interim measure pending the introduction of the Agricultural Quarantine Bill, instructed officers of the Department of Primary Industry and Energy to ensure further Proclamations be sent to the Committee for comment. The Bill would provide that the quarantine scheme would in future be regulated by regulations and not Proclamations.

#### Failure to table within 15 sitting days

- 4.40 Pursuant to subsection 111(2) of the Telecommunications Act 1975, Telecom By-laws are subject to the requirements of the Acts Interpretation Act 1901 and must be tabled in both Houses of Parliament within 15 sitting days after the date



on which they are made. The Telecommunications (Community Calls) By-laws Amendment No. 50 and Telecommunication (Charging Zones and Charging Districts) By-laws Amendment No. 79 should have been tabled in the Senate on 16 December 1987 (the Senate rose for the summer recess on 18 December 1987). This was not done and the By-laws were instead tabled on 17 February 1988. As a consequence, they were void on and from 17 December 1987 and by statutory revival the previous repealed By-laws applied.

- 4.41 The revived provisions operated from 17 December 1987 until the date of gazettal of the later By-laws - The Telecommunications (Community Calls) By-laws Amendment No. 52 and Telecommunications (Charging Zones and Charging Districts) By-laws Amendment No. 81 made on 9 March 1988.
- 4.42 The Committee was concerned that these By-laws were not retrospective in order to address the hiatus that arose between 17 December 1987 and the date of gazettal of the later By-laws.
- 4.43 The Chairman of the Australian Telecommunications Commission told the Committee that because of the hiatus some subscribers and public phone users would have been overcharged and some would have been undercharged, but most affected subscribers would have been given a net advantage. The Commission could not identify those subscribers, nor any subscriber who had actually been a net loser. Any net overcharging could only be formally legalised retrospectively by statute.
- 4.44 The Committee remained concerned about the delay in tabling, delay in taking subsequent steps to correct the unfortunate oversight, and the implications of non-compliance with tabling provisions.
- 4.45 The purpose of statutory tabling is to ensure that Parliament is aware of, and retains control over, instruments of delegated legislation. Fifteen sitting days

is a long period of time within which to inform Parliament of the making of subordinate laws, and indeed it has been suggested as being too long.<sup>2</sup> The practice of withholding instruments from tabling until towards the end of the statutory tabling period is in breach of basic principles of good government, and it creates practical problems of a greater or lesser degree. Instruments should be tabled in Parliament as soon as possible after they have been made.

#### **Sub-delegation of law-making power**

4.46 Paragraph 1 of Appendix 2 of the Navigation (Orders) Regulations Order No. 8 of 1987 provided that the fee for a medical fitness examination shall be the fee specified by the Commonwealth Interdepartmental Committee on Fees and Allowances. Thus, the Order did not fix the fee but left it to another body to do so. This may have constituted an invalid exercise of power as the power was in effect wrongly subdelegated to another body.

4.47 The former Minister for Land Transport and Infrastructure Support, the Hon. P. Duncan M.P., conceded that the provision would have been legally more sound had it been drafted with the fees set out as part of the provision. He undertook to remove Paragraph 1, as it was no longer required.

#### **Invalid sub-delegation of power**

4.48 Section 25 of the Export Control Act 1982 authorised regulations to be made empowering the Minister to make Orders. In the Export Control (Orders) Regulations the Minister exercised this power in making the Export Control (Animals) Orders (Export Control (Orders) No 15. of 1987).

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2. See Eightieth Report, Parliamentary Paper 241/1986, page 97

There appeared to be no legal authorisation for Orders to subdelegate further to other persons any power to issue other legislative or quasi-legislative instruments. Order 6, however, empowered the Secretary to 'determine' -

- (a) the period of time during which a person shall give notice of that person's intention to export live animals...; and
- (b) the information to be contained in a notice of intention to export live animals...

4.49 This provision appeared to the Committee to constitute an unlawful subdelegation of prescriptive power i.e. it authorised the determination of rules of general application rather than decisions applying general rules to particular cases.

4.50 The Department of Primary Industry and Energy, on receipt of advice from the Attorney-General's Department, undertook to amend Order 6 and other Orders. This was confirmed by the then Minister for Resources, the Hon. Peter Morris, M.P.

#### **Inappropriate sub-delegation of legislative power**

4.51 The Australian Meat and Livestock Corporation Order No. MS12/1988 provided for the carriage of meat by sea to Canada and the United States of America. The Order contained a possibly invalid sub-delegation of legislative power. Paragraph 3(a) provided that a licensed exporter should not contract for the carriage of meat by sea to North America between 1 March 1988 and 30 November 1989 unless

the charges payable for such carriage do not exceed those set out in the applicable rate shown in the Schedule to this Order or otherwise notified by the Corporation by notice published in the Gazette;...

4.52 The Committee took the view that a statutory body with delegated legislative powers may not, without the clear authority of its enabling Act, use those powers to subdelegate to itself, in its executive capacity, power to exercise those same delegated legislative powers.

4.53 Subsection 16K(2) of the Australian Meat and Livestock Act 1977 provided that certain AMLC Orders

(a) may make provision with respect to any matter relating to, or incidental to, the carriage of meat and live-stock, by sea, to countries and places outside Australia and, without limiting the generality of the foregoing, may make provision for and in relation to -

(i) ...

(ii) the charges payable for the carriage of meat and live-stock, by sea, to countries and places outside Australia;...

4.54 This widely drawn empowering provision was not sufficiently wide to permit the making of Orders which subdelegated to the Corporation, in its executive capacity, the same legislative powers that were exercisable by Orders in its legislative capacity. The subdelegated power to notify new charges for carriage by sea was a legislative or quasi-legislative power and not merely an administrative power. Express provision was made in subsection 16K(2) of the Act for Orders, not notices, to make provision for and in relation to charges. In this case, the restriction on

the general power was clearly the express provision that Orders (not notices in the Gazette) 'may make provision for and in relation ... the charges payable for the carriage of meat and live-stock by sea'.

- 4.55 The Corporation undertook to amend the Orders and insert a formula for the variation of the Currency Adjustment Factor (CAF) and Bunker Adjustment Factor (BAF) thereby accommodating the necessary three monthly interval adjustments.

#### Possible invalid subdelegation of power

- 4.56 Postal By-laws Amendment No. 3 of 1987 provided that an applicant seeking to obtain cash for stamps should satisfy the Commission 'by whatever means the Commission from time to time may determine' that the stamps were legally purchased. This may have been a subdelegation of a legislative power and not a valid exercise of a by-law making power.
- 4.57 By-law 10(6)(d) gave the Commission a totally open-ended discretion in its choice of methods to check the bona fides of persons seeking to surrender stamps to the Commission. Its purpose was to allow the Commission to protect its own revenue by monitoring the cashing in of stamps.
- 4.58 The question was whether the delegation to the Commission in its law-making capacity of a power to make by-laws included the power to make a by-law which subdelegated to the Commission itself as an executive body, the power, in effect, to prescribe certain standards of honesty, ownership or entitlement to surrender stamps. Having raised the issue with the Commission, the Committee was

advised that the regulation making power in the Postal Service Act was wide enough to permit the making of such a by-law.

- 4.59 The Committee, therefore, decided not to pursue the matter although it was not altogether satisfied that the new provision of the By-laws was beyond challenge.

#### Invalidity

- 4.60 A technical flaw in the Wheat Tax Regulations (Amendment) (Statutory Rules 1987 No. 182) may have rendered the Regulations invalid. Subsection 5(2) of the Wheat Tax Act 1957 provided that regulations prescribing a rate of tax shall not be made except after consideration by the Governor-General of a report made to the Minister by the Australian Wheatgrowers' Federation.

- 4.61 The enacting words of the Regulations, however, referred to the consideration of a report from an organisation known as the 'Grains Council of Australia, formerly the Australian Wheatgrowers' Federation'. The Australian Wheatgrowers' Federation had, in fact, adopted a resolution to change its name on 9 October 1986 to the Grains Council of Australia.

- 4.62 The Committee informed the Minister for Primary Industry and Energy, the Hon. John Kerin M.P., that it knew of no rule of law permitting a reference to one body to be read as if it were a reference to another body, even one that continued to perform broadly similar functions under another name.

- 4.63 The Minister undertook to amend the Act. The amendment was effected in the Statute Law (Miscellaneous Provisions) Act 1987, which omitted 'Australian Wheatgrowers Federation' and substituted 'Grains Council of Australia or, if another organisation is prescribed for the purposes of this subsection, the other organisation'.

**PRINCIPLE (b)**

**DOES DELEGATED LEGISLATION TRESPASS UNDULY ON PERSONAL RIGHTS AND FREEDOMS?**

**Advertisement relating to bankruptcy**

4.64 The Bankruptcy Rules (Amendment) (Statutory Rules 1988 No. 19) repealed requirements to publish in the Gazette and newspapers certain details relating to bankruptcies, including public examinations of bankrupt persons, details of first meetings with creditors, and the removal of trustees in bankruptcy from office by the Court.

4.65 The Committee pointed out that publicity procedures were designed to protect the interests of creditors, and removal could prejudice both the efficiency of official bankruptcy administration and the rights of those to whom advertisements were addressed.

4.66 The Minister for Consumer Affairs, Senator the Hon. N. Bolkus, explained to the satisfaction of the Committee that bankruptcies were still widely publicised, with wider advertising optional, whenever the Registrar thought such action appropriate in the interests of consumers.

**Unrestricted period of detention**

4.67 The Children's Services (Amendment) Ordinance (No. 2) 1987 (A.C.T. Ordinance No. 53 of 1987) implemented Ministerial undertakings to the Committee in response to its concerns about aspects of the Principal Ordinance (see Eighty-Third Report paras 4.31, 4.33 and 5.27-5.48)

4.68 Although the amendment ordinance is discussed in detail (see paragraph 5.34 - 5.40 of this Report), one issue is

illustrative of the Committee's application of Principle (b). This relates to the possibility of open-ended detention without appearance before a Court, a matter which could be a fundamental breach of personal liberties.

- 4.69 The then Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon. J. Brown, M.P., undertook to amend the Ordinance to provide that 24 hours be the usual time limit for bringing children before a Court.

#### Inconsistent penalties for similar offences

- 4.70 The Games, Wagers and Betting-houses (Amendment) Ordinance 1987 (A.C.T. Ordinance No. 59 of 1987) extended the Games, Wages and Betting-houses Act 1901 of N.S.W. to the Australian Capital Territory. The Ordinance provided penalties for offences, but these were, in relation to terms of imprisonment, of different lengths to those in the Act. The then Minister for Arts and Territories, the Hon. Gary Punch, M.P., undertook to amend the Ordinance to remove the discrepancy between the penalties.

#### Punishment to fit the crime.

- 4.71 The then Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon. J. Brown M.P., agreed to re-examine the Lakes (Amendment) Ordinance 1987 (A.C.T. Ordinance No. 49 of 1987) which provided up to six months imprisonment for a passenger in an unauthorised power boat. The previous penalty was \$100. The Committee considered that penalties set by the executive on behalf of the legislature should be demonstrably reasonable in order to punish properly and deter.
- 4.72 The Committee does not usually object to penalty specifications because of the complexity of the influences considered in setting these. In this case, however, the



potential punishment was of such severity that it appeared to be at variance with the spirit of some of the observations of the Law Reform Commission's Discussion Papers on Sentencing.<sup>3</sup> Other more serious offences in the Ordinance attracted a maximum penalty of a \$500 fine.

#### Onus of proof

- 4.73 The issue of possible reversal of the onus of proof arose in two separate Australian Capital Territory Ordinances.
- 4.74 The Liquor (Amendment) Ordinance (No. 2) 1987 (A.C.T. Ordinance No. 72 of 1987) was intended to curb under-age drinking in the A.C.T. Subsection 17A(9) provided that 'a beverage in a container that purports to contain liquor ... shall be taken to be liquor unless the contrary is established.' The Explanatory Statement indicated that the provision was designed to overcome 'the previous difficulties of establishing that a beverage is in fact liquor, and that a sealed container purporting to contain liquor does in fact contain liquor.'
- 4.75 The then Minister for the Arts and Territories, the Hon. G. Punch M.P., assured the Committee that subsection 17A(9) did not reverse any onus of proof in criminal proceedings. For any offence against the Ordinance concerning liquor, the prosecution must prove all the elements of an offence beyond reasonable doubt, including the fact that a beverage is liquor. The onus of proof was only reversed in relation to a sealed container purporting to contain liquor.
- 4.76 The Committee was satisfied that provisions in the Gaming and Betting Laws Amendment Ordinance 1987 (A.C.T. Ordinance

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3. See, for example, paragraphs 22 and 34 ('Category F offences') in the Commission's Summary of the Discussion Papers, October 1987.

No 61 of 1987) which reversed evidentiary burdens in criminal prosecutions satisfied its test and requirement of appropriate and compelling justification for such burdens to be cast on presumptively innocent defendants.

#### **Strict liability criminal offences**

- 4.77 Briefly, strict liability is liability for having done something or permitted something to happen without intention, recklessness or negligence. Thus, strict liability offences are committed if the prohibited event takes place without mens rea (the mental element of a completed crime).
- 4.78 The Committee views strict liability offences with disquiet. It is a fundamental tenet of personal freedom that criminal offences created by legislation do not remove basic common law protection.
- 4.79 Regulation 16AI of the National Parks and Wildlife Regulations (Amendment) (Statutory Rules 1987 No. 139) created strict liability offences relating to killing or injuring protected species; and taking, keeping, selling or purchasing such species. While certain exceptions to strict liability were provided there could be accidental or unwitting breach of the regulations. The Committee suggested that liability be limited to actions that are done knowingly, recklessly or negligently. The Minister for the Environment and the Arts, Senator the Hon. G. Richardson, undertook to amend Regulation 16AI. He believed, however, that for compelling reasons of policy, commercial dealings, such as the sale or purchase of protected animals should remain strict liability offences.
- 4.80 The Defence (Public Areas) By-Laws (Statutory Rules 1987 No. 238) created offences by providing that without written consent, a person shall not damage or destroy a natural or man-made structure or feature, or interfere with, damage,

injure or destroy an animal or plant or the nest or dwelling of an animal. The Committee appreciated the need to control activities on Commonwealth land used for defence purposes. These provisions, however, went beyond that objective by creating strict liability offences. A proper balance between protecting the environment from damage and avoiding criminal liability for accidental acts causing damage or interference was required.

4.81 The Minister for Defence, the Hon. K. Beazley M.P., advised that it was not intended to impose criminal liability for accidental acts, and undertook to amend the relevant paragraphs to include 'wilfully'.

4.82 The Motor Traffic (Amendment) Ordinance 1988 (A.C.T. Ordinance No. 9 of 1988) provided that a person shall not drive or park an explosives vehicle in, directly above, or within 50 metres of either end of, a major road tunnel. This strict liability offence was considered justified because of danger to life and property.

4.83 Strict liability offences were contained in section 186A of the Motor Traffic (Amendment) Ordinance (No 3) 1988 (A.C.T. Ordinance No. 11 of 1988). An unwitting driver or a person accidentally stranded on a trailer or camper unit without the driver's knowledge could be guilty of an offence. Although penalties for these offences were low and prosecution guidelines and the commonsense of law enforcers could preclude vexatious prosecutions, strict liability offences were not necessary. There were no compelling justifications of public interest or legal necessity.

4.84 The Committee considered an offence should only arise where there was a deliberate intention to ride on the accessory rather than, for example, where an unwitting or careless driver moved the vehicle. The then Minister for the Arts and Territories, the Hon. Gary Punch, M.P., agreed to amend the Ordinance, noting that the offence of actually driving such a vehicle could be in a different category since it was

designed to impose upon the driver an obligation prior to driving to check that no one remained in or on the relevant accessory.

4.85 Strict liability arose in regulations 19A and 19B of the Great Barrier Reef Marine Park Regulations (Amendment) (Statutory Rules 1987 No. 247). Regulation 19A provided that for a prosecution for infringing conditions imposed on a permission to use or enter a particular zone, an act done by an employee or other agent of the person charged shall be deemed to have been done also by that person. Regulation 19B provided that where, by use of a vessel or aircraft, an offence was committed against certain other regulations, the owner or part owner of the vessel or aircraft was also guilty of the offence.

4.86 While the Great Barrier Reef Marine Park required careful management, the provisions were remarkably wide. A defence of reasonable excuse should be provided to enable a court to determine whether an employer or a vessel owner, master, or shareholder, took sufficient reasonable steps to prevent employees, agents, passengers and others from committing offences while purportedly acting in the course of employment or agency or while using vessels in an unauthorised way. A high standard of care would still be demanded from persons whose actions could damage the Park.

4.87 The Minister for the Arts, Sport, the Environment, Tourism and Territories, Senator the Hon. G. Richardson undertook to amend the regulations to provide for a defence of reasonable excuse for persons not personally involved in an offence.

#### Consumers rights

4.88 The States Grants (Petroleum Products) Act 1965 Amendment of Schemes (Amendment No. 88/01) Petroleum Products Freight Subsidy Scheme restored four remote Western Australian

localities to the Scheme from 15 January 1988. This corrected an error in a previous amendment which had inadvertently deleted the localities from eligibility to receive a petroleum subsidy.

- 4.89 The Committee withdrew its Notice of Motion for Disallowance as the amendment benefited consumers, but considered the suggestion of the Minister for Science, Customs and Small Business, the Hon. B. Jones M.P., that the 24 end-consumers detrimentally affected might apply for an ex-gratia payment by the Commonwealth, did not fully consider the consumers rights to redress for administrative error. The Committee urged the Minister to direct the Commonwealth to make the required payments to people who were denied a benefit, of which they were probably unaware, by an administrative and drafting error in the preparation of the original Amendment. Equity in administration of the subsidy scheme demanded ex-gratia payments be at the initiative of the Minister, not the unwitting consumer.

#### Identity cards

- 4.90 A distinction between identity documents required to be carried by wardens and rangers who are members of the police force, and those who are not, was contained in the National Parks and Wildlife Regulations (Statutory Rules 1987 No. 139). Police needed to produce only written evidence of their status, while others were required to produce a proper identity card. The Minister for the Environment and the Arts, Senator the Hon. G. Richardson, explained in detail the distinctive identification carried by members of the Australian Federal Police (AFP) and its purpose, and the purpose of warden identity cards, and undertook to amend the regulation to require a member of the AFP to produce such identification as would be required in the course of his or her normal duties.

## Decisions in writing

- 4.91 There were apparent inconsistencies between various sections of the Phosphate Mining Corporation of Christmas Island (Winding up) Ordinance 1987 (Territory of Christmas Island Ordinance No 8 of 1987), some of which conferred power to take certain decisions or actions in writing while others required no written instrument. In the interests of continuity, consistency and propriety a requirement that the exercise of important powers be expressed in writing should accompany the conferral of important powers under delegated legislation.
- 4.92 The then Minister for the Arts and Territories, the Hon. G. Punch, M.P., advised that the majority of provisions which did not require a written instrument were based on similar provisions of the Companies Code with which uniformity was sought. The Minister assured the Committee that a written instrument would be the means of exercising decisions. In future, drafting of legislation for the external territories would have regard to the principle requiring important powers to be exercised in writing.

## PRINCIPLE (c)

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

- 4.93 In its Eighty-Third Report<sup>4</sup>, the Committee listed the six principles it applied in its examination in this area:
- (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;

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4. para 4.38

- (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 1975; there are special cases where because of the significance of the decision, the statement of reasons should accompany the initial notice of decision ...
- (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.

#### Right to practice a trade, business or profession

4.94 The right to earn a living is a fundamental right which should not be subject to unnecessary curtailment, or loss of livelihood through the exercise of discretionary judgments conferred by delegated legislation without recourse to certain protections.

4.95 The Agents (Amendment) Ordinance 1988 (A.C.T. Ordinance No. 5 of 1988) made two amendments to the Principal Ordinance concerning the control of agents. The first referred to the ability of the Agents Board to suspend an agent's licence when in fact there was no power in the Principal

Ordinance to do so. The second gave the Agents Board the power to appoint a receiver whenever an agent's licence had been suspended or revoked.

- 4.96 The Minister for the Arts and Territories, the Hon. Gary Punch, M.P., explained that the power to suspend a licence had not yet been inserted into the Ordinance due to administrative delays, and required an amending Ordinance. Until that had been done the power to appoint a receiver could not be exercised in relation to the suspension of a licence.
- 4.97 New Regulation 4 of the Foreign Fishing Boats Levy Regulations (Amendment) (Statutory Rules 1987 No. 296) prescribed a class of fishing boats imported into Australia, the licensing of which did not attract levy.
- 4.98 The Regulations made the question of determining the ownership of a boat an unreviewable discretionary decision of the Departmental Secretary or an officer authorised by the Secretary. This was inappropriate as citizenship and ownership were ascertainable matters of fact and law.
- 4.99 As a matter of law, Australian-owned boats were exempt from levy. The Minister for Primary Industries and Energy, the Hon. John Kerin, M.P., agreed to amend the regulations to make it clear that the Secretary had no discretion in this matter and that his or her responsibility be limited to ascertaining whether, as a matter of fact, a boat is Australian-owned.

#### **Absolute discretions**

- 4.100 The Telecommunications (General) By-laws Amendment No. 50 1988 lacked criteria to guide the exercise of an absolute discretionary power to determine that a group of buildings was not a building complex and that therefore the owner or



tenant of the complex would not be eligible to operate a shared tenant private branch exchange (PBX). There was no internal or external right of review.

- 4.101 The Committee believed it may be beyond power or inappropriate and misleading to confer an 'absolute discretion' by means of delegated legislation, particularly if no indication has been given in the enabling Act or the parliamentary debates on the Bill that such an unusual and unexpected use would be made of delegated power.
- 4.102 The Committee stated its preference for independent review by the AAT, but acknowledged that if arguments of policy and principle are compelling in demonstrating that AAT review is inappropriate, then it may be that agreement could be reached on a formal internal appeal procedure, protected by its inclusion in the By-laws.
- 4.103 The Commission agreed to provide a right to apply to the Managing Director for a review of an adverse decision in respect of a building complex.

#### Reviewability of discretionary powers

- 4.104 The Nursing Home Financial Arrangements Principles under subsection 40AA(7) of the National Health Act 1953 provided for the determination of scales of fees in relation to nursing homes and other matters. The principles vested numerous discretions in the Secretary. It was not clear whether these decisions were subject directly or indirectly to review by the AAT. The Minister for Community Services and Health, the Hon. Dr. Neal Blewett, M.P., advised that a proprietor is able to request the Minister to review the Secretary's decisions. The proprietor's request must be first referred to the Nursing Homes Fees Review Committee of Inquiry established under the Act. In reporting to the Minister, that Committee has regard to the same principles as the Minister is required to apply.

4.105 After careful consideration, the Committee decided not to press specifically for AAT review, and accepted the Minister's preference for internal review.

The Committee noted

- . that a new system of national uniform nursing home fees was being phased-in, which would gradually eliminate discretionary elements from the process of determining fees, and that this would occur during 1988/89;
- . that the continued exercise of important discretionary powers by the Secretary during the transitional period was subject to ministerial review;
- . that proposals in the Community Service and Health Legislation (Amendment) Bill 1987 would continue ministerial review in a more comprehensive way; and
- . that under both the present and the proposed mechanism, the Minister is able to receive reports from State Nursing Homes Fees Review Committees of Inquiry which function as protective tribunals.

#### Unreviewable discretions

4.106 In applying Principle (c), the Committee considers special circumstances relating to discretionary decisions without appeal to the AAT.

4.107 Three discretionary decisions by the Insurance and Superannuation Commissioner under the Occupational Superannuation Standards Regulations (Statutory Rules 1987 No 322) were not subject to review.

4.108 The Treasurer, the Hon. P. Keating, M.P., explained the absence of merits review by

- . the special taxation and policy complexities of the Standards in question;
- . the national financial and economic significance of the general scheme in which exemptions would be exceptional; and
- . the practice of not subjecting to independent review administrative exemptions from the application of a general scheme that is intended, in all but exceptional circumstances, to apply uniformly and in its entirety to a general class of persons.

4.109 The Committee accepted the Treasurer's advice and explanations.

#### Review rights

- 4.110 The then Minister for the Arts and Territories, the Hon. G. Punch M.P., undertook to amend the Business Franchise (Tobacco and Petroleum Products) (Amendment) Ordinance (No. 2) 1987 (A.C.T. Ordinance No. 58 of 1987) to require the Commissioner to issue a copy of an exemption certificate upon request, thereby obviating the need for inclusion of review rights. This met the Committee's concern that there was no provision for review of a decision of the Commissioner to refuse to issue a copy of an exemption certificate which had been lost or destroyed.
- 4.111 The then Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon. J. Brown M.P., undertook to amend the The Gaming Machine Ordinance 1987 (A.C.T. Ordinance No. 34 of 1987) to make clear that an Authority is to determine a universal percentage payout figure without, by implication, giving rise to the expectation of some right of appeal which would be inappropriate in the circumstances.

- 4.112 One program made under the Housing Assistance Ordinance 1987 provided review rights for discretionary decisions. Others did not. The then Minister for the Arts and Territories, the Hon. G. Punch, M.P., undertook to make decisions to move refugees from temporary accommodation, to transfer a tenant (Public Housing); to allocate housing (Defence Force); and to allocate a particular site from stock to a particular person (Long Stay Caravan Park Housing Assistance) subject to appeal rights.
- 4.113 The Canberra Sewerage and Water Supply Regulations (Amendment) (A.C.T. Regulations 1987 No. 19) gave a discretion to the A.C.T. Engineer to refuse a permit for building work, with no opportunity for internal reconsideration or external review of the adverse exercise of that discretion. An unfair refusal could seriously disrupt building operations.
- 4.114 The then Minister for the Arts and Territories, the Hon. Gary Punch, M.P., undertook to amend the Regulations to provide AAT review.
- 4.115 The Great Barrier Reef Marine Park Regulations (Amendment) (Statutory Rules 1987 No. 247) provided for appeals against a refusal to grant one particular permit but not another. The Minister for the Arts, Sport, the Environment, Tourism and Territories, Senator the Hon. G. Richardson, advised that this was an oversight and undertook to amend the regulations.
- 4.116 Under the Export Inspection (Quantity Charge) Regulations (Amendment) (Statutory Rules 1987 No. 251) new paragraph 4(aa) provided for the exemption from an export inspection charge of products prepared at an establishment which had a Departmental approved quality control system. The provisions for approval of such a system appeared in the relevant export control orders where reconsideration and AAT review rights existed regarding initial decisions made

under an order'. Rights of review existed in regard to Order 23 of the Dairy Produce Orders (Orders No 4 of 1985) referring to Approved Quality Assurance arrangements.

- 4.117 The question was whether the arrangements specified in that Order were also the arrangements referred to in new paragraph 4 (aa) which referred, not to an Approved Quality Assurance arrangement but to 'an arrangement between the Department and the occupier of the establishment in relation to an export control order, being an arrangement with respect to inspection procedures to ensure the quality of products prepared'. If the arrangements were the same, then it would appear that the approval was reviewable. If, however, different 'arrangements' were contemplated within new paragraph 4(aa) then appeal rights needed to be provided.
- 4.118 The Minister for Resources, Senator the Hon. Peter Cook, advised that the reference to paragraph 4(aa) of the Regulations did relate to the Approved Quality Assurance arrangements referred to in Order 23 of the Dairy Produce Orders (Orders No. 4 of 1985). He confirmed that the Secretary's discretion in Order 23 is reviewable.
- 4.119 The situation could have been simplified with the use of similar rather than different wording, and a reference in the Explanatory Statement to the existence of appeal rights.
- 4.120 The Meat Inspection (Fees) Orders As Amended (Amendment) being Meat Inspection (Orders) No 5. of 1987 provided that the Secretary may, in a particular case, for a reason that the Secretary thinks sufficient, remit the whole or a part of an amount of a fee payable under these Orders.
- 4.121 The Committee was concerned about the width of the discretion, its subjective drafting, the absence of criteria and the lack of any right to seek AAT review. The then Minister for Resources, the Hon. Peter Morris, M.P., advised

that its purpose was to enable remission of fees where a misunderstanding had arisen as to when the fees were payable and where it would be inequitable to require persons to pay those fees (eg. inadequate notification of an increase in fees, or confusion about the date from which the Orders applied). The Minister undertook to include a right of review to the AAT.

- 4.122 The Export Control (Fees) Orders as amended (Amendment) Export Control Orders No. 11 of 1987 did not require an individual to be given information concerning appeal rights against an initial adverse decision of the Secretary. Under the General Orders, an individual was informed that after an initial adverse decision was given, an internal review was available before an AAT appeal but this right of initial review was not given under the amending orders.
- 4.123 The then Minister for Resources, the Hon. Peter Morris, M.P., undertook to amend the Orders to ensure notification of the right to an internal review of an initial decision.
- 4.124 The then Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon. J. Brown M.P., advised that an appeal provision was not provided under section 38AA(1)(a) of the Co-operative Societies (Amendment) Ordinance (No. 3) 1987 (A.C.T. Ordinance No. 42 of 1987) as this would be contrary to the central objective of the legislation, which was to ensure the protection of members' funds. Where an institution is in financial difficulty it is important that timely and effective action should be able to be taken before public confidence is eroded to avoid a damaging 'run' on the funds of a society.
- 4.125 The Minister undertook, however, to provide for AAT review in respect of two discretions under new section 58B of the Ordinance.
- 4.126 The Bounty (Ship Repair) (Registration) Regulations (Statutory Rules 1987 No. 53) provided conditions for the

repair of bountiable ships. Before being registered as a repairer an applicant was required to specify the subcontractors to be employed in carrying out repairs.

- 4.127 Under the Bounty (Ship Repair) Act 1986 the Minister's decision to refuse to register a person as a repairer is appealable to the AAT. Where a registered repairer wishes to add the names of further subcontractors to those in the original application, the identity of such a contractor must be submitted to the Minister for approval. If registration has already been granted, however, there is no right of appeal against a Ministerial refusal to approve additional contractors.
- 4.128 The Minister for Science and Small Business, the Hon. B. Jones M.P., advised that such a result was unintended and undertook to amend the regulations to provide appeal rights to the AAT.
- 4.129 Both the Bounty (Ships) (Reservation of Bounty) Regulations (Amendment) (Statutory Rules 1987 No. 116) and the Bounty (Ship Repair) (Reservation of Bounty) Regulations (Statutory Rules 1987 No. 117) concerned the right to reserve certain bounty from a limited fund on a 'first come, first served' basis. These regulations vested the Comptroller with discretions against which there was no appeal. A failure to obtain a reservation of bounty as a result of the unfair exercise of such a discretion could result in a failure to obtain bounty payments.
- 4.130 The Minister for Science and Small Business, the Hon. B. Jones M.P., advised that it was not intended to deny a reservation applicant an appeal right against an adverse reservation decision and undertook to provide for retrospective review rights.
- 4.131 Two Ordinances in the package of Australian Capital Territory Taxation Legislation failed to provide for review

of decisions relating to refunds of duty and taxes. These decisions fell within the class of judgmental discretionary decisions customarily subject to AAT review.

- 4.132 The then Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon. J. Brown M.P., undertook to amend the Stamp Duties and Taxes Ordinance 1987 (A.C.T. Ordinance No. 39 of 1987) and the Payroll Tax Ordinance 1987 (A.C.T. Ordinance No. 40 of 1987).

#### PRINCIPLE (d)

#### DOES DELEGATED LEGISLATION CONTAIN MATTERS MORE APPROPRIATE FOR PARLIAMENTARY ENACTMENT?

- 4.133 During the period of this report the Committee made no recommendations that any instrument of delegated legislation be disallowed because of infringement of Principle (d).
- 4.134 The question of possible infringement of Principles (a) and (d) arose in the Dairy Produce Levy Regulations (Statutory Rules 1987 No. 325), which reduced the 'minimum weight' for the levy, defined in sub-section 9(4) of the Dairy Produce Levy (No. 1) Act 1986 as 15 tonnes or any lesser prescribed weight, by prescribing a weight of one kilogram.
- 4.135 The Committee was concerned that the regulations may 'not be in accordance with the statute', a criterion of propriety connoting both the letter and the spirit of the Act and Parliament's implied expectations as to how regulation-making powers might be exercised. In addition, or alternatively, the regulations may contain an initiative of such significance for the administration of the relevant export scheme that the change should perhaps have warranted the making of an Act of Parliament to bring it about.
- 4.136 The change in administration introduced by the regulations was at, or beyond, the margins of what should be acceptable



in regulatory law-making. In a more general sense the regulations gave rise to serious questions about the proprieties and limitations of exercising prescriptive powers.

- 4.137 The Minister for Primary Industries and Energy, the Hon. J. Kerin, M.P., indicated his prior intention to amend the Act, and that the regulations were an interim measure to handle any administrative problems arising from a long delay in placing the appropriate amending legislation before Parliament. The Dairy Produce Levy (No 1) Amendment Act (Act No. 18 of 1988) received Royal Assent in May 1988.

## CHAPTER 5

### LEGISLATION CONSIDERED IN DETAIL

#### Introduction

- 5.1 This chapter discusses selected examples of the Committee's scrutiny of instruments of delegated legislation during the period under review. Where an instrument has also been discussed in other Chapters, references to paragraphs in those chapters can be found in Appendix 5 (Alphabetical index to legislation).

#### Aboriginal and Torres Strait Islander Heritage Protection Regulations (Amendment) (Statutory Rules 1987 No. 153)

- 5.2 Regulation 10 prescribed the circumstances in which the register of declarations of preservation of Aboriginal places or objects could be inspected, and conferred on the Minister an unreviewable discretion as to who could inspect the document.
- 5.3 The Minister for Aboriginal Affairs, the Hon. Gerry Hand, M.P., explained that the Regulations were intended to ensure that Aboriginal views on their own heritage items were respected. Thus, before making a decision to grant or deny access to such items, a Minister would consult with the Aboriginal community concerned. Such a decision, involving a balancing of the interests of opposing groups, would ultimately be political in nature and unamenable to review.

**A.C.T. Institute of Technical and Further Education  
Ordinance 1987  
(A.C.T. Ordinance No. 71 of 1987)**

- 5.4 This Ordinance established the A.C.T. Institute of Technical and Further Education as an independent authority to provide technical and further education in the A.C.T.
- 5.5 Significant powers were capable of exercise other than in writing. The Committee considered ministerial or official powers conferred by legislation should be required to be exercised in writing.
- 5.6 Paragraphs 8(3)(b), 9(3)(b) and 10(3)(b) provided that the Institute not buy shares or form companies or partnerships without written ministerial approval. Where approval was given the Minister was required to prepare a statement to be tabled in both Houses of the Parliament within 15 sitting days of the share purchase or business formation. If, however, the Minister was of the opinion that the disclosure of the business venture 'would adversely affect the commercial interests of the Institute' the statement was not required to be tabled until the Minister 'ceases to be of that opinion'.
- 5.7 The Committee's concerns related to the open-ended formulation of the obligation on the Minister; the possibility that some business venturers may have a predisposition to prefer a degree of secrecy; and the risk that concealed business relationships could give rise to suspicions, whether justified or unjustified, of impropriety or improper influence.
- 5.8 A suggested amendment was that in each case where a degree of secrecy was required, the Minister could periodically table a general ministerial certificate that certain matters

should not be revealed for reasons specified in the legislation. This would respect the position and role of Parliament without necessarily deterring share purchases, company flotations, or would-be joint venturers.

5.9 The then Minister for the Arts and Territories, the Hon. G. Punch, M.P., proposed that the decision that there be no disclosure of a commercial transaction could be listed in the Institute's annual report, and continue to be reported in each subsequent annual report until the Minister decided to release the details. The existence of such decisions could then be noted by the Parliament. The Minister undertook to write to the Minister for Finance proposing the necessary amendment to the Audit Regulations.

5.10 The Minister also undertook to amend the Ordinance to provide that removal of the Director of the Institute be in specified circumstances only; that a monetary limit for penalties be provided in the Ordinance; and for AAT review of any administrative decision that could result in the imposition of a penalty.

**Australian Capital Territory Housing Assistance Programs**  
**Public Rental Housing Assistance Program**  
**Defence Force Rental Housing Assistance Program**  
**Long Stay Caravan Park Housing Assistance Program**  
made under section 12 of the Housing Assistance Ordinance  
1987

5.11 The Committee's concerns regarding these Programs related to the lack of appeal rights; lack of protection of personal privacy; possible uncertainty in clauses; the extent of the discretionary powers of the Commissioner for Housing, including power to certify 'that it is necessary in the public interest' that information be divulged; protection of privacy of individuals; lack of relevant information in the Explanatory Statements; and other matters.

- 5.12 The Minister for the Arts and Territories, the Hon. Gary Punch M.P., responded in detail, and was generally favourable to the Committee's concerns.<sup>1</sup>

**Australian Federal Police (Police Liaison Advisory Committee for the Australian Capital Territory) Regulations (Repeal) (Statutory Rules 1988 No. 32)**

- 5.13 This regulation abolished the Police Liaison Advisory Committee for the Australian Capital Territory. The Committee queried why such a body had been abolished given a heightened awareness of the role of the police, the existence of criminal activity and the need for various forms of community involvement in the process of government and administration generally in the A.C.T. The then Minister for Territories, the Hon. Gary Punch, M.P., explained that since the abolition of the A.C.T. House of Assembly, the Advisory Committee had not operated effectively and the Australian Federal Police had sought other avenues of police and community liaison in the A.C.T. He also pointed out that the Australian Federal Police Act 1979 had been amended by the Statute Law (Miscellaneous Provisions) Act 1988 which removed the obligation to establish an Advisory Committee.

**Australian Rifle Clubs Regulations (Repeal)  
(Statutory Rules 1988 No. 17)  
Defence (General) Regulations  
(Statutory Rules 1988 No. 18)  
Rifle Clubs (Firearms) Order 1988  
Rifle Clubs (Firearms) Order (Amendment) 1988**

- 5.14 Paragraph 123G(1)(c) of the Defence Act 1903 provided that the Minister for Defence may make Orders, not inconsistent with the Act, for and in relation to the control and administration of rifle ranges, and for the carriage, possession and use of firearms on or in connection with a rifle range.

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1. For full text of the Minister's reply, and the Chairman's letter see Senate Hansard, 31 May 1988, p.3164.

5.15 The above instruments were intended to be temporary as the new exemption provisions were to remain in force for approximately six months to give rifle clubs and associations time to adjust to State and Territory law, and would then be repealed. The Committee suggested that the (Rifle Clubs (Firearms) Order (Amendment)) of 11 February 1988 and the Defence (General) Regulations should have been subject to an express sunset clause that would have terminated temporary exemptions from State and Territory laws. Then, if the proposed timetable for change was not met and extension of the life of the legislation was necessary, fresh instruments would be required, which would come before the Parliament (and the Committee) for further scrutiny in the usual way.

5.16 In accordance with its Principles, the Committee had no interest in the policy behind the package.<sup>2</sup>

5.17 The Committee, acting solely within its scrutiny principles, acknowledged that the disallowance of the Australian Rifle Clubs Regulations (Repeal) (Statutory Rules 1988 No. 17) had altered the practical and legal situation regarding the legislative package for rifle clubs and withdrew its Notice of Motion of Disallowance of the Rifle Clubs (Firearms) Order to enable the Minister to reconsider his position.<sup>3</sup>

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2. Part of the package, the Australian Rifle Clubs Regulations (Repeal) (Statutory Rules 1988 No. 17) was disallowed by the Senate on 10 May 1988 for policy reasons.  
Senate Hansard, 10 May 1988 pp. 2248-2262.

3. The full text of Committee correspondence was incorporated in Hansard along with a short summary of the Committee's scrutiny.

**Australian Meat and Live-stock Order MQ22/87  
(Sheepmeat and/or Goatmeat to EEC - 1988 Quota  
Administration Scheme)**

**Australian Meat and Live-stock Order MQ23/87  
(High Quality Beef to EEC - 1988 Quota Administration Scheme)**

- 5.18 The Orders required that telex be the exclusive means of communication of export approvals by the Australian Meat and Livestock Corporation (AMLC), although details of changes to consignments subject to approvals were communicable by the licensee by either telex or facsimile. The Committee noted that facsimile transmission had virtually superseded telex.
- 5.19 The AMLC explained that the option to have approvals transmitted directly to the works (where the product is prepared) was available to 'Approved Establishments'. To obtain approval as an 'Approved Establishment' from the Department of Primary Industry and Energy, the works must possess a telex machine. The AMLC was not aware of a Departmental requirement relating to facsimile machines, and noted that at the time the Orders in question were issued, every licensee in possession of a 1987 entitlement or likely to receive a 1988 entitlement (and thus likely to be affected by the Orders) had a telex machine. The AMLC noted that licensees could communicate with AMLC by telex, letter or facsimile.

**Australian Wine and Brandy Corporation (Annual General Meeting of  
the Industry) Regulations  
(Statutory Rules 1987 No. 264)**

- 5.20 These regulations set out the rules for the conduct of the Annual General Meeting (AGM) of the wine industry. The Committee's concern related to the confidentiality of a winemaker's liability to pay a levy. The number of votes

that a winemaker could cast at the AGM equated to the number of whole dollars of relevant levy imposed on the person in the preceding year. If a teller at a meeting released the winemaker's voting figure, the amount of levy could be calculated. Under regulation 6 the nominated tellers were subject to a duty of confidence. The Committee queried how this could be enforced in order to protect the privacy of the winemakers' liability to tax.

- 5.21 The Minister for Primary Industries and Energy, the Hon. John Kerin, M.P., explained that it was the policy of his Department to appoint only Commonwealth officers to act as tellers. Any disclosure of votes by such a nominated teller would bring the officer within the scope of section 70 of the Crimes Act 1914 which imposes a penalty of imprisonment for two years if the officer concerned disclosed the relevant information. The Committee accepted the Minister's view that this provided an adequate mechanism to protect winemakers' privacy.

**Broadcasting Act 1942  
Orders under section 92V  
relating to Remote Television Licenses**

- 5.22 Section 119A of the Broadcasting Act 1942 provided for appeals to the AAT against various decisions under the Act, although it did not appear to extend such rights to the Orders of the Australian Broadcasting Tribunal (ABT) under which decisions of importance to licensees could be made.
- 5.23 The Committee had been informed that the Administrative Review Council (ARC) was examining the desirability of merits review of the ABT's procedural decisions. The Committee sought an indication of progress made by the ARC and whether consideration had been given to merits review of substantive ABT discretions of the kind arising under the orders in question.



- 5.24 The then Minister for Transport and Communications, Senator the Hon. Gareth Evans, advised of a foreshadowed review by the ARC of broadcasting legislation, but as this was the subject of two other reviews he wished to see a co-operative approach to ensure effective use of resources.

**Building and Services Ordinance 1924 (A.C.T) Determination  
Building Ordinance 1972 (A.C.T) Determination  
Unit Titles Ordinance 1970 (A.C.T) Determination of Fees**

- 5.25 These determinations purported to fix fees under provisions of Ordinances which were not in existence when the determinations were made; subsection 15(4) in the case of the Building Ordinance 1972; and paragraph 16(1)(e) in the case of the Unit Titles Ordinance 1970. The determinations were made on 9 September 1987, but the relevant provisions were not included in the Ordinances until 16 September 1987. It was possible that section 8 of the Interpretation Ordinance did not operate to validate the determinations, as that section related to Ordinances that have been made but which are not yet in force. In this case, the Ordinances had not been made at the date of the determinations, although the determinations purported to come into force immediately.
- 5.26 The then Minister for the Arts and Territories, the Hon. G. Punch, M.P., advised that the determinations were validly made as they were signed by the delegate of the Minister on 9 September 1987, and were gazetted on 16 September 1987. The Ordinances were signed by the Governor-General on 13 September 1987 and gazetted on 16 September 1987. The Minister considered the relevant action was arranging for the determinations to be gazetted. Each Ordinance provided that the Minister (or his delegate) may, by notice in writing published in the Gazette, determine fees for the purposes of the Ordinance.

- 5.27 The Committee's continued concern related to the technical issue of the validity of the determinations.
- 5.28 The Minister then offered to validate the determinations with retrospective amendments to the Ordinances to declare the determinations valid.
- 5.29 The Committee left this decision to the discretion of the Minister as the alternative view of the law was not untenable, and his view was arrived at after careful consideration, but advised that amendment may be the wiser course of action.

**Canberra Institute of the Arts Ordinance 1988  
(A.C.T. Ordinance No. 1 of 1988)**

- 5.30 This Ordinance established the Canberra Institute of the Arts as an independent educational Institute, consisting of the Canberra School of Music and the Canberra School of Art.
- 5.31 The Committee questioned why some decisions were to be taken in writing, whereas others were not, eg. certain ministerial approvals, determinations and directives.
- 5.32 While the Committee recognised that decisions would in all probability be taken in writing, an express legal requirement to predicate operative decision-making on written documents could have protective consequences for all concerned.
- 5.33 The Minister undertook to amend the Ordinance to provide that certain statutory discretions be exercised in writing, which was consistent with previous undertakings relating to the Schools Authority (Amendment) Ordinance 1987 and the A.C.T. Institute of Technical and Further Education Ordinance 1987.

**Children's Services (Amendment) Ordinance (No. 2) 1987  
(A.C.T. Ordinance No. 53 of 1987)**

- 5.34 This Ordinance was enacted to effect undertakings given to the Committee following its consideration of the original Ordinance.<sup>4</sup>
- 5.35 The Committee had at the time of its scrutiny of the Principal Ordinance indicated that there should be some shorter period than the prescribed 48 hours for a child to be brought before a court. The Minister then undertook to delete the reference to 48 hours from the Ordinance. This was implemented by the amending ordinance, which resulted in a requirement that a child be brought before a court 'as soon as practicable'.
- 5.36 This was not what the Committee had intended, as the amendment, instead of shortening the period of possible detention, left the issue to be determined on a basis which could well result in a period of detention exceeding the previous limit of 48 hours. It did not seem to be impracticable for action to be undertaken within say 24 hours.
- 5.37 The then Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon. J. Brown, M.P., advised that 24 hours was not considered a practicable period, that persons with responsibility for administering the provisions in question would treat the interests of the children as paramount and would be sensitive to questions of personal liberty.
- 5.38 The Committee again advised the Minister that an 'as soon as practicable' provision was not satisfactory in the context of this Ordinance, that there was no serious practical

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4. See Eighty-Third Report paragraphs 4.31, 4.44, 5.27 - 5.48

impediment to dealing expeditiously with children detained over the weekend and respectfully urged the Minister to amend the Ordinance with a definite specified period of time.

5.39 The Minister then undertook to amend the provisions to ensure that 24 hours be the usual time limit for bringing children before court subject to the contingencies of practicalities.

5.40 Ideals of legal principle and propriety should be included at the very beginning of all legislation, but especially where that legislation is a model introducing new concepts.

**Children's Services Regulations  
(A.C.T. Regulations 1987 No. 6)**

5.41 Regulations 6, 7 and 8 imposed obligations on licensees of child care centres to keep records and registers. No penalty was specified for failure to observe these obligations. The Committee questioned whether failure might amount to a breach of a licence condition thereby attracting the penalty set out in subsection 118(2) of the Children's Services Ordinance 1987.

5.42 The then Minister for the Arts and Territories, the Hon. G. Punch, M.P., undertook to amend the Regulations to provide a specific penalty for failure to comply with Regulations 6, 7 and 8.

**Customs (Prohibited Exports) Regulations  
(Amendment) Regulations 1987  
(Statutory Rules 1987 No. 317)**

5.43 These regulations gave effect to a government policy decision to abolish or amend export controls on certain products. Two matters were of concern -

- the Explanatory Statement referred to the removal from export control of lower quality wine, but the necessary amendments were not in the regulations; and
  - placement in the Eighth Schedule of two new items, Ketobemidone and Opium, at the end of the Schedule. Item 69 (the last item in the Schedule) was a catch-all Item dealing with substitutes for drugs listed, and should be made clearly applicable to the two new drugs listed, with them being placed in their appropriate alphabetical position in Schedule 8 (which is an alphabetical listing of drugs).
- 5.44 The Minister for Science, Customs and Small Business, the Hon. B. Jones, M.P., advised that the discrepancy between the Statutory Rule and the Explanatory Statement occurred because the proposed amendment was withdrawn, but the Explanatory Statement was not amended accordingly. The Minister also undertook to re-arrange Part I of the Eighth Schedule so that listed drugs appear in alphabetical order.

**Customs (Prohibited Exports) Regulations (Amendment)  
(Statutory Rules 1987 No. 319)**

- 5.45 This regulation implemented certain undertakings previously given to the Committee, but the amendment to Regulation 13F(1) of the Principal Regulations deleting the words 'or an authorised person' in two instances may have had the effect that the Minister may terminate only a permission granted by the Minister, so the duration of a permission granted by an authorised person could not be controlled by the Minister.
- 5.46 The Minister for Science, Customs and Small Business, the Hon. B. Jones, M.P., undertook to amend the regulation as this was an unforeseen consequence. The intention was to make permissions granted either by the Minister or an authorised person subject to overriding control (including termination) by the Minister.

**Customs Regulations (Amendment)**  
**(Statutory Rules 1987 No. 140)**

- 5.47 The Committee sought an explanation of the change in charging techniques for prescribed fees for each 7 lines of information contained in an entry form raised for the purpose of recording the movement of dutiable goods out of a warehouse, and processed by the Australian Customs Service.
- 5.48 The Minister advised that technological changes resulting from computerised entries required amendments to the charging techniques. The old 'page' charged at \$7 was in fact the new 'seven lines of information' and was still charged at \$7. The amendment to the Regulations was to update the basis for charging on documents. It was merely continuing what was previously occurring in practice with the pre-computer system.

**Determination under Section 58B of the Defence Act 1903**  
**(Amendment)**  
**Defence Determination No. 6 of 1988**

- 5.49 New Clause 28, inserted in Determination 3714 (Overseas Living Allowance) provided for an allowance to be payable at the discretion of the approving authority. There was no criteria specified for the exercise of that discretion, and no right of appeal.
- 5.50 The then Minister for Industrial Relations, the Hon. R. Willis, M.P., advised the Committee that the relevant criteria were set out in clause 29 of the same Determination (Determination 3714.)
- 5.51 The Committee's correspondence on this matter was tabled in the Senate on 23 May 1988 and incorporated in Hansard.<sup>5</sup>

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5. Senate Hansard, 23 May 1988, p. 2654.

**Determination under Section 58B of the Defence Act 1903  
(Amendment)  
Defence Determination No. 10 of 1988**

- 5.52 This Determination provided for a Reunion Allowance. Clause 2 defined certain absence or travel as that 'approved' by an officer who 'according to the custom of the Service' was empowered to approve such absence or travel. The question was whether this expression was too vague and uncertain for use in a legislative instrument dealing with the entire Defence Force in its three traditional constituent elements.
- 5.53 The Committee accepted the explanation of the then Minister for Industrial Relations, the Hon. R. Willis, M.P., that the use of the expression was settled and well understood in all branches of the Defence Force.<sup>6</sup>

**Environment Protection and Management Ordinance 1987  
(Territory of Heard Island and McDonald Islands  
Ordinance No. 1 of 1987)**

- 5.54 This Ordinance related to the protection and management of the environment and wildlife of Heard Island and the McDonald Islands. A number of aspects affected the rights of individuals.

**Publication of Plans of Management**

- 5.55 Provisions in paragraph 8(3)(b) and subsection 8(4) invited persons to make representations in connection with a proposed plan but left open the possibility that submissions could be refused after an unreasonable brief period, as a definite and reasonable minimum period for submission of representations had not been provided. Paragraph 8(8)(b) of

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6. The Committee's correspondence on this matter was tabled. Senate Hansard, 23 May 1988, p. 2654 (w).

the Ordinance, on the other hand, allowed interested persons to make representations on the published plan 'by such date, not being less than one month after the date of publication of the notice.'

- 5.56 The Minister for the Arts, Sport, the Environment, Tourism and Territories, Senator the Hon. G. Richardson, advised that the intention was never to reduce to an unworkable minimum the period during which persons may make representations, the intention being to provide an opportunity for public comment, and undertook to amend paragraph 8(3)(b) along the lines of paragraph 8(8)(b).

#### Strict liability offences

- 5.57 The Explanatory Statement stated that the Ordinance effected rigid controls on activities that may be undertaken in the Territory. While there may be arguments of public policy dictating the severe penalties in order to deter persons intent on perpetrating irreparable damage to the ecology of the Territory, the heavy penalties contained in section 14(1) were for a range of criminal offences which appeared to be able to be committed without wilful intent or criminal negligence.
- 5.58 The Minister agreed that in some situations the penalties associated with strict liability offences may be too severe and undertook to review the offences and penalties.

#### Upper limit of fees

- 5.59 A principal instrument should generally limit fees or penalties that may later be prescribed to a reasonable maximum. Subsection 15(4) of the Ordinance merely provided that the regulations may prescribe fees payable in respect of the issue of permits.
- 5.60 The Minister undertook to amend the Ordinance accordingly.



### Identity cards

- 5.61 Public officials with enforcement powers should use photographic identity cards. This was not the case here. Subsection 20(3) provided for inspectors to be issued with 'a certificate signed by the Minister to the effect that the person is an inspector for the purposes of this Ordinance'. The Minister undertook to amend the Ordinance to require inspectors to use proper photographic identity cards.

### Notice of appeal rights

- 5.62 The Minister accepted the suggestion that subsection 23(2) be amended to provide that notification of decisions and AAT review rights under the Ordinance be given within 28 days.

### Fisheries Regulations (Amendment) (Statutory Rules 1988 No. 30)

- 5.63 The Committee's concern related to technical drafting. Paragraph 17(1)(k) of the Fisheries Act 1952 provided for prescribing short methods of reference to areas of proclaimed waters specified in the regulations and the purposes for which those methods of reference may be used.
- 5.64 When referring to the areas of proclaimed waters the regulations referred to areas 'described' instead of 'specified'. While the Committee would not normally draw such a technicality to the attention of the Minister, the Committee was aware of a judgment in Anderson v Todd (unreported, Townsville District Court, Apps. 20 and 29 of 1987, June 1987) where the Court, using a literal interpretation, had held that a fisheries notice made under another section of the Fisheries Act 1952 was invalid as it did not meet the requirements of that section.

- 5.65 The Minister for Primary Industries and Energy, the Hon. John Kerin, M.P., explained that he had been advised by the Attorney-General's Department that the validity of the regulations depended not on whether the word 'specify' was used but on whether the regulation in effect 'specified' a relevant area of waters.

**Gaming Machine Ordinance 1987  
(A.C.T. Ordinance No. 34 of 1987)**

- 5.66 This Ordinance replaced the Poker Machine Control Ordinance 1975 and implemented the main recommendations of the Report of the Australian Capital Territory Poker and Amusement Machine Enquiry 1985.
- 5.67 The comments of the then Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon. John Brown, M.P., were sought on a number of issues.<sup>7</sup>

**Defence of reasonable excuse**

- 5.68 The obligations imposed by sections 30 and 49 to display notices, by section 32 to maintain a register, and by subsections 34(6) and (7) (the surrender of certificates), appeared to impose strict criminal liability. The Minister agreed to include a defence of reasonable excuse in sections 30 and 49 and sub-sections 34(6) and (7), but not in section 32 as this was considered central to the regulatory aims of the Ordinance.

**Mens rea**

- 5.69 Sections 44 and 45 appeared to impose strict liability on a licensee in relation to aspects of the operation of machines. By contrast, section 43 required knowledge before

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7. See paragraphs 4.111 for a discussion of the issue of appeal rights.

a person could be convicted of allowing unlicensed machines to be used. The Minister undertook to include a 'knowledge' element in section 44, but not in section 45, as linking of gaming machines to a device identified in subsection 45(3) could only be deliberate.

#### Other matters

- 5.70 Section 7 gave the Secretary power to appoint persons as inspectors with significant duties, but provision was not made for them to carry and produce photographic identifying authority. The Minister undertook to provide that the certificates issued to inspectors appointed under that section include a photograph of the officer.
- 5.71 Under section 28, renewal of a licence was mandatory, but if the Authority wished to deprive a body of its licence it was required to act under section 24. The Committee believed there might be a case for allowing the Authority to conduct an inquiry when an application for renewal was made, being a suitable time when issues relating to the desirability of the body concerned to hold a licence would be addressed. This was agreed to by the Minister.
- 5.72 A person who wished to appeal to the Supreme Court had 30 days within which to do so under subsection 52(2). There appeared to be no power to extend this period. This discretion should have been available to the Court. The Minister, however, undertook to amend subsection 52(2) to provide that appeals from decisions of the Authority on the matters listed under subsection 52(1) would come within the jurisdiction of the AAT, not the Supreme Court. The usual provision for extending the period for appeals would be included.
- 5.73 The Chairman reported to the Senate on the Committee's scrutiny on 24 November 1987.<sup>8</sup>

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8. Senate Hansard, 24 November 1987, p. 2269-70, 2271.

**Health Insurance Act 1973**  
**Approval under section 23DB(1): APA/1**  
**Approval under section 23DB:APP/1**  
**Determination of Principles under section 23DN(2): APL/1**

5.74 The task of reviewing the various Determinations, Authorisation and Approvals made under Acts concerned with the health system is made difficult due to the lack of up-to-date reprints of the principal Acts (which are frequently amended). In this case, the instruments relating to pathology did not include a numbering system to identify and distinguish each instrument. The Committee noted that it was not certain whether the informal citation appearing on the top right-hand corner of the tabled documents actually appeared in the gazetted form of the instruments available to the public.

5.75 The Minister for Community Services and Health, the Hon. Dr. Neal Blewett, M.P., noted a previous undertaking to the Committee to number instruments sequentially for each year, and to distinguish by letters each category of instrument. Although the instruments in question were not intended to operate on a sequential basis, and would stand for some time without amendment, the Minister agreed to cite the instruments with sequential references at the next available opportunity.

5.76 Other concerns met by the Minister included

limitation to incorporation by reference of material from the Medical Benefits Schedule Book (Book) as the Book existed at the time of the Approval (APA/1). When the Book was amended, the instruments would be amended pursuant to subsection 23DB(2) of the Act.

- . the definition of 'Standards' in clause 1.1 of APL/1 which may be beyond the limits of section 49A of the Acts Interpretation Act 1901 as the 'Standards' might be varied. The reference would be amended.
- . proper forms of identification for inspectors (clause 15 APA/1).
- . amendment of clause 7.3 of APL/1 to provide for an extension of time within which to furnish any required further information.

**Live-stock Slaughter Levy Regulations (Amendment)**  
**(Statutory Rules 1988 No. 20)**  
**Live-stock Export Charge Regulations (Amendment)**  
**(Statutory Rules 1988 No. 21)**

- 5.77 These regulations increased various rates of charges. The Preamble to the Live-stock Export Charge Regulations (Amendments) (Statutory Rules 1988 No. 21) recited that they were made by the Governor-General 'with the advice of the Federal Executive Council and under subsection 13(2) of the Live-stock Export Charge Act 1977', but did not recite that the mandatory procedures required under section 13 of the Act had in fact taken place. In addition the Explanatory Statement did not contain this information.
- 5.78 In writing to the Minister for Primary Industries and Energy, the Hon. J. Kerin M.P., the Committee noted that a Preamble which recited that required procedures have been observed is evidence to those involved in its making and implementation, as well as those affected, that those procedures have been complied with.
- 5.79 The Minister confirmed compliance with each of the steps. The Australian Meat and Livestock Corporation (AMLC) had put a motion to its annual general meeting on 3 December 1987

seeking endorsement to vary the rates before making its recommendation to the Minister. The motion was passed in accordance with legislative requirements, and particulars of voting were provided to the Minister.

**Long Service Leave (Building and Construction Industry  
(Amendment) Ordinance (No. 2) 1987  
(A.C.T. Ordinance No. 74 of 1987)**

- 5.80 On the issue of the lack of photographic identity cards for inspectors the then Minister for the Arts and Territories, the Hon. G. Punch, M.P., undertook to provide that inspectors be provided with official photographic identity cards.
- 5.81 Section 11 amended section 37 of the Principal Ordinance to reduce the penalty from \$10,000 to \$500 where an employer failed to pay contributions to the long service leave fund. The Explanatory Statement noted that the penalty of \$10,000 was no longer considered appropriate because section 33B of the Interpretation Ordinance 1967<sup>9</sup> provided that a person commits a separate offence for each day that the payment (of relevant contributions) is not made; and an offence against that section now had a civil penalty.
- 5.82 The Committee doubted whether section 33B of the Interpretation Ordinance 1967 would achieve the same effect, as the \$10,000 penalty had been regarded as appropriate since 1981. Subsection 37(1) required periodic notices and payments of contributions be lodged within 15 days of the
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9. Where, by or under a provision of an Ordinance, an act or thing is required to be done within a particular period or before a particular time, unless the contrary intention appears, the obligation to do that act or thing continues, notwithstanding that that period has expired or that time has passed, until that act or thing is done.

expiration of certain periods. Section 33B of the Interpretation Ordinance may merely indicate that on the sixteenth day the obligation to notify or pay is not spent but continues in force. As it currently stands, the penalty for failure to lodge could be \$500 after the first week of delay, the first day of delay or the first hour of delay. Alternatively, on a proper construction of the provisions, the penalty may well be \$500 for each prosecution brought. It would seem that to create a continuing offence which can take advantage of section 33B, a period, such as one day or one week, should be expressly specified as the period, on the recurring expiration of which, the penalty is incurred and reincurred.

- 5.83 There should be an appropriate relationship between the level of the reduced penalty and the duration of the recurring period to encourage payment of the relevant contributions without building-up an unreasonably large penalty out of proportion to the nature of the offence.
- 5.84 The then Minister for the Arts and Territories, the Hon. G. Punch, M.P., undertook to amend the Interpretation Ordinance to reproduce the effect of sub-section 4K(2) as contained in the Crimes Legislation Amendment Act 1987 (No. 120 of 1987).
- 5.85 Its inclusion in the Ordinance would remove any doubt about prosecutions for continuing offences, as it is clear that a separate offence arises on each day on which a person fails to comply with the statutory requirement.

**Meat Inspection (South Australia) Orders  
Meat Inspection Orders No. 2 of 1987**

- 5.86 Subsection 34(4) of the Meat Inspection Act 1983 provided that an Order may apply, adopt or incorporate a provision of a State Act or a Regulation or rule made under such an Act

in force at a particular time or in force from time to time. An Order could also adopt any matter contained in an 'instrument' as in force at the time the Order takes effect. In these Orders, the 'State Act' is expressly defined as the Meat Hygiene Act 1980 of the State (as amended) including regulations and other 'instruments' made pursuant to the State Act.

- 5.87 Incorporation of other instruments as in force 'from time to time' appeared to be at variance with paragraph 37(4)(b) of the empowering Act, and raised the issue of the validity of the Orders.
- 5.88 The Minister for Primary Industries and Energy, the Hon. John Kerin, M.P., undertook to remove the reference to 'instruments'. The definition of 'State Act' would be interpreted by a Court to exclude 'instruments' that are made under the State Act after the entry into force of the Orders.
- 5.89 Subsection 10(a) was ambiguous in that an authorised officer may 'possess an official mark...' Clarification was sought as to whether a marking device rather than the mark itself may be possessed in the sense that an authorised officer may be in possession of or take possession of such a device. The Minister explained that paragraph 10(a) was intended to ensure that adequate safeguards were maintained for both official marks and official marking devices. While in most cases official marking devices would be used to apply an official mark, paragraph 10(a) was intended to cover situations where, for example, official marks applied to cartons may well be an adhesive label and so capable of being possessed.



**Merit Protection (Australian Government Employees) Regulations  
(Amendment)  
(Statutory Rules 1987 No. 330)**

- 5.90 Regulation 31 permitted a Redeployment and Retirement Appeal Committee to make Orders prohibiting or restricting the disclosure of evidence given before it. No sanction for a failure to comply with such an Order could be identified. In matters of law and legal proceedings moral suasion is less certain and less reliable than legal obligation and the absence of sanction was liable to create uncertainty and undermine the Redeployment Committee's role and authority.
- 5.91 The then Minister assisting the Prime Minister for Public Service Matters, the Hon. R. Willis, M.P., advised that there was no provision in the Merit Protection (Australian Government Employees) Act 1984 that allowed the agency to take action where there was a breach of regulation 31, and that there was some doubt as to whether the Act, as it stood, would permit the making of a regulation to provide a sanction for failure to comply with such an Order. He undertook to amend section 81 of the Act to extend its provisions to breaches of Orders made under the Regulations.

**National Health Act 1953.**  
**Section 45D: Standards for Nursing Home Care**

- 5.92 This instrument determined the Standards to be observed in the provision of nursing home care in approved nursing homes.
- 5.93 The Committee's concerns related to whether, under Standard 4, official guidance was given to proprietors as to what would amount to justification for expulsion of a resident; preparation of the reasons for expulsion; what would amount

to 'sufficient warning' prior to expulsion; and other matters including whether avenues of appeal, (internal to the home or external) against such a decision existed.

5.94 The background to the new Standards for nursing homes, and the document 'Living in a Nursing Home - Outcome Standards for Australian Nursing Homes' were provided to the Committee. Standard 4.2 recommended that proprietors draw to the attention of prospective residents the conditions under which they might be asked to leave; that a resident be advised of the reasons for being asked to leave; that sufficient warning be given; and that the resident be advised of avenues of appeal.

5.95 Advice as to what would justify requesting a resident to leave is considered the responsibility of the nursing home staff and management. Should a nursing home fail to meet the Standards, however, action could be taken under section 45E of the National Health Act. Although no avenue for appeal existed against such action, the Minister for Housing and Aged Care, the Hon. P. Staples, M.P., advised an amendment to the Act would prevent any such action being taken prior to the establishment of a Standards Review Panel.

5.96 The Committee remained concerned that reasons be given in writing by proprietors to residents. Personal rights of aged citizens would be better protected if there was a requirement for proprietors to provide to intending residents and their relatives written information on the conditions of their residency.

#### Pharmaceutical Benefits Declaration No. PB2 of 1987

5.97 This Declaration replaced Schedules of Drugs formerly set out in the National Health (Pharmaceutical Benefits) Regulations. Schedule I to the Declaration contained

provisions similar to Schedule 5 in the regulations that permitted certain drugs to be a 'pharmaceutical benefit' only with the authority of the Secretary of the Department. A refusal by the Secretary to exercise his or her discretion and issue an appropriate written authority meant that the drugs in question would not be available at reduced cost. There was no provision for review of the Secretary's decision.

5.98 The Committee noted that the existence of appropriately structured avenues of appeal can serve to underwrite the quality of initial decisions and thus instill public confidence in the competence and professionalism of possibly hard decisions. Review procedures also facilitate the correction of unfair or erroneous decisions in the unlikely event that these occur.

5.99 The advice of the Minister for Veteran's Affairs, the Hon. Ben Humphries, M.P., for and on behalf of the Minister for Community Services and Health, the Hon. Dr Neal Blewett, M.P., was that it was inappropriate to provide avenues of appeal against decisions of the Secretary or his delegate in this case. The Minister explained in detail the procedures for amendments to the Schedule of Pharmaceutical Benefits and the role of the Pharmaceutical Benefits Advisory Committee (PBAC).<sup>10</sup>

#### Public Service Determinations 1987/46 and 1987/59

5.100 Clause 3.4.98(2) of Determination 1987/46 provided that a qualification allowance should not exceed a specified amount 'except with the approval of the Secretary'. There was no indication when such approval might be given.

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10. For details of the Committee's correspondence see Senate, Hansard 15 December 1987 p.3033 ff (w).

5.101 As there were no foreseeable circumstances in which the discretion would be exercised to authorise payment of a sum exceeding the stipulated maximum allowance, the Committee believed the subclause should be amended by deleting 'except with the approval of the Secretary'.

5.102 Determination 1987/59, new paragraph 3.4.103(1)(b) conferred on the Secretary a broad discretion to deem work 'extraordinary'. The phrase, in the context of the Western Australia State award, related to circumstances where an enrolled nurse performed work at a level significantly above the work level of other enrolled nurses and above the general standard required of an enrolled nurse. The Committee considered the paragraph would be amended by substituting for 'extraordinary' expressions reflecting the criteria used.

**Remand Centres (Amendment) Ordinance 1987  
(A.C.T. Ordinance No. 30 of 1987)**

5.103 Before this Ordinance was made, the Remand Centres Ordinance 1976 provided for visits by independent magistrates, appointed by the Chief Magistrate, to receive complaints from persons on remand. This arrangement could theoretically have led to a conflict of duties, and at the request of the Chief Magistrate was replaced by the office of Official Visitor.

5.104 The Ordinance did not provide for the independence, qualifications or tenure of Official Visitors, whose role in relation to remand centres was of considerable significance and sensitivity in the protection of presumptively innocent persons in custody.

5.105 The then Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon. J. Brown, M.P., undertook to amend the Ordinance to provide that appointees not be

Public Servants or correctional service employees but rather legal practitioners, academics or other independent persons; with a minimum term of appointment; and that they could not be removed in the absence of misbehavior or incapacity.

Schools Authority (Amendment) Ordinance 1987  
(A.C.T. Ordinance No. 70 of 1987)

5.106 The Committee was concerned -

- . whether the new section 66 of the Principal Ordinance in the width of protection bestowed by it on certain office holders of the Schools Authority, excluded liability for negligence, and possibly conferred immunity on the Authority;
- . about powers granted to the Minister without express requirement that they be exercised only in writing; and
- . about the difference in the drafting of section 19, and section 35 of the Health Authority (Amendment) (No. 2) Ordinance 1987. Section 19 could give the impression that while employment with the Schools Authority continued, previous terms and conditions were subject to change in a way that could not arise under section 35 of the Health Authority (Amendment) Ordinance.

5.107 The then Minister for the Arts and Territories, the Hon. G. Punch, M.P., advised that the Authority could be sued, but that the Chief Education Officer was protected from action in the same way as an employee.

5.108 The Minister undertook to amend the Ordinance to ensure that the powers would be exercised only in writing, and that section 19 be reworded so that it would be in the same terms as section 35 of the Health Authority (Amendment) Ordinance, making it clear that employees of the restructured Schools Authority would continue to be employed on the same terms and conditions to which they were previously subject.

**Taxation (Administration) Ordinance 1987  
(A.C.T. Ordinance No. 41 of 1987)**

5.109 The Taxation (Administration) Ordinance contained a number of provisions intended to enhance the ability of tax officers to collect tax. In pursuit of that goal, however, provisions were unduly invasive of the citizen's rights and liberties.

5.110 A number of issues were raised -

- . that the annual reports of the Commissioner be tabled in Parliament;
- . that power vested in a tax officer allowing unrestricted access to any documents should be limited to documents relevant to the enforcement of a specific tax law;
- . that certain apparently wide search powers be amended along the lines of section 232 and 236 of the Credit Ordinance 1985 (regarded as providing a suitable standard for the drafting of entry and search provisions);
- . that provisions requiring persons to attend and give evidence on oath before the Commissioner or another person be limited in period, day, time or place, and the qualifications of officers authorised to take evidence be specified;
- . that the decisions made pursuant to sections 26, 32, 34, 38, 43 and 77 be subject to review; and
- . that the lack of clarity in section 56 regarding persons to whom the section applies (passing the responsibility for offences committed by a corporation on to the persons involved in the management of that corporation) be amended to remove the uncertainty that it may apply to persons other than officers of the corporation.

5.111 The then Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon. John Brown, M.P., replied in detail and -

- . agreed to table the annual report in Parliament;
- . explained that section 12 conferred powers on taxation officers to inspect documents 'for the purposes of a tax law'. This required the documents inspected to be relevant to a tax law or the search would be beyond power.
- . considered that the power of entry relating to tax matters was reasonable (and no wider than any other Commonwealth tax legislation), but agreed to some amendment to meet the concerns of the Committee.
- . agreed to amend section 18 so that the time, place, day or period be reasonable; but declined, on the grounds of administrative practicability, to include the qualifications or status of officers authorised to exercise the power.
- . explained why separate or further appeal rights were not required under sections 26, 32, 34, 38 and 43, but undertook to amend section 77 to provide for review of a decision by the Commissioner regarding the status of a person as a member of a business group.
- . declined to amend section 56 on the grounds that the section was based on section 84 of the Taxation (Administration) Act 1953. The liability of persons is the same under both sections, but the burden on the defendant under section 56(3) of the Ordinance was lesser.

**Wool Marketing Regulations  
(Statutory Rules 1987 No. 132)**

- 5.112 The Committee raised a number of concerns about these regulations.

**Reasonable excuse for action**

- 5.113 Obligations were imposed by subregulations 11(1), 22(2) and 24(2), in circumstances where it was possible for persons to be unable to comply for reasons outside their control. The question was whether a defence of reasonable excuse could be provided as in subregulations 11(4) and (5).
- 5.114 The Acting Minister for Primary Industries and Energy, the Hon. Peter Morris, M.P., explained that the usual defences of an honest and reasonable belief in a state of facts, and impossibility of compliance, were available to persons charged with strict liability offences, should the Australian Wool Corporation (AWC) prosecute. He noted that the policy of the AWC was to avoid such action where possible.

**Onus of proof**

- 5.115 Subregulations 11(6) and 21(5) permitted a certificate of the AWC to be evidence that certain information was in the possession of a person, thereby reversing the burden of proof on to the defendant.
- 5.116 The Acting Minister undertook to repeal subregulations 11(6) and 21(5), as powers in other regulations were sufficient for any proceedings for a relevant offence.



**Other issues**

**5.117 Other issues were raised -**

- . that a 'within such period' provision should be qualified by a minimum period, or at least, a reasonable period;
- . the reasons why the register of persons kept under the Wool Tax (Administration) Act 1964 should not be publicly available;
- . the possibility that if, under regulation 20, the principles approved by the Minister and made by regulation pursuant to paragraph 51(3)(c) of the Wool Marketing Act 1987, dealt with more than administrative details, they may be ultra-vires as a subdelegation; and
- . entry onto premises by inspectors without consent or pursuant to a search warrant.

**5.118 The Acting Minister explained -**

- . that subregulation 11(4) would be amended to read 'within such reasonable period as determined by the Corporation'. Where registered persons could not comply with the time limits, the AWC would allow further reasonable time;
- . that the information on the register was provided to the AWC by the Commissioner of Taxation, and regulation 13 provided claimant (woolgrower) access to the AWC;
- . that the 'principles' are in fact the basis on which remuneration costs were calculated, but as the term 'principles' may be misleading, the regulation would be amended e.g. 'formula for determining remuneration costs'; and

- that regulation 23 would be amended to follow the Committee's preference for the form set out in sections 232 and 236 of the A.C.T. Credit Ordinance 1985 regarding entry of inspectors onto premises.

**Workmen's Compensation (Amendment) Ordinance (No. 2) 1987  
(A.C.T Ordinance No. 24 of 1987)**

- 5.119 The Committee sought the advice of the then Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon. John Brown, M.P., on changes made by this Ordinance. A new subsection 16(2B) provided that a registered auditor shall not knowingly supply false information, but appeared not to make the consequential changes to make such an action an offence. The Explanatory Statement stated that the intention was that such conduct would be an offence.
- 5.120 The Minister's explanation that the penalty already provided at the foot of section 16 would apply to a breach of any of the subsections in the section (section 33 of the Interpretation Ordinance 1967) satisfied the Committee's concerns.

## CHAPTER 6

### MINISTERIAL UNDERTAKINGS NOT YET IMPLEMENTED 1987 - 1988

#### THE PROBLEM OF DELAY

- 6.1 Excessive delay in implementing undertakings continues to be a problem. Pertinent points were made in the Eighty-Third Report:

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.<sup>1</sup>

- 6.2 The Committee had previously stated in its Eightieth Report that

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

- 6.3 The whole basis of the parliamentary honour on which the undertaking convention is based is undermined if the implementation of undertakings is not expedited as quickly as possible after a Minister has given his or her word to act. 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.

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1. Eighty-Third Report (April 1988) paragraphs 8.1  
2. Parliamentary Paper No. 241/1986, page 125, para. 5.2

6.4 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 have to consider whether it should refuse to accept any further undertakings regarding future legislation. In this situation an option would be to report its predicament to the Senate and recommend that a bipartisan motion of disallowance be passed in respect of an instrument which contains provisions of concern to the Committee. It would 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.

6.5 In previous Reports, this Chapter has described only undertakings outstanding from previous Reports. This Report changes that by

- . listing those undertakings outstanding from previous reports; and
- . listing those undertakings made during the reporting period of this Report (July 1987 - June 1988) which remain outstanding at the end of the reporting period (June 1988).

LISTED IN THE SEVENTY-NINTH REPORT (APRIL 1986)<sup>3</sup>

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

6.6 This undertaking was reported in detail in the Eighty-Third Report<sup>4</sup> at paragraphs 8.6 - 8.8.

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3. Parliamentary Paper No. 170/86

4. Parliamentary Paper No. 170/88

**LISTED IN THE EIGHTIETH REPORT (OCTOBER 1986)<sup>5</sup>**

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

- 6.7 This undertaking was to provide protective criteria to limit release of confidential information to persons prescribed by regulations; and to specify the conditions under which releases could lawfully occur.

**UNDERTAKINGS OUTSTANDING BUT NOT PREVIOUSLY LISTED IN REPORTS**

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

- 6.8 The then Minister for Veterans' Affairs, Senator the Hon. Arthur Gietzelt informed the Committee that the Repatriation Commission would make arrangements for an immediate internal review of travelling expense decisions and calculations under sub-regulation 9(3). His view was that the existence of certain discretions concerning payments of travelling allowances did not at that time require review by the AAT. The Committee, however, believed that although tightly drawn, sub-regulations 9(5) and (6) provided for wide discretions about which there could be dispute, and accepted the Minister's undertaking that the need for external review be examined after the Regulations have been in operation.

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

- 6.9 The then Minister for Territories, the Hon. Gordon Scholes, M.P., agreed that there should be a right of appeal under section 23 of the Ordinance to the AAT in cases where a registered Optometrist had been reprimanded by the Board.

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5. Parliamentary paper No. 241/1986, paragraphs 4.131-4.136

Following discussions, the ACT Health Authority requested the Attorney-General's Department to include a right of appeal to the AAT under section 23. The Authority also undertook to review the application of subsection 23(4) which the Committee considered too broad; optometrists faced loss or suspension of their licenses for associating with people advertising or canvassing on their behalf.

6.10 The then Minister for the Arts and Territories, the Hon. G. Punch, M.P., informed the Chairman that a further issue had arisen; whether subsection 23(4) was unduly anti-competitive.

6.11 Although the undertaking has not been implemented, the Committee has been assured that the Optometrists Board has adopted a policy of not relying on the subsection for disciplinary action.

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

6.12 Section 57 of the Ordinance, concerning service of notices, did not use the current modern form of drafting, and included the vague and imprecise expression '... a person apparently over the age of 16 years and apparently residing ...' The Committee considered more reliance could be placed on a phrase such as 'who is or is reasonably believed to be.'

6.13 The then Minister for Territories, the Hon. Gordon Scholes, M.P., agreed with the views expressed, but noted that the question of drafting policy was a matter for the Attorney-General (to whom the Committee had also written). The Attorney-General agreed to direct his professional drafters to require the presence of a server's reasonable belief as the test of identity of a proper recipient of a notice or document being served. The Minister then undertook to amend the Ordinance regarding the service of documents.

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

- 6.14 The then Minister for Territories, the Hon. G. Scholes, M.P., undertook to amend the Ordinance progressively to remove or revise outdated provisions which the Committee had identified in certain N.S.W. Acts.

**UNDERTAKINGS GIVEN DURING THE REPORTING PERIOD OF THIS REPORT**

**Environment Protection (Impact of Proposals) Act 1974  
Order under section 6 made on 29 May 1987**

- 6.15 The Minister for the Environment and the Arts, Senator the Hon. G. Richardson, wrote to the Chairman on 18 November 1987 undertaking to meet the Committee's concerns regarding -

- . Ministerial supervision of certain departmental decisions. The Minister undertook to formalise reporting to the Minister on these decisions.
- . differences between an Environment Impact Statement (EIS) and a Public Environment Report (PER). The Minister undertook to develop and publish appropriate guidelines.
- . requirements that various matters be made public but no procedures laid down for how this was to be done. The Minister undertook to amend the Procedures to clarify current practice.
- . an unfettered discretion of the Minister to suppress a draft EIS or PER. The Minister undertook to introduce a formula in the Procedures for exemptions and to publish in the Gazette notices and reasons for the unavailability of the EIS or PER.

- . requirements that reasons for certain decisions be given but no procedures laid down for how this was to be done. The Minister undertook to amend the Procedures to make explicit the means of publicising decisions and the reasons for them.
  
- . a provision that the Minister may direct that discussions with the public be held, but also gave the Minister power to define the public. The Minister undertook to develop appropriate guidelines for a definition of the public. This has been implemented.
  
- . exemptions from the Procedures on certain grounds. The Minister undertook to amend the Procedures to formalise current practices of publishing reasons for exemptions.

**Gaming Machine Ordinance 1987**  
**(A.C.T. Ordinance No. 34 of 1987)**

See paragraphs 4.111, 5.66 - 73

**Children's Services (Amendment) Ordinance (No 2) 1987**  
**(A.C.T Ordinance No. 53 of 1987)**  
**Children's Services Regulations**  
**(A.C.T Regulations 1987 No 6)**

See paragraph 5.34 - 42

**Great Barrier Reef Marine Park Regulations (Amendment)**  
**(Statutory Rules 1987 No. 247)**

See paragraph 4.85 - 86, 4.115

6.16 The Minister for the Arts, Sport, the Environment, Tourism and Territories, Senator the Hon. Graham Richardson,



undertook to amend the Regulations with respect to public notice by written advertisement of proposals which may restrict the use by the public of Marine Parks; and to provide for AAT review of certain decisions.

Health Insurance Act 1973  
Approval under section 23DB(1) : APA/1  
Approval under section 23DB : APP/1  
Determination of Principles under section 23DN(2) : APL/1

See paragraph 5.74 - 76

6.17 The Minister for Community Services and Health, the Hon. Dr. Neal Blewett, M.P., advised that new instruments relating to the approvals of forms of undertakings for 'approved pathology practitioners' and 'approved pathology authorities' had been remade as a result of the concern of the Committee about correct tabling. The Minister also undertook to amend the instruments to include a right of review of a determination of a person as a 'Scientist' or 'Senior Scientist' and to provide photographic identity documents.

Orders under section 92V of the Broadcasting Act 1942 by the Australian Broadcasting Tribunal

6.18 See paragraph 5.22 - 24

Games, Wagers and Betting-Houses (Amendment) Ordinance 1987 (A.C.T. Ordinance No. 59 of 1987)

6.19 See paragraph 4.70

**Public Service Board Determinations 1983/10 and 1984/46**

6.20 The First Assistant Secretary, Co-ordination and Conditions Division, Department of Industrial Relations, wrote to the Chairman on 3 May 1988 advising that Public Service Determination 1988/63 of 3 May 1988 had implemented undertakings to omit certain references in the Determinations to the 'public interest' and to substitute 'the interests of the service' and to provide criteria for relevant factors to be taken into account in determining the interests of the service.

6.21 The use of the expression 'in the public interest' in other areas of legislation was also to be examined with a view to amendment.

**Environment Protection and Management Ordinance 1987  
(Territory of Heard Island and McDonald Islands Ordinance No. 1  
of 1987)**

6.22 See paragraph 5.54 - 62

**Merit Protection (Australian Government Employees) Regulations  
(Amendment)  
(Statutory Rules 1987 No. 330)**

6.23 See paragraph 5.90 - 91

**Long Service Leave (Building and Construction Industry)  
(Amendment) Ordinance (No. 2) 1987  
(A.C.T. Ordinance No. 74 of 1987)**

6.24 See paragraph 5.80 - 85

**Schools Authority (Amendment) Ordinance 1988  
(A.C.T. Ordinance No. 2 of 1988)**

6.25 See paragraph 4.31 - 33

**Housing Assistance Ordinance 1987:  
(A.C.T. Ordinance No 36 of 1987)  
Programs made under section 12**

6.26 See paragraph 4.112, 5.11 - 12

## CHAPTER 7

### MINISTERIAL UNDERTAKINGS IN PROGRESS 1987 - 1988

- 7.1 Ministerial undertakings to be implemented at the next appropriate occasion (for example, in the making of the next amendment) are discussed briefly, with references to relevant detailed discussions at Chapters 4 and 5.

#### Navigation (Orders) Regulations Orders 5 - 12 of 1986

- 7.2 The then Minister for Transport, the Hon. Peter Morris, M.P. undertook to examine the reviewability of administrative discretions under the Orders, and to bring forward appropriate legislative amendments.
- 7.3 This undertaking was implemented in the Transport Legislation Amendment Act 1989.

#### Export Control (Fresh Fruits and Vegetables) Order Export Control Orders No. 9 of 1987

- 7.4 See paragraph 3.12

#### Credit Ordinance 1985 (A.C.T. Ordinance No. 5 of 1985) Credit (Amendment) Ordinance 1987 (A.C.T. Ordinance No. 4 of 1987)

- 7.5 The then Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon. John Brown M.P., undertook that, from 1 January 1988, each instrument tabled would be given a sequential number; and that Explanatory Statements be provided for Notices of Exemption made under the Ordinances.

**Magistrates Court (Civil Jurisdiction) (Solicitors' Costs) Regulations (Amendment)**  
**(A.C.T. Regulations 1987 No 14)**

7.6 See paragraph 4.8

**Declarations under the Nuclear Non-Proliferation (Safeguards) Act 1987**

7.7 See paragraph 3.25

**Defence Determination 1987/70**

7.8 See paragraph 4.11

**Live-stock Slaughter Levy Regulations (Amendment)**  
**(Statutory Rules 1988 No. 20)**  
**Live-stock Export Charge Regulations (Amendment)**  
**(Statutory Rules 1988 No. 21)**

7.9 See also paragraph 5.77 - 79

7.10 The Department of Primary Industries and Energy received advice from the Attorney-General's Department that regulations will recite compliance with any mandatory procedures to be completed prior to their making.

**Determinations under States Grants (Tertiary Education Assistance) legislation**

7.11 See paragraph 3.11

**Family Court of Australia (Delegation of Powers) Rules (Amendment)**  
**(Statutory Rules 1988 No. 10)**

7.12 See paragraph 3.10

**Proclamations 134A and 135A made pursuant to section 13 of the Quarantine Act 1908  
Quarantine (Animals) Regulations (Amendment)  
(Statutory Rules 1987 No. 303)**

7.13 See also paragraph 4.35 - 39

7.14 The Minister for Resources, Senator the Hon. Peter Cook, undertook to amend the Act to meet the concerns of the Committee regarding tabling and disallowance of Proclamations. In the meantime Proclamations would be sent to the Committee for comment, and any comments of the Committee would be addressed in the same way as other delegated legislation.

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

7.15 This undertaking was implemented by section 9 of the Transport Legislation Amendment Act 1988 (No. 57 of 1988), which provided a right of review to the AAT for decisions in respect of remissions or refunds of charges and penalties made by the Minister, Secretary or an officer of the Department authorised by the Secretary under section 5A of the Air Navigation (Charges) Act 1952, as prescribed in the Air Navigation (Charges) Regulations (Amendment), Statutory Rules 1986 No. 169.

7.16 Sections 5J and 5K of the Air Navigation (Charges) Act were, however, inadvertently repealed by section 99 of the Civil Aviation Act 1988, leaving decisions made by regulation pursuant to Section 5A again without a right of review. It is understood this is being addressed.

## CHAPTER 8

### MINISTERIAL UNDERTAKINGS IMPLEMENTED 1987 - 1988

8.1 The Ministerial undertakings described below arise from the Committee's scrutiny of legislation discussed in previous Reports and from undertakings given during the period of this Report that were implemented within this period. References are also given to the relevant paragraphs where the delegated legislation has been considered illustrative of the application of the Committee's Principles (Chapter 4) or included in Chapter 5 as a case study.

#### PREVIOUS REPORTS

LISTED IN EIGHTIETH REPORT (OCTOBER 1986)<sup>1</sup>

LISTED IN EIGHTY-THIRD REPORT (APRIL 1988)

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

8.2 The then Minister for Health undertook to amend the Regulations to provide for notification and Administrative Appeal Tribunal review of certain decisions.

This undertaking was implemented by the Meat (Amendment) Regulations, A.C.T. Regulations 1988 No. 4 of 10 April 1988.

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

8.3 The then Minister for Health undertook to amend the Ordinance to provide for proper identification for

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1. Parliamentary Paper No. 241/1986

Inspectors and for notification and Administrative Appeal Tribunal review of certain decisions.

- 8.4 This undertaking was implemented by the Meat (Amendment) Ordinance 1988, A.C.T. Ordinance No. 19 of 1988 of 28 April 1988.

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

- 8.5 The then Minister for the Arts and Territories, the Hon. Gary Punch, M.P., undertook to include a 'sunset clause' in the Ordinance to ensure that it was remade and consequently re-examined in the Parliament.
- 8.6 Following further correspondence the Committee agreed to release the Minister from the undertaking to include the 'sunset clause'. The Chairman advised the Minister, however, that a related undertaking should be honoured: the periodic (i.e. at least every 12 months) tabling of information of legal compensation and medical developments regarding AIDS. The Committee would be happy to continue to be the vehicle for such tabling.

**UNDERTAKINGS IMPLEMENTED BETWEEN 1 JULY 1987 - 30 JUNE 1988**

**Classification of Publications Ordinance 1983**  
(A.C.T. Ordinance No. 59 of 1983)

- 8.7 Section 56(1) of the Ordinance provided that the Attorney-General or the Minister may exempt a person or body from the provisions of the Ordinance by notice in writing. The Committee raised concerns about a Minister's power to grant an exemption from a law without Parliamentary scrutiny.



8.8 The Classification of Publications (Amendment) Ordinance (No. 2) 1988 (A.C.T Ordinance No. 35 of 1988) made on 17 June 1988, implemented an undertaking to provide that exemptions may only be made by Regulation.

**Air Navigation Regulations (Amendment) 1986**  
(Statutory Rules 1986 No. 141)

8.9 The then Minister for Aviation, the Hon. Peter Morris, M.P., undertook to provide a right of appeal to the Administrative Appeals Tribunal in respect of a particular decision.

8.10 Undertaking implemented by the Civil Aviation Act 1988 (No. 63 of 1988).

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

8.11 An undertaking to provide for AAT review, given by the Minister for Primary Industries and Energy, the Hon. John Kerin M.P., was implemented by the Australian Horticultural Corporation (Apple and Pear Export Control) Regulations, Statutory Rules 1988 No. 187 (25 July 1988).

**Northern Prawn Fishery (Special Provisions) Management Plan**  
**Section 7B(1) of the Fisheries Act 1952**  
**Plan of Management No. 12**

8.12 The Minister for Primary Industries and Energy, the Hon. John Kerin, M.P., undertook to amend the Plan to meet the concerns of the Committee with respect to -

- . unclear drafting, which did not make certain what permissible combinations of action may be taken;
- . an ambiguity in a reference to another provision of the instrument; and
- . an unintended unfettered discretion where the intention was to provide an objective obligation.

The undertaking was implemented by Plan of Management  
No. 16 (11 April 1988)

**Meat Inspection (South Australia) Orders  
Meat Inspection Orders No. 2 of 1987**

8.13 See paragraphs 5.86 - 89

8.14 Undertaking implemented by Meat Inspection Orders No. 4 of  
1988.

**Co-operative Societies (Amendment) Ordinance (No. 3) 1987  
(A.C.T Ordinance No. 42 of 1987)**

8.15 See paragraphs 4.124 - 125

8.16 The then Minister for the Arts, Sport, the Environment,  
Tourism and Territories, the Hon. John Brown M.P., undertook  
to amend the Ordinance to provide for AAT review of  
discretions.

8.17 Undertaking implemented by the Co-operative Societies  
(Amendment) Ordinance 1988, A.C.T. Ordinance No. 40 of 1988  
(30 June 1988).

**Australian Citizenship Regulations (Amendment)  
(Statutory Rules 1987 Nos. 87 and 88)**

8.18 The then Minister for Immigration, Local Government and  
Ethnic Affairs, the Hon. M. Young M.P., undertook to amend  
the Regulations to provide formal review procedures for  
Australian citizens whose application for duplicates of  
certain citizenship documents could be refused by authorised  
officers exercising discretionary powers.

8.19 Undertaking implemented by Australian Citizenship  
Regulations (Amendment) Statutory Rules 1988 No. 325 (24  
November 1988).

**Public Service Board Determination 1984/19**

8.20 The First Assistant Secretary, Pay and Classification Division, Department of Industrial Relations, wrote to the Chairman on 25 November 1987 undertaking to amend the Determination to correct a typographical error, to clarify drafting, to provide objective criteria and to recognise the practical application of a State award.

8.21 Undertakings implemented by Public Service Determination 1988/31 (1 March 1988).

**Bounty (Ships) (Reservation of Bounty) Regulations (Amendment)  
Bounty (Ship Repair) (Reservation of Bounty) Regulations  
Bounty (Ship Repair) (Registration) Regulations  
(Statutory Rules 1987 No. 53, No. 116 and No. 117)**

8.22 See paragraphs 4.126 - 130

8.23 Undertakings implemented by Statutory Rules 1988 Nos.174-176, (30 June 1988).

**Wool Marketing Regulations  
(Statutory Rules 1987 No. 132)**

8.24 See paragraphs 5.112 - 118

8.25 Undertakings implemented by the Wool Marketing Regulations (Amendment), Statutory Rules 1988 No. 115 (3 June 1988).

**Payroll Tax Ordinance 1987  
(A.C.T. Ordinance No. 40 of 1987)**

8.26 See 4.132.

8.27 Undertaking implemented by the Payroll Tax (Amendment) Ordinance 1988, A.C.T. Ordinance No. 32 of 1988 (30 June 1988).

**Navigation Orders Regulations  
Order No. 8 of 1987  
Marine Orders, Part 2 (Fees)**

8.28 See paragraphs 4.46 - 47

8.29 Undertaking implemented by Order No. 7 of 1988.

**Meat Inspection (Fees) Orders (Amendment)  
Meat Inspection Orders No. 5 of 1987**

8.30 See paragraphs 4.120 - 121

8.31 Undertaking implemented by Meat Inspection Orders No. 3 of 1988.

**Business Franchise (Tobacco and Petroleum Products) (Amendment)  
Ordinance (No. 2) 1987  
(A.C.T. Ordinance No. 58 of 1987)**

8.32 See paragraph 4.110

8.33 Undertaking implemented by the Business Franchise (Tobacco and Petroleum Products) (Amendment) Ordinance 1988, A.C.T. Ordinance No. 37 of 1988 (30 June 1988).

**Defence (Public Areas) By-laws (Amendment)  
(Statutory Rules 1987 No. 238)**

8.34 See paragraphs 4.80 - 81

8.35 Undertaking implemented by Defence (Public Areas) By-laws (Amendment), Statutory Rules 1988 No. 9 (19 January 1988).

**Commonwealth Teaching Service Determination 1987/3**

8.36 The Acting Assistant Secretary of the Legislation Branch of the Department of Industrial Relations wrote to the Chairman on 8 March 1988 advising that the comments of the Committee with respect to Commonwealth Teaching Service Determination 1987/3 had been accepted and the errors corrected by Commonwealth Teaching Service Determination 1988/1.

**Public Service Board Determination 1987/75**

8.37 The Acting Assistant Secretary of the Legislation Branch of the Department of Industrial Relations wrote to the Chairman on 8 March 1988 undertaking to amend the Determination to correct a drafting oversight. This undertaking was implemented.

**Customs (Prohibited Exports) Regulations (Amendment)  
(Statutory Rules 1987 Nos. 317 and 319)**

8.38 See paragraphs 5.43 - 46

8.39 Undertakings implemented by Customs (Prohibited Exports) Regulations (Amendment) (Statutory Rules 1988 No. 178) (30 June 1988).

**Telecommunications (General) By-laws Amendment No. 50**

8.40 See paragraphs 4.100 - 103

8.41 Undertakings implemented by Telecommunications (General) By-laws Amendment No. 51 (22 June 1988).

**Public Service Determination 1988/6**

8.42 The Secretary of the Department of Industrial Relations wrote to the Chairman on 13 April 1988 undertaking to amend the Determination to correct a drafting error. This undertaking was implemented.

**Canberra Institute of the Arts Ordinance 1988  
(A.C.T. Ordinance No. 1 of 1988)**

8.43 See paragraphs 5.30 - 33

8.44 Undertakings implemented by the Canberra Institute of the Arts (Amendment) Ordinance 1988, A.C.T. Ordinance No. 38 of 1988 (30 June 1988).

**Agents (Amendment) Ordinance 1988  
(A.C.T. Ordinance No. 5 of 1988)**

8.45 See paragraphs 4.95 - 96

8.46 Undertaking implemented by the Agents (Amendment) Ordinance (No. 2) 1988, A.C.T. Ordinance No. 47 of 1988 (25 July 1988).

**Defence Determinations Nos. 6 and 10 of 1988**

8.47 See paragraphs 5.49 - 53

8.48 Undertaking implemented by Defence Determination No. 24 of 1988 (8 June 1988).

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

8.49 The then Minister for Territories, the Hon. G. Scholes, M.P., undertook on 11 May 1987 to amend the Ordinance to provide for tabling and disallowance of ministerial guidelines.

8.50 This undertaking was implemented by the Lands (Amendment) Ordinance 1988, Christmas Island Ordinance No. 2 of 1988 (25 May 1988).

**Meat Inspection (Victoria) Orders  
Export Control Orders No. 1 of 1988**

8.51 See paragraph 4.2

8.52 An undertaking to provide certain review rights by the Secretary and then by the AAT was implemented by the Meat Inspection Orders No. 2 of 1988 (30 March 1988).

APPENDIX 1

**CLASSIFICATION OF LEGISLATIVE INSTRUMENTS  
UNDER THE HEADING 'OTHER' IN PARAGRAPH 1.7**

Remuneration Tribunal Determinations	9
Commonwealth Teaching Service Determinations	4
Order under <u>Environment Protection (Impact of Proposals) Act 1974</u>	1
Order under <u>Broadcasting Act 1942</u>	1
Amendments of Schedules of Schemes under <u>States Grants (Petroleum Products) Act 1965</u>	4
Petroleum Products Freight Subsidy Scheme Amendments	4
Determinations of Fees under <u>Quarantine Act 1908</u>	4
Determinations under <u>Liquified Petroleum Gas (Grants) Act 1980</u>	2
Declaration under <u>Copyright Act 1968</u>	1
Certificate and determination under <u>Aged and Disabled Persons Homes Act 1954</u>	2
Notices under Nursing Homes Assistance (1974 and 1986) Acts	3
Principles, determinations, approvals under <u>Disability Service Act 1986</u>	3
Variation in the Plan of Management of the City of Canberra	1

States Grants Petroleum Products Scheme	2
Declarations under <u>Excise Act 1901</u>	2
Approvals, variations and directions under <u>States Grants (Tertiary Education Assistance) Act 1984</u>	9
Horticultural Research and Development Orders	2
Australian Horticultural Corporation Orders	2
Horticultural Policy Council Orders	2
Remuneration Tribunal Review	1
A.C.T. Housing Assistance Ordinance Programmes	4
Declaration under <u>Wildlife Protection (Regulation) of Exports and Imports Act 1982</u>	1
Declaration under the <u>Crimes (Foreign Inursions) and Recruitment Act 1978</u>	1
Australian National Railways Commission General By-laws	1
Code of Practice under <u>Environment Protection (Nuclear Codes) Act 1978</u>	1
Rifle Clubs (Firearms) Orders	2
Proclamations made under <u>World Heritage Properties Conservation Act 1983</u>	2
Bass Strait Oil Declaration	1
Revocation Orders under <u>Foreign Proceedings (Excess of Jurisdiction) Act 1984</u>	2
Order under Section 19BA of <u>Acts Interpretation Act 1901</u>	1



## APPENDIX 2

This statement was referred to by the Chairman of the Committee, Senator Collins, in his last statement in the Provisional Parliament House on 2 June 1988.<sup>1</sup> It summarises in essence, the development and evolution of the Committee's bipartisan approach to issues of personal rights and liberties. The Statement is reproduced in full as it was not incorporated in Hansard.

### Statement

As all Senators appreciate, this, the last week of parliamentary activity in the Provisional Parliament House, is a very significant week in the history of the Australian Parliament and in the history of the various parts of this institution. One of those parts, for which I have some responsibility, is the Regulations and Ordinances Committee. The Committee has existed in this Senate, and operated from this building, for just over 56 years. Because of the role it plays in scrutinising the laws that are made under delegation by Governments rather than Parliaments, the Committee has often rightly been described as the most important Standing Committee in the Parliament. If this Committee is important, and if it has made a contribution to the protection of personal rights and liberties and the safeguarding of parliamentary rights and proprieties, it is because of the work and commitment of the Senators who over the past half century have been members of it and have combined in bipartisan unity to give it a parliamentary personality and power that governments and their officials can ignore only at their own peril.

I want to pay a tribute both to those men and women who in the late 1920's conceived the idea of establishing a delegated legislative scrutiny committee, at that time only the second such committee

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1. Senate Hansard 2 June 1988 p.3538

established in the parliamentary world; and to their proteges who between 1932 and 1988 have served on the Committee risking party political criticism and suspicion in a cause that remains as important and as necessary today as ever it has been.

In 1930 Senator Sir Hal Colbatch signed the report of the Senate Committee that recommended that a scrutiny committee for delegated legislation be established. Anyone reading the evidence that was given to that Committee by the distinguished academics and politicians of that era, will be struck by two things. Firstly, the unanimity of concern about the volume, the complexity and the sheer danger to freedom and liberty of unsupervised Executive law-making. And secondly, the unanimity of belief that the more reflective Senate was an ideal House for such dangers to be challenged and removed without the elected Government of the day having any genuine reason to feel that its existence was threatened or destabilised. From this consensus there developed the charter and modus operandi of the Committee, the originality of which reflects the genius of parliamentarians who view politics as the art of the possible, an art wherein too little compromise will fail to produce results and too much will fail to produce justice and equity. This genius was reflected in the Committee's bipartisan commitment to certain principles of scrutiny which, since 1932, have been the Committee's terms of reference and which focus on questions of personal liberty, parliamentary propriety and legal principle. From this grew the Committee's avowed refusal to criticise Government policy, setting that matter to one side while issues of general principle affecting the rights of people and Parliament are addressed.

The history of the Committee almost right up to the present day, has been a history of a struggle for power in which successive generations of parliamentarians have sought to control and supervise successive Executive Governments whose enthusiasm in implementing policies in delegated legislation has sometimes caused them to overlook parliamentary proprieties or the personal rights and liberties of individuals.

The Committee was first appointed on St. Patrick's Day, 1932. The first chairman was Senator Colbatch. At his first meeting with the Committee it was resolved to ask all Ministers to supply Parliament with Explanatory Statements for their Regulations. Anyone familiar with the Committee's reports since then will see how the Committee has regularly repeated that request as new kinds of delegated legislation have evolved to take their place alongside Regulations.

Senator Colbatch's First Report (Reports the First to the Twenty-sixth are consolidated in P.P.188/69) dealt with an issue as topical today as it was serious then - film censorship. The Committee rejected Regulations relating to the censorship of films, giving reasons whose tenor would be echoed and re-echoed in reports for the next half-a-century. The new Regulations abolished an appeal board and vested its powers in a single censor. The Committee reported that 'the determination of public policy on a matter of such moment should not be accomplished by departmental legislation'.

In the Second Report (1933) the Committee's second Chairman, Senator Brennan, complained that by December 1933 no fewer than 130 Regulations had been gazetted. (The Committee is now currently examining over 800 legislative instruments per year.) Senator Brennan called for a reform in the standards of presentation of delegated legislation, once again a theme repeated in later Committee reports. He asked for periodic consolidations of Regulations and the inclusion in amending Regulations of notes detailing all previous amendments. He also sharply criticised the practice of making peace-meal amendments to single provisions instead of reprinting in full each amended provision in its amended form. Although drafting standards have improved, to this day infrequent consolidation, missing legislative histories and peace-meal amendments of provisions remain the bane, not only of legislative scrutineers in Parliament, but of the long suffering general public, legal advisers and business users of subordinate legislation.

In 1935 in the Committee's Third Report, the Committee's fourth Chairman, Senator Duncan-Hughes, criticised the use of certain retrospective Regulations which were probably invalid but which the Government of the day would not repeal, leaving it either to the Senate to disallow them or to the Courts to rule on them if the case was ever presented. The Committee also objected to certain Regulations which reversed the onus of proof in certain criminal proceedings.

In 1938, the Fourth Report, issued by the Committee's fifth Chairman, Senator McLeay, set out the Principles of Scrutiny which the Committee applied - the same principles that had been recommended by the Senate Committee in 1930 and which, with only slight amendments, are still in force today. These Principles in general terms are as follows - Is delegated legislation in accordance with the statute? Does it trespass unduly on personal rights and liberties? Does it unduly make rights and liberties subject to administrative and not judicial decisions? Does it amount to substantive legislation?

The Committee had been in existence for only 6 years yet it felt obliged to report that, in spite of its efforts to make reasonable recommendations, and although 'wisely made and rightly regarded its reports ought to be of assistance in the making of effective legislation', still 'some of its few critical recommendations have apparently been regarded by the Executive as hostile'. The blow-torch was being applied behind the scenes to Senators whose interest was nothing more conspiratorial than the protection of personal and parliamentary rights.

By the time of its Fifth Report in 1942, the Committee under its ninth Chairman, Senator Spicer, had met its first major crisis in addressing the problem of scrutinising literally thousands of instruments made under the war-time National Security Act. Almost by definition these instruments infringed the Committee's Principles. This crisis precipitated two developments which showed both the independence and the pragmatism for which the Committee has become renowned. Firstly, the Committee sought funds to retain an independent lawyer to advise it in its scrutiny of delegated

legislation. When the Government offered the services of a legal officer from the Attorney-General's Department, the Committee declined arguing that its independence from Government was essential. Secondly, the Committee reported that the unique nature of subordinate legislation made under the National Security Act required the scrutiny of a joint parliamentary committee. In the eventuality a non-parliamentary Regulations Advisory Committee was established by the Attorney-General.

In 1947, in the Committee's Sixth Report, the Committee's eleventh Chairman, Senator Nash, reported that in 1945 the Committee had secured the services of an independent legal adviser (ex-Senator Spicer). The Committee's modus operandi had now assumed its familiar pattern - the examination of instruments in the light of the legal adviser's comments, followed by correspondence to Ministers seeking explanations of, or amendments to, particular laws. Depressingly, the Committee began to report ministerial undertakings it had received but which had not been implemented, a serious and frustrating problem that persists to this day and which can cause serious repercussions for the Ministers whose officials allow this happen.

In 1949, in the Seventh Report, the Committee's acting Chairman, Senator Cooke, drew attention to the need for all Territories legislation to be subject to a uniform statutory disallowance scheme to protect the citizens of the Territories from abuse of Executive power.

In the Committee's Eighth Report in 1952, the twelfth Chairman, Senator Tate, for the first time challenged Regulations which would have empowered the making of subdelegated legislation in the form of ministerial determinations that would not be subject to tabling and disallowance in Parliament. He thereby set in motion the long and arduous process, still unfinished, to make every legislative and quasi-legislative instrument of the Executive, subject to parliamentary control.

This theme was continued in the Committee's Ninth Report in 1954. This report also signalled the opening of a remarkable era in the history of the Committee. Senator Ian Wood had become the Committee's thirteenth Chairman, a position he was to occupy continuously for the next 20 years until 1973.

In the Tenth Report, in 1956, Senator Wood included the first transcript of the Committee's hearing of evidence from public servants in connection with Air Force Regulations which the Committee forthrightly criticised as ultra vires and too substantive to be in subordinate form because they allowed unlimited salary deductions without rights of appeal or rights to be heard.

In its landmark Eleventh Report, in 1957, the Committee protested that certain Regulations, which introduced an import licencing scheme, served to 'deny every individual in the Australian import trade any right of access to the courts to adjudicate complaints alleging discrimination, refusal to consider applications, unjust treatment or delays - all of which could ruin a business.' In language that became quintessentially that of Senator Wood, the Report noted that 'the Committee is not concerned with Government policy sought to be achieved by the Regulations and it is important to note that this immunity of the Committee from responsibility for Government policy imposes on the Committee an impartial duty to determine whether Regulations conflict or comply with [its Principles of scrutiny] ...whether the importance of the Regulations to Government policy be great or small'. The Report went on to advise that 'the Senate ought not to permit a law of such a character to be made by the Executive. The result would be, if not a "new despotism"- yet a despotism not made any better because we have become somewhat cynical of it'. As a result of the Committee's vocal opposition to the Regulations and what the Canberra Times described as 'a day of hard bargaining' and 'a near-midnight conference' (22 May 1957 page 1), the Government undertook to establish special advisory boards in each State to hear appeals by importers against departmental decisions and thereby seek to remove some of the risk of hardship and complaint. This 1957 Report opened a debate about merits review of important administrative discretionary decisions which only began to close in

1975 with the establishment of the Administrative Appeals Tribunal. In the Committee's Thirteenth, Fifteenth, Sixteenth and Eighteenth Reports (1957, 1959, 1960 and 1962) Senator Wood again focused on the need for some effective mechanism to challenge the merits of administrative discretionary powers to give or refuse meat trading permits, export licences and building licences that affected the right to earn a livelihood.

In its Nineteenth Report, in 1964, Senator Wood's Committee for the first time touched on the question of the need to protect personal privacy when it requested that certain regulations be amended to restrict an official's power to demand personal information. Also, for the first time, the Committee criticised an instrument which was intended to have merely temporary existence and effect but which did not contain any sunset clause to guarantee that intention.

In its Twentieth Report (1965), the Committee, under Senator Wood, called for the amendment of delegated legislation which gave an official power to order the detention for 12 months of a person suffering from tuberculosis. Although there was a right to apply to a magistrate for a review of the order, the official was granted immunity from any action for unlawful detention - the Governor-General being granted a discretion to award a detainee 'reasonable compensation'. The Committee contended that no one officer should be capable of condemning a person to 12 months detention. Removal of a right to legal redress and a substitution of the Governor-General's award, in Senator Wood's memorable phrase, 're-echoed the idea that the divine decisions of kings (or their representatives) are proper alternatives to judicial decisions of independent courts'.

In its Twenty-first and Twenty-second Reports in 1965 and 1967, Senator Wood and the Committee again criticised the use of uncontrolled ministerial discretions, in these instances affecting planning appeals and land-use rights.

In 1968 and 1972 the Committee's Twenty-fifth and Forty-second Reports (P.P. 217/72) set down rules for the scrutiny of retrospective instruments which are still applied by the Committee today. They provided in particular, that where retrospectivity in the payment of monies exceeded two years the Committee would automatically report to the Senate unless there was some quite exceptional justification for the retrospectivity. In addition, the Committee initiated the practice of always obtaining detailed ministerial explanations of any retrospectivity of more than a few months.

The Committee in its Twenty-sixth, Twenty-ninth, Thirtieth, Thirty-second and Thirty-third Reports in 1969 and 1970 (P.P. 49/70, 50/70, 81/70, 130/70) again reiterated its serious concerns about the absence of criteria for official decision-making and the lack of any suitable redress for the misuse of discretionary administrative powers in the hands of officials. In calling particularly for express objective criteria for decision-making in the Thirty-second Report, (P.P. 81/70) Senator Wood advised that 'reliance upon a Minister or other official acting 'reasonably or fairly' is not a sufficient safeguard.'

In 1970, the Committee's Thirty-fourth Report (P.P. 160/70) challenged Bankruptcy Rules which, in permitting the Court to amend an information that failed to disclose any offence or was otherwise defective, omitted reference to any limiting words, such as 'unless, having regard to the merits of the case, the required amendment cannot be made without injustice.'

In 1971 the Committee's Thirty-sixth (P.P. 121/71) Report resulted in disallowance of the A.C.T. Evidence Ordinance because its highly significant subject matter ought more properly to have been introduced by a Bill before the Parliament.

The Thirty-seventh Report (P.P. 143/71) records the Committee's first meeting outside the Provisional Parliament House. The Committee visited Norfolk Island in the context of its continuing scrutiny of Norfolk Island Ordinances and resolved, after



consultations with Island representatives, that scrutiny of Ordinances should take account of the desire of the descendants of the Pitcairn Islanders to preserve their environment, history, culture and traditions.

The Committee's Thirty-eighth Report (P.P. 100/71) again criticised failures to provide objective criteria for decisions and unlimited, unreviewable discretions including the power of a Minister, in his unfettered discretion, to refer only some and not all cases of claimed conscientious objection to a court.

In the Thirty-ninth Report (P.P. 24/72), Senator Wood clarified the Committee's interpretation of its first Principle (Is the delegated legislation in accordance with the Statute?) when he said '... the Committee has always interpreted the Principle mentioned above as expressing something wider than legal validity. A regulation may be validly made under the Statute but, notwithstanding its lawfulness, the Regulation may be regarded as an "unusual or unexpected use of the powers conferred by the Statute" ...and such Regulation may thereby attract the Committee's scrutiny.'

In its Forty-third Report (P.P. 220/72), the Committee set out for the first time a detailed description of how it operated in practice, describing its procedure and the way it had applied its Principles.

Following the change of government in 1972, Senator Devitt, became the Committee's fourteenth Chairman and in the Forty-fourth Report (P.P. 40/73), criticised the failure, after a delay of four years, to proclaim an Act which had in fact repealed an earlier Act under which Regulations were still lawfully being made.

In the Forty-sixth Report (P.P. 238/73), Senator Devitt recommended that an A.C.T. Ordinance be disallowed because it gave an official an unacceptably wide and unfettered discretion to prohibit the sale of the goodwill of a business.

In the Forty-seventh Report (P.P. 290/73), Senator Devitt reported on harsh penalties, inappropriate enter and search powers, too wide a definition 'good faith' conferring immunity on officials, and Regulations which inappropriately authorised delegation of ministerial powers to unspecified officials. The Committee still has to battle against this latter tendency, which for all the convenience it has for the Executive, leaves Parliament wondering who is actually exercising ministerial powers. The Committee also persuaded a Minister to examine wide and unreviewable discretionary powers in the context of the then Government's consideration of an Administrative Review Tribunal. Between August 1971 and October 1973 four official reports were published on proposals for review of the merits and legality of discretionary administrative decisions. Although frequently overlooked by legal historians, the Reports of the Regulations and Ordinances Committee, in particular those issued by Senator Wood, were fundamental in creating a climate of opinion in the Parliament which favoured and sought the creation of proper avenues of appeal against the merits of bureaucratic discretions.

In the Committee's Fiftieth Report (P.P. 271/74), Senator Devitt pointed out that the Committee's practice of accepting undertakings from Ministers to amend offending Regulations did not, in the Committee's view, compromise its independence. Once again, in examining particular Regulations, the issue of how best to provide an effective avenue of appeal against discretionary administrative decisions was to the fore in the Committee's thinking. The Committee also highlighted and sought to limit the novel offence of 'being in possession of seaweed in Jervis Bay'. Delegation of ministerial powers to unspecified officials caused continuing serious concern and was referred to again in this report and in the Committee's Fifty-seventh Report (P.P. 353/76). Also in the Fiftieth Report the practice commenced of the Chairman making thoughtful statements and offering reflective analyses of the process and effects of delegated law-making and parliamentary control of it. In an incorporated paper, Senator Devitt pointed to the need for bipartisan parliamentary accountability of those aspects of Executive law-making which impinged on personal rights. The Senator estimated that, at that time, some 20% of all

instruments scrutinised were the subject of special inquiry by the Committee. A view of the Committee's impact was revealed in this assessment by Senator Devitt who wrote 'the Committee has had a very large impact upon the quality and content of delegated legislation made by the Australian Government over the years. If it had not been for the scrutiny of the Committee, a large number of provisions infringing individual rights and liberties would have accumulated in the Federal Law of Australia. Complaints are often heard from civil liberties organisations that established rights and liberties are whittled away gradually by statutory or subordinate provisions. The Committee has largely prevented this from being done by delegated legislation in the federal sphere in Australia.' Senator Devitt was astute enough to point to remarks made by Senator Durack who had drawn attention to the fact that the Committee's work is both preventive and curative. Referring to this normative effect of the scrutiny role, Senator Devitt stated 'Departments responsible for making Regulations and Ordinances are known to be acutely conscious of the Committee's principles and standards when formulating legislation and in consequence have been at pains to ensure that such subordinate legislation is of a nature and quality designed to meet the high standards expected by the Committee'.

In its Fifty-first Report (P.P. 4/76) the Committee objected to the use of provisions which conferred on certain officials a wide immunity from civil action for damage or injury, a practice that was regarded as 'not in accordance with accepted standards... [and] an undesirable type of provision especially in delegated legislation...'

In its Fifty-third Report (P.P. 63/76), Senator Wood, having resumed the chairmanship, the Committee recommended the disallowance of an Ordinance dealing with the law of contract because it contained substantive and novel provisions that invaded the rights of citizens.

In its Fifty-sixth Report (P.P. 277/76), Senator Wood roundly criticised the use of extensive retrospectivity in delegated legislation made by various Departments, noting that 'the Committee

considers that the retrospectivity of all of [the] Regulations was due to inefficiency on the part of the responsible Departments'. However, the Committee decided 'not to add to the confusion already existing by recommending disallowance of any of the Regulations concerned'.

In its Fifty-seventh Report (P.P. 353/76), the Committee argued that an obligation to keep records should be limited to a specified time. The Committee also persuaded the Telecommunications Commission to amend a By-law which made it an offence to tell a lie in the course of a telephone conversation, a provision that was useful only to those who were listening in when perhaps they should not have been. The sobering quality of the word 'reasonable' appearing as a prefix to limit certain official powers was also favourably averted to by the Committee. The imposition of criminal penalties for lease infringements in the A.C.T. was also viewed as an unacceptable inroad on the rights and liberties of lessees.

In the Committee's Fifty-eighth Report (P.P. 215/77), Senator Wood and the Committee issued a rebuke and a warning to Ministers who had given undertakings to the Committee to amend delegated legislation which months later had not been amended. The Committee stated that '... in the future... it will accept undertakings by Ministers only if a firm assurance is given that the amendments promised will be made with reasonable promptness. If this condition is not met a report will be made to the Senate and it will then be the responsibility of the appropriate Minister in the Senate to explain the matter to the Senate's satisfaction'.

In its Fifty-ninth Report (P.P. 233/77) the Committee reported that the Prime Minister had given it an assurance that Regulations, which had the effect of excluding various statutory authorities and government companies from the jurisdiction of the Ombudsman, would be reviewed by the newly established Administrative Review Council. The Committee argued that to restrict unduly the rights of the Ombudsman to investigate, was to restrict unduly the rights of the citizen to redress for maladministration. The Committee also sought to have changed provisions which, by obliging a person to supply an official with information and documents, in effect

removed the privilege against self-incrimination, what the Committee described as the 'long established right of a person not to be compelled to be a witness against himself'. The provision was changed so that information compelled under it could not be used except in proceedings for refusal to comply with the information request. The conferral on officials of too wide an immunity from civil suit for their actions was again challenged.

In its Sixty-first Report (P.P. 18/78) Senator Wood's last report after almost thirty years in the Senate the Committee drew attention to the Regulations which indirectly had the effect of applying to members of the Remuneration Tribunal the terms of the Tribunal's own Determination. The Committee considered that in thus setting their own remuneration, the Tribunal ran the risk of losing its credibility. The Committee recommended that a statute should determine the entitlements of members of the Tribunal for the period of their office.

The Committee's fifteenth Chairman was Senator Missen, who issued his first report in 1978 (Sixty-second Report, P.P. 203/78). This report again severely criticised Ministers for not carrying out their promises to the Committee to amend delegated legislation which trespassed on the rights of individuals. Senator Missen went so far as to warn Ministers that the time was coming when ministerial undertakings would no longer be acceptable to the Committee as a means of protecting rights and that the disallowance of offending instruments would be looked upon as the real remedy. Senator Missen also reminded Senators that the right to examine the regulation-making clauses of Bills had been claimed by the Committee but not properly resolved. He wrote that 'this was a matter which had been intended to be referred to the Committee in 1932, but which was omitted from its terms of reference, apparently due to a mere oversight. In the debate on the Fifteenth Report all Senators who spoke other than Ministers, supported the Committee's view that it ought to examine the regulation-making clauses of Bills in the terms of that report, but there was no formal expression of the Senate's opinion. Since then the Committee has occasionally commented in its reports on regulation-making provisions in Bills or Acts but the matter has not been formally

resolved. At present the Secretary to the Committee looks at the regulation-making clauses in Bills to see whether there is anything that ought to be drawn to the attention of the Committee. For the last few years the Secretary has also been looking at Bills to see whether they empower the making of instruments which are legislative in character and which ought to be subject to disallowance. The Committee considers that these two tasks ought to be formally undertaken...'. Senator Missen also noted that the Senate Standing Committee on Constitutional and Legal Affairs was enquiring into this issue. From these two developments eventually emerged the Senate's Standing Committee for the Scrutiny of Bills.

In its Sixty-third Report (P.P. 275/78) the Committee objected to the creation of certain offences in certain environmental Regulations for which there was no right to plead a reasonable excuse and disallowance was therefore recommended.

The Committee's Sixty-fourth Report (P.P. 42/79) proposed the amendment of the Principles to include a power to scrutinise delegated legislation to ensure that discretionary administrative decisions were properly subject to merits review of the kind practiced by the newly established Administrative Appeals Tribunal. Principle (d) of the Committee's terms of reference, which referred to scrutiny designed to ensure that delegated legislation dealt only with 'administrative detail' was also altered to a more subjective formulation - is the delegated legislation more appropriate for parliamentary enactment? The march of time had rendered a criterion of mere 'administrative detail' obsolete, since in the Committee's view, it was doubtful whether delegated legislation could now always be restricted to such a narrow base.

In the Sixty-sixth Report (P.P. 116/79) the Committee called for amendments to the statutory disallowance scheme in the Acts Interpretation Act 1901 to provide that when a Regulation which repeals another Regulation is disallowed, the repealed Regulation will revive. Amendments to achieve this 'common law rule of revival' were made in 1982 and are of great significance to the Senate because, in the absence of revival, disallowance of a repealing Regulation will create a void in the law. The

Committee's Sixty-sixth Report is also important because three years before the Senate Constitutional and Legal Affairs Committee reported on the burden of proof in criminal proceedings (P.P. 319/82), the Committee had recommended that 'there is a strong case for ensuring, as a matter of legislative policy, that throughout the criminal law the burdens placed upon the accused are evidential burdens only and not persuasive burdens... It is the belief of the Committee that the persuasive burdens should not be upon the defendant in criminal matters, particularly in delegated legislation. The conclusion of the Committee is that this can best be achieved by the enactment of a statutory provision...'. Once again, the Committee in recommending that the matter be referred to the Constitutional and Legal Affairs Commission for report, a report which subsequently endorsed the Committee's view, was seen to be in the forefront of protecting fundamental legal principle, in this case the principle that at common law the burden of proof is entirely upon the prosecution in a criminal case and the required standard of proof is proof beyond reasonable doubt. The Committee also persuaded the Minister for the Capital Territory to remove a provision in an Ordinance which prevented a person from challenging in the courts a decision to commit a child to 'government control' until a period of 12 months had elapsed. The Minister agreed to amend the Ordinance so as to allow appeal to the courts at any time. The Committee also complained about a provision which enabled an official on whom powers were conferred, to delegate those powers to another unspecified person. The Committee noted that it had 'long objected to unrestricted delegation'. The Report also noted that the Senate itself, having become concerned about outstanding ministerial undertakings given to the Committee but not implemented, had passed a resolution expressing that concern and as a result most of the undertakings given to the Committee had been carried out with commendable promptness.

In its Sixty-ninth Report (P.P. 155/80) the Committee informed the Minister for Defence that it would not accept Regulations which conferred on a military board power to determine the compensation payable to a person whose private property had been used for defence purposes. In 1980 the Committee also announced that it

would host the First Conference of Commonwealth Delegated Legislation Committees in Canberra later that year. It is probably worth noting at this juncture that the Conference was held at the end of September 1980 and its proceedings were published shortly thereafter. Attended by some of the world's leading experts on parliamentary scrutiny of delegated legislation, the Conference brought together parliamentary and academic delegates from the Australian States, the Canadian States, West and Southern Africa, the United Kingdom, the Indian subcontinent and Papua New Guinea. They came to Canberra to share their expertise and offer their moral support to colleagues engaged in the precarious but parliamentary activity of publicly criticising and seeking amendments to their own Government's delegated legislation in order to protect the rights and liberties of individuals and the right of Parliament to oversee subordinate law-making activity. The Canberra conference was followed in April 1983 by the Second Commonwealth Conference of Delegated Legislation Committees held in Ottawa, Canada, where no fewer than twenty-seven Commonwealth jurisdictions were represented by a total of seventy-five delegates. In a classic statement of the role of legislative scrutiny committees the report of the conference proclaimed that 'the scrutiny and control of delegated legislation is not a parlour game for the amusement or vindication of a small group of dedicated parliamentarians but an exercise necessary to protect the rights and liberties, livelihoods and welfare of ordinary men and women who are liable to be crumpled under the weight of an insensitive, if well meaning, bureaucracy. It is in the light of this fundamental axiom that all the procedures adopted for scrutiny and control must be tested.' Word has only recently reached the Senate Committee that the Third Commonwealth Conference of Delegated Legislation Committees will be held in London in 1989.

The Committee's seventeenth Chairman, Senator Lewis, in the Committee's Fiftieth Anniversary Report (Seventy-first Report P.P. 47/82) reminded the Senate of the origins and functions of a Committee that had now become by far the oldest and most resilient Committee of its kind in continuous existence in the parliamentary world. Senator Lewis had no hesitation in commenting that 'the Australian Senate is the world path-finder in the area of



parliamentary control of Executive acts under delegated authority,' The Report set out in some detail how united and bipartisan Committee members had, over the years, worked to earn that reputation. There are few if any scrutiny Committees which can claim that 'any motion for disallowance which has been moved on the Committee's behalf has been accepted by the Senate despite the will of the Government concerned. As a result, Ministers are wary of showing any intransigence in the private negotiations undertaken by the Committee. The Committee therefore has an outstanding record of considerable influence upon Executive actions.' In this Report the Committee also expressed interest in seeing more extensive use made of the affirmative resolution procedure in relation to delegated legislation rather than the negative resolution procedure which currently predominates. Still concerned about the substantial delays which arose in giving effect to ministerial undertakings, the Committee pointed out that it was examining procedures that might allow amendments to be made to delegated legislation by Parliament itself as soon as the need for this arose on the recommendation of the Committee. In what was then the most detailed Report the Committee had published, numerous instruments of delegated legislation were commented on, reflecting the Committees continuing care in assessing the implications of all delegated legislation which might affect the rights of individuals.

In its Seventy-second Report (P.P. 83/82) the Committee reported on its scrutiny of the A.C.T. Public Assemblies Ordinance 1982, an Ordinance the provisions of which had caused considerable controversy because of the effects it could have on the right to freedom of assembly. The Committee persuaded the Minister for the Capital Territory to prepare a new Ordinance setting out a code covering the law relating to parades, processions and assemblies generally in the A.C.T. to be made prior to Anzac Day 1982. A draft of that Ordinance was referred to the Committee and as the Report noted 'the procedures that have been followed in the consideration of the draft... represent a unique participation by the Committee in the making of an Ordinance of notable social significance.'

In its Seventy-third Report (P.P. 326/82) the Committee drew the attention of the Senate to inadequacies in Explanatory Statements upon which it relied in comprehending the impact of delegated legislation. The Committee drew attention to Regulations which conferred on an official an unrestricted right to enter premises. The Committee persuaded the relevant Minister that such a power should only be exercised after obtaining prior approval from a Magistrate. The Committee also obtained a Minister's undertaking to amend an instrument which conferred an unduly wide protection from civil, and even criminal, actions.

In his first report (Seventy-fourth Report, P.P. 32/84) the Committee's eighteenth Chairman, Senator Coates, summarised for the benefit of Senators the types of provisions which had been of serious concern to the Committee. For example the Committee had signalled out for attention retrospective provisions; possibly defective appeal provisions, including those where no obligation was placed on a decision-maker to notify a person of his or her right of appeal; subjectively based administrative discretions where the exercise of a decision was 'on such terms as a decision-maker thinks reasonable' or 'in the opinion of the decision-maker', drafting which tends to limit the scope of judicial review of such decisions; subdelegation provisions; unappealable administrative discretions; reversals of the onus of proof; and various miscellaneous provisions which tended to trespass on personal rights and liberties.

Following on from its previous report, the Committee indicated that it was still considering how best to obtain for the Parliament a proper power of partial disallowance of delegated legislation. Also in reporting to the Senate on the Second Commonwealth Conference of Delegated Legislation Committees, Senator Coates reminded Senators that 'one only has to look at some other countries, where delegated legislation is subject to little or no parliamentary control and has got completely out of hand, to realise how fortunate Australia has been.' Indeed the Seventy-fourth Report contained for the record extracts of the statements which had been made to the Senate by various members of the Committee about the Second Commonwealth Conference. These

included the comments of the previous Chairman, Senator Lewis, who drew attention to one of the central themes of the Conference - the need for Governments to accept that the adoption of a scrutiny committee's report which is critical of a government regulation should not be a matter for a vote of confidence. Noting that some over-sensitive governments often feel unjustifiably and erroneously that their standing or confidence is at stake when a committee criticises a subordinate instrument, Senator Lewis reminded the Senate that 'delegates left the Conference determined to free their Parliaments and Legislatures from the tyranny of this unwanted extension of the doctrine of responsible government', he went on to add 'that... fortunately, in Australia, as a result of the activities of the Senate Regulations and Ordinances Committee, governments do not really take that to heart so much, although from time to time we have heard Ministers appear to argue that the disallowance of a regulation would mean the end of the Government, that the Government would have to fall. As has been indicated in the Report (of the Second Commonwealth Conference) that is absolute nonsense.'

In May 1984 the Senate, by special resolution, expanded the membership of the Committee and referred to it for a report, the question whether certain regulations and an ordinance concerning the Commonwealth's powers to prevent the importation of violent or pornographic video tapes amounted to substantive legislation more appropriate for parliamentary enactment. For the first time in its history the Committee divided, the majority finding that, on balance, there was nothing in the regulations or the ordinance more appropriate for parliamentary enactment. A dissenting report expressed the opposite opinion. The consensus of academic opinion subsequently took the view that a strongly bipartisan committee like the Regulations and Ordinances Committee which depended for its strength and authority on the bipartisan commitment of all Senators to a fixed set of scrutiny principles for the protection of civil rights and liberties should not be asked with an expanded membership to become involved in issues of political controversy. Where delegated legislation of this nature gives rise to political controversy and results in a desire for it to be closely

scrutinised by such a Committee, it was believed that a Committee separate and distinct from the Regulations and Ordinances Committee should be established for the purpose.

In its Seventy-fifth Report (P.P. 303/84) the Committee reported on its scrutiny of certain High Court Directions which contained a reversal of the onus of proof to which the Committee objected. After an exchange of correspondence between the Court and the Committee, the High Court agreed to delete from the Directions the two provisions which contained the objectionable reversal of onus provisions.

In its Seventy-sixth Report (P.P. 507/85) the Committee's nineteenth Chairman, Senator Cooney, reported on the disallowance of an Ordinance which purported to repeal in excess of 100 N.S.W. Acts which applied in the A.C.T. and which were considered to be no longer appropriate. The Committee had asked that these Acts be identified in a Schedule to the Ordinance so that the repeal of any particular Act could be prevented by a disallowance motion if the Senate wished to adopt that course. The Attorney-General was unwilling to agree to the Committee's suggestion and the Ordinance was disallowed.

In its Seventy-seventh Report (P.P. 172/86) the Committee commented on a range of issues including the need for subdelegated legislative instruments made under a delegated legislative instrument to be subject to tabling and disallowance; the need for Administrative Appeal Tribunal review rights in connection with various discretionary decisions; the need for Regulations permitting extradition to South Africa to be drafted with protection safeguards along lines similar to those included in extradition treaties between Australia and other countries (for example Western Europe). The Committee severely criticised extradition Regulations which would have made it lawful to extradite to South Africa a person wanted for an offence which had it occurred in Australia would have been regarded as trivial. The Committee also challenged National Crime Authority Regulations which conferred on the Authority a power to order a form of substituted service of summons to a hearing on a third party for a

person who could not otherwise be located. Whether he or she knew of it or not such service would amount to service on the actual individual whose attendance was desired. The Committee considered that this procedure was fraught with danger for both the third party served and the person whose attendance was required. The Minister agreed that the power to order such substituted service should be in the hands of a judge in chambers rather than the N.C.A. itself. In dealing with another instrument the Committee also drew attention to the need to respect genuine conscientious objection in imposing obligations on individuals.

In its Seventy-eight Report (P.P. 171/86) the Committee examined the Artificial Conception Ordinance 1987 and although it did not recommend disallowance of the Ordinance as such, it recommended that all future legislation arising from the impact and effects of new biological technology should be by means of enactment made in the Parliament.

In its Seventy-ninth Report (P.P. 170/86) the Committee reported on the disallowance of certain Health Insurance Regulations. These made it lawful for the Health Insurance Committee, which has custody of computer records describing the medical insurance claims of millions of Australians over the past decade, to transfer those records to the Department of Social Security. Although the intention was to assist in preventing social security fraud, the Committee considered that such an unrestricted legal power was completely inappropriate in delegated legislation and following discussions with the relevant minister the Regulations were disallowed with his agreement.

In its Eightieth Report (P.P. 241/86) the Committee called for amendments to the Acts Interpretation Act to prevent the making of retrospective regulations, to provide the Parliament with partial disallowance powers, to make the tabling of delegated legislation mandatory and to remove a legal loophole which made it possible for a disallowance motion to be defeated by the repeal and the immediate re-enactment in the same terms of regulations which were controversial and which Government expected would be disallowed. (The disallowance of the second repealing and re-enacting

regulations would merely have the effect of reviving the first and depending on the time at which this occurred it might not be legally possible for the Senate to move to disallow the revived regulations.) The Eightieth Report also set out in detail guidelines on how the Committee interpreted its four principles using instruments it had scrutinised as illustrations. Thus the Committee referred to: its objections to legislative impediments to disallowance procedures; the need for tabling and disallowance of subdelegated legislative instruments; the need for adequate explanatory statements; the need for care to be taken that legislation was not ultra vires its enabling statute; and the need for delegations of ministerial powers to be confined to named senior officials. The Committee also included in its guidelines reference to the need to protect privacy and confidentiality and the right to trial by jury. The Committee called for amendments to ensure that the exercise of enter, search and seizure powers would have to be reasonable. The Committee also advanced the proposition that superior court judges, rather than Magistrates, Justices of the Peace and Clerks or Deputy Clerks of Petty Sessions Courts, should exercise remarkable power of granting search warrants over the telephone. Reversals of the onus of proof, strict liability offences, immunity from civil action, religious and sex discrimination, the need for officials for power to enter premises to carry proper photographic identity cards and the need for discretionary administrative decisions affecting the right to a livelihood to be made subject to merits review were all issues considered by the Committee in its scrutiny.

Alarmed at the consequences of the repeal and re-enactment procedure referred to above which could allow a coach and four to be driven through the statutory disallowance scheme, the Committee in its Eighty-second Report (November 1987) recommended that the Acts Interpretation Act should be amended urgently to close the repeal and re-enactment loophole.

Finally, in its Eighty-third Report (April 1988) tabled by the Committee's twentieth Chairman, Senator Collins, the Committee found itself repeating many of the themes which have characterised its Reports since 1932: the need for better explanatory statements

to enable parliamentarians to understand the impact of delegated laws made under their authority and with their presumed approval; the need for improvements to the statutory disallowance scheme to allow for partial disallowance powers so that a House of Parliament could act in a more forensic way in expressing its disapproval of an instrument of delegated legislation by removing only an objectionable part; and a range of other issues where the Committee felt that principles of freedom and parliamentary propriety were affected, for example: the possible unreasonableness of charges, fees and penalties; the unexpected use of delegated powers to permanently suspend certain decisions from the application of sex discrimination legislation; the absence of provision for parliamentary scrutiny of subdelegated legislative instruments; inadequate protection of religious rights; insufficient use of proper photographic identity cards by officials with power to enter private property; insufficient protection of children in custody and in care; the provision of inadequate rights of appeal for the parents of such children; the absence of rights to seek review of discretionary administrative decisions adversely affecting the right to practice a trade, business or profession; the conferral of large official powers the exercise of which was not qualified by reference to reasonable limits; and finally, the provision of reasons for decisions, adequate notification of decisions and adequate notification of the rights to appeal against such decisions.

This is a long summary as befits a description of the activities of one of the Commonwealth Parliament's most active and most important Committees. The 83 reports of the Committee contain much more detail on the painstaking work and the independent spirit of the Committee's Chairmen, its Members, committee Secretaries and Legal Advisers spanning more than half-a-century. What gives the Committee its authority and its reputation has been, and continues to be, this pain-staking effort, this independence of mind of both Senators and their advisers who are committed to the protection of traditional freedoms, who at least aspire to perfection in the law and who are resolved to protect the paramount role of Parliament as a law-maker.

In my capacity, therefore, as the twentieth Chairman of the Senate Standing Committee on Regulations and Ordinances, I pay tribute to the commitment, the courage and the independence of my predecessors and of the Committee members who gave their Chairmen vital guidance and lent them vital moral support. Those who know anything of the activities of the Committee will know that, as the time for moving a motion of disallowance ticks away and the Committee awaits an undertaking from a Minister to amend delegated legislation to protect the rights of individuals there can be increasing tension and drama. That drama has been played out in this House of Parliament. The move from a Provisional Parliament House to a permanent Parliament House signals, at least in a symbolic way, a profound coming of age of the Australian parliamentary institution. An indispensable attribute of the maturity of any political institution, and indeed of any political individual, is the capacity to act independently, without fear or favour, to remove from the delegated statute book subordinate laws which do not respect the traditional and evolving rights and liberties of individuals or the expectations of parliamentarians to retain control over subordinate laws. In leaving the old Parliament House, Parliament as an institution leaves behind it many memories of many events, many special places and many never to be forgotten personalities. For the Regulations and Ordinances Committee, at least, those personalities still live with us and stand before us in the Reports summarised in this paper - Senator Colbatch, Senator Wood, Senator Wright, Senator Devitt, Senator Cavanagh and Senator Missen and many other whose spirit will accompany the Regulations and Ordinances Committee to the new Parliament House to remind us of their achievements and to inspire us to emulate them. The present members of the Committee have a trust to discharge in serving on the Committee and maintaining with bipartisan and non-political commitment its high standards of liberty, legality and propriety, not only for the sake of our own consciences, and not only for the sake of our own reputations, which whether we like it or not will be examined as this paper has briefly examined the reputations of 19 Committee Chairmen.



More importantly the trust is to preserve this forum for delegated legislative accountability for the future parliamentarians whose attitudes to issues of personal rights and the role of Parliament will impinge so greatly on the lives of our children, and our grandchildren and their children long after we, like our predecessors, have departed the scene.

Bob Collins  
Chairman

June 1988

**APPENDIX 3**

**ISSUES ARISING IN DELEGATED LEGISLATION 1987-88**

<b>absolute discretionary power</b>	<b>Telecommunications (General) By-laws Amendment No. 50 of 1988</b>
<b>advertising</b>	<b>Bankruptcy Rules (Amendment) (Statutory Rules 1988 No. 19)</b>
<b>allowances</b>	<b>Defence Determination No. 6 of 1988  Defence Determination No. 10 of 1988</b>
<b>annual reports</b>	<b>Australian Capital Territory Gaming and Liquor Authority Ordinance (No. 31 of 1987)  Australian Capital Territory Institute of Technical and Further Education Ordinance (No. 71 of 1987)  Housing Assistance Ordinance (No. 36 of 1987)  Taxation (Administration) Ordinance 1987 (No. 41 of 1987)</b>
<b>bankruptcy</b>	<b>Bankruptcy Rules (Amendment) (Statutory Rules 1988 No. 19)</b>

**citation requirements**

**Health Insurance Act 1973  
Approvals and Determinations of  
Principles**

**Health Authority Ordinance 1985  
Determination of Fees and Charges**

**Nuclear Non-proliferation  
(Safeguards) Act 1987 Declaration**

**commercial transactions,  
disclosure of**

**Australian Capital Territory  
Institute of Technical and  
Further Education Ordinance  
(No. 71 of 1987)**

**confidentiality**

**Australian Wine and Brandy  
Corporation (Annual General  
Meeting of the Industry)  
Regulations (Statutory Rules 1987  
No. 264)**

**consolidation**

**Air Force Regulations (Amendment)  
(Statutory Rules 1988 No. 40)**

**Australian Military Regulations  
(Amendment) (Statutory Rules 1988  
No. 38)**

**Naval Forces Regulations (Amendment)  
(Statutory Rules 1988 No. 39)**

**Public Service Determination No. 1  
of 1988**

consumers rights

Amendment of Schemes (Amendment No. 88/01) Petroleum Products Freight Subsidy Scheme States Grants (Petroleum Products) Act 1965

decisions in writing

Australian Capital Territory Institute of Technical and Further Education Ordinance (No. 71 of 1987)

Canberra Institute of the Arts Ordinance 1988 (No. 1 of 1988)

National Health Act 1953

Section 45D: Standards for Nursing Home Care

Phosphate Mining Corporation of Christmas Island (Winding up) Ordinance 1987 (Territory of Christmas Island Ordinance No. 8 of 1987)

Schools Authority (Amendment) Ordinance (No. 70 of 1987)

detention, unrestricted periods of

Children's Services (Amendment) Ordinance (No. 2) 1987 (No. 53 of 1987)

discretionary powers

Australian Capital Territory Housing Assistance Programs

Public Service Determinations 1987/46 and 1987/59

drafting errors

Long Service Leave (Building and  
Construction Industry)  
(Amendment) Ordinance (No. 2)  
(No. 74 of 1987)

Meat Inspection (Modification)  
Regulations (Amendment)  
(Statutory Rules 1988 No. 34)

explanatory statements,  
inadequacy of

Australian Capital Territory  
Housing Assistance Programs

Australian National Railways  
Commission By-laws Amendment  
No. 1 of 1988

Code of Practice on Radiation  
Protection in the Mining and  
Milling of Radioactive Ores 1987

Export Control (Fees) Orders As  
Amended (Amendment) (Export  
Control Orders No. 19 of 1987)

Export Control (Fresh Fruit and  
Vegetables) Orders (Export  
Control Orders No. 9 of 1987)

Export Inspection (Quality Charges)  
Regulations (Amendment) 1987  
(Statutory Rules 1987 No. 251)

Family Court of Australia  
(Delegation of Powers) Rules  
(Amendment) (Statutory Rules 1988  
No. 10)

Fisheries Notices Nos 183-189 of  
1987

Lakes (Amendment) Ordinance 1987  
(No. 49 of 1987)

Migration Regulations (Amendment)  
(Statutory Rules 1987 No. 313)

Migration Regulations (Amendment)  
(Statutory Rules 1987 No. 314)

Navigation Orders Regulations No. 5  
of 1987

Nursing Homes Assistance Act 1974.  
Notices under 13(A)

Radiocommunications (Certificates of  
Proficiency) Regulations  
(Amendment) (Statutory Rules 1987  
No. 152)

States Grants (Tertiary Education  
Assistance) Act 1984. Variations  
to the Schedules

export controls

Customs (Prohibited Exports)  
Regulations. (Statutory Rules  
1987 No. 317)

evidence, disclosure of  
penalties

Merit Protection (Australian  
Government Employees) Regulations  
(Amendment) (Statutory Rules 1987  
No. 330)

fees and charges

Customs Regulations (Amendment)  
(Statutory Rules 1987 No. 140)

Live-stock Slaughter Export Charge  
Regulations (Amendment)  
(Statutory Rules 1988 No. 21)

Live-stock Slaughter Levy  
Regulations (Amendment)  
(Statutory Rules 1988 No. 20)

Magistrates Court (Civil  
Jurisdiction) (Solicitors' Costs)  
Regulations Amendment 1987  
Regulations 1987 (1987 No. 14)

Meat Inspection (Fees) Orders As  
Amended (Amendment) Meat  
Inspection (Orders) No. 5 of 1987

Navigation Regulations (Statutory  
Rules 1987 Nos 229-234)

Rules of the Supreme Court of the  
Australian Capital Territory  
(Amendment) (Statutory Rules 1987  
No. 93)

failure to table

Telecommunications (Charging Zones  
and Charging Districts) By-laws  
Amendment No. 79

Telecommunications (Community Calls)  
By-laws  
Amendment No. 50

identity cards

Environment Protection and  
Management Ordinance 1987  
(Territory of Heard Island and  
McDonald Islands Ordinance No. 1  
of 1987)

Long Service Leave (Building and  
Construction Industry (Amendment)  
Ordinance (No. 2) 1987  
(No. 74 of 1987)

National Parks and Wildlife  
Regulations (Statutory Rules 1987  
No. 139)

inconsistency

Games, Wages and Betting-houses  
(Amendment) Ordinance (No. 59 of  
1987)

Lakes (Amendment) Ordinance (No. 49  
of 1987)

incorporation by reference

Australian Meat and Livestock Order  
Nos M33/87 and M38/87

Defence Determination No. 70 of 1987

Health Insurance Act 1973 Approval  
(APP/1)

Meat Inspection (South Australia)  
Orders

Meat Inspection Orders No. 2 of 1987



invalidity

Building Ordinance 1972 (A.C.T.)  
Determination

Building Services Ordinance 1924  
(A.C.T. Determination)

Unit Titles Ordinance 1970 (A.C.T.)  
Determination of Fees)

Wheat Tax Regulations (Amendment)  
(Statutory Rules 1987 No. 182)

levy charges

Dairy Produce Levy Regulations  
(Statutory Rules 1987 No. 325)

mandatory pre-requisites  
for making delegated  
legislation

Live-stock Export Charge Regulations  
(Amendment) (Statutory Rules 1988  
No. 21)

Live-stock Slaughter Levy  
Regulations (Amendment)  
(Statutory Rules 1988 No. 20)

Wheat Tax Regulations (Amendment)  
(Statutory Rules 1987 No. 82)

official visitors

Remand Centres (Amendment) Ordinance  
1987 (No. 30 of 1987)

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reversal of

Gaming and Betting Laws Amendment  
Ordinance (No. 61 of 1987)

	<b>Liquor (Amendment) Ordinance (No. 2) (No. 72 of 1987)</b>
	<b>Wool Marketing Regulations (Statutory Rules 1987 No. 132)</b>
<b>parents, responsibilities of</b>	<b>Children's Services Regulations 1987 (1987 No. 6)</b>
<b>penalties, level of</b>	<b>Games, Wages and Betting-houses (Amendment) Ordinance (No. 59 of 1987)</b>
	<b>Lakes (Amendment) Ordinance (No. 49 of 1987)</b>
	<b>Long Service Leave (Building and Construction Industry (Amendment) Ordinance (No. 2) 1987 (No. 74 of 1987)</b>
<b>personal rights</b>	<b><u>National Health Act 1953</u> Section 45D: Standards for Nursing Home Care</b>
<b>plans of management</b>	<b>Environment Protection and Management Ordinance 1987 (Territory of Heard Island and McDonald Islands Ordinance No. 1 of 1987)</b>

preambles	Wheat Tax Regulations (Amendment) (Statutory Rules 1987 No. 182)
principle (d)	Dairy Produce Levy Regulations (Statutory Rules 1987 No. 325)
privacy, protection of personal	Australian Capital Territory Housing Assistance Programs
reasonableness of charges and fees	Export Control (Fees) Orders As Amended (Amendment) Export Control Orders No. 19 of 1987  Meat Inspection (Orders) Regulations Meat Inspection Orders No 1 of 1988  Migration Regulations (Amendment) (Statutory Rules 1987 Nos. 313 and 314)
reasons	Export Control (Fees) Orders as amended (Amendment) Export Control Orders No. 11 of 1987
records/registers	Children's Services Regulations (1987 No. 6)
retrospectivity	Defence Determination No. 25 of 1987  Defence Determination No. 52 of 1987

	Remuneration Tribunal Determination No. 10 of 1987
	Student Assistance Regulations (Amendment) (Statutory Rules 1987 Nos. 288 and 304)
right to practice a trade, business, or profession	Agents (Amendment) Ordinance (No. 5 of 1988)
rights of review	Australian Capital Territory Housing Assistance Programs.
	<u>Broadcasting Act 1942.</u> Orders under Section 92V.
	Bounty (Ship Repair) (Registration) Regulations (Statutory Rules 1987 No. 53)
	Business Franchise (Tobacco and Petroleum Products) (Amendment) Ordinance (No. 2) (No. 58 of 1987)
	Canberra Sewerage and Water Supply Regulations (Amendment) (1987 No. 19)
	Co-operative Societies (Amendment) Ordinance (No. 42 of 1987)
	Co-operative Societies (Amendment) Ordinance (No. 40 of 1988)

Dairy Produce Orders (Orders No. 4  
of 1985)

Export Control (Fees) Orders as  
amended (Amendment) Export  
Control Orders No. 11 of 1987

Export Inspection (Quality Charge)  
Regulations (Amendment)  
(Statutory Rules 1987 No. 251)

Gaming Machine Ordinance (No. 34 of  
1987)

Great Barrier Reef Marine Park  
Regulations (Amendment)  
(Statutory Rules 1987 No. 247)

Meat Inspection (Fees) Orders as  
Amended (Amendment)  
Meat Inspection (Orders) No. 5 of  
1987  
Meat Inspection (Orders) No. 3 of  
1988

Nursing Home Financial Arrangements.  
Principles under subsection  
40AA(7) National Health Act 1953

Payroll Tax Ordinance (No. 40 of  
1987)

Pharmaceutical Benefits Declaration  
No. PB2 of 1987

Stamp Duties and Taxes Ordinance  
(No. 39 of 1987)

	Taxation (Administration) Ordinance 1987 (No. 41 of 1987)
	Telecommunications (General) by-laws Amendment No. 50 of 1988
search powers	Taxation (Administration) Ordinance 1987 (No. 41 of 1987)
statute, delegated legislation not in accordance with	Dairy Produce Levy Regulations (Statutory Rules 1987 No. 325)
strict liability	Australian Meat and Livestock Corporation Order No. MS12/1988
	Defence (Public Areas) By-laws (Statutory Rules 1987 No. 238)
	Environment Protection and Management Ordinance 1987 (Territory of Heard Island and McDonald Islands Ordinance No. 1 of 1987)
	Gaming Machine Ordinance 1987 (No. 34 of 1987)
	Great Barrier Reef Marine Park Regulations (Amendment) (1987 No. 247)
	Motor Traffic (Amendment) Ordinance (No. 9 of 1988)

	Motor Traffic (Amendment) Ordinance (No. 11 of 1988)
	National Parks and Wildlife Regulations (Amendment) (Statutory Rules 1987 No. 139)
	Wool Marketing Regulations (Statutory Rules 1987 No. 132)
sub-delegation	Export Control (Orders) No. 15 of 1987
	Navigation (Orders) Regulations Order No. 8 of 1987
	Postal By-laws Amendment No. 3 of 1987
sunset clauses	Defence (General) Regulations (Statutory Rules 1988 No. 18)
	Rifle Clubs (Firearms) Order (Amendment) 1988
tabling and disallowance	Canberra Institute of the Arts Ordinance (No. 1 of 1988)
	Financial Institutions Duty Ordinance (No. 43 of 1987)
	Quarantine Proclamation Nos. 134A and 135A

	Schools Authority (Amendment) Ordinance (No. 2 of 1988)
tabling of information	A.C.T. Institute of Technical and Further Education Ordinance (No. 71 of 1987)
ultra-vires	Australian Meat and Livestock Corporation Order No. MS12/1988  Export Control (Orders) No. 15 of 1987  Postal By-laws Amendment No. 3 of 1987
unreviewable discretions	Aboriginal and Torres Strait Islander Heritage Protection Regulations (Amendment) (Statutory Rules 1987 No. 153)  Agents (Amendment) Ordinance 1988 (No. 5 of 1988)  Bounty (Ships) (Reservation of Bounty) Regulations (Amendment) (Statutory Rules 1987 No. 116)  Bounty (Ships Repair) (Reservation of Bounty) Regulations (Statutory Rules 1987 No. 117)



**Foreign Fishing Boats Levy  
Regulations (Amendment)  
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**Occupational Superannuation  
Standards Regulations (Statutory  
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**Telecommunications (General) By-laws  
Amendment No. 50 of 1988**

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**Australian Capital Territory Housing  
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**APPENDIX 4**

**ALPHABETICAL INDEX OF LEGISLATION AND  
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**A**

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Aboriginal and Torres Strait Islander Heritage Protection Regulations (Amendment) (Statutory Rules 1987 No. 153)	5.2-5.3
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Administrative Appeals Tribunal Act 1975	4.93
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Air Navigation (Charges) Act 1952	7.15-7.16
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Australian Meat and Livestock Corporation Order No. MS12/1988	4.51-4.55
Australian Meat and Live-stock Order No. M33/87	4.12
Australian Meat and Live-stock Order No. M38/87	4.12
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Australian Meat and Live-stock Order MQ23/87 (High Quality Beef to EEC - 1988 Quota Administration Scheme)	5.18-5.19
Australian Military Regulations (Amendment) (Statutory Rules 1988 No. 38)	4.13-4.14
Australian National Railways Commission By-law Amendment No. 1 of 1988	3.14
Australian Rifle Clubs Regulations (Repeal) (Statutory Rules 1988 No. 17)	5.14-5.17
Australian Wine and Brandy Corporation (Annual General Meeting of the Industry) Regulations (Statutory Rules 1987 No. 264)	5.20-5.21

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