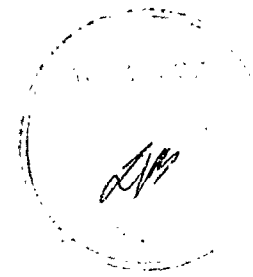

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

ONE HUNDRED AND FIFTH REPORT

ANNUAL REPORT 1996-97

JUNE 1998

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

ONE HUNDRED AND FIFTH REPORT

ANNUAL REPORT 1996-97

JUNE 1998

CONTENTS

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

MEMBERS OF THE COMMITTEE

Senator Bill O'Chee (Chairman)
Senator Mal Colston (Deputy Chairman)
Senator George Campbell
Senator Kay Patterson
Senator Marise Payne
Senator Nick Sherry

PRINCIPLES OF THE COMMITTEE

(Adopted 1932: Amended 1979)

The Committee scrutinises delegated legislation to ensure:

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

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

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

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

CHAPTER 1

OVERVIEW AND STATISTICS

Introduction

1.1 The Standing Committee on Regulations and Ordinances was established in 1932 and, apart from certain Committees dealing with internal parliamentary matters, is the oldest Senate Committee. Its functions, which are set out in the Standing Orders, are to scrutinise all disallowable instruments of delegated legislation to ensure their compliance with non-partisan principles of personal rights and parliamentary propriety.

1.2 The Committee engages in technical legislative scrutiny. It does not examine the policy merits of delegated legislation. Rather, it applies parliamentary standards to ensure the highest possible quality of delegated legislation, supported by its power to recommend to the Senate that a particular instrument, or a discrete provision in an instrument, be disallowed. This power, however, is rarely used, as Ministers almost invariably agree to amend delegated legislation or take other action to meet the Committee's concerns.

1.3 The general requirements of personal rights and parliamentary proprieties under which the Committee operates are refined by the Standing Orders into four principles. In accordance with these principles, 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.

1.4 The above principles have been amended only once since 1932. This was in 1979, following the establishment of the Administrative Appeals Tribunal, the first Commonwealth tribunal intended to review the merits of a comprehensive range of administrative decisions.

Membership

1.5 The Committee has six members with, in accordance with the Standing Orders, a government Chairman. There is a non-government Deputy Chairman. During the reporting period the membership of the Committee was as set out below:

Senator Bill O'Chee (Chairman)[1]
Senator Mal Colston (Deputy Chairman)[2]
Senator Kim Carr[3]
Senator John Hogg[4]
Senator Sue Mackay[5]
Senator Kay Patterson[6]
Senator Marise Payne[7]
Senator Jim Short[8]
Senator John Tierney[9]

Independent Legal Adviser

1.6 The Committee is advised by an independent legal adviser, who examines and reports on every instrument of delegated legislation, comments on all correspondence received from Minister, writes special reports and attends meetings of the Committee when required. The Committee was saddened by the death on 10 October 1997 of Emeritus Professor Douglas Whalan AM, who had been the Committee's legal adviser since 1982. On 22 October 1997 the Senate noted its appreciation of the erudition and good humour which Professor Whalan brought to the work of the Committee and expressed its profound sympathy to his widow and family.

Committee Staff

1.7 The Committee secretariat consists of a Secretary, a research officer, and two administrative officers.

---

1 Senator O'Chee was reappointed on 8 May 1996 and elected as Chairman on 23 May 1996. Senator O'Chee was a former Deputy Chairman from 30 September 1993 to 29 April 1996.

2 Senator Colston was reappointed on 2 May 1996 and appointed as Deputy Chairman on 23 May 1996. Senator Colston was a former Chairman from 14 May 1990 to 18 October 1990 and from 30 September 1993 to 29 April 1996.

3 Senator Carr was a member of the Committee from 2 May 1996 to 1 July 1996.

4 Senator Hogg commenced as a member of the Committee on 1 July 1996.

5 Senator Mackay commenced as a member of the Committee on 2 May 1996.

6 Senator Patterson commenced as a member of the Committee on 8 May 1996. Senator Patterson was discharged from the Committee for the period 6 December 1996 to 4 February 1997. Senator Patterson recommenced as a member of the Committee on 5 February 1997.

7 Senator Payne commenced as a member of the Committee on 7 May 1997.

8 Senator Short was a member of the Committee from 6 December 1996 to 4 February 1997.

9 Senator Tierney was a member of the Committee from 8 May 1996 to 7 May 1997.

Statistics

1.8 During the year the Committee scrutinised 1791 instruments, which was 109 less than the previous year. The following table sets out the numbers and broad categories of these instruments.

Instruments examined by the Committee 1996-97

Civil aviation orders	560
Statutory rules	395
Public service and defence determinations	318
Veterans' entitlements instruments	166
Health and family services instruments	79
Territory instruments	34
Higher education instruments	31
Radiocommunications instruments	24
Remuneration Tribunal determinations	21
Customs and excise instruments	17
Telecommunications instruments	15
Primary industries and energy instruments	13
Miscellaneous instruments, details of which are in Appendix 1	118
	1791

Ministerial Undertakings

1.9 During the year Ministers and other law-makers undertook to amend or review 32 different instruments or parent Acts to meet the concerns of the Committee. This number includes only undertakings to amend existing legislation. It does not include undertakings to improve explanatory statements, include provisions for numbering and citation or take administrative action. Details of undertakings are given in Chapters 4 and 5.

Other Committee Activities

1.10 The Committee tabled the following reports:

One Hundred and Fourth Report, *Annual Report 1995—96*, tabled on 25 June 1997.

1.11 Other significant matters, which are reported in Chapters 2, 6 and 7, are as follows:

On 22 August 1996 Senator O'Chee, on behalf of the Committee, made a statement to the Senate on the Census.

On 10 October 1996 Senator O'Chee, on behalf of the Committee, made a statement to the Senate on instruments made under the *Native Title Act 1993*.

On 21 November 1996 Senator O'Chee, on behalf of the Committee, made a statement to the Senate on the Legislative Instruments Bill 1996.

On 3 December 1996 Senator O'Chee, on behalf of the Committee, made a statement to the Senate on late tabling of legislative instruments.

On 12 December 1996 Senator O'Chee, on behalf of the Committee, made a statement to the Senate on an apparent breach of parliamentary propriety (Crimes Regulations, Statutory Rules 1996 No.7).

On 12 December 1996 Senator O'Chee, on behalf of the Committee, made a statement to the Senate on the work of the Committee during the spring sittings 1996.

On 6 March 1997 Senator O'Chee, on behalf of the Committee, made a statement to the Senate on legislative instruments made in preparation for the Sydney 2000 Olympic Games.

On 6 March 1997 Senator O'Chee, on behalf of the Committee, tabled the paper *'Sir Humphrey Appleby is alive and well; the Legislative Instruments Bill 1996'*, which he presented to the Fourth Commonwealth Conference on Delegated Legislation held in Wellington, New Zealand, 10-13 February 1997.

On 23 June 1997 Senator O'Chee, on behalf of the Committee, made a statement to the Senate on Scrutiny of High Court Rules.

On 23 June 1997 Senator O'Chee, on behalf of the Committee, made a statement to the Senate on the Legislative Instruments Bill 1996.

On 25 June 1997 Senator O'Chee, on behalf of the Committee, made a statement to the Senate on Explanatory Statements.

On 25 June 1997 Senator O'Chee, on behalf of the Committee, made a statement to the Senate on the work of the Committee during the autumn and winter sittings 1997.

CHAPTER 2

ISSUES AND ROLES

2.1 At the end of each major sittings period during the reporting year the Chairman made a detailed statement to the Senate on the work of the Committee. The following are extracts from those statements.

Senator O'Chee, Senate Hansard, 12 December 1996, p.7354

Overview

2.2 During the present sittings the Committee scrutinised the usual large number of disallowable legislative instruments tabled in the Senate, made under the authority of scores of enabling Acts administered through virtually every Department of State. Almost every legislative scheme relies on delegated legislation to provide the administrative details of programs set out in broad policy in enabling Acts which authorise such delegated legislation.

2.3 The Committee acts on behalf of the Senate to scrutinise each of these instruments to ensure that they conform to the same high standards of parliamentary propriety and personal rights which the Senate applies to Acts. If the Committee detects any breach of these standards it writes to the Minister or other law-maker in respect of the apparent defect, asking that the instrument be amended or an explanation provided. If the breach appears serious then the Chairman of the Committee gives notice of a motion of disallowance in respect of the instrument. This allows the Senate, if it wishes, to disallow the instrument. This ultimate step is rarely necessary, however, as Ministers almost invariably take action which satisfies the Committee.

2.4 As usual, by the end of the sittings Ministers have given the Committee undertakings to amend many provisions in different instruments or enabling Acts to meet its concerns, reflecting a continuing high level of cooperation from Ministers in its non-partisan operations. The Committee is grateful for this cooperation.

2.5 During the sittings the Committee scrutinised 889 instruments. Of these, 192 were statutory rules, which are generally better drafted and presented than other series of delegated legislation. The other 697 instruments were the usual heterogeneous collection of different series.

2.6 Each of the 889 instruments was scrutinised by the Committee under its four principles, or terms of reference, which are included in the Standing Orders. There were 101 prima facie defects or matters worthy of comment in those 889 instruments. The defects are described below under each of the four principles.

Principle (a)

Is delegated legislation in accordance with the statute?

2.7 The Committee interprets this principle broadly. Together with the Committee's fourth principle, it covers not only technical validity, but also every other aspect of parliamentary propriety. The Committee noted that there may have been problems with instruments for the following reasons.

Validity

2.8 Legislative instruments are invalid if they subdelegate legislative power without express authorisation in the enabling Act. One Ordinance purported to grant power to the Minister to make Determinations, which would themselves be disallowable instruments, without any apparent legislative authority. Two other instruments purported to confer upon individuals what appeared to be legislative power. Three instruments made by a statutory authority subdelegated legislative power to itself.

2.9 Under s.49A of the *Act Interpretation Act 1901* legislative instruments may, in general, only incorporate material as it exists at the time the instrument was made, not as the material exists from time to time. In one case, the enabling Act expressly authorised some material as amended to be incorporated, but not the actual documents as amended which the instrument purported to incorporate. Another enabling Act authorised the law of a foreign country as in force from time to time to be incorporated, but the instrument incorporated material as amended which did not appear to be part of that law. Another instrument purported to incorporate amended material for which there appeared to be no provision in the enabling Act to affect the operation of s.49A.

2.10 Under s.48(3) of the Acts Interpretation Act delegated legislation generally ceases to have effect if not tabled in both Houses within 15 sitting days of making. On 3 December 1996 the Chairman of the Committee, Senator Bill O'Chee, made a detailed statement to the Senate on recent failures to table. Earlier in the present sittings, however, two legislative instruments ceased to have effect because they were not tabled in time. The sole purpose of both instruments was to provide for the payment of money from one Commonwealth agency to another and this was validly done within those 15 sitting days. The Committee points out that this procedure is undesirable because it means that the Senate is not given an opportunity to scrutinise such instruments.

2.11 There were other problems affecting validity. One instrument was neither signed nor dated. Another had insufficient information to identify who made it, the date of making or the authority under which it was made; some of this material was included in a covering letter, although part of this information was wrong. The Explanatory Statements for three instruments included errors which, if correct, would have made the three instruments void. A Note to another instrument advised that, to avoid doubt, the instrument commenced on making, while the Explanatory Statement advised that it commenced on gazettal; if it actually commenced on making it would have been void for prejudicial retrospectivity. One instrument provided that it would take effect from a specified date although the Appendix to the instrument advised that it would take effect from another date. One instrument included a

report on a matter while the Act required a record of the matter. Another instrument did not effect its legislative intent. A number of instruments did not comply with an earlier undertaking by the Minister to ensure that the instruments complied with the requirements of the enabling Act. The Explanatory Statement for another instrument advised that it would be administered according to what its provisions were intended to be, not what they actually were.

Drafting

2.12 The Committee considers that the quality of drafting of legislative instruments should not be less than that of Acts. This standard was not always met.

2.13 Regulations which implemented firearms controls after the Port Arthur killings provided for guns to be tested by dropping from a height of not more than 45 centimetres, when it appeared that not less than 45 centimetres was intended. One instrument provided for offences with no apparent penalties. Another provided for approved persons with no provision for approval. Several instruments had no numbering while others had the same numbering. One instrument included apparently contradictory provisions. The Explanatory Statement for one instrument advised that it was removing an unworkable provision; the Committee asked why an unworkable provision was included. Other instruments included reference errors and deficiencies in drafting style. Three sets of Regulations were made on the same day, amending the same principal Regulations.

Retrospectivity

2.14 Under s.48(2) of the Acts Interpretation Act legislative instruments which operate retrospectively are void if they adversely affect any person apart from the Commonwealth. The Committee, however, will write to Ministers about any unusual retrospectivity, or delay, even if it is valid. One instrument, not amended since 1984, included references to provisions of Acts repealed a decade ago. One instrument, providing for the imposition of tax, operated with four years retrospectivity. Another provided for grants of money to private companies which could have been made a year earlier. Another provided for 10 months retrospectivity even though the authorities had known for three years that the instrument would be needed.

Explanatory Statements

2.15 Due to the initiative of the Committee all legislative instruments are now accompanied by Explanatory Statements. Some of these, however, do not give sufficient information to enable informed scrutiny of the instrument by individual Senators. One Explanatory Statement gave insufficient details of an important new primary dispute resolution process. Others were too brief to be useful. Others did not advise that the purpose of the instrument was to implement an undertaking given by a Minister to the Committee. Others did not advise of the date of gazettal of instruments which commenced on gazettal.

Delegation

2.16 It is a breach of parliamentary propriety if a legislative instrument provides for inappropriate delegation of administrative powers. Several instruments provided for wide delegation of power, in one case to any person at all.

Principle (b)

Does delegated legislation trespass unduly on personal rights and liberties?

2.17 The Committee also interprets this provision broadly, to include every aspect of personal rights. The Committee noted possible breaches of personal rights for the following reasons.

Decision making safeguards

2.18 Legislative instruments which provide for administrative decisions to be made should include appropriate safeguards. One instrument provided for time limits for some decisions but not for others. Another provision required notice in writing of a decision to be given but not, as appeared appropriate in the circumstances, for a statement of reasons for the decision. Another expressly advised that a decision maker could take into account the commercial reputation of an applicant, but there was no requirement for the applicant to be made aware of any adverse material or to respond to it. Another provided subjective criteria for a decision maker to apply, including the criterion of any other matter which the decision maker considers relevant. One instrument, which was made partly to provide for the 2000 Sydney Olympic Games, reduced the existing rights of competitive athletes selected for drug testing. Another instrument provided an international organisation with a 10 months retrospective right to sue. The Explanatory Statement for another instrument advised that it removed an existing right because legal advice was received that the enabling Act did not provide the authority for such a right; the Committee asked if the Act would be amended to provide such authority.

Privacy

2.19 The Committee protects personal privacy. One instrument provided for the disclosure of personal information, subject only to subjective criteria, but gave no indication of to whom the information could be disclosed. Another instrument provided that a class of agent must provide information about people for whom the Agent acts when required to do so by a government agency. A number of instruments provided for the disclosure of private information in circumstances where it would have been appropriate for the Privacy Commissioner to have been consulted.

Safeguards for business

2.20 The Committee ensures that legislative instruments which affect business operations should operate as fairly as possible. One instrument prescribed four well known private companies as the only companies which could do certain work for a government agency, including work connected with the 2000 Olympics; but the Explanatory Statement gave no

indication of how the companies were chosen. Another instrument provided for unfair and apparently unintended restrictions on certain business activity, while another unrelated instrument provided for an unfair and unintended interruption to a permission to carry on business. The Explanatory Statement for another instrument advised of potential inconvenience for business people affected by an aspect of the official launch of the logos and mascots of the Sydney Organising Committee for the Olympic Games.

Taxes and charges

2.21 The Committee questions changes to taxes, charges and financial provisions generally, which in the circumstances may not operate fairly. One instrument increased a fee from $368 to $500 while another instrument increased a similar fee from $368 to $800, with no explanation for the difference. Another instrument increased an allowance for Commonwealth public servants by 40 per cent, four years after the previous increase. Another instrument had the potential to operate unfairly in respect of the recovery of medical and dental costs from members of the Australian Defence Force. One instrument provided only a Canberra telephone number for inquiries from everywhere in Australia from athletes selected for mandatory drug testing, but the number was not a free call. One instrument provided that agents must keep separate accounts for those whom they represent, but there was no requirement that the separate accounts be trust accounts. One instrument, made to correct an earlier instrument, inadvertently resulted in a hiatus in the payment of an allowance to Commonwealth public servants.

Principle (c)

Does delegated legislation make rights unduly dependent upon administrative decisions which are not subject to independent review of their merits?

2.22 Many legislative instruments provide for Ministers, statutory office holders and other public offices to exercise discretions. The Committee considers that such discretions should be as narrow as possible, include objective criteria to guide and limit the exercise of the discretion, and provide for appropriate review of the merits of a decision by an external, independent tribunal, which would usually be the Administrative Appeals Tribunal.

Discretions affecting business

2.23 A number of instruments affecting business did not appear to provide for review of administrative decisions. One instrument provided for discretions relating to compliance by miners with mandatory requirements. Another granted a power to withdraw accreditation of commercial premises, with only subjective criteria. A number of amending instruments provided for unreviewable discretions although the principal instrument provided for review of similar discretions; one of these included a number of decisions affecting the commercial operations of a casino operator. One instrument provided a discretion to recover the costs of an inquiry into a business operator. Another provided a discretion to release commercially sensitive information. The Explanatory Statement for another instrument advised of review rights in respect of a discretion, but it was not apparent what these were. One instrument provided a discretion to exempt certain containers and packs from mandatory standards. The

Explanatory Statement for another advised that a discretion was intended to operate as a sanction for a certain commercial decision.

Discretions affecting individuals

2.24 A number of instruments did not appear to provide for review of decisions affecting individuals. These included power to refuse to provide hearing services, to affect superannuation benefits and to import firearms. Other discretions were to undertake or discontinue inquiries about disputes with a statutory authority, to authorise people as counsellors and mediators and to exempt people from the payment of fees.

Principle (d)

Does delegated legislation contain matters more appropriate for parliamentary enactment?

2.25 The Committee raises this principle less often than its other principles. It is a principle, however, which goes to the heart of parliamentary propriety and complements the first principle of the Committee, that an instrument should be in accordance with the statute.

Other developments

2.26 In addition to its main task of scrutinising delegated legislation, the Committee was active in other ways during the present sittings.

2.27 On 16 October 1996 the Chairman, Senator O'Chee, together with the Chairman of the Standing Committee for the Scrutiny of Bills, Senator Cooney, tabled a Position Paper on Scrutiny of National Schemes of Legislation.

2.28 The Chairman made the following special statements to the Senate:

Instruments made in respect of the Australian Census; 22 August 1996

Instruments made under the *Native Title Act 1993*; 10 October 1996

Legislative Instruments Bill 1996; 21 November 1996

Late tabling of legislative instruments; 3 December 1996

Aspects of the Crimes Regulations; 12 December 1996

2.29 During its scrutiny of the Legislative Instruments Bill 1996 the Chairman, the Legal Adviser and the Secretary had two lengthy meetings with the Attorney-General, the Hon Daryl Williams AC QC MP. The Committee is grateful to the Minister for his personal attention to its concerns.

2.30 During its scrutiny of the Crimes Regulations officers of the Attorney-General's Department attended upon the Committee. The Committee is grateful to the Attorney-General for releasing these officers.

2.31 On 22 August 1996 the Committee hosted a visit by the Scrutiny of Acts and Regulations Committee of the Victorian Parliament.

2.32 On 3 December 1996 the Committee made a submission to the inquiry by the Legal and Constitutional Legislation Committee into the Administrative Review Council.

2.33 The Committee would like to record its appreciation of the sterling work of its independent Legal Adviser, Emeritus Professor Douglas Whalan AM.

2.34 The Committee is grateful for the support which it has received from the Senate during the present sittings.

Senator O'Chee, Senate Hansard, 25 June 1997, p.5192

Overview

2.35 During the sittings the Committee continued its non-partisan scrutiny of the usual large number of disallowable legislative instruments tabled in the Senate, made under scores of parent Acts administered through virtually every Department of State. Legislative instruments implement administrative details of almost every program established by Act.

2.36 The Committee acts on behalf of the Senate to scrutinise each of these instruments to ensure that they comply with the same high standards of parliamentary propriety and personal rights which the Senate applies to Acts. If the Committee detects any breach of these standards it writes to the Minister or other law-maker about the apparent defect, asking that the instrument be amended or an explanation provided. If the breach appears serious, or if the Committee has not received a satisfactory reply from the Minister, the Chairman of the Committee gives notice of a motion of disallowance of the offending instrument. This allows the Senate, if it wishes, to disallow the instrument. This ultimate step is rarely necessary, however, because Ministers almost invariably take action which satisfies the Committee.

2.37 As usual, during the sittings Ministers gave the Committee undertakings to amend many provisions in different instruments or parent Acts to meet its concerns. The Committee is grateful for this high level of cooperation from Ministers.

2.38 During the present sittings the Committee scrutinised 902 instruments, compared to 1021 for the sittings in the first half of 1996. Of these, 203 were from the statutory rules series, which are generally better drafted and presented that other series of legislative instruments. The other 699 instruments were the usual heterogeneous collection of different series.

2.39 Each of the 902 instruments was scrutinised by the Committee under its four principles, or terms of reference, which are included in the Standing Orders. There were 100 apparent defects or matters worthy of comment in those 902 instruments. The defects are described below under each of the four principles.

Principle (a)

Is delegated legislation in accordance with the statute?

2.40 This principle is interpreted broadly by the Committee to include not only technical validity but also every other aspect of parliamentary propriety.

2.41 Technical validity is, however, an important aspect of the work of the Committee. For instance, under s.49A of the *Acts Interpretation Act 1901* delegated legislation may generally incorporate material apart from the provisions of Acts or other delegated legislation only as it existed at a particular time and not as amended from time to time. Several instruments purported to incorporate variable material, including in one case material from a foreign organisation. Another included some provisions which expressly limited some incorporated material to a particular date, but which did not do so for other incorporated material. Numbers of enabling Acts provide for mandatory procedures to be followed by the Minister or others before delegated legislation is made. In the case of several instruments, however, there was no indication either on the face of the instrument or in the Explanatory Statement that this had been done. Instruments cease to have effect if not tabled in both Houses within a specified period, generally 15 days. In several cases it was possible that powers had been exercised under provisions which had ceased to have effect for this reason. As usual, several instruments appeared to be void for prejudicial retrospectivity. One instrument was tabled without schedules which included the substantive provisions of the instrument.

2.42 The Committee considers that the drafting of delegated legislation should be of a quality not less than that of Acts. In this context some instruments were made with no making words at all. Others included inaccurate statutory references in the making words. Some provisions, including making words, were incomplete. Numbers of instruments were made under the wrong provision of the 1,000 page long enabling Act under which they were made. The date of making of one instrument was indicated only by the year. Many instruments included cross-reference errors. Several instruments did not provide for numbering or citation. Two instruments had the same citation.

2.43 Other drafting deficiencies included unclear drafting, drafting errors, vague and subjective expressions and gender specific expressions. Numbers of redundant instruments were not revoked. Several instruments provided for the permissive "may" although it appeared that the mandatory "must" was intended. This was the case even though other similar provisions used "must" and, in one case, the provision related to an entitlement to the payment of money. Several instruments did not appear to effect the legislative intent expressed in the Explanatory Statement. In one case this related to the power of the Minister to vary rates of mining royalty. One instrument purported to include substantive provision in Notes, which are intended only to be illustrative or informative. Information in Notes to

another instrument was wrong. One instrument did not include the usual pink slip erratum attachment when this should have been done.

2.44 The Committee ensures that legislative instruments do not breach parliamentary propriety. Several instruments purported to be made by departmental memoranda to the Minister with the making action by the Minister consisting of ringing the word "agreed" in the memorandum. In one of these cases the putative instrument included cryptic handwritten anonymous and undated annotations by persons apparently not the Minister. In one case there was considerable delay in making legislative guidelines but the Explanatory Statement advised, in effect, that there was nothing to worry about because the administrators had acted as if they had been made. The making of several regulations which were financially beneficial to individuals was delayed for up to two years. Several instruments missed the opportunity to implement undertakings given to the Committee. Some instruments provided for levels of delegation of powers which may not have been appropriate. Others may not have limited sufficiently the appointment of authorised officers who could exercise powers under legislative instruments. Several sets of regulations amending the same principal instrument were made on the same day, with no apparent reason for the duplication.

2.45 The Committee ensures that all legislative instruments are accompanied by proper Explanatory Statements. Numbers of Explanatory Statements were inadequate or misleading. The Explanatory Statements for four sets of regulations remaking regulations disallowed earlier by the Senate did not refer to this. On behalf of the Committee the Chairman made a statement to the Senate on 25 June 1997 on recent action in respect of Explanatory Statements, reporting that the Federal Executive Council Handbook would be effectively revised to meet the concerns of the Committee.

Principle (b)

Does delegated legislation trespass unduly on personal rights and liberties?

2.46 The Committee interprets this principle broadly, to include every aspect of personal rights. During the present sittings the Committee detected the following possible defects in delegated legislation.

2.47 The Committee writes to the Minister about any instrument which might affect the rights of individuals. One instrument provided for members to be removed summarily from statutory Committees. Another did not provide a right for people to respond to adverse material before a decision was made. Another did not require consultation with the affected person before an exemption was cancelled. One provision for a search warrant did not include the usual reasonable force safeguard. One instrument provided for non-prescribed search warrants in electronic form with no indication of the usual safeguards. Another provided for powers of entry by private firms, broader than those which police have in the absence of a warrant, which did not appear to include appropriate safeguards. Other provisions for powers of entry did not require those entering to produce photographic identification. As usual, instruments also provided for strict liability and for reversal of the usual onus of proof.

2.48 One instrument provided inadequate safeguards for people required personally to produce documents in court. Another instrument did not include the usual safeguard that substantial rather than strict compliance with forms is sufficient. In one case a roll of voters was not available for public inspection. The Explanatory Statement for another instrument did not indicate that the Privacy Commissioner had been consulted about the release of personal information. The Committee scrutinised numbers of instruments providing for penalties imposed by infringement notices, not all of which provided for adequate safeguards. Several did not provide for notice to those affected of the beneficial consequences of paying an administrative penalty rather than going to court. The Court noted apparent deficiencies in some infringement notices which could be issued by private firms and in penalties which could be paid on the spot. Several of these instruments provided for more than one infringement notice for the same act or omission. Another provided for minor offences to be subject to infringement notices but did not appear to define minor.

2.49 The Committee questions any provisions which may be harsh or unfair. One instrument provided for time limits within which public officials must make a decision in respect of some decisions but not for other similar decisions. Another imposed reasonability requirements on some actions by public officials but not others. One instrument provided for costs for court witnesses with professional qualifications to be ten times higher than costs for ordinary witnesses. Another instrument provided that government bodies could give notice to members of the public by prepaid post but did not provide this privilege for those responding to the notices. One instrument which provided for the Commonwealth to take over leases at airports appeared to breach the rights of creditors of the former lessees. One instrument removed the right of a miner to renew a mining lease for a further 21 years and replaced it with a determination by the Minister. Another instrument required people to use a particular computer system without explaining how that system was selected.

2.50 The Committee ensures that determinations affecting Commonwealth employees are fair. One instrument appeared to leave a time during which allowances would not be paid to members of the Australian Defence force. Another may not have provided for full reimbursement of the costs of selling a house. Another may not have included adequate safeguards in respect of payment by the Commonwealth of part of medical insurance premiums for certain staff.

Principle (c)

Does delegated legislation make rights unduly dependent on administrative decisions which are not subject to independent review of their merits?

2.51 Many legislative instruments provide for Ministers or other public officials to exercise discretions. The Committee considers that such discretions should be as narrow as possible, include objective criteria to limit and guide their exercise, and include review of the merits of decisions by an external, independent tribunal, which would usually be the Administrative Appeals Tribunal.

2.52 Numbers of instruments provided discretions which affect business or which have a commercial effect. One instrument provided for parentage testing for family law purposes by accredited laboratories. Such accreditation was not only commercially significant but also

affected personal rights because the results of such testing were admissible in proceedings. In this case, however, there was no review of the accreditation process. Another instrument provided for an accreditation process the procedures for which were quite vague but which had significant commercial consequences, again with no review. The package of instruments which provided for the leasing of Commonwealth airports included numbers of decisions which could have an adverse commercial effect. Some of these decisions were subject to AAT review, some to internal review and some to no review at all. Decisions made by the internal review did not appear to be subject to AAT review. Some decisions could be made by State or local government agencies and by non-government companies.

2.53 One instrument provided for important commercial discretions in relation to whether motor vehicles complied with the required engineering standards. Another instrument provided for review of a decision to refuse or to cancel a commercially significant exemption, but not for review of a decision to impose conditions on the exemption. The Explanatory Statement for another instrument expressly advised that it included a discretion which was aimed at commercial importation but which did not appear to be subject to review. Another apparently unreviewable commercial discretion affected the balance date of companies.

2.54 The Committee carefully scrutinises instruments which affect personal rights. One instrument provided only subjective criteria for a discretion to exempt a person from payment of a fee. Other instruments provided inadequate criteria. Another instrument appeared to provide for discretions but did not indicate who was to make the decisions or what would happen if there was a dispute about the relevant facts. There were other instances of discretions which were not clearly drafted. One instrument provided a discretion to permit individuals to inspect and take copies of a roll of voters. Another instrument did not provide for review of discretions relating to penalty provisions.

Principle (d)

Does delegated legislation contain matter more appropriate for parliamentary enactment?

2.55 The Committee does not raise this principle as often as its other three principles. Nevertheless, it is a principle which goes to the heart of parliamentary propriety and complements the first principle, that an instrument should be in accordance with the statute.

Other developments

2.56 In addition to its main task of scrutinising legislative instruments, the Committee was active in other ways during the sittings.

2.57 The Committee tabled its *One Hundred and Fourth Report* , the Annual Report for 1995-96, on 25 June 1997.

2.58 During the sittings the Chairman made the following statements to the Senate on behalf of the Committee:

> Legislative instruments made in preparation for the Sydney 2000 Olympic Games; 6 March 1997
>
> Paper given to the Fourth Commonwealth Conference on Delegated Legislation on the Legislative Instruments Bill 1996; 6 March 1997
>
> Scrutiny by the Committee of High Court Rules; 23 June 1997
>
> Government amendments of the Legislative Instruments Bill 1996; 23 June 1997
>
> Revision of the Executive Council Handbook to reflect the requirements of the Committee in relation to Explanatory Statements; 25 June 1997

2.59 The Committee agreed that it would present a paper to the Sixth Australasian and Pacific Conference on Delegated Legislation on its scrutiny of the package of instruments providing for the leasing of Commonwealth airports.

2.60 The Committee would like to record its appreciation of the work of its independent Legal Adviser, Emeritus Professor Douglas Whalan AM and also the staff of the Committee Secretariat. Without the tireless work of these people, the Committee would be unable to discharge the duties entrusted to it by the Chamber.

2.61 The Committee is also grateful for the support which it has received from the Senate during the present sittings.

CHAPTER 3

GUIDELINES ON THE APPLICATION OF THE PRINCIPLES OF THE COMMITTEE

3.1 Standing Order 23(3) establishes the four principles under which the Committee scrutinises every disallowable instrument of delegated legislation. These principles are set out at the start of this and every other Report of the Committee. The Committee interprets the principles in a broad and expanding fashion, to cover any possible defect affecting personal rights or parliamentary proprieties. This Chapter illustrates aspects of delegated legislation which the Committee has raised with Ministers and other law-makers during the reporting period.

Principle (a)
Is delegated legislation in accordance with the statute?

Technical validity and effect

3.2 Delegated legislation must be made validly under both its enabling Act and any other relevant legislation such as the *Acts Interpretation Act 1901*.

(i) Incorporation of material as in force from time to time

3.3 Section 49A of the Acts Interpretation Act provides generally that delegated legislation may incorporate or adopt the provision of an Act or other delegated legislation in force from time to time, but may only incorporate other material as in force or existing when the incorporating instrument takes effect.

3.4 The **Therapeutic Goods Order No. 54 made under s.10 of the *Therapeutic Goods Act 1989*** provided for incorporation of material which the Explanatory Statement described as a critical aspect of all health care facilities. The Order expressly provided that the incorporation related to material which is current at any given time. In reply to the Committee's query, the Minister advised that the Order would be amended to remove the invalid reference. The **Meat and Live-stock Orders Nos. MQ66/96 and MQ67/96 made under s.68 of the *Meat and Live-stock Industry Act 1995*** provided that a reference to any statute included a reference to that statute as amended or replaced from time to time. The Acts Interpretation Act provides for the incorporation of an Act as amended from time to time, but there did not appear to be a similar provision for incorporation of Acts replaced. The Minister advised the Committee that the provision was broad enough to cover Acts replaced. The **Employment Services (Participants) Determination No. 2 of 1995 and the Employment Services (Terminating Events) Determination No. 2 of 1995 made under s.25 and s.26 respectively of the *Employment Services Act 1994*** incorporated the Disability Reform Package Strategy and other strategies, packages and initiatives. The Committee asked the Minister whether the Determinations refer to these as existing when the Determination came into effect, or whether there is legislative authority for them to be applied as in force from time to time. The reply attached an opinion from the Office of General Counsel of the Attorney-General's Department that the Determinations intended to

refer to the programs as they exist from time to time and that an alternative interpretation would have the result that each time a program was changed, in even the slightest way, the Determinations would also have to be amended. The opinion, which did not refer to s.49A of the Acts Interpretation Act, also advised that there was nothing in the enabling Act which precluded a reference to a program as it exists from time to time. The Committee wrote back to the Minister advising of the provisions of s.49A. The reply to the Committee attached another opinion from the Attorney-General's Department which advised that the programs were evidenced in writing but were not in writing. The Committee advised the Minister that it did not accept this advice but would take no further action because only a court could decide definitively on the issue.

(ii) Prejudicial retrospectivity

3.5 Subsection 48(2) of the Acts Interpretation Act provides generally that prejudicially retrospective delegated legislation taking effect before gazettal and affecting anyone except the Commonwealth is void. The **Transitional Provisions for the Calculation of Paid Up Values** and the **Calculation of the Cost of Investment Performance Guarantees made under s.101 of the *Life Insurance Act 1995*** were both made on 16 December 1996 and were expressed to come into effect from 31 December 1996. The Committee ascertained, however, that the instruments were not gazetted until 22 January 1997. The Minister advised the Committee that the first instrument was void and would be replaced. The second instrument did not make any substantive changes to the previous instrument and was thus not invalidated. The **Meat and Live-stock Orders Nos. MQ66/96 and MQ67/96 made under s.68 of the *Meat and Live-stock Industry Act 1995*** were both made on 26 February 1996 but were expressed to have effect from 1 January 1995. In reply to the Committee's query the Minister attached a legal opinion which advised that the Orders were not intended to operate retrospectively and a reasonable argument could be made that they are not retrospective, although there would clearly be merit in amending the Orders to make this plain. The Minister advised the Committee that there would be new procedures for drafting the Orders.

3.6 The **South Pacific Regional Environment Programme (Privileges and Immunities) Regulations, Statutory Rules 1996 No. 144**, provided for various legal privileges and immunities for SPREP and its officers. The Regulations properly provided that any immunity from suit commenced on gazettal. Other rights, however, including the right to sue, were retrospective for 10 months. The Minister advised that there was no activity by SPREP in Australia during the relevant period. In any event, it was difficult to see how SPREP suing on a cause of action previously arising could prejudice anyone. If SPREP could not sue on such a cause of action this would in effect confer an immunity on a person who had done SPREP a civil wrong. Also, while ever SPREP was not a legal entity, the wrong would have been suffered instead by some natural person, who could have sued in their own name. The Committee replied to the Minister, advising that it did not accept his proposition that it is difficult to see how there could be any prejudice in an international organisation suing a person on a cause of action which may have arisen more than 10 months before the Regulations declared it to be an international organisation. If, as the Minister advised, a natural person instead of SPREP could sue then this position should only have been changed from gazettal.

(iii) Invalid subdelegation

3.7 Delegated legislation is void if it purports to subdelegate legislative power without the authority of an Act. The **Cultural Bequests Program Guidelines (No. 1) made under s.78(6C) of the *Income Tax Assessment Act 1936*** provided that an application under the Program must be made on or before a date notified by the Minister in the *Gazette*. The Committee advised the Minister that this could be an invalid subdelegation of legislative power. The Minister advised that the Guidelines would be amended to provide a date. The **Family Law Regulations (Amendment), Statutory Rules 1996 No. 71**, provided for a Registrar of the Family Court to determine certain matters relating to advertising by counsellors, mediators and arbitrators. The relevant provision expressly recited that it was made for the purposes of a section of the enabling Act. The Committee wrote to the Minister suggesting that the section did not provide for the Regulations to subdelegate what appears to be a legislative power. The Minister advised that the section did not provide such a power but that the regulation came within the "necessary and convenient" broad regulation making power. The **Meat and Live-stock Orders Nos. MQ66/96 and MQ67/96 made under s.68 of the *Meat and Live-stock Industry Act 1995*** both provided that an application to export must be made in accordance with conditions advised by the Australian Meat and Live-stock Corporation from time to time. The Committee asked whether this was an invalid subdelegation of legislative power. The Minister replied to the Committee attaching a legal opinion which advised that the power was possibly invalid and there was a risk that a court would overturn it, but that overall it was probably valid.

3.8 Two **Fees Determination No. 1 of 1996** were both made under a recent amendment of the **Administration Ordinance 1990** of the Jervis Bay Territory, which was itself made under the ***Jervis Bay Acceptance Act 1915***. The **Determination made under ss.3 and 4 of the Territory of Cocos (Keeling) Islands Utilities and Services Ordinance 1996** was similarly made under a recent amendment of the Ordinance, which was itself made under the ***Cocos (Keeling) Islands Act 1955***. Both amendments purported to confer on the Minister and the Administrator respectively the power to make certain Determinations and both provided for tabling and possible disallowance. Both enabling Acts, however, provided narrow and explicit references to delegated legislation made under the Ordinances and the Committee asked whether the Determination making powers were invalid subdelegations of legislative power. The Minister confirmed that the subdelegations could not come within the express provisions of the Act dealing with delegated legislation but advised that they could be brought under the general plenary power to make Ordinances. The Committee advised the Minister that it did not necessarily accept this advice and that, in any event, delegated legislation which must rely on the plenary power for validity, rather than on existing clear enabling provisions of an Act, is not sound legislative or administrative practice.

(iv) Compliance with procedural requirements of the enabling Act

3.9 Delegated legislation must comply with specific requirements of the enabling Act and must in other respects be validly made. The enabling *Public Service Act 1922* provided that **Public Service Determinations** made in each calender year must be numbered in regular arithmetical series as near as possible in the order in which they are made. The Committee advised the Minister that this requirement was not being met. The Minister advised that the provision was directory and that the failure to comply with the provisions of the Act did not

affect validity. New procedures had been instituted to remedy the deficiencies and the Minister assured the Committee that such circumstances would not be repeated. The Committee advised the Minister that it accepted this advice, noting that the same problem existed with respect to **Defence Determinations** made under the *Defence Act 1903*. Five months later the Committee wrote again to the Minister about continuing difficulties with **Public Service Determinations**. The Minister advised that this had been difficult to control because two agencies were involved, resulting in occasional and unavoidable delays. The enabling Act for the **Ningaloo National Park Plan of Management made under s.11 of the *National Parks and Wildlife Conservation Act 1975*** provided for detailed procedures to be followed before a Plan can be made. These included notice of intention, public submissions and a draft plan. Neither the Plan nor the explanatory material indicated that this had been done. The Minister provided the Committee with detailed advice about the procedures. The **Eleventh Amending Deed made under s.5 of the *Superannuation Act 1990*** did not indicate that the required consent of the PSS Board had been obtained before the Minister made the Deed. The Minister advised that future Deeds and explanatory material would include this information.

3.10 The **Exemption No. 132/FRS/144/1996 made under r.207 of the Civil Aviation Regulations** stated that it was made by one official, but it was signed by another official. The Committee asked about validity. The Minister advised that validity could only be determined by a court. However, the instrument may well be valid, as both officials had authority to make the Exemption and the discrepancy was an administrative oversight to which the "slip rule" could apply. The **Public Service Determination 1996/196** was neither signed nor dated. The Committee asked about validity. The Minister advised that the original was signed and dated and the fact that the tabling copy was not did not affect validity. The Committee asked the Minister if he could ensure that future tabling copies were both signed and dated. The **Currency Determination No. 7 of 1996** was signed but dated by year, not by day or month. The Minister advised that this was an oversight.

3.11 The **Maximum Amount Recoverable in Tort Determination made under s.121 of the *Telecommunications Act 1991*** was signed by the Chairman of AUSTEL although the Act requires AUSTEL itself to make a Determination. The Committee sought the Minister's confirmation that signature by the Chairman is sufficient for the instrument to be validly made. The Minister attached legal advice that the Determination was probably not validly made and suggested that the most appropriate course would be to revoke the Determination. The **Guidelines for Merit-based Equity Scholarships Scheme made under s.35 of the *Higher Education Funding Act 1988*** were made by an internal departmental memorandum signed by the Minister who, however, added an annotation asking that an amendment be made. The Minister's annotation was further annotated by another person. There was no indication that the Guidelines included the amendment. In reply to the Committee's query about validity the Minister advised that future Guidelines would be made by a formal making instrument.

(v) Failure to table

3.12 Subsection 48(3) of the Acts Interpretation Act provides that regulations not tabled before each House of the Parliament within 15 sitting days after making cease to have effect. This or similar requirements apply to other disallowable instruments through s.46A of that

Act or specific provisions of the enabling Act. On 3 December 1996 Senator O'Chee made a statement to the Senate on this matter, reproduced in Chapter 6 of this Report. The Committee writes to Ministers about any unusual aspects of failure to table. During its scrutiny of the **Native Title (Notices) Determination No. 1 of 1996** the Committee ascertained that due to a failure to table an earlier instrument there was a period of over two years when there was no valid or effective Determination indicating how notification under the *Native Title Act 1993* was to be given. The Minister advised the Committee that this had resulted in thousands of void administrative acts. The situation would be rectified by an amendment of the Act providing for prejudicially retrospective validation. On 10 October 1996 Senator O'Chee made a statement to the Senate on this matter, reproduced in Chapter 6 of this Report. The **Industrial Relations Court Rules (Amendment), Statutory Rules 1996 Nos. 219 and 220**, were not tabled within time and ceased to have effect. The Committee sought and received an assurance from the Chief Justice that the powers provided for by the Rules were not exercised between the dates upon which they ceased to have effect and the date upon which fresh Rules were made.

3.13 The **Locally Engaged Staff Determination 1996/27** was sent to the Committee under a covering letter dated after the Determination had already ceased to have effect because of a failure to table. The Minister advised the Committee that this was a matter of concern which resulted from a breakdown of procedures. New procedures had been implemented. The enabling Act for the **Determination of Benefits of Members of the National Road Transport Commission made under s.15 of the *National Road Transport Commission Act 1991*** provided that a Determination must be made in writing signed by a majority of members of the Ministerial Council. The Explanatory Statement advised that this was done on a particular date which, if so, would have meant that the Determination was validly tabled. This date was, however, the date of the signature of the last of the eight members who signed, with all of the other signatures being outside the limit of 15 sitting days. The Committee also questioned the form of the Determination, which consisted of eight identical Determinations each signed by a different Minister over a five week period. The Minister advised that the Committee's view was probably correct and that its concerns would be addressed.

Possible breaches of parliamentary propriety

3.14 The Committee ensures that delegated legislation does not breach parliamentary propriety. The **AUSTUDY Regulations (Amendment), Statutory Rules 1995 No. 132,** provided for the means testing of AUSTUDY benefits. Senator Brian Harradine wrote to the Committee about these Regulations, attaching a copy of a memorandum from the Parliamentary Research Service which advised that actions by the Minister, the Secretary and the Department may be inconsistent with the Regulations and therefore invalid. The Committee wrote to the Minister advising that regulations were made under the authority of an enabling Act of the Parliament and that it would be a matter of concern if administrators failed to observe the provisions of regulations, or substituted other requirements in place of those prescribed by regulation. The Minister advised the Committee that she entirely took its point about the primacy of legislation, that she appreciated the Committee's vital role in safeguarding the legislative process and congratulated Senator Harradine and the Committee on raising the issue. A review would ensure that no breach of the Regulations could occur. The Committee accepted the advice that no future breaches should occur but wrote again asking whether any breach of the Regulations had occurred previously. The Minister advised

that although the Regulations were capable of supporting the way in which they had been administered, she accepted that there were other interpretations which would be in accordance with the regulatory framework. The Committee suggested to the Minister that the review of the Regulations should ensure that as far as possible the Regulations should be capable of only one interpretation.

3.15 The **Tenth Amending Deed to Establish an Occupational Superannuation Scheme for Commonwealth Employees and Certain Other Persons made under s.5 of the *Superannuation Act 1990*** among other things corrected errors in earlier Deeds. The Explanatory Statement advised that the Deed had been administered to produce the intended outcomes pending the present corrections. The Committee wrote to the Minister noting that, despite the actual provisions of the Deed, the scheme was administered in the form in which it was intended rather than the form in which it actually existed. The Minister confirmed that the erroneous provisions were never administered. The Minister considered that this was acceptable because the intended effect had clearly been set out in the Explanatory Statements for the earlier Deeds. The Committee wrote back to the Minister asking under which provisions of Commonwealth law this was done, noting that the correcting Deed was not made until more than seven months later. At the Committee's suggestion the Minister agreed to amend the Act to validate the administrative actions. The **National Gallery Regulations (Amendment), Statutory Rules 1996 No. 92,** made the first amendment relating to entry charges since 1984, although the legislation affecting those given exemption from entry charges had changed substantially since then. This legislation included the new *Veterans' Entitlements Act 1986*, the new *Social Security Act 1991* and amendments of the *Student and Youth Assistance Act 1973* now covered by the present new exemption. The Committee asked whether the previously existing provisions of the Regulations were ignored in practice and people were exempted from entry charges in breach of the Regulations. The Minister advised that there was a broad discretionary power to admit people without charge but that the Regulations would be reviewed to see whether it would be possible to draft them in a general way to avoid the need for periodic revision.

3.16 The Explanatory Statement for the **Commissioner's Rules No. 22 made under s.252 of the *Life Insurance Act 1995***, which commenced on 18 September 1996, advised that the Insurance and Superannuation Commission intended to administer the Rules as if they had taken effect on 1 January 1996. It also advised that the ISC had been administering the intent of the Rules rather than their literal provisions. The Committee advised the Minister that this was a matter of some concern. If the Rules had no adverse effect on any person then they could and should have been made retrospective to 1 January 1996. If there was any adverse effect at all then the solution is to amend the enabling Act to provide for prejudicial retrospectivity. The Committee emphasised that it would be of concern if a Commonwealth agency is, or was, administering legislation not according to its provisions but according to what the agency considered the provisions should be. The Minister advised that both he and the ISC agreed with the Committee and that the ISC would write to all life insurance companies instructing them that they must strictly apply the earlier Rules until the date of commencement of **Commissioner's Rules No. 22**. Also, a new Explanatory Statement would be produced which would be laid before both Houses.

3.17 The **Crimes Regulations (Amendment), Statutory Rules 1996 No. 7**, exempted the Australian Securities Commission from aspects of the Spent Convictions Scheme, which provides for important personal rights. The enabling Act, however, provided for the Privacy Commissioner to receive applications for exemptions and to advise the Minister on whether an exemption should be granted. The Committee noted that neither the making words of the Regulations nor the Explanatory Statement referred to this requirement, or that it had been observed, or to the substance of the Privacy Commissioner's advice, the obtaining of which was mandatory. In response to the Committee's query the Minister replied three and half months later, advising that the Privacy Commissioner was consulted but that the Minister had overruled the Commissioner's advice that the exemption should not be granted. The Committee was concerned at this advice, not necessarily because the Regulations excluded the ASC from the scheme, but because the absence of information and the delay meant that the Senate did not have an opportunity to exercise all of its options. The Committee suggested to the Minister that the Regulations should be repealed and remade. After further unsatisfactory correspondence with the Minister the Committee wrote to the Parliamentary Secretary responsible for the Federal Executive Council Handbook, asking that it be amended to set out the relevant requirements of the Committee. The Parliamentary Secretary agreed to do this. On 12 December 1996 and 25 June 1997 Senator O'Chee made statements to the Senate on this matter, reproduced in Chapter 6 of this Report.

3.18 The **Customs (Prohibited Imports) Regulations (Amendment)** and the **Customs (Prohibited Exports) Regulations (Amendment), Statutory Rules 1996 Nos. 31 and 32**, provided for aspects of the suspension of United Nations sanctions against parties in the former Yugoslavia. The Explanatory Statement advised that because this was a suspension rather than a termination of sanctions it was being implemented by "conditioned blanket permissions" rather than by direct amendment of the relevant provisions. The Committee asked the Minister why this form of procedure was used, the result of which appears to have been an unusual use of the permission provisions in the Regulations. The Minister advised that the enabling Act was restrictive in its operation and the use of permissions was the only way in which the exact terms of Security Council resolutions could be implemented. The **Currency Determination No. 5 of 1996 made under s.13A of the *Currency Act 1965*** provided for designs on Australian coins of Goya's Naked Maja, of a panda and bamboo and of the coat of arms of Zurich. The Committee asked the Minister about the relevance to Australia of these designs. The Minister advised that the use of foreign symbols on a limited mintage of a particular coin can add exclusivity and collector appeal. The symbols are intended to improve the attractiveness of the coins in specific overseas markets. Most of the coins will be sold overseas.

3.19 It may be a breach of parliamentary propriety if particular instruments or provisions are not repealed or replaced where it is appropriate to do so. In reply to a query from the Committee the Minister advised that the **Australian Dried Fruits Board (AGM) Regulations, Statutory Rules 1993 No. 144,** were inoperative following repeal of sections of the enabling Act; the **Fisheries Levy (Northern Fish Trawl Fishery) Regulations (Amendment), Statutory Rules 1992 No. 13,** were inoperative under new Offshore Constitutional Settlement arrangements; and the **Wool Research and Development Corporation Regulations (Amendment), Statutory Rules 1992 No. 443,** were no longer operative following amendment of the enabling Act. The Committee suggested that the Regulations should be formally repealed. The Minister agreed to do this. The Explanatory

Statements for the five **Radiocommunications Standards, Statutory Rules 1996 Nos. 310 and 312-315,** advised that the instrument will replace an existing standard and, in each case, identified the Statutory Rules that will be replaced. In only one case, however, did the present Statutory Rules repeal existing Statutory Rules. In reply to the Committee's query, the Minister advised that it was intended to revoke the previously existing standards. The Explanatory Statement for the **Interpretation Act 1984 (W.A.)(C.I) (Amendment) Ordinance 1996, Territory of Christmas Island Ordinance No. 6 of 1996,** advised that the Ordinance omitted a provision that was found to be unworkable, but gave no details of why this was so. The Committee noted that the unworkable provision had been in force for more than four years and advised the Minister that this was a matter of concern. The Minister advised that while it had taken some time and effort to resolve the issue, no person was adversely affected.

3.20 It may be a breach of parliamentary propriety if legislative instruments do not provide for appropriate penalties. The **Fisheries Management Regulations (Amendment), Statutory Rules 1995 No. 360,** required the use of Tori poles for pelagic or longline fishing in a specified area, in order to reduce the danger of sea birds, particularly the Wandering Albatross, being caught on weighted hooks and drowned. The Regulations provided, however, for the relatively light penalty of $1,000 for breach of this provision. In reply to its query the Committee was advised that this was the maximum penalty for which the Regulations could provide and that the effectiveness of the Regulations will depend on the degree of commitment by boat crews using the poles, which could best be achieved by cooperation rather than coercion. The Committee wrote back to the Minister noting that the enabling Act provided for offences with penalties up to $50,000 and asking whether the Act could be amended to provide for a more appropriate level of penalty. The Minister advised that a cooperative rather than a punitive approach should lead to further enhancement of the design and effectiveness of the poles. The **Occupational Health and Safety (Commonwealth Employment) (National Standards) Regulations (Amendment), Statutory Rules 1996 No. 129,** provided for scores of offences with penalties for breaches. A number of similar provisions, however, did not provide for penalties. The Minister advised the Committee that some of these were covered by other provisions. The others could be either considered as a criminal matter, in which case penalties would be needed, or as a breach of a condition of a licence. The administering authorities had made a policy decision to address the issue as a licence condition.

3.21 Excessive delay in making legislative instruments or in complying with requirements of enabling Acts may be a breach of parliamentary propriety. Enabling provisions for the **Ningaloo National Park Plan of Management made under s.11 of the *National Parks and Wildlife Conservation Act 1975*** provided that a Plan must be prepared as soon as possible after a park had been declared and must then be tabled in both Houses as soon as practicable. In fact the Plan was not made until eight years after the Park was declared and was not tabled until more than six months after it was made. The Minister advised that the Plan took a considerable period to make because policy issues concerning use of the Park required much time consuming negotiation. Tabling was delayed because of the requirement to print copies and a comments document. The **Ships (Capital Grants) Regulations (Amendment), Statutory Rules 1996 No. 87,** effectively provided for the payment of a grant in respect of three named ships, with retrospectivity in one case of 17 months and in two cases of nine months. The Minister advised that the delay was caused by factors specific to the unique

nature of each of the ships, which involved a complex technical assessment of their design and operations. The **Income Tax Regulations (Amendment), Statutory Rules 1996 No. 185,** provided that capital gains tax does not apply to payments made under two specified government schemes, with retrospectivity in one case of four years and in the other of 20 months. The Minister advised that in both cases there had been a lengthy delay between the time that the scheme commenced and the time that the administering department asked the Australian Taxation Office for an exemption. The **South Pacific Regional Environment Programme (Privileges and Immunities) Regulations, Statutory Rules 1996 No. 144,** provided for 10 months retrospective operation of obligations under an international agreement. The Minister replied to the Committee's query but did not appear to address this issue. In reply to the Committee's further query the Minister advised that the delay was due to the need to attend to matters of higher priority in a climate of stringent resource constraint. The Minister had approved proposed amendments of the enabling Act, one with the present SPREP case in mind, which should avoid the problem. There appeared to be delay of some years in making the **National Gallery Regulations (Amendment)** and the **Australian National Maritime Museum Regulations (Amendment), Statutory Rules 1996 Nos. 92 and 93.** The Minister explained that this was an oversight exacerbated by changes to the arts portfolio.

3.22 Unnecessary duplication of legislative instruments may constitute a breach of parliamentary propriety. The three sets of amendments made by the **Health Insurance Regulations (Amendment), Statutory Rules 1996 Nos. 231, 234 and 235** were all made on the same day, gazetted on the same day and commenced on the same day. Also, two of the three amended the same two provisions of the Principal Regulations. The Committee asked why it was necessary to make three sets of regulations when one may have been appropriate. The Minister advised that each of the three related to a different election or Budget commitment and were developed separately. There was a difference of some weeks in the drafting which made it impossible to combine the changes. The **Banks (Shareholdings) Regulations (Amendment), Statutory Rules 1996 Nos. 146 and 147,** were both made on the same day and gazetted and came into effect on the same day, with identical provisions and Explanatory Statements, except for the substitution of different parties. The Minister advised the Committee that he shared its concern and that the case was unfortunate but unavoidable due to unforseen circumstances. It was not originally intended to have two sets of regulations.

3.23 It may be a breach of parliamentary propriety if Committee correspondence is not answered by the person to whom it is addressed. Usually this will be the Minister administering the enabling Act under which the legislative instrument is made or, in the case of rules of court, the Chief Justice of the court. This reflects long standing practice and the importance of a communication from a Committee of the Senate. The Committee pointed out this requirement to Ministers in respect of the **Cultural Bequests Program Guidelines (No. 1) made under s.78(6C) of the *Income Tax Assessment Act 1936***; the **Export Control (Hardwood Wood Chips) Regulations, Statutory Rules 1995 No. 386**; the **Exemption No. 132/FRS/144/1996 made under the Civil Aviation Regulations**; the **Employment Services (Participants) Determination No. 2 of 1995** and the **Employment Services (Terminating Events) Determination No. 2 of 1995 made respectively under s.25 and s.26 of the *Employment Services Act 1994*.** In the case of the **High Court Rules (Amendment), Statutory Rules 1997 No. 11**, the Registrar replied to a letter from the

Committee to the Chief Justice. The Committee wrote again to the Chief Justice, advising that it was grateful to the Registrar, but preferred to receive replies from those to whom they are addressed. The Registrar replied again. The Committee wrote to the Chief Justice for the third time, again advising that it was grateful to the Registrar, but setting out its views on the matter. The Chief Justice then replied to the Committee. The Committee advised the Chief Justice that it was grateful for his reply, which followed precedents set by Sir Harry Gibbs and Sir Anthony Mason.

Inadequate explanatory material

3.24 Due to the previous efforts of the Committee it is now accepted that each legislative instrument should be accompanied by adequate explanatory material. The Explanatory Statement for the sensitive **Export Control (Hardwood Wood Chips) (1996) Regulations, Statutory Rules 1996 No. 206,** was very slight with only a few lines of background and brief notes on individual provisions. The Explanatory Statement for the **Family Law Regulations (Amendment), Statutory Rules 1996 No. 71,** which established an important new process of primary dispute resolution, provided only general background with no notes on individual provisions. The Committee noted that the Explanatory Statement for the related **Family Law Rules (Amendment), Statutory Rules 1996 No. 60,** the main purpose of which was, like the Regulations, to make changes consequent upon the passage of the *Family Law Reform Act 1995*, provided these notes. The **Classification (Publications, Films and Computer Games) Regulations, Statutory Rules 1995 No. 401,** prescribed 32 different fees, some of which were quite substantial, with no indication in the Explanatory Statement of the basis upon which the fees were set. The Committee advised the Minister that the Explanatory Statement for the **Remuneration Tribunal Determination No. 13 of 1996** did not provide enough information for Senators to scrutinise the powers which the Tribunal had exercised under the authority of an Act of Parliament. The Explanatory Statement for the **Taxation Administration Regulations (Amendment), Statutory Rules 1996 No. 347,** which prescribed the Royal Commission into the City of Wanneroo for the purposes of a provision of the enabling Act, did not explain the effect of the provision. In all these cases the Minister provided the Committee with a detailed explanation. The Explanatory Statements for the **Mining Legislation (Amendment) Ordinance 1996, Territory of Cocos (Keeling) Islands Ordinance No. 8 of 1996** and **Territory of Christmas Island Ordinance No. 10 of 1996** advised that the Ordinances gave a specified power to the Minister, although the relevant provisions did not do this. The Minister advised that the Explanatory Statements were incorrect.

3.25 Explanatory Statements for legislative instruments which implement an undertaking given by a Minister or Chief Justice to the Committee should advise of this, so that Senators will be kept aware of the kind of issues which the Committee raises. This information was not included in the Explanatory Statements for the **Australian War Memorial Regulations (Amendment), Statutory Rules 1996 No. 243,** the **Determination No. 1996-97/ACC4 made under s.47(2)(b)(iii) of the *National Health Act 1953***, the **Casino Control (Amendment) Ordinance 1996, Territory of Christmas Island Ordinance No. 5 of 1996,** or the **Native Title (Notices) Determination No. 1 of 1996**. In all these cases the Minister advised the Committee that future instruments would do so. The Explanatory Statement for the **Family Law (Child Abduction Convention) Regulations (Amendment), Statutory Rules 1996 No. 74,** also did not refer to the fact that the Regulations implemented an

undertaking given to the Committee. After considerable correspondence with the Minister administering the enabling Act the Committee obtained an undertaking from the Parliamentary Secretary responsible for the Federal Executive Council Handbook that the Handbook would be revised to reflect the Committee's requirements in this regard. The Committee was also advised that the Handbook would be revised to ensure that Explanatory Statements should refer to any mandatory procedures for the making of legislative instruments, following Committee scrutiny of the **Crimes Regulations (Amendment), Statutory Rules 1996 No. 7**. On 25 June 1997 Senator O'Chee made a statement in the Senate on these aspects of Explanatory Statements, reproduced in Chapter 6 of this Report.

Inappropriate levels of delegation

3.26 Many legislative instruments provide for a decision maker to delegate his or her powers. The Committee ensures that such delegation is restricted to persons of suitable seniority and experience. The **Exempt Nursing Homes Principles (Amendment No. 1 of 1996) made under s.39AB(4) of the *National Health Act 1953*** provided for the Minister to delegate any of his or her powers under the Principles to any person at all. The Committee asked about the need for this wide power and about how it would be exercised. The Minister advised that the power was superfluous and would be removed as soon as possible. The **Sydney 2000 Games (Indicia and Images) Protection Regulations, Statutory Rules 1997 No. 65,** provided for the Chief Executive Officer of SOCOG or an authorised person to exercise functions in respect of the register of licensed users. It appeared that an authorised person could be any person at all. The Committee asked about this power of delegation. The Minister advised that one person had been nominated and a further limited number would be nominated to act in the absence of this person. The **Airports (Control of On-Airport Activities) Regulations, Statutory Rules 1997 No. 57,** provided for different classes of people to be authorised for different types of ground traffic control at leased airports. The Minister advised that the wider range of authorised persons for one type of traffic control reflected the need for greater flexibility because State laws will apply to vehicle matters in certain circumstances. The **Export Control (Hardwood Wood Chips) (1996) Regulations, Statutory Rules 1996 No. 206,** provided for the Minister to delegate his or her important powers in this sensitive area to any officer of the Department, no matter how junior. The Minister advised that decisions by a delegate may be subject to reconsideration by the Minister and review by the AAT. Also, under paragraph 34AB(c) of the Acts Interpretation Act a power when exercised by a delegate would be deemed to have been exercised by the Minister. It was therefore in the Minister's interest to delegate only to suitable people. The **Employment Services (Terminating Events) Determination No. 2 of 1995 made under s.26(2) of the *Employment Services Act 1994*** provided for the Employment Secretary to exercise certain powers. The Committee asked whether these powers would be exercised personally. The Minister advised that the Determination did not provide for delegation, but that the powers could be delegated under general law principles and that the Employment Secretary would not be expected to decide every case, but may appoint others to act for him or her.

Drafting defects

3.27 The Committee considers that the standard of drafting of legislative instruments should be not less than that for Acts. The Explanatory Statement for the **Customs (Prohibited Imports) Regulations (Amendment), Statutory Rules 1996 No. 91,** advised that they implemented a number of resolutions of a special meeting of the Australian Police Ministers' Council following the Port Arthur killings and introduced a new structure for the importation of all firearms into Australia. The Regulations provided that a gun must be tested by being dropped from a height of not more than 45 centimetres when it appeared that not less than 45 centimetres was intended. In reply to the Committee's query the Minister advised that the Regulations would be amended. The Explanatory Statement for the **Determination No. 1996-97/ACC1 made under s.47(2)(b)(iii) of the *National Health Act 1953*** advised that it provided for a nursing home resident contribution to apply from one date for Department of Veterans' Affairs pensioners and from another date for Department of Social Security pensioners. As drafted, however, the Determination did not apply at all to DSS pensioners and applied ambiguously to DVA pensioners. The Minister advised that the Determination would be revoked and a new one made. The Explanatory Statement for the **Defence Determination 1996/40** advised that it provided for payment of an allowance to ADF members on leave, as a result of a Defence Force Remuneration Tribunal Determination authorising payment of the allowance from 13 June 1996. Since the Determination only commenced on 25 November 1996 the Committee asked whether the allowance was paid to members on leave between the two dates and whether there was legal authority for this. The Minister advised that a new Determination would be made to correct the position.

3.28 The **Transitional Provisions for the Calculation of Paid Up Values and Surrender Values made under s.101 of the *Life Insurance Act 1995*** were made on 16 December 1996. However, the **Commissioner's Rules No. 27 made under s.252 of the *Life Insurance Act 1995***, made on 23 December 1996, referred to an instrument with the same title made six months earlier. The Committee asked whether it was intended that the two instruments should be in force at the same time. The Minister advised that all future new instruments would expressly revoke their predecessors. The **Determination PHI 14/1996 made under s.4(1)(dd) of the *National Health Act 1953*** provided for commencement on 25 September 1996. The Explanatory Statement also advised that it would commence on that date. However, an Appendix to the Determination, which set out the actual legislative changes, advised that they would commence in March 1996. The Minister advised that to the extent that this may be misleading to users the Department would write to all those affected to explain the error and procedures would be reviewed. The **Remuneration Tribunal Determination No. 15 of 1996** was incomplete and unclear in effect. The Minister advised that the Determination would be amended.

3.29 The **Family Law Regulations (Amendment), Statutory Rules 1996 No. 71,** referred to approved arbitrators, but did not provide for anyone to approve such arbitrators. In reply to the Committee's query the Minister advised that the enabling Act defined approved arbitrators as arbitrators approved under the Regulations. There are no provisions for approval but the matter is currently under consideration and the reference to approved arbitrators was included for convenience pending new regulations.

3.30 The **Childcare Assistance (Fee Relief) Guidelines (Variation), CCA/12A/96/1, made under s.12A(1) of the *Child Care Act 1972***, provided that relevant families would be "able" to be assessed for assistance on a more favourable basis. The Committee suggested that this should be "must" to reflect legislative intention. The Minister undertook to amend the Guidelines. The **Workplace Relations Regulations (Amendment), Statutory Rules 1996 No. 328**, used the permissive "may" for some provisions but the mandatory "must" for similar provisions. The Minister advised that it is a fundamental principle of administrative law that a public official entrusted by legislation with a discretionary power would normally be under a duty to exercise that power when appropriate circumstances arise. A failure on the part of an official to do so could lead to an application for a writ of mandamus. Therefore, the Minister advised, the use of "must" instead of "may" in the present case would not impose any greater requirement on an official to ensure that no unlawful disclosure occurred.

3.31 The Committee ensures that references in legislative instruments to provisions of Acts are accurate and that drafting practice follows the usual conventions. The **Airports (Building Control) Regulations, Statutory Rules 1996 No. 292,** the **Airports Regulations, Statutory Rules 1997 No. 8,** the **Airports (Environment Protection) Regulations, Statutory Rules 1997 No. 13,** the **Airports (Control of On-Airport Activities) Regulations, Statutory Rules 1997 No. 57,** the **Occupational Health and Safety (Commonwealth Employment) (National Standards) Regulations, Statutory Rules 1996 No.129,** the **Bankruptcy Regulations (Amendment), Statutory Rules 1996 No. 263,** and the **Locally Engaged Staff Determination 1996/11,** all included reference errors which the Minister undertook to correct. The Committee also received assurances in respect of drafting oversights in the following instruments: the **National Gallery Regulations (Amendment), Statutory Rules 1996 No. 92,** the **High Court Rules (Amendment), Statutory Rules 1997 No. 11,** the **Eleventh Amending Deed to the Deed to Establish an Occupational Superannuation Scheme for Commonwealth Employees made under s.5 of the *Superannuation Act 1990*,** the **Determination No. PHI 6/1996 made under s.4(1)(dd) of the *National Health Act 1953*** and the **Childcare Assistance (Fee Relief) Guidelines (Variation), CCA/12A/97/1, made under s.12A(1) of the *Child Care Act 1972*.**

3.32 Printed copies of legislative instruments may include Notes as well as an attached Explanatory Statement. While Notes do not form part of an instrument the Committee scrutinises such Notes for compliance with its principles. A Note to the **Occupational Health and Safety (Commonwealth Employment) (National Standards) Regulations (Amendment), Statutory Rules 1996 No. 288,** was wrong. The Committee pointed this out and the Regulations were then recalled and a substitute copy issued. A Note to substantive provisions of the **High Court Rules (Amendment), Statutory Rules 1997 No. 11,** purported to include substantive provisions, rather than the usual illustrative or informative functions. In reply to its query the Committee was informed that a complete revision of the Rules would take into account the concerns of the Committee. A Note to the **Commissioner's Rules No. 22 made under s.252 of the *Life Insurance Act 1995*** advised that they commenced on the day on which they were made, which would have meant that the Rules were void for prejudicial retrospectivity. The Explanatory Statement, however, advised that they commenced on gazettal, which meant that the Rules were valid. The Minister undertook to amend the instrument.

Numbering and citation

3.33 Due to the efforts of the Committee it is now accepted that every legislative instrument should provide a clear system of numbering and citation. Without such a system legislative instruments may be imprecise and confusing. The relevant Minister undertook to provide numbering for future instruments in the following series: the **Commissioner's Rules made under s.252 (1) of the *Life Insurance Act 1995*,** the **Maximum Amount Recoverable in Tort Determination made under s.121 of the *Telecommunications Act 1991*,** the **Determination made under ss.3 and 4 of the Territory of Cocos (Keeling) Islands Utilities and Services Ordinance 1996,** and the **Determination of Approved Joint Ventures and Consortia made under s.40BH of the *Export Market Development Grants Act 1974*.**

Principle (b)
Does delegated legislation trespass unduly on personal rights and liberties?

Unreasonable burdens on business

3.34 The Committee questions any provision which may operate harshly or unfairly on people operating a business, particularly a small business. The **Agricultural and Veterinary Chemicals Code Regulations (Amendment), Statutory Rules 1996 No. 162**, provided that where the holder of a manufacturing licence dies or is made bankrupt, the legal representative may give notice of that fact and continue with manufacture. The Regulations also provided, however, that if the National Registration Authority reasonably requires further information about the legal representation then the exemption ceases until the NRA receives the information. As drafted, therefore, as soon as the NRA requests information the exemption ceases and the manufacturer is unlicensed. The Committee wrote to the Minister advising that this could have serious commercial consequences. The Minister advised that the Regulations would be amended. The **Occupational Health and Safety (Commonwealth Employment) (National Standards) Regulations (Amendment), Statutory Rules 1996 No. 288**, provided that the National Occupational Health and Safety Commission must cancel an exemption if it is satisfied that one of four specified situations exists. The Committee noted that there was merits review of such a decision, but that the Commission was not required to consult with the holder of an exemption before cancelling it. The Committee advised the Minister that peremptory cancellation without consultation may be quite damaging. The Minister advised that the situation required an objective test with the consequence that, while the Commission may consult if it chooses to do so, it should not be required to do so in every case. As a matter of good administrative practice it is more likely that the Commission would consult than not do so.

3.35 The **Casino Control (Amendment) Ordinance 1996, Territory of Christmas Island Ordinance No. 5 of 1996**, provided that a person is an associate of a casino licensee or operator if the person has an interest in the capital of the licensee or operator. This appeared to include even the smallest interest. The Committee advised the Minister that other provisions of the Ordinance, in relation to corporations and trusts, provide for holdings of 40 per cent for an associate. The Minister advised the Committee that the definition of associate would be narrowed. The **Trade Marks Regulations (Amendment), Statutory Rules 1996 No. 184,** postponed the publication of applications by the two Sydney 2000 Olympic Games

organising Committees for three months. Usually the Registrar is required to publish details of an application as soon as practicable. The Explanatory Statement advised that the benefit gained by postponing publication outweighs any "potential inconvenience" to other applicants. The Committee wrote to the Minister about this unusual privilege and about the potential inconvenience. The Minister advised that in principle if a person lodges an application which conflicts with a Games trade mark lodged earlier, the application could fail with associated loss of the application fees. Also, if a person started using a trade mark in the mistaken belief that it did not conflict with any earlier filed application from Games organisers, that person might be required to cease using the trade mark and thus incur financial loss. However, the likelihood of a person proposing in good faith to use or registrar a trade mark sufficiently similar to conflict with the Olympics or Paralympics trade marks during the short period of three months is extremely slight. In reality there is very little potential for anyone to suffer disadvantage or inconvenience. On 6 March 1997 Senator O'Chee made a statement to the Senate on this matter, reproduced in Chapter 6 of this Report. The **Meat and Live-stock Order MQ66/96 made under s.68 of the *Meat and Live-stock Industry Act 1995*** provided that certain consequences will flow provided that a certificate annotated by the relevant European Union authority is received by 31 March. Given that the Order was only made on 26 February the Committee asked the Minister whether this was a reasonable time for the certificate to be sent to Europe, be annotated by the EU authority, returned to Australia and sent to the Australian agency. The Committee noted that an equivalent provision in the related **Order MQ67/96** provided six months for this to be done. The Minister advised that from a legal point of view there was no difficulty with the time frame.

3.36 The **Airports (Environment Protection) Regulations, Statutory Rules 1997 No. 13**, provided that notices to airport-lessee companies by the Secretary or the airport environment officer may be given by pre-paid post. However, a provision which required airport-lessee companies to give notices or applications to the Secretary or airport environment officer did not include this concession. The Minister advised that the Regulations would be amended to remove the inconsistency. The **Australian Sports Drug Agency Regulations (Amendment), Statutory Rules 1996 No. 163**, prescribed five private courier services which may be used by the Agency. The Explanatory Statement gave no indication of how these were selected to provide what is presumably a commercially profitable service. The Minister advised that the provision did not compel the Agency to use any of the five companies and that the list will be reviewed and expanded if other courier companies are able to demonstrate that they can provide the service. The Committee wrote again to the Minister, noting that his reply did not address its query about how the five companies were selected. The Committee also advised the Minister that his advice that the Regulations do not compel the Agency to use any or all of the services was wrong, because the enabling Act provided for prescribed courier services and the use of any other courier service would not be valid. The Committee suggested that the Regulations should be amended to provide for companies to apply to be prescribed, with AAT review for any company which the Agency decided could not provide the services. The Minister agreed to do this.

3.37 The **Mining Legislation (Amendment) Ordinance 1996, Territory of Christmas Island Ordinance No. 10 of 1996** and the **Territory of Cocos (Keeling) Islands Ordinance No. 8 of 1996** amended Western Australian mining legislation as applied in the two

Territories. The Explanatory Statements advised that the Ordinances removed an existing right to renew certain mining tenements for a further 21 years "as of right" and replaced it with a provision that the term of renewal is to be determined by the Minister. There were no reasons given for this substantial derogation of rights. The Minister advised the Committee that the amendments affected only one company, which at present was negotiating for a new 21 year lease. The reserves for the lease were expected to last less than the 21 years and the company had obtained independent legal advice on the amendments and was satisfied that its rights were protected. The company could apply for a renewal of the lease if new reserves were found or new technology extended the life of the mine.

3.38 The Explanatory Statement for the **Maximum Amount Recoverable in Tort Determination made under s.121 of the *Telecommunications Act 1991*** advised that the basis for the Determination was the potential for enormous awards of damages for tortious Acts by carriers in respect of their basic services to threaten the viability of those carriers. The Determination excluded claims for death, personal injury and defamation but the Explanatory Statement gave no explanation for the limit of $10 million for other claims. There was also no explanation for providing that $10 million is the total sum for any one act or omission. This meant that if there were many claimants, as may be likely, that sum must satisfy all claims, which could result in people not being adequately compensated. In reply to the Committee's query the Minister advised that the Determination emphasised protection to carriers against claims which would threaten their viability. The amount was considered to be a sum which would protect the smallest carrier against bankruptcy. The $10 million was higher than any known claim but not high enough to affect viability. If the amount was insufficient to meet all legitimate claims it could be increased by a later Determination.

Protection of the rights of individuals

3.39 The Committee questions provisions which may prejudice the personal rights of individuals. The **Migration Agents Regulations (Amendment), Statutory Rules 1996 No. 79**, provided for the financial duties of migration agents. One provision required agents to keep separate accounts for operating expenses and for money paid by the clients to the agent for fees and disbursements. Another provided that the Regulations did not affect the duty of an agent who is also a legal practitioner to comply with the usual financial responsibility of a legal practitioner to clients' funds. The Committee noted that this last provision would require a legal practitioner to comply with trust account provisions, which would give substantial protection to clients' money. The Committee asked the Minister why an agent who is not a legal practitioner was not required to keep proper trust accounts, what happened if an agent who is not a legal practitioner becomes bankrupt and whether the clients' money was at risk. The Committee noted that an earlier Code of Conduct provided for trust accounts, although in a directory rather than mandatory fashion. The Minister advised that if a non-lawyer agent becomes bankrupt then clients may seek to recover their money under existing bankruptcy law. The Committee replied that this was an unsatisfactory arrangement because clients of bankrupt non-lawyer agents would be in the same position as other unsecured creditors and as such may lose all of their money; the present arrangements cannot be said to achieve the stated aim of the scheme, which is to provide a high level of consumer protection. The Committee advised the Minister that it considered that the rights of clients are prejudiced by the present arrangements and would appreciate his detailed advice. The Minister replied that the migration agent industry was still in its infancy and had yet to

develop an infrastructure which would support trust accounts similar to those in the legal profession. The question of mandatory trust accounts raised a number of significant issues which would need to be closely examined. Trust accounts would impose regulatory and financial imposts on small business and would increase cost to clients. The whole scheme was being reviewed and the question of trust accounts would be examined as part of the review. The Committee wrote back asking for further advice. The Minister replied that the review had been completed and found that trust accounts increased costs and the burden of regulation. The government had now decided that the migration advice industry would move to self regulation. New legislation would delegate regulatory power to the industry association, which will develop a code of conduct. Trust accounts would be considered in this context. The Committee replied that it accepted there would be some cost, but did not accept that this would be significant. In any event, agents who are lawyers will have to operate trust accounts. The Committee remained of the view that such accounts are an important safeguard for clients and would refer the matter to the Standing Committee for the Scrutiny of Bills, suggesting that it may be worthwhile for that Committee to raise the issue when it scrutinises the relevant Bill.

3.40 The **Workplace Relations Regulations (Amendment), Statutory Rules 1996 No. 328**, provided that members of an amalgamated organisation or any other person authorised by an electoral official may inspect or make copies of a roll of voters. The Committee asked the Minister why the roll is not available for inspection by any member of the public. The Minister advised that although the conduct of elections of registered organisations are regulated to some extent by statute, such elections are not public elections in the same way as parliamentary elections. The outcome of the ballot affects the members of the organisation, not the public generally. There is therefore no need for the roll to be a public document. The Explanatory Statement for the **Superannuation Industry (Supervision) Regulations (Amendment), Statutory Rules 1995 No. 240**, advised that the Commonwealth is negotiating with the States and Territories on the means by which public sector superannuation schemes will conform to the principles of the supervisory legislation without being formally subject to its provisions. The Committee wrote to the Minister advising that it understood that some schemes which are subject to the legislation may amalgamate with schemes which are not so subject and asked whether any members would be consequently disadvantaged. The Minister advised that it was unlikely that members would be disadvantaged because the Regulations did not provide for a reduction of accrued benefits, except in specified circumstances. The State and Territory governments have undertaken to protect members and to ensure that their schemes conformed with the principles of the Commonwealth retirement incomes policy. The **Mutual Assistance in Criminal Matters Regulations (Amendment), Statutory Rules 1997 No. 3,** provided that persons who are required to produce documents or articles must appear in person to do so. The Committee considered that this provision was restrictive, given that the Explanatory Statement advised that forms for search warrants would be available electronically because this is inherently more flexible. The Committee asked the Minister whether people could produce documents and articles more flexibly than by personal appearance. The Minister advised that the person will need to appear in person to provide formal evidence so that the documents or articles may be adduced in evidence in a requesting country. The material will be used in criminal proceedings and therefore will need to comply strictly with admissibility requirements. It was therefore essential for a person to appear physically before a Magistrate. In practice the

documents and articles are sought in a manner involving the least amount of inconvenience to holders, which avoided the problems identified by the Committee.

3.41 The **Defence Force Regulations (Amendment), Statutory Rules 1996 No. 177**, provided that a member of the ADF may be required to pay an amount for medical or dental treatment if the Minister determines that the member may have an enforceable claim for damages against a person for the illness or injury which is the subject of the treatment. The Committee noted that this provision applied not necessarily where a member has been successful in a claim for damages but where the member "may" have a claim. The Committee suggested that payment should be required only where the member has actually recovered damages. The Minister advised that the member is able to include the cost in the damages claim against the other party. If the action succeeds the member pays the Commonwealth from the damages and if not the determination will be revoked and the member will not have to pay. Administrative instructions are being developed which will meet the Committee's concern.

3.42 The **Australian Sports Drugs Agency Regulations (Amendment), Statutory Rules 1996 No. 163**, lessened safeguards for the rights of competitors selected for drug testing. The Committee accepted that some of these were based on recent amendments of the enabling Act which are intended to reduce legal challenges on technical grounds. Nevertheless the Committee asked the Minister about permissive rather than mandatory safeguards in the Regulations for competitors who are under 18 years, intellectually disabled, or unable to understand English. The Committee also asked about provisions under which Australian and non-Australian competitors were treated differently and about only one contact telephone number, which was located in Canberra and which did not appear to be a free call. The Minister advised that individual competitors may not wish particular safeguards to be implemented and that the permissive requirements were necessary for drug testing to be as smooth and efficient as possible. The different provisions for Australian and non-Australian competitors are a result of initial positive test results for non-Australians being referred to the relevant international sporting federation. However, the procedure of most of these bodies included safeguards similar to those for Australians. With respect to the single Canberra telephone number the Minister advised that most questions could be answered by the officer collecting a sample, but drug testing is conducted in all States and Territories and it is preferable that any queries are addressed to head office in Canberra. The Committee wrote again to the Minister, noting his advice that competitors under 18 years or who are unable to understand English may wish to waive safeguards. The Committee suggested, however, that this could not be the case with intellectually disabled athletes. The Committee also suggested that the telephone arrangements would not be satisfactory for the 2000 Olympic Games. The Minister then advised that the Regulations would be amended in respect of intellectually disabled competitors and monitored and possibly reviewed in respect of the single Canberra telephone line. On 6 March 1997 Senator O'Chee made a statement to the Senate on this matter, reproduced in Chapter 6 of this Report.

Right of reply to adverse material

3.43 It may be a breach of personal rights if individuals are not made aware of adverse material affecting their interests. The **Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Regulations, Statutory Rules 1996 No. 283**, provided that the

Minister must consider certain matters when deciding applications relating to hazardous waste. Among other things, the Minister must be satisfied that the applicant is a suitable person to be granted a permit and that for these purposes the Minister must consider both the applicant's financial viability and previous record on environment matters. The Regulations also provided for the Minister to revoke or vary a permit if the Minister becomes aware that the applicant gave false or misleading information or did not disclose information that ought reasonably to have been disclosed. The Committee suggested to the Minister that these were important matters and that it may be appropriate for the Regulations to provide for applicants to be given notice of any adverse material received by the Minister and to respond to it before a decision is made. The Committee accepted that the enabling Act included wide review provisions but suggested that the personal rights of applicants would be enhanced by such an amendment. The Minister advised the Committee that the Regulations would be amended. The **Export Control (Hardwood Wood Chips) (1996) Regulations, Statutory Rules 1996 No. 206**, provided that in deciding whether to grant a licence the Minister may consider the commercial reputation of the applicant. The Committee advised the Minister that it would seem necessary, to protect personal rights, for the Regulations to provide that an applicant must be notified of any adverse material and be given a right of reply. The Minister advised that he agreed that a decision on commercial reputation may require subjective assessment and that as a matter of natural justice the procedure suggested by the Committee should be followed. This was, however, done as a matter of administrative practice and failure to do so could be subject to judicial review. Also, if commercial reputation was a factor in a decision, then this would be included in the mandatory statement of reasons given to unsuccessful applicants. In addition, the decision itself was subject to AAT review.

3.44 The **Bankruptcy Regulations, Statutory Rules 1996 No. 263**, provided that the Inspector-General may terminate the membership of members of statutory Committees in certain circumstances, including physical or mental incapacity or neglect of duty. This could have serious consequences for a person's reputation and the Committee asked whether a member is given a formal right to respond to any allegations. The Minister advised that there was no such formal procedure in the Regulations but that removal would be subject to judicial review. Also, as a matter of sound administrative practice, members would be provided with a statement of reasons and be given adequate opportunity to respond.

Absence of appropriate safeguards for offence provisions

3.45 Offence provisions must include proper safeguards. The **Airports (Environment Protection) Regulations, Statutory Rules 1997 No. 13**, provided for administrative infringement notices. The Committee noted that, while such a system may be acceptable in the circumstances, it did not provide for the necessary safeguard that infringement notices should advise that, if the fine is paid, payment not only discharges the liability and prevents any prosecution for the matter, but also ensures that the person concerned is not to be regarded as having been convicted of an offence. The Minister advised the Committee that the Regulations would be amended to provide for this. The **Federal Airports (Amendment) By-laws No. 1 of 1997** provided for the burden of proof to lie on the accused for a number of offences which included offensive and disorderly behaviour and causing a public nuisance. The Explanatory Statement advised that the purpose of the By-law was to establish a series of public order offences applying in the general community, but did not mention the reversal of

the usual onus of proof. The Minister advised the Committee that the By-law would be amended to remove the provision.

3.46 The **Petroleum (Submerged Lands) (Management of Safety on Offshore Facilities) Regulations, Statutory Rules 1996 No. 298**, provided that all offences provided for by the Regulations, apart from those under one specified part, are strict liability offences. The Explanatory Statement did not advise of the reasons for these offences, which may breach personal rights. The Regulations also provided that a person is not liable to be punished, in respect of the same act or omission, for more than one offence under the Regulations. This was an appropriate safeguard but the same provision then appeared to remove much of this protection by providing that the safeguard did not prevent punishment for two or more offences merely because the same act or omission was a common element of each of the offences. The Minister advised that the strict liability offences were necessary because it was important to ensure that safety provisions are obeyed, the operation of the types of facility in question (such as oil rigs) being potentially hazardous, with possible catastrophic consequences. The strict liability offences which will apply primarily to individuals have relatively low penalties. Other strict liability offences will apply invariably to bodies corporate operating large commercial undertakings. The offences with the highest penalties are not strict liability, being directed at intentional or reckless conduct. The Minister also advised that the double jeopardy provision would be removed.

Safeguards on powers given to public officials

3.47 Legislative instruments which provide for public officials to exercise powers which affect the liberty or property of individuals should include appropriate safeguards. The **Mutual Assistance in Criminal Matters Regulations (Amendment), Statutory Rules 1997 No. 3**, omitted previous forms relating to search warrants, replacing them with non-prescribed forms which will be available electronically to investigators and prosecutors. The Committee asked whether the new forms would continue to provide the usual safeguards relating to reasonable grounds and reasonable and usual force. The Minister advised that the enabling Act provides that applications for search warrants must be based on reasonable grounds, that warrants can only be issued where a Magistrate is satisfied about such reasonable grounds and that only necessary and reasonable force may be used to execute warrants. These requirements must be satisfied regardless of whether they are included in a statutory or administrative form. Statutory forms are inherently inflexible and can give rise to technical legal arguments. Nevertheless, for administrative convenience and efficiency precedents will be drafted and the Minister saw considerable benefit in including words relating to reasonable grounds and reasonable usual force on the face of the form to advise recipients of these limitations and to reinforce the substantive law. The **Airports (Environment Protection) Regulations, Statutory Rules 1997 No. 13**, provided that an airport-lessee company has a right of entry to an occupier's premises and access to any document under the control of the occupier, with penalties for non-compliance. These appeared to be wide powers, which even the police do not have without a warrant. Also, the provisions did not include the usual safeguard under which the people entering must produce photographic identity passes. In addition, the people entering do not appear to be employees of the Commonwealth or a Commonwealth agency and therefore may not be subject to the safeguards provided in respect of, for instance, privacy or the Ombudsman. The Minister advised that airport-lessee companies are responsible for the environmental quality of an

airport and need adequate power to carry out these functions. The Regulations include a number of safeguards relating to entry, such as prior notification in writing and reasonableness tests. The Regulations are intended to codify the rights of an airport-lessee company as head lessee of all airport land and not to provide for additional powers. While some powers of access would be exercised by a private entity, others were exercisable by an airport environment officer appointed under the Regulations who will be subject to a comprehensive framework of accountability.

3.48 The **Workplace Relations Regulations (Amendment), Statutory Rules 1996 No. 328**, provided in three separate provisions that public officials must take action by "reasonable" means. A fourth provision, however, provided for an official to take subjective action. The Committee asked the Minister about the reasons for this. The Minister advised that it is a requirement of administrative law that officials exercise power reasonably and that a failure to do so was subject to judicial review. Nevertheless, the Regulations would be amended. The **Airports (Control of On-Airport Activities) Regulations, Statutory Rules 1997 No. 57**, provided in five separate provisions for action to be taken in "reasonable" circumstances. Two other provisions for action, however, did not include a reasonability safeguard. The Minister advised the Committee that the two provisions in question were intended to introduce greater flexibility and that reasonability safeguards would not be appropriate.

The right to privacy

3.49 The Committee ensures that legislative instruments respect the basic rights of privacy. The **Mutual Assistance in Criminal Matters (United States of America) Regulations (Amendment), Statutory Rules 1996 No. 175**, provided for United States agencies to have access to information in Financial Transaction Reports. The Committee asked the Minister whether the Privacy Commissioner was consulted about the decision to permit access. The Minister advised that there was no need for such consultation because the information was provided as an executive act in accordance with statute. The Committee referred the Minister's reply to the Privacy Commissioner, who advised that it was unfortunate that consultation did not take place, because one of the functions of the Privacy Commissioner was to examine proposed enactments with privacy implications. In practice, consultation did not always take place, or was unnecessarily brief. Also, the Legislation and Cabinet Handbooks recognise the need for consultation, but are unclear about how it is to take place. The Privacy Commissioner further advised that she had asked for the Handbooks to be amended. The Committee replied that it supported such amendment.

3.50 The **Life Insurance Regulations (Amendment), Statutory Rules 1996 No. 305**, provided for the publication of information about unclaimed moneys. The Explanatory Statement advised that in the absence of this provision publication of such information may breach the Information Privacy Principles. The Committee asked the Minister whether the Privacy Commissioner was consulted about the provision. The Minister advised that there was no prior consultation but that as a consequence of the Committee's letter the Privacy Commissioner was subsequently contacted. The Privacy Commissioner then advised that the provision was acceptable in principle but that individual amounts owing should not be published, because this may constitute an unwarranted disclosure of an individual's affairs and potentially encourage misrepresentation of that individual. The Minister advised the

Committee that he accepted this advice. The **Competition Policy Reform (Transitional Provisions) Regulations, Statutory Rules 1995 No. 331**, provided that a general duty of confidentiality imposed on officers of the Australian Competition and Consumer Commission did not apply in relation to information given to the Minister. The Committee sought and received advice that the Minister was not immune from confidentiality and privacy laws in relation to such information. The **Migration Agents Regulations (Amendment), Statutory Rules 1996 No. 79**, required agents to keep records of written and oral communications with clients and to make these available on request to the Migration Agents Registration Board. The Committee asked the Minister about privacy protection and whether the Privacy Commissioner was consulted about these provisions. The Minister advised that the Board was acutely aware of the confidential and sensitive nature of this information. The Board was subject to the *Privacy Act 1988* and has implemented procedures designed to protect information provided by agents. It was not considered necessary to consult the Privacy Commissioner.

3.51 The **Family Law Regulations (Amendment), Statutory Rules 1996 No. 71**, provided for a family or child counsellor to make an oath or affirmation in relation to non-disclosure of communications and admissions made to the counsellor. The Regulations then listed a number of subjective matters relating to disclosure. Except for one case there was no indication of to whom these disclosures may be made. It was unclear, for instance, whether the counsellor could tell the press, the police, or the parties in dispute. The same questions arose in relation to court mediators, community mediators and private mediators. Also, one regulation provided that mediators must not use any information acquired from the mediation to the detriment of any person, which appeared to conflict with other provisions which would allow disclosure of such information. In reply to the Committee's query the Minister advised that disclosure would vary with the circumstances of each case. A disclosure to report an offence would generally be made to the police whereas a disclosure to protect a child may in some cases be made to the police and in others to a child welfare authority. It may be necessary to disclose information to a party to the dispute, to protect that person from a threat to their life or health. These matters are left to the professional judgment of the counsellor or mediator. The provision prohibiting release of detrimental information by a mediator is intended to ensure that a mediator does not improperly profit from, or disadvantage another, through the use of private information.

Fees, charges and allowances

3.52 Many legislative instruments provide for fees, charges and allowances. The Committee questions any aspect of these which appears unfair or unusual. The **Public Service Determination 1996/71** corrected errors in an earlier Determination by increasing rates of allowance. The later Determination, however, operated only from the date upon which it was made, with the result that staff affected by the Determinations were deprived of the increase for a time. The Minister advised that a further Determination would be made to correct this. The **Public Service Determination 1996/82** increased certain reimbursements by 37.5 per cent and 40 per cent. The reimbursements had not been adjusted for four years. The Committee suggested that the large increases and long delay indicated that staff had been unfairly disadvantaged. The Minister advised that, consistent with a report which found that the delivery of human resource services in the Australian Public Service was inefficient, reimbursement increases would in future be made automatically on an annual basis.

3.53 The **Hearing Services Regulations (Amendment), Statutory Rules 1996 No. 149**, deleted a provision for a refund in certain circumstances of a hearing aid charge. The Explanatory Statement advised that this was because the enabling Act did not provide for refunds. The Committee asked the Minister if the Act could be amended to provide for refunds, noting that the invalid provision had apparently been applied for more that four years. The Minister advised that he would ensure that the matter would be considered further. The **Moomba-Sydney Pipeline System Sale Regulations, Statutory Rules 1996 No. 19**, provided that the notification of an access dispute fee is $5,000 if related to variation of an existing determination and $15,000 in any other case. If, however, a notification is withdrawn before an arbitration hearing by the ACCC then $2,250 of the $5,000 or $12,250 of the $15,000 must be refunded, leaving in both cases a non-refundable component of $2,750. The **Trade Practices Regulations (Amendment), Statutory Rules 1996 No. 20**, provided, on the other hand, for notification of access dispute fees for other infrastructure facilities of national significance of $2,750, with no refund, and further discretionary fees of $2,000 if related to variation of an existing determination and $10,000 in any other case. The Explanatory Statement did not advise of the basis for the different fee structures. There was also a hearing fee of $4,000 per day, apportioned between the parties. The Minister advised the Committee that the enabling Act for the Moomba-Sydney Pipeline did not support the progressive step-by-step fee structure available for the wider access provisions, so larger initial fees were imposed, but with provision for refund. The fee of $2,750 represents in both cases the costs of the ACCC in processing each application . The rest of the amount payable is intended in both cases to recover the costs of an arbitration. The discretionary nature of the trade practices fees allows for more flexibility and for fees to be imposed only after costs are incurred, so there is no need for refund provisions. The **Bankruptcy Rules (Amendment), Statutory Rules 1996 No. 191**, increased filing fees for individuals from $368 to $800 and for corporations to $1,600, while filing fees for the National Native Title Tribunal and the Administrative Appeals Tribunal were increased only from $368 to $500. The Minister advised the Committee that the fees payable under the Bankruptcy Rules are for applications that are made to the Federal Court and the cost of providing court services is greater than the cost of tribunals. The government had announced, however, that filing fees in the Federal Court would be reduced from $800 to $500 for individuals and from $1,600 to $1,200 for corporate litigants. The fees under the **Bankruptcy Rules** would be similarly reduced and would also be amended to provide for refunds of amounts paid in excess of the new rates.

3.54 The **Cultural Bequests Program Guidelines (No. 1) made under s.78(6C) of the *Income Tax Assessment Act 1936*** provided that applicants for the Program must undertake to enter into an agreement with the Commonwealth and the recipient institution. The Committee asked who paid for the preparation of such agreements and whether it was intended that applicants should bear any part of the cost. The Minister advised that the Guidelines would be amended to provide that the costs will be borne by the Program. The **High Court Rules (Amendment), Statutory Rules 1997 No. 11**, provided for witnesses called because of their professional, scientific or other special skill or knowledge to be paid $610.20 per day, while other witnesses are to be paid only $64.40 per day. The Committee asked the Chief Justice about the reasons for the difference and whether the provisions could operate harshly or unfairly. The High Court advised that a complete revision of the Rules would take into account the concerns of the Committee.

Principle (c)
Does delegated legislation make rights unduly dependent upon administrative decisions which are not subject to independent review of their merits?

3.55 Delegated legislation often provides for discretions which affect business operations. In such cases, the Committee considers that discretions should be limited and guided by objective criteria and be subject to external review of their merits by an independent body, usually the Administrative Appeals Tribunal. Instances of instruments where the Committee has written to the Minister about review are set out below.

(i) Health industry

3.56 The Explanatory Statement for the **Exempt Nursing Homes Fees Redetermination Principles (Amendment No. 1 of 1996) made under s.40AD(1BE) of the *National Health Act 1953*** advised that the amendments enabled the Secretary to refuse to approve a redetermination in a number of circumstances. This in effect introduced a sanction for exempt homes which did not meet certain requirements. In reply to the Committee's query about review the Minister advised that the meaning of the changes were not clear on the face of the instrument and they would be revoked as soon as possible. Any future amendments would take the concerns of the Committee into account. The **Health Insurance Commission Regulations (Amendment), Statutory Rules 1995 No. 375**, provided for the HIC to deduct overpayments for administrative costs in relation to the Australian Childhood Immunisation Register. The Committee asked the Minister about these costs and whether AAT review was available if a payee disputed that overpayment had occurred. The reply dealt fully with the costs, which amounted to $7.36m, but mentioned only that AAT review was not available, with no reasons. The Committee wrote again. The Minister advised that internal procedures require payees to be given notice of any apparent overpayment and afforded the opportunity to contest the issue. The Explanatory Statement for the **Health Insurance Commission Regulations (Amendment), Statutory Rules 1995 No. 440**, which also related to the Australian Childhood Immunisation Register, advised that they provided for payments to be made by EFT and that in the absence of such provisions a person could insist on payment by other means. The Regulations, however, then provided a discretion for the HIC to direct payment by other means. In reply to the Committee the Minister advised that the matter was properly described as procedural and was therefore not appropriate for AAT review. The Minister accepted that a similar provision in social security legislation was subject to AAT review but this was because of the circumstances of the client base. The payees in the present case were of a professional and corporate nature. Only one practice had sought internal review of a decision. During the early operation of the scheme a small number of doctors had requested payment by cheque, apparently on the basis that Medicare payments are generally by cheque, but when advised of the EFT regime, none pursued the matter.

3.57 The **Therapeutic Goods Order No. 54 made under s.10 of the *Therapeutic Goods Act 1989*** provided for the Secretary to exercise a discretion to exempt containers from mandatory controls if the exemption was in the public interest or did not constitute a significant safety risk. In reply to the Committee's query about merits review, the Parliamentary Secretary advised that the discretion in the Order would be deleted, leaving only a discretion in the enabling Act, which was subject to merits review. The **Determination No. ADPCA 10F 3/1995 made under s.10F of the *Aged or Disabled***

Persons Care Act 1954 provided for a number of important discretions affecting financial assistance to hostels. The Committee wrote to the Minister, who advised that AAT review was not available, but that she would consider extending such review in the context of other legislative amendments. The Committee wrote back, suggesting that the consideration of AAT review should include consultation with the Administrative Review Council and asking if the Minister could write back on progress in three months. The Minister replied, advising that she had circulated the draft of a new Bill which provided for all decisions under the Act and legislative instruments to be reviewable by the AAT, except those involving competitive assessments.

(ii) Transport and communications

3.58 A number of the Regulations providing for the long term lease of Commonwealth airports provided for officials to exercise discretions. The **Airports (Building Control) Regulations, Statutory Rules 1996 No. 292**, provided for AAT review of specified decisions of Commonwealth, State and local government agencies and private corporations, bodies and individuals. The Committee asked whether there were any legal or administrative problems with this. The Committee also noted that although the Regulations provided for extensive AAT review, there were some gaps, such as a discretion to allow building to be carried out without complying with the Australian building standard. The Minister advised that review by the Commonwealth AAT of decisions of the various public and private bodies and individuals is a valid arrangement in terms of both legal policy and practice if those persons are lawfully authorised to exercise powers under Commonwealth legislation. Also, in relation to one of those persons, airport building controllers, contracts require them to operate under the same legal principles and administrative procedures as apply to the Commonwealth and its agencies. The Department would monitor closely the performance of airport building controllers during the initial contract period of one year. The Regulations would also be amended to fill in the AAT gaps and to impose a time limit on the making of certain decisions. The **Airports Regulations, Statutory Rules 1997 No. 8**, prohibited certain subleases and licences subject to a discretion exercisable by the Secretary to permit them. The Committee asked about independent review of these commercially valuable discretions. The Minister advised that Regulations would be amended to provide AAT review.

3.59 The **Airports (Environment Protection) Regulations, Statutory Rules 1997 No. 13**, provided for tests to be carried out by a laboratory accredited by the National Association of Testing Authorities. The Committee asked the Minister for detailed advice about the process of accreditation and about review of these commercially valuable decisions. The Regulations also provided for AAT review of some decisions but not of others. The Committee noted that the decisions not subject to AAT review varied in importance but that some were commercially significant. The Minister advised the Committee about NATA review procedures, advising that it was the only suitable accrediting agency in Australia but that should this position change then it would certainly be appropriate to amend the Regulations. In relation to the other discretions the Minister advised that he had requested a review and that the Regulations would be amended to reflect its findings. The **Airports (Control of On-Airport Activities) Regulations, Statutory Rules 1997 No. 57**, also provided for AAT review of some discretions but not of others, which could have commercial significance. The Minister advised that these provisions were intended only to be transitional and that State liquor laws, subject to appropriate modifications, would apply at leased

airports. The Regulations gave power to State authorities to suspend authorisations but were not intended to set out the procedures, including merit review, by which this is done. These procedures would be left to State law.

3.60 The **Road Transport Reform (Mass and Loading) Regulations (Amendment), Statutory Rules 1996 No. 342**, provided for a vehicle registration authority to declare that a bus complies with the Australian Design Rules. The Committee wrote to the Minister, noting an earlier undertaking that the related **Road Transport Reform (Heavy Vehicle Standards) Regulations** and the **Road Transport Reform (Oversize and Overmass Vehicles) Regulations, Statutory Rules 1995 Nos. 55 and 123**, would be amended to provide AAT review of similar discretions and that the Regulations would not commence until the Ministerial Council, which supervised these national legislative scheme instruments, had agreed to the new provisions. The Minister gave the Committee similar assurances in relation to the present Regulations and all other Regulations to be made under the umbrella enabling *Road Transport Reform (Vehicles and Traffic) Act 1993*.

3.61 The **Australian Postal Corporation Regulations, Statutory Rules 1996 No. 72**, provided that the Australian Competition and Consumer Commission must not undertake an inquiry about bulk interconnection services if it reasonably believes certain matters. The Regulations also gave the ACCC a discretion not to release confidential commercial information, supplied by one party to a dispute, to the other party to a dispute. The Committee noted that both discretions included an objective standard of belief by the ACCC, which appeared to indicate that external review was appropriate. The Committee asked whether the absence of review was within the relevant guidelines of the Administrative Review Council. The Minister replied, attaching Attorney-General's Department advice that the ARC guidelines have no formal legal standing, are not intended to be exclusive and are not an official reflection of government policies, although they are a valuable guide to policy makers. In the present case AAT review of the discretions about inquiries would defeat the underlying purpose of relieving a statutory body of the burden of expending scarce resources through further deliberations in unwarranted cases. In relation to a decision to refuse to release confidential commercial information to a requesting party, that party may apply for it under the *Freedom of Information Act 1982*, which includes review rights. The Regulations would be amended to make this clear. The **Radiocommunications (Compliance Labelling – Incidental Emissions) Notice, Statutory Rules 1996 No. 294**, provided for the appointment and revocation of bodies which will assess whether devices comply with a standard. The Committee asked about review of decisions affecting this commercially valuable right. The Minister advised that the decisions did not come within the ARC exceptions and therefore appeared appropriate for merit review. The provisions would, however, shortly cease to have effect following amendments of the enabling Act. The new enabling provisions provided for assessing bodies to be determined directly under the Act. These determinations would be legislative rather than administrative and therefore will not be subject to administrative review.

(iii) Primary industries and resources

3.62 The **Agricultural and Veterinary Chemicals Code Regulations (Amendment), Statutory Rules 1996 No. 111**, provided for the National Registration Authority to withdraw an assigned notification number in certain circumstances, the effective result being that a

person would have to cease business from particular premises. The Committee asked about AAT review, noting that the enabling Act provided for AAT review of many other decisions of the NRA. The Minister advised the Committee that he would seek to have the Regulations amended as soon as possible to provide for AAT review. However, the Regulations were part of a national uniform legislative scheme and it would be necessary to obtain the approval of all States and Territories for the amendment. If the approval is not forthcoming the Minister would contact the Committee to examine other ways of addressing the problem. The **Meat and Live-stock Orders Nos. MQ66/96 and MQ67/96 made under s.68 of the *Meat and Live-stock Industry Act 1995***, both provided for different discretions to increase or vary an exporter's quota, to withdraw an export approval at any time and for any reason and to vary other matters in relation to a quota. The Orders only provided expressly for AAT review of one of the discretions. In reply to the Committee's query the Minister advised that, although the meaning of one of the other discretions was unclear, all would be reviewable by the AAT. The **Export Control (Hardwood Wood Chips) (1996) Regulations, Statutory Rules 1996 No. 206**, provided for extensive reconsideration and AAT review of most decisions made under the Regulations. They did not provide, however, for review of a decision to suspend or vary a licence, which appeared to be a decision which would affect commercial operations. In reply to the Committee's query the Minister advised that review was not appropriate because under the Regulations a suspension or variation could be no longer than 28 days. At the end of that period the Minister must cancel the suspension or variation or take other action. The Committee wrote again to the Minister, seeking further details, which the Minister supplied.

3.63 The **Offshore Minerals (Data Lodgment and Reporting) Regulations, Statutory Rules 1996 No. 85**, provided administrative details of the exploration and production of minerals other than petroleum on Australia's continental shelf. This legislation is administered on a day to day basis by the States and the Northern Territory on behalf of the Commonwealth. The Regulations provided for a number of discretions in the context of offence provisions with apparent penalties of $10,000. The Minister advised that the enabling Act provided for AAT review of decisions made by the Commonwealth Minister when acting as a Designated Authority for the purpose of the Act, including decisions made under the Regulations. The Act did not provide, however, for review of decisions by a State or Northern Territory Minister acting as a Designated Authority. Where Commonwealth legislation provides for the sharing of administration it is not considered appropriate to subject decisions by State Ministers and joint Commonwealth and State bodies to AAT review. This is consistent with administrative review policy and Administrative Review Council guidelines.

(iv) Other industries

3.64 The **Superannuation Industry (Supervision) Regulations (Amendment), Statutory Rules 1995 No. 430**, provided for the Insurance and Superannuation Commissioner to exercise a discretion in relation to a funding credit. The Explanatory Statement advised that the discretion would be exercised favourably only if fund trustees could justify such an exercise in their particular circumstances. In reply to the Committee's query the Minister advised that the discretion should clearly be subject to AAT review and that the Regulations would be amended as quickly as possible. The **Superannuation Industry (Supervision) Regulations (Amendment), Statutory Rules 1995 Nos. 157 and**

158, both provided for the Insurance and Superannuation Commissioner to exercise discretions which could adversely affect accrued benefits. The Minister advised that the Regulations required the approval of two-thirds of the members or trustees before the ISC could exercise the discretion and that a subsequent decision to endorse their decision would be procedural while a refusal will often be polycentric and therefore within the ARC exceptions. Not all such decisions will be polycentric, but the ARC did not require all decisions in the class to be polycentric for the exception to apply.

3.65 The **Ozone Protection Regulations, Statutory Rules 1995 No. 389**, provided a discretion for the Minister to waive licence fees of $10,000 and $2,000 if satisfied that certain activities are for test purposes. As drafted, therefore, the Minister had a discretion not to waive a fee even if satisfied that an activity is for test purposes. The Committee suggested to the Minister that the drafting should be amended to provide that, if so satisfied, the Minister must waive the fee. The Committee also suggested that the discretion about being satisfied should be subject to AAT review. The Minister advised that the purpose of the discretion was to enable fees to be waived where this would be equitable and within the spirit of the ozone protection program. For instance, if the test had commercial or environmental significance then the fee should be paid. The Regulations would be amended, however, to provide AAT review.

3.66 The **Grants Entry Test made under s.13K of the *Export Market Development Grants Act 1974*** provided for a test to be taken by first-time applicants for a grant. The Committee asked the Minister whether the review provisions in the enabling Act included claimants who did not pass the test. The Minister confirmed that this was the case and that amendments of the enabling legislation due to be introduced into Parliament would communicate this more clearly. The **Customs (Prohibited Imports) Regulations (Amendment), Statutory Rules 1997 No. 22**, gave the Minister discretions to approve the importation of disposable cigarette lighters, impose conditions or requirements on the importation and to revoke a permission to import. In reply to the Committee's query the Minister advised that there was no AAT review because the matter involved high government policy considerations of public safety. As a corollary, decisions were restricted to the Minister acting personally. This is within the Administration Review Council guidelines and was also the basis for absence of merits reviews in relation to decisions on the importation of firearms, of radioactive substances and of Iraqi goods under United Nations sanctions. The **Casino Control (Amendment) Ordinance 1996, Territory of Christmas Island Ordinance No. 5 of 1996,** provided for a number of important discretions although not all appeared to be subject to independent merits review. In reply to the Committee's query the Minister advised that the Ordinance would be amended to provide for the Magistrate's Court, the usual avenue of administrative review in the Territory, to review decisions to recover certain costs from the casino licensee and from the casino operator. In relation to other discretions, the decision to grant a casino licence is made after long and expensive investigations and therefore comes within the ARC exception of decisions which are the product of processes which would be difficult to justify repeating on review. Such a decision could also come within the ARC exception of decisions having a high political content and also being a polycentric decision, as only one licence can be granted. The Minister considered other decisions to be part of the decision making process and therefore within the ARC exceptions.

3.67 The **Occupational Health and Safety (Commonwealth Employment) (National Standards) Regulations (Amendment), Statutory Rules 1996 No. 129**, provided for AAT review of a discretion to grant a licence but not of a decision to refuse to renew a licence. Another discretion, to fix a date for a licence to come into force, could have significant commercial consequences but was not subject to AAT review. Other provisions provided for special licences for the Department of Defence and the Australian Defence Force, which mirrored the provisions for ordinary licences, including the power to grant or to refuse a licence, but without any AAT review. In reply to the Committee's query the Minister advised that the Regulations would be amended to provide for AAT review of a decision not to renew a licence and to remove the discretion to fix a date. The Department of Defence and the ADF did not seek to have AAT review of discretions affecting them, because of the unique nature of their operations. The **Occupational Health and Safety (Commonwealth Employment) (National Standards) Regulations (Amendment), Statutory Rules 1996 No. 288**, provided for AAT review of decisions to refuse to grant a licensing exemption or to cancel such an exemption but not to impose conditions on an exemption. The Committee suggested to the Minister that it may be appropriate to provide for AAT review, because conditions could have a commercial effect. The Minister advised the Committee that the decisions were procedural and therefore should not be reviewable. The Committee referred the Minister's reply to the President of the ARC, who advised that the conditions imposed could be extreme or onerous and that AAT review should be available. The Minister then undertook to amend the Regulations.

Review of decisions affecting personal rights

3.68 The Committee also ensures that legislative instruments provide appropriate criteria and review rights for discretions which directly affect individuals. The **Cultural Bequests Program Guidelines (No. 1) made under s.78(6C) of the *Income Tax Assessment Act 1936*** provided a discretion for the Minister to agree with a decision to refuse to accept a gift from a donor's estate, which attracts a tax deduction and capital gains tax exemption, and to require an additional valuation of the gift. In reply to the Committee's query about independent merits review the Minister advised that the Guidelines would be amended to provide AAT review of decisions to refuse a gift but that the discretion in respect of valuation came within the exceptions acceptable to the ARC because it relates to a finite fund. The **Superannuation (Existing Invalidity Pensions) Regulations (Amendment)** and the **Superannuation (Former Contributions for Units of Pension) Regulations (Amendment), Statutory Rules 1996 Nos. 101 and 102,** modified the enabling Act to provide that certain benefits are to be paid to a person's legal representative or, if no such representative can be found, to any individuals that the Superannuation Board determines. The Minister advised the Committee that the decisions in question are subject to review by the Superannuation Complaints Tribunal and that in accordance with the Committee's suggestion he had asked the Department to ensure that notification of review procedures is included in future Explanatory Statements. The **Customs (Prohibited Imports) Regulations (Amendment), Statutory Rules 1996 No. 91,** implemented a number of resolutions of a special meeting of the Australian Police Ministers' Council following the Port Arthur killings, introducing a new structure for the importation of all firearms into Australia. The Regulations provided for the Attorney-General to exercise a number of discretions in respect of such importation. The Committee asked whether AAT review was available and, if not, whether the exclusions are within the relevant ARC guidelines. The Minister advised that

AAT review was not available on the grounds of high government policy considerations of public safety. The final decisions can only be made personally by the Attorney-General.

3.69 The **Nursing Homes Financial Arrangements Principles (Amendment No. 5 of 1995) made under s.40AA of the *National Health Act 1953*** provided a discretion for the Secretary to approve travel costs to training courses. This appeared to be a significant power affecting nursing and personal care staff, the Explanatory Statement expressly advising that some staff may be disadvantaged if a training course is not available in their State or in the nearest capital city. In reply to the Committee's query the Minister advised that AAT review would not be appropriate because the course may well be over before the matter could be heard. The Department has held discussions with interested parties who are satisfied with the present arrangements. The Minister further advised that she would initiate internal review procedures. The **Childcare Assistance (Fee Relief) Guidelines, CCA/12A/97/1 made under s.12A(1) of the *Child Care Act 1972*** limits childcare assistance to 50 hours per week, except in specified circumstances relating to work commitments. However, the instrument was not clear on who would make a decision on whether circumstances came within the Guidelines or what would happen if there are disputes about the facts. The Committee asked whether review was available to persons affected by the decisions. The Committee noted earlier advice from the then Minister in respect of the **Childcare Assistance (Fee Relief) Guidelines, CCA/12A/93/1,** that an Australian Law Reform Commission inquiry would address discretions in the Guidelines. The Minister advised that legislation being prepared would for the first time provide for the Social Security Appeals Tribunal and the AAT to review decisions, which would implement ALRC recommendations. The Minister also explained administrative procedures which were intended to ensure consistency in the decision making process. The **Hearing Service Regulations (Amendment), Statutory Rules 1996 No. 149,** provided a discretion for the Australian Hearing Service to refuse to provide services to people who do not pay the hearing aid charge. The **Determination No. PB 17 of 1996 made under s.99L of the *National Health Act 1953*** provided for a discretion in respect of relocation of pharmacies, arising from exceptional circumstances not involving commercial interest, which could not have been reasonably foreseen. In both these cases the Minister assured the Committee that review provisions in the enabling Act were wide enough to include the present discretions.

3.70 The **Family Law Regulations (Amendment), Statutory Rule 1996 No. 71,** provided for the Attorney-General to authorise a person to offer family and child counselling and for the Chief Justice of the Family Court to approve a person as a court mediator. These appeared to be discretions which could affect the rights of people to earn a living and the Committee asked about AAT review. The Minister advised the Committee that the Regulations would be amended to provide for AAT review of decisions of the Minister. This would be done before any decisions are made. Court mediators were employed by the Court and as such would be subject to employment related review channels. The Committee wrote again to the Minister seeking and obtaining further advice about appointment and employment of court mediators. The **Bankruptcy Rules (Amendment), Statutory Rules 1996 No. 191,** provided a discretion for the Registrar of the Federal Court to waive fees in respect of bankruptcy proceedings. It appeared that such decisions may be reviewable by the Court, but the Committee asked why this was the case when similar decisions in respect of the High Court, the Family Court and the Federal Court itself were reviewable by the AAT. In reply to the Committee's query the Minister advised that this was anomalous and that the

Regulations would be amended. In respect of the **Administrative Appeal Tribunal Regulations (Amendment), Statutory Rules 1996 No. 187,** the Minister confirmed that AAT review was available for decisions of the Registrar not to waive fees.

Principle (d)
Does delegated legislation contain matter more appropriate for parliamentary enactment?

3.71 This is a principle not often raised by the Committee. It is, however, a breach of parliamentary propriety if matters which should be subject to all the safeguards of the parliamentary passage of a Bill are provided for in delegated legislation. Also, as noted earlier in this Chapter, Ministers often undertake to amend or review Acts to meet the concerns of the Committee.

CHAPTER 4

MINISTERIAL UNDERTAKINGS IMPLEMENTED

4.1. Ministerial undertakings to amend legislation to meet the concerns of the Committee were implemented during the reporting period by the following instruments. Some of the undertakings were given during the previous reporting periods but were not implemented until the present reporting year. Other undertakings were implemented during earlier reporting periods but not reported upon until now.

Actuarial Standard for Paid Up Values and Surrender Values made under s.101 of the *Life Insurance Act 1995*
Actuarial Standard for Cost of Investment Performance Guarantees made under s.101 of the *Life Insurance Act 1995*

4.2. On 16 April 1997 the Assistant Treasurer, Senator the Hon Rod Kemp, undertook to revoke and remake the Standard relating to the calculation of paid up values and surrender values; to number future standards; and that new standards will revoke their predecessors. This undertaking was implemented by **Actuarial Standard for Paid Up Values and Surrender Values made under s.101 of the *Life Insurance Act 1995***, of 14 April 1997.

Air Navigation (Aircraft Engine Emissions) Regulations (Amendment) Statutory Rules 1995 No. 277

4.3. On 13 June 1996 the Minister for Transport and Regional Development, the Hon John Sharp MP, undertook to amend the Regulations to provide for AAT review. This undertaking was implemented by **Air Navigation (Aircraft Engine Emissions) Regulations (Amendment), Statutory Rules 1997 No. 80**, of 7 April 1997.

Airports (Building Control) Regulations Statutory Rules 1996 No. 292

4.4. On 4 April 1997 the Minister for Transport and Regional Development, the Hon John Sharp MP, undertook the amend the Regulations to provide for AAT review of decisions, to specify time limits for certain decisions and to correct reference errors. This undertaking was implemented by **Airports (Building Control) Regulations (Amendment), Statutory Rules 1997 No. 114**, of 14 May 1997.

Airports (Environment Protection) Regulations
Statutory Rules 1997 No. 13

4.5. On 23 April 1997 the Minister for Transport and Regional Development, the Hon John Sharp MP, undertook to amend the Regulations to validate incorporation of material, provide safeguards for administrative offences and official notices and correct drafting errors. This undertaking was implemented by **Airports (Environment Protection) Regulations (Amendment), Statutory Rules 1997 No. 112**, of 14 May 1997.

Airports Regulations
Statutory Rules 1997 No. 8

4.6. On 23 April 1997 the Minister for Transport and Regional Development, the Hon John Sharp MP, undertook to amend the Regulations to provide for merits review of decisions and to correct drafting oversights. This undertaking was implemented by **Airports Regulations (Amendment), Statutory Rules 1997 No. 113**, of 14 May 1997.

Australian War Memorial Regulations (Amendment)
Statutory Rules 1994 No. 375

4.7. On 27 March 1995 the Minister for Veterans' Affairs, the Hon Con Sciacca MP, undertook to amend the *Australian War Memorial Act 1980* or the Regulations to incorporate the list of 'authorised officers' of the Council of the Australian War Memorial. This undertaking was implemented by **Australian War Memorial Regulations (Amendment), Statutory Rules 1996 No. 243**, of 23 October 1996.

Banking (Statistics) Regulations
Statutory Rules 1989 No. 357

4.8. On 23 July 1990 the Minister Assisting the Treasurer, the Hon Simon Crean MP, undertook to amend the Regulations to require that a notification be in writing. This undertaking was implemented by **Banking (Statistics) Regulations (Amendment), Statutory Rules 1997 No. 24**, of 19 February 1997.

Casino Control (Amendment) Ordinance 1995
Territory of Christmas Island Ordinance No. 2 of 1995

4.9. On 19 September 1995 the Parliamentary Secretary to the Minister for the Environment, Sport and Territories, the Hon Warren Snowdon MP, undertook to amend the Ordinance to provide for review of decisions. This undertaking was implemented by the **Casino Control (Amendment) Ordinance 1996, Territory of Christmas Island Ordinance No. 5 of 1996**, of 28 August 1996.

Charter of the United Nations (Sanctions - Republic of Bosnia and Herzegovina) Regulations (Amendment)
Statutory Rules 1996 No. 30

4.10. On 24 May 1996 the Minister for Foreign Affairs, the Hon Alexander Downer MP, undertook to repeal the Regulations as soon as the first free and fair elections were held in Bosnia. This undertaking was implemented by the **Charter of the United Nations (Sanctions - Republic of Bosnia and Herzegovina) Regulations (Repeal), Statutory Rules 1996 No. 291**, of 11 December 1996.

Childcare Assistance (Fee Relief) Guidelines (Variation) Instrument No. CCA/12A/96/1 made under s.12A(1) of the *Child Care Act 1972*

4.11. On 17 September 1996 the Minister for Family Services, the Hon Judi Moylan MP, undertook to amend the Guidelines to clarify provisions relating to childcare assistance assessment for Australian Defence Force personnel. This undertaking was implemented by the **Childcare Assistance (Fee Relief) Guidelines (Variation), Instrument No. CCA/12A/96/2 made under s.12A(1) of the *Child Care Act 1972***, of 24 September 1996.

Commissioner's Rules No. 22 made under s.252 of the *Life Insurance Act 1995*

4.12. On 29 November 1996 the Assistant Treasurer, Senator the Hon Rod Kemp, undertook to amend the Rules to clarify the commencement date. This undertaking was implemented by the **Variation of Commissioner's Rules No. 22 made under s.252 of the *Life Insurance Act 1995***, of 20 November 1996.

Currency Determination No. 7 of 1996

4.13. On 21 March 1997 the Assistant Treasurer, Senator the Hon Rod Kemp, undertook to date future instruments. This undertaking was implemented by **Currency Determination No. 1 of 1997**, of 9 April 1997.

Customs (Prohibited Imports) Regulations (Amendment)
Statutory Rules 1996 No. 91

4.14. On 16 October 1996 the Minister for Small Business and Consumer Affairs, the Hon Geoff Prosser MP, undertook the amend the Regulations to clarify the height from which a firearm may be dropped during safety testing. This undertaking was implemented by the **Customs (Prohibited Imports) Regulations (Amendment), Statutory Rules 1996 No. 324**, of 20 December 1996.

Determination No. 1996-97/ACC1 made under s.47(2)(b)(iii) of the *National Health Act 1953*

4.15. On 9 December 1996 the Minister for Family Services, the Hon Judi Moylan MP, undertook to remake the ineffective Determination. This undertaking was implemented by **Determination No. 1996-97/ACC4 made under s.47(2)(b)(iii) of the *National Health Act 1953***, of 5 December 1996.

Exempt Nursing Homes Principles 1990, EXP 1/1993, made under the *National Health Act 1953*

4.16. On 1 March 1994 the Minister for Housing, Local Government and Community Services, the Hon Brian Howe MP, undertook to amend the Principles to improve drafting. This undertaking was implemented by **Exempt Nursing Homes Principles (Amendment No. 1 of 1996) made under the *National Health Act 1953***, of 25 October 1996.

Northern Prawn Fishery (NPF) Management Plan 1995 (Plan NPF01)
Southern Bluefin Tuna (SBT) Fishery Management Plan (Plan SBT01)

4.17. On 6 June 1995 the Minister for Resources, the Hon David Beddall MP, undertook to provide for commencement dates in all future plans of management. This undertaking was implemented by **Southern Bluefin Tuna Fishery Management Plan 1995 (Amendment No. 1 of 1996)**, of 2 December 1996.

Occupational Health and Safety (Asbestos) Ordinance 1995
Territory of Christmas Island Ordinance No. 5 of 1995
Occupational Health and Safety (Asbestos) Ordinance 1995
Territory of Cocos (Keeling) Islands Ordinance No. 3 of 1995

4.18. On 28 February 1996 the Minister for Sport, Territories and Local Government, the Hon Warwick Smith MP, undertook to amend the Ordinances to provide for review of discretions; to include mental elements in offence provisions; and to include a penalty. The Ordinances were repealed by the **Occupational Health and Safety (Asbestos)(Repeal) Ordinance 1977, Territory of Christmas Island Ordinance No. 3 of 1997,** and **Territory of Cocos (Keeling) Islands Ordinance No. 3 of 1997**, of 20 August 1997, following the application in the two Territories of relevant Western Australian laws.

Public Service Determination 1995/146

4.19. On 22 February 1996 the Industrial Relations Department undertook to increase annually the USA education assistance rates. This undertaking was implemented by **Public Service Determination 1997/13**, of 13 March 1997.

Public Service Determinations 1996/70 and 71

4.20. On 16 August 1996 the Minister for Industrial Relations, the Hon Peter Reith MP, undertook to amend the Determinations to ensure no staff member was disadvantaged by the lack of retrospectivity with respect to changes made to allowances. This undertaking was implemented by **Public Service Determination 1996/157**, of 15 August 1996.

Radiocommunications Regulations
Statutory Rules 1993 No. 177

4.21. On 25 November 1993 the Minister for Communications, the Hon David Beddall MP, undertook to amend the Regulations to provide for notification of rights. This undertaking was implemented by the **Radiocommunications Regulations (Amendment), Statutory Rules 1996 No. 158**, of 17 July 1996.

Therapeutic Goods Order No. 54 made under s.10 of the *Therapeutic Goods Act 1989*

4.22. On 25 March 1997 the Parliamentary Secretary to the Minister for Health and Family Services, Senator the Hon Christopher Ellison, undertook the amend the Regulations to delete a discretion and to validate incorporation of documents. This undertaking was implemented by the **Therapeutic Goods Order No. 54A made under s.10 of the *Therapeutic Goods Act 1989***, of 26 March 1997.

Weapons of Mass Destruction Regulations
Statutory Rules 1995 No. 373

4.23. On 2 April 1996 the Minister for Defence, the Hon Ian McLachlan MP, undertook to amend the Regulations to require reasons to be given for decisions and to protect property rights. This undertaking was implemented by the **Weapons of Mass Destruction Regulations (Amendment), Statutory Rules 1996 No. 176**, of 14 August 1996.

CHAPTER 5

MINISTERIAL UNDERTAKINGS NOT YET IMPLEMENTED

5.1 Below are Ministerial and other undertakings, given to amend legislation to meet the concerns of the Committee, which had not been implemented at 30 June 1997, the end of the reporting period. Some have been implemented since that date.

Accounting Standard AASB 1014 'Set-Off and Debt Extinguishment of Debt'
Accounting Standard AASB 1032 'Specific Disclosures by Financial Institutions'
Accounting Standard AASB 1033 'Presentation and Disclosure of Financial Instruments'
Accounting Standard AASB 1034 'Information to be Disclosed in Financial Reports'

5.2 On 19 June 1997 the Parliamentary Secretary to the Treasurer, Senator the Hon Ian Campbell, undertook to include a formal making statement in future accounting standards.

Administrative Appeals Tribunal Regulations (Amendment)
Statutory Rules 1993 No. 276

5.3 On 14 April 1994 the Minister for Justice, the Hon Duncan Kerr MP, undertook to amend the Regulations to provide for notification of rights.

Agricultural and Veterinary Chemicals Code Regulations (Amendment)
Statutory Rules 1996 No. 111

5.4 On 28 August 1996 the Minister for Primary Industries and Energy, the Hon John Anderson MP, undertook to amend the Regulations to provide for AAT review of certain decisions with commercial consequences.

Agricultural and Veterinary Chemicals Code Regulations (Amendment)
Statutory Rules 1996 No. 162

5.5 On 17 October 1996 the Minister for Primary Industries and Energy, the Hon John Anderson MP, undertook to amend the Regulations to provide safeguards for business operators.

Air Navigation Regulations (Amendment)
Statutory Rules 1995 No. 342

5.6 On 23 May 1996 the Minister for Transport and Regional Development, the Hon John Sharp MP, undertook to amend the Regulations to provide for security officers to carry identification cards with a photograph no more than five years old.

Applied Laws (Implementation) Ordinance 1995
Territory of Christmas Island Ordinance No. 1 of 1995

5.7 On 21 November 1995 the Parliamentary Secretary to the Minister for the Environment, Sport and Territories, the Hon Warren Snowdon MP, undertook to review the *Christmas Island Act 1958* to include safeguards about prejudicial retrospectivity.

Applied Laws (Implementation) Ordinance 1995
Territory of Cocos (Keeling) Islands Ordinance No. 1 of 1995

5.8 On 21 November 1995 the Parliamentary Secretary to the Minister for the Environment, Sport and Territories, the Hon Warren Snowdon MP, undertook to review the *Cocos (Keeling) Islands Act 1955* to include safeguards about prejudicial retrospectivity.

Australian Dried Fruits Board (AGM) Regulations
Statutory Rules 1993 No. 144
Fisheries Levy (Northern Fish Trawl Fishery) Regulations (Amendment)
Statutory Rules 1992 No. 13
Wool Research and Development Corporation Regulations (Amendment)
Statutory Rules 1992 No. 443

5.9 On 4 July 1996 the Minister for Primary Industries and Energy, the Hon John Anderson MP, undertook to repeal the above inoperative Regulations.

Australian Horticultural Corporation (Honey Export Control) Regulations
Statutory Rules 1993 No. 26

5.10 On 30 August 1993 the Minister for Primary Industries and Energy, the Hon Simon Crean MP, undertook to amend the Regulations to improve drafting, delete provisions for mandatory forms and provide for review of discretions.

Australian Postal Corporation Regulations
Statutory Rules 1996 No. 72

5.11 On 21 October 1996 the Minister for Communications and the Arts, Senator the Hon Richard Alston, undertook to amend the Regulations to make it clear that they are subject to the *Freedom of Information Act 1982.*

Australian Sports Drug Agency Regulations (Amendment)
Statutory Rules 1996 No. 163

5.12 On 12 December 1996 the Minister for Sport, Territories and Local Government, the Hon Warwick Smith MP, undertook the amend the Regulations to protect the rights of intellectually disabled competitors, to provide for companies to apply to become a prescribed courier service, and to provide for AAT review of decisions.

Australian War Memorial Regulations (Amendment)
Statutory Rules 1996 No. 243

5.13 On 26 February 1997 the Minister for Veterans' Affairs, the Hon Bruce Scott MP, undertook to mention the role of the Committee, where appropriate, in future Explanatory Statements.

AUSTUDY Regulations (Amendment)
Statutory Rules 1994 No. 409

5.14 On 29 March 1995 the Minister for Schools, Vocational Education and Training, the Hon Ross Free MP, undertook to amend the Regulations to correct drafting errors.

Bankruptcy Regulations (Amendment)
Statutory Rules 1996 No. 263

5.15 On 26 March 1997 the Attorney-General, the Hon Daryl Williams MP, undertook to amend the Regulations to correct a drafting oversight.

Bankruptcy Rules (Amendment)
Statutory Rules 1996 No. 191

5.16 On 21 November 1996 the Attorney-General, the Hon Daryl Williams MP, undertook the amend the Rules to provide for AAT review.

Casino Control (Amendment) Ordinance 1996
Territory of Christmas Island Ordinance No. 5 of 1996

5.17 On 24 February 1997 the Minister for Sport, Territories and Local Government, the Hon Warwick Smith MP, undertook to amend the Ordinance to narrow an unfair definition and provide for merits review of decisions.

Childcare Assistance (Fee Relief) Guidelines (Variation)
Instrument No. CCA/12A/97/1 made under s.12A(1) of the *Child Care Act 1972*

5.18 On 9 May 1997 the Minister for Family Services, the Hon Judi Moylan MP, undertook to provide for merits review of administrative decisions when new child care legislation is introduced.

Child Care Centre Relief Eligibility Guidelines made under s.12A of the *Child Care Act 1972*

5.19 On 27 May 1992 the Minister for Aged, Family and Health Services, the Hon Peter Staples MP, undertook to amend the Act and delegated legislation to provide for review of discretions, following an Australian Law Reform Commission review of child care. The Minister subsequently advised on 29 January 1996 that the ALRC recommended that review should be provided and that the Department was looking at the best way to implement this recommendation.

Childcare Rebate (Definition of Child Care) Determination No. 1 of 1994 under the *Childcare Rebate Act 1993*

5.20 On 8 November 1994 the Minister for Family Services, Senator the Hon Rosemary Crowley, undertook to amend the Determination to correct a drafting oversight.

Crimes Regulations (Amendment)
Statutory Rules 1996 No. 7

5.21 On 3 March 1997 the Attorney-General, the Hon Daryl Williams MP, undertook to include in Explanatory Statements, where applicable, information on mandatory consultation.

Cultural Bequests Program Guidelines (No. 1) made under s.78(6C) of the *Income Tax Assessment Act 1936*

5.22 On 30 May 1997 the Minister for Communications and the Arts, Senator the Hon Richard Alston, undertook to amend the Guidelines to avoid invalid subdelegation, clarify costs and to provide for merits review of a discretion.

Determination No. 1996-97/ACC4 made under s.47(2)(b)(iii) of the *National Health Act 1953*

5.23 On 30 April 1997 the Minister for Health and Family Services, the Hon Michael Wooldridge MP, undertook to mention the Committee in future Explanatory Statements when an instrument implemented an undertaking.

Determination No. ADPCA 10F 3/1995 made under 10F of the *Aged or Disabled Persons Care Act 1954*

5.24 On 10 October 1996 the Minister for Family Services, the Hon Judi Moylan MP, undertook to provide for AAT review in future legislative amendments.

Determination of Benefits of Members of the National Road Transport Commission made under s.15 of the *National Road Transport Commission Act 1991*

5.25 On 6 January 1997 the Minister for Transport and Regional Development, the Hon John Sharp MP, undertook to ask the NRTC to validate procedures and change the presentation and format of future instruments.

Determination PHI 14/1996 made under s.4(1)(dd) of the *National Health Act 1953*

5.26 On 6 March 1977 the Minister for Health and Family Services, the Hon Michael Wooldridge MP, undertook to provide a clear commencement date for future Determinations.

Eleventh Amending Deed to Establish an Occupational Superannuation Scheme for Commonwealth Employees and Certain Other Persons made under s.5 of the *Superannuation Act 1990*

5.27 On 11 April 1997, the Minister for Finance, the Hon John Fahey MP, undertook to indicate in future Explanatory Statements that mandatory making procedures had been followed.

Excise Regulations (Amendment)
Statutory Rules 1995 No. 425

5.28 On 16 May 1996 the Minister for Small Business and Consumer Affairs, the Hon Geoff Prosser MP, undertook to amend the *Excise Act 1901* to provide for AAT review of decisions.

Exempt Nursing Homes Principles (Amendment No. 1 of 1996)

5.29 On 21 March 1997 the Minister for Family Services, the Hon Judi Moylan MP, undertook to amend the Principles to remove a superfluous power.

Exempt Nursing Homes Fees Redetermination Principles (Amendment No. 1 of 1996)

5.30 On 21 March 1997 the Minister for Family Services, the Hon Judi Moylan MP, undertook to amend the Principles to remove a discretion.

Export Control (Fees) Orders (Amendment)
Export Control Orders No. 1 of 1996

5.31 On 6 May 1996 the Minister for Primary Industries and Energy, the Hon John Anderson MP, undertook to amend charging legislation to provide for AAT review.

Export Inspection and Meat Charges Collection Regulations (Amendment)
Statutory Rules 1995 No. 257

5.32 On 30 November 1995, the Minister for Primary Industries and Energy, Senator the Hon Bob Collins, undertook to amend the Regulations to provide for merits review.

Family Law Regulations (Amendment)
Statutory Rules 1996 No. 71

5.33 On 10 September 1996 the Attorney-General, the Hon Daryl Williams MP, undertook to amend the Regulations to provide for AAT review of discretions.

Federal Airports (Amendment) By-Laws No. 1 of 1997

5.34 On 23 April 1997 the Minister for Transport and Regional Development, the Hon John Sharp MP, undertook to amend the By-Laws to remove a reversal of proof provision.

Formulation of Principles made under s.58CD of the *National Health Act 1953*

5.35 On 22 November 1993 the Minister for Housing, Local Government and Community Services, the Hon Brian Howe MP, undertook to validate provisions of the Principles.

Freedom of Information (Miscellaneous Provisions) Regulations (Amendment)
Statutory Rules 1991 No. 321

5.36 These Regulations, which provided for a conclusive exemption certificate to remain in force for five years, were disallowed by the Senate on policy grounds on 24 March 1992, with the result that such certificates remained in force indefinitely. On 29 April 1992 the Attorney-General, the Hon Michael Duffy MP, undertook to consult with other agencies to ascertain the best way to resolve this matter.

Grants Entry Test made under s.13K of the *Export Market Development Grants Act 1974*

5.37 On 16 October 1996 the Minister for Trade, the Hon Tim Fischer MP, undertook the amend the *Export Market Development Grants Act 1974* to provide for review of certain decisions.

Great Barrier Reef Marine Park Regulations (Amendment)
Statutory Rules 1993 No. 206

5.38 On 17 November 1993 the Minister for the Environment, Sport and Territories, the Hon Ros Kelly MP, undertook to amend the Regulations to provide for review of certain discretions.

Great Barrier Reef Marine Park Regulations (Amendment)
Statutory Rules 1993 No. 266

5.39 On 10 January 1994 the Minister for the Environment, Sport and Territories, the Hon Ros Kelly MP, undertook to amend the Regulations to provide for review of certain discretions.

Guidelines for Merit-based Equity Scholarships Scheme made under s.35 of the *Higher Education Funding Act 1988*
Guidelines for Advances of Operating Grants to Higher Education Institutions Instrument No. G1 of 1997 made under the *Higher Education Funding Act 1988*

5.40 On 30 April 1997 the Minister for Employment, Education and Youth Affairs, Senator the Hon Amanda Vanstone, undertook to make future Guidelines by a formal instrument.

Hazardous Waste (Regulation of Exports and Imports)(OECD Decision) Regulations
Statutory Rules 1996 No. 283

5.41 On 9 April 1997 the Minister for the Environment, Senator the Hon Robert Hill, undertook to amend the Regulations to provide an opportunity to respond to adverse information.

Health Insurance Regulations (Amendment)
Statutory Rules 1992 No. 111

5.42 On 5 November 1992 the Parliamentary Secretary to the Minister for Health, Housing and Community Services, the Hon Gary Johns MP, undertook to amend the Regulations to limit the delegation of discretions.

Hearing Services Regulations (Amendment)
Statutory Rules 1996 No. 149

5.43 On 21 October 1996 the Parliamentary Secretary to the Minister for Health and Family Services, Senator Bob Woods, undertook to review the Act to provide for refunds of charges.

Income Tax Regulations (Amendment)
Statutory Rules 1994 No. 461

5.44 On 31 May 1995 the Parliamentary Secretary to the Treasurer, the Hon Paul Elliott MP, undertook to amend the Regulations to provide for merits review.

Life Insurance Regulations (Amendment)
Statutory Rules 1996 No. 305

5.45 On 16 May 1997 the Assistant Treasurer, Senator the Hon Rod Kemp, undertook to include only names and not amounts in any publication of unclaimed moneys.

Maximum Amount Recoverable in Tort Determination made under s.121 of the *Telecommunications Act 1991*

5.46 On 9 October 1996 the Minister for Communications and the Arts, the Hon Michael Lee MP, undertook to revoke the invalid Determination.

Meat and Live-stock Order No. MQ64/95 under s.68 of the *Meat and Live-stock Industry Act 1995*

5.47 On 18 June 1996 the Minister for Primary Industries and Energy, the Hon John Anderson MP, undertook that future Orders would avoid any possible prejudicial retrospectivity.

Meat and Live-stock Order No. MQ65/95 made under s.68 of the *Meat and Live-stock Industry Act 1995*

5.48 On 18 June 1996 the Minister for Primary Industries and Energy, the Hon John Anderson MP, undertook to provide review provisions in future Orders.

Meat and Live-stock Order No. M73/95 made under s.68 of the *Meat and Live-stock Industry Act 1995*

5.49 On 18 June 1996 the Minister for Primary Industries and Energy, the Hon John Anderson MP, undertook to amend the Order to correct a drafting defect.

Meat Inspection (General) Orders (Amendment)
Meat Inspection Orders No. 3 of 1993

5.50 On 31 May 1994 the Minister for Primary Industries and Energy, Senator the Hon Bob Collins, undertook to validate provisions of the Orders.

Meat Inspection (New South Wales) Orders
Meat Inspection Orders No. 5 of 1993

5.51 On 2 May 1994 the Minister for Primary Industries and Energy, Senator the Hon Bob Collins, undertook to amend the Orders to provide for review of discretions.

National Gallery Regulations (Amendment)
Statutory Rules 1996 No. 92

5.52 On 6 November 1996 the Minister for Communications and the Arts, Senator the Hon Richard Alston, undertook the amend the Regulations to remove unnecessary provisions and to correct a drafting error.

National Health (Pharmaceutical Benefits) Regulations (Amendment)
Statutory Rules 1994 No. 348

5.53 On 3 March 1995 the Parliamentary Secretary to the Prime Minister, the Hon Andrew Theophanous MP, undertook to review penalty levels.

Native Title (Notices) Determination No. 1 of 1996 made under ss. 23 and 252 of the *Native Title Act 1993*

5.54 On 16 September 1996 the Minister for Aboriginal and Torres Strait Islander Affairs, Senator the Hon John Herron, undertook to amend the Native Title Act to validate actions taken during the two years from 1 January 1994.

NHMRC Guidelines for the Protection of Privacy in the Conduct of Medical Research

5.55 On 3 September 1991 the Minister for Justice, Senator the Hon Michael Tate, undertook to provide for the tabling and disallowance of the Guidelines.

Nursing Home Nasogastric Feeding Principles 1992 (NGP1/1992)
Nursing Home Oxygen Treatment Principles 1992 (OTP1/1992)

5.56 On 1 October 1992 the Minister for Aged, Family and Health Services, the Hon Peter Staples MP, undertook to amend the Principles to provide for review of discretions.

Occupational Health and Safety (Commonwealth Employment)(National Standards) Regulations (Amendment)
Statutory Rules 1996 No. 129

5.57 On 23 August 1996 the Minister for Industrial Relations, the Hon Peter Reith MP, undertook to amend the Regulations to remove one discretion and to provide for AAT review of another.

Occupational Health and Safety (Commonwealth Employment)(National Standards) Regulations (Amendment)
Statutory Rules 1996 No. 288

5.58 On 27 October 1997 the Minister for Workplace Relations and Small Business, the Hon Peter Reith MP, undertook to amend the Regulations to provide for merits review of a decision to impose a condition.

Petroleum (Submerged Lands)(Management of Safety on Offshore Facilities) Regulations
Statutory Rules 1996 No. 298

5.59 On 26 March 1997 the Minister for Resources and Energy, Senator the Hon Warwick Parer, undertook to amend the Regulations to remove a double jeopardy provision.

Plant Breeder's Rights Regulations (Amendment)
Statutory Rules 1995 No. 290

5.60 On 20 December 1995 the Minister for Primary Industries and Energy, Senator the Hon Bob Collins, undertook to amend the Regulations to provide for AAT review of discretions and to improve drafting.

Prawn Export Promotion Levies and Charges Regulations
Statutory Rules 1995 No. 245

5.61 On 10 November 1995 the Minister for Resources, the Hon David Beddall MP, undertook to include a right of appeal to the AAT.

Principles NHP 2/1993 made under the *National Health Act 1953*

5.62 On 7 October 1993 the Parliamentary Secretary to the Minister for Housing, Local Government and Community Services, the Hon Andrew Theophanous MP, undertook to amend the Principles to remove an invalid legislative power.

Public Service Determination 1995/87

5.63 On 7 November 1995 the Assistant Minister for Industrial Relations, the Hon Gary Johns MP, undertook that inappropriate expressions would be removed as soon as possible.

Remuneration Tribunal Determination No. 19 of 1994

5.64 On 9 December 1994 the Minister for Industrial Relations, the Hon Laurie Brereton MP, undertook to amend the Determination to correct a drafting error.

Remuneration Tribunal Determination No. 13 of 1996

5.65 On 9 December 1996 the Minister for Industrial Relations, the Hon Peter Reith MP, undertook that future Explanatory Statements will include reasonable background information.

Remuneration Tribunal Determinations

5.66 On 17 March 1995 the Minister for Industrial Relations, the Hon Laurie Brereton MP, undertook to amend the *Remuneration Tribunal Act 1973* to impose a time limit within which the Tribunal must send determinations to the Minister.

Road Transport Reform (Heavy Vehicle Standards) Regulations
Statutory Rules 1995 No. 55

5.67 On 29 August 1995 the Parliamentary Secretary to the Minister for Transport, the Hon Neil O'Keefe MP, undertook to amend the Regulations to provide for AAT review of discretions and to remove a strict liability provision. The Parliamentary Secretary further advised that the Regulations would not commence before the Ministerial Council agreed to replacement regulations.

Road Transport Reform (Mass and Loading) Regulations (Amendment)
Statutory Rules 1996 No. 342

5.68 On 2 May 1997 the Minister for Transport and Regional Development, the Hon John Sharp MP, undertook to amend the Regulations to provide for independent review of discretions.

Road Transport Reform (Oversize and Overmass Vehicles) Regulations
Statutory Rules 1995 No. 123

5.69 On 29 August 1995 the Parliamentary Secretary to the Minister for Transport, the Hon Neil O'Keefe MP, undertook to amend the Regulations to provide for AAT review of discretions. The Parliamentary Secretary further advised that the Regulations would not commence before the Ministerial Council agreed to replacement regulations.

Superannuation Industry (Supervision) Regulations (Amendment)
Statutory Rules 1995 No. 430

5.70 On 21 April 1997 the Parliamentary Secretary to the Treasurer, Senator the Hon Brian Gibson, undertook to amend the Regulations to provide for merits review.

Taxation Administration Regulations (Amendment)
Statutory Rules 1996 No. 347

5.71 On 14 April 1997 the Assistant Treasurer, Senator the Hon Rod Kemp, undertook that future Explanatory Statements would include details of the practical effect of the Regulations.

Television Licence Fees Regulations (Amendment)
Statutory Rules 1992 No. 448

5.72 On 19 August 1993 the Minister for Communications, the Hon David Beddall MP, undertook to amend the Regulations to correct a drafting error.

Tenth Amending Deed to Establish an Occupational Superannuation Scheme for Commonwealth Employees and Certain Other Persons made under s.5 of the *Superannuation Act 1990*

5.73 On 7 August 1996 the Minister for Finance, the Hon John Fahey MP, undertook to amend the *Superannuation Act 1990* to validate administrative actions.

Therapeutic Goods (Charges) Regulations (Amendment)
Statutory Rules 1994 No. 223

5.74 On 23 September 1994 the Minister for Family Services, Senator the Hon Rosemary Crowley, undertook to amend the Regulations to correct a drafting error.

Workplace Relations Regulations (Amendment)
Statutory Rules 1996 No. 328

5.75 On 29 April 1997 the Minister for Industrial Relations, the Hon Peter Reith MP, undertook to amend the Regulations to include a reasonability requirement.

Zone Election Rules, Rules No. 4 of 1990 made under the *Aboriginal and Torres Strait Islander Commission Act 1989*

5.76 On 12 April 1991 the Minister for Aboriginal Affairs, the Hon Robert Tickner MP, undertook to amend the Rules to remove strict liability and vicarious liability offences and a reversal of the usual onus of proof.

CHAPTER 6

SPECIAL STATEMENTS

6.1 During 1996-97 the Chairman made the following special statements to the Senate.

CENSUS
SENATOR O'CHEE, SENATE HANSARD, 22 AUGUST 1996, P.2880

6.2 On behalf of the Standing Committee on Regulations and Ordinances I would like to report to the Senate on the delegated legislation under which the recent census was conducted. Most public comment on these legislative provisions was concerned with the fine of $100 per day for failing to fill out the form. It is, however, not widely known that the whole conduct of the census was based on legislative instruments made by the executive, some of which were not only not subject to parliamentary scrutiny, but also were not even required to be tabled.

6.3 The enabling act for the census is the *Census and Statistics Act 1905*, which is a short act with provision for the collection of general statistics as well as for the census. The legislative scheme of that act is to provide the barest structural bones, which are to be filled out by delegated legislation. The act provides for a census to be taken in each fifth year after 1981, although these may be increased by regulation. There is nothing objectionable in this because the entire process so far is under parliamentary control, with any such regulations being subject to scrutiny and possible disallowance. However, the act then provides for the actual census day to be appointed by proclamation. Again, there is nothing exceptional in such a provision. Indeed, it may be the most appropriate and practical option. What is exceptional is that there are no formal procedures for any parliamentary scrutiny of this action.

6.4 The Governor-General in fact proclaimed 6 August 1996 as the census day, sealing the proclamation with the great seal of Australia. This proclamation was made on 13 June 1996 but was not gazetted until 26 June 1996, two days before parliament rose. This lack of parliamentary control will, however, be corrected with the passage of the Legislative Instruments Bill 1996, which provides for scrutiny of such proclamations.

6.5 Two notices given by the Australian Statistician are also of concern because they are the basis for the obligation to fill out the census form. Here also both notices were only made and gazetted on 26 June 1996, and there is no requirement for them to be tabled or subject to scrutiny. One notice required every occupier of a private dwelling to fill out the census household form, while the other required people not counted in a household to fill out the census form. This is another instance of legislation regarding which the parliament may at present have no knowledge but which will be subject to full scrutiny under the proposed Legislative Instruments Act.

6.6 The position is more satisfactory in respect of the contents of the census questions, which were prescribed in the census regulations which commenced as early as 6 September 1994. This was entirely appropriate because the early tabling ensured that these regulations satisfied the two essential criteria for delegated legislation, which are parliamentary control and adequate time for that control to be exercised. The census forms themselves are actually not at present subject to tabling or disallowance but, again, would be under the new bill.

6.7 The position was also satisfactory in respect of other delegated legislation necessary to implement the act in its application to the census. As well as providing for the questions in the forms, the census regulations prescribed other relevant matters. The related statistics regulations provided for persons to be engaged for the purposes of the census and for such officers to maintain secrecy in relation to the forms. Finally, the statistics determination, which under the act is a statutory rule, provides for the disclosure of information collected in the census. All these instruments are subject to full parliamentary scrutiny.

6.8 In summary, then, the taking of the census involved two separate series of principal regulations made by the Governor-General, one principal series of statutory rules cited as a determination and made by the minister, one proclamation by the Governor-General, and two notices and two forms made by the Australian Statistician. All this was done under an act which is only seven pages long.

6.9 The taking of the census illustrates the diversity and variety of delegated legislation and its central role in modern public administration. It also reveals that crucial aspects of important legislation, affecting, in this case, the entire population of Australia, are subject neither to parliamentary disallowance nor even to tabling. However, as mentioned earlier, that problem should be solved by the Legislative Instruments Bill. The Standing Committee on Regulations and Ordinances is taking a close interest in the provisions of that bill to ensure that the interests of parliament are protected, and I will report to the Senate in detail in due course.

INSTRUMENTS MADE UNDER THE *NATIVE TITLE ACT 1993*
SENATOR O'CHEE, SENATE HANSARD, 10 OCTOBER 1996, P.3855

6.10 Madam President, on 27 June 1996 I reported on action by the Regulations and Ordinances Committee in respect of certain instruments made under the Native Title Act. The Committee had ascertained that an important legislative determination made on Christmas Eve 1993, the very day that the Native Title Act received royal assent, was never tabled and so ceased to have effect 15 sitting days later. The Committee was alerted to the failure to table when a subsequent determination, made some two years later, purported to amend the earlier determination. After the Committee notified the Department of the Prime Minister and Cabinet of the, by now, more than two years invalidity, a fresh determination was made, gazetted and tabled, all on the same day. That fresh determination, however, could legally only operate from that date and could not validate any action taken in putative reliance on the earlier determination. Any such action taken during that period of more than two years was, of course, totally void.

6.11 When I reported to the Senate earlier, I advised that the Committee would continue to inquire into this matter. The Committee then wrote to the Minister for Aboriginal and Torres Strait Islander Affairs (Senator Herron) about the practical effects of the invalidity and of the

steps proposed to remedy the situation. We have now received the minister's reply, which illustrates the need to comply with the statutory requirements for tabling delegated legislation.

6.12 The invalid determination provided for mandatory action in specified circumstances by the Commonwealth minister, the Commonwealth itself, the states and territories and the native title registrar. One of these circumstances was notification by governments of their intention to do a future act, such as grant a mining lease. In response to the Committee's inquiry, the minister advised that there may have been thousands of these actions, all of which were totally invalid. Another circumstance concerned applications for determinations of native title, in respect of which the minister advised the Committee that there were hundreds of invalid actions. Another aspect of the invalidity related to actions by state and territory agencies, the minister advising the Committee that there was little likelihood that the range and extent of these could easily, if ever, be ascertained. This result is scarcely a flattering picture of Commonwealth public administration, with thousands of invalid actions, some of which date back more than two years.

6.13 The minister also advised the Committee that the Prime Minister (Mr Howard) had asked the state and territory governments for their preferred option to correct the situation. As a result of these consultations, the proposed amendments provided for by the Native Title Amendment Bill 1996 would include a provision to validate retrospectivity of all of these thousands of actions. The Committee in this case will not oppose such amendments, if only because to do otherwise would result in the considerable financial expenditure in this area over the last two years being wasted, and because of the waste of time if the whole process had to start again. Moreover, it would adversely affect thousands of people who had acted in the honestly held but incorrect belief that their actions were valid. The Committee nonetheless has substantial reservations about the Commonwealth legislation providing for prejudicial retrospectivity. The minister did not expressly advise that the retrospectivity would be prejudicial but, if it was not prejudicial, the problem could be corrected by delegated legislation.

6.14 Under the Acts Interpretation Act legislative instruments may operate retrospectively only if nobody apart from the Commonwealth is adversely affected. The final outcome, therefore, is that thousands of ineffective actions will be validated years later by prejudicially retrospective provisions of a Commonwealth act. This is an unfortunate result but one which, as I say, cannot be avoided without much time and money being wasted. The Committee was assisted in this matter by the prompt actions of the Prime Minister and the Minister for Aboriginal and Torres Strait Islander Affairs, Senator Herron, for which the Committee is grateful.

6.15 Winston Churchill is said to have remarked that when he was told that a battleship was being launched he did not ask whether it had a bottom. In the present case, on behalf of the Senate, the Standing Committee on Regulations and Ordinances asked whether the native title battleship had a bottom. In this case, it did not.

LATE TABLING OF LEGISLATIVE INSTRUMENTS
SENATOR O'CHEE, SENATE HANSARD, 3 DECEMBER 1996, P.6566

6.16 The present sittings has seen many instances of the Senate exercising its right to scrutinise delegated legislation and, in a number of cases, of disallowing individual instruments. This close scrutiny of legislative instruments is a major contribution to our system of parliamentary responsible government, under which the executive branch is responsible to Parliament. During the sittings the Regulations and Ordinances Committee has also continued its non-partisan scrutiny of delegated legislation, ensuring that individual instruments comply with high standards of parliamentary propriety and personal rights. The Committee does not, of course, raise policy issues.

6.17 The *Acts Interpretation Act 1901* at present provides the legislative basis for parliamentary scrutiny of delegated legislation. This will change if the present Legislative Instruments Bill 1996 becomes law and it was in respect of these changes that I reported to the Senate last week. However, it is the Acts Interpretation Act which provides for existing safeguards. One of the most important of these is that virtually all disallowable legislation must be tabled in both Houses within 15 sitting days of making, failing which an instrument will cease to have effect. Such tabling enables individual Senators both to be aware of what legislation has been made and, if thought appropriate, to set in train procedures which may lead ultimately to its disallowance.

6.18 It is therefore disturbing to report that in the last month there have been at least seven instances of disallowable instruments not being tabled in the Senate within the required 15 sitting days. Of course such instruments then cease to have effect, sometimes with unexpected legislative or administrative effects. Nevertheless, the result is that Commonwealth legislation has been made and has been in effect for those 15 sitting days, which may be the equivalent of several calendar months, without the Senate even being aware of its existence, much less being able to scrutinise it effectively. These present seven instances illustrate a number of other undesirable features of late tabling.

6.19 Two of the instruments which were not tabled in time were Marine Orders made under the *Navigation Act 1912*. These instruments related to the safety of life at sea and as such are important. One of the Orders included, in the words of the instrument itself, a penal provision, in relation to ships carrying toxic, corrosive and chemical gases. The other included mandatory safety provisions. These Orders were sent to the Committee for scrutiny under a covering letter signed on a date when they were already invalid.

6.20 The two Marine Orders were then remade, with different citations, more than a month after the original Orders were made, with a prospective date of effect. It would not, of course, have been possible to remake penal and mandatory provisions to operate with retrospective effect. These fresh Orders were, however, themselves void because they were made within seven days of the last day on which the original Orders could have been validly tabled. The Orders were therefore in breach of section 48A of the Acts Interpretation Act, inserted in that Act in 1988 at the suggestion of the Regulations and Ordinances Committee in order to give the Senate the fullest opportunity to scrutinise legislative instruments.

6.21 The final result, therefore, is that two instrument dealing with compulsory requirements of safety at sea, breach of one of which is an offence, were made and operated for a time, then, apparently without the knowledge of the administering agency, ceased to have effect because they were not tabled within the statutory period. They were then remade, after the staff of the Committee drew the invalidity to the attention of the authorities, with the intention that, after a period of hiatus, they would operate again. These two Orders were, however, void and, again without the knowledge of the agency, were never in operation. The Committee understands that the instruments will now be made for the third time.

6.22 Another instrument which ceased to have effect because it was not tabled was made by the Minister for Family Services under the National Health Act in respect of additional funding for isolated nursing homes. This instrument was validly tabled in the House. The Committee understands that an error was then found in the instrument and that, rather than repeal the incorrect provision and make it again with the intended effect, the Department decided to withdraw the instrument from tabling in the Senate. The result was that the instrument ceased to have effect.

6.23 The Committee points out that such use of the provisions of the Acts Interpretation Act, which are intended to give both Houses the opportunity to scrutinise delegated legislation, is not appropriate. The correct course in such a case, indeed the only course which properly recognises parliamentary propriety, is to table the instrument in the second House and to make a further instrument which corrects the oversight, as far as this is possible. In the present case the invalid instrument does not adversely appear to affect anyone except the Commonwealth, so it could even be made with retrospective effect, which would appear to have been the proper procedure.

6.24 Two instruments which ceased to have effect were made by officers of the Department of Industrial Relations as Determinations under the *Public Service Act 1922*. One of these Determinations was tabled in the House of Representatives after it had ceased to be valid, even by the standards of the fewer sitting days of the House. The Department of Industrial Relations then withdrew the instrument from tabling in the Senate after advice from Senate staff that it was invalid. That Determination was sent to the Senate for tabling and scrutiny under a covering letter dated on a day when the instrument was already invalid. In the legal context, of course, it makes no difference whether the instrument is tabled or not. If the Determination has ceased to have effect then tabling will not revive its provisions, all of which are ineffective. Indeed, under the express provisions of the Acts Interpretation Act, if an instrument which is invalid for late tabling purports to repeal an existing provision, then the repealed provision is revived.

6.25 The second invalid instrument made by the Department of Industrial Relations was tabled within time in the House of Representatives on the last possible day, but this was too late for valid tabling in the Senate, which sits for more days than the House. Here again the covering letter from the Department to the Senate was dated on a day when the instrument was already invalid.

6.26 The final instruments which were not tabled in time were two sets of Rules of the Industrial Relations Court, each made by ten judges of that Court. Honourable Senators will recall the activities of the Regulations and Ordinances Committee in respect of the first set of Industrial Relations Court Rules, which were almost 300 pages long. The Committee advised the Minister and the Chief Justice that these original Rules appeared to be void for prejudicial

retrospectivity. The Committee was in turn advised that, although in the opinion of the Attorney-General and the Chief Justice the Rules were not void, they would be repealed and remade in order to put the matter beyond doubt. This was then done, with the exception of one provision which everyone seemed to agree was void.

6.27 The present two sets of Rules were both quite short, providing for the powers of judicial registrars and for the Court's power to determine costs. Neither provided for a commencement date and so both commenced on gazettal, which was a fortnight later. I add that the Committee would usually prefer that gazettal be earlier than this. In summary, Rules were made, gazetted two weeks later and ceased to have effect 15 sitting days after making, which was four weeks ago. The Committee has, so far, not received any replacement Rules to correct the invalidity, insofar as this can be done. Any action taken by the Court or a judicial registrar in reliance on the putative Rules during this time would, of course, have no lawful authority. The fact that the invalid Rules were made by the judiciary, not by the executive, illustrates the range of instruments which must be tabled in the Senate, in order for it to carry out its function of scrutinising legislation made under the tabled authority of an Act of Parliament.

6.28 These two Rules of Court were included in the Statutory Rules series, most of which consists of Regulations made by the Governor-General. The Committee understands that this is the first time for many years that Statutory Rules were not tabled within time.

6.29 These recent failures to table illustrate aspects of the operation of legislative provisions which safeguard the ability of the Senate to scrutinise the operations of the executive and the judiciary. The nature of several of these failures, however, is such that it could be beneficial to reintroduce a previous provision of the Acts Interpretation Act under which instruments which were not validly tabled were void rather than merely of no effect.

6.30 These failures to table are of course not the only ones which have come to the attention of the Committee in the present sittings. I have twice reported to the Senate on the consequences of the failure to table a particular instrument made under the Native Title Act. In that case the Minister for Aboriginal Affairs advised the Committee that the Act would be amended retrospectively, apparently with prejudicial effect, to correct what the Minister advised were thousands of invalid administrative actions taken over a period of more than two years. Also, the Committee recently received an unusual instrument made under the *National Road Transport Commission Act 1992* by a majority of the members of a Ministerial Council. In that case, however, most of the signatures of the Ministers were dated earlier than the required 15 sitting days. The Committee considers that the instrument may therefore have ceased to have effect and we have written to the Minister about our concerns.

6.31 At present the Senate is sitting for a period of four weeks, including two weeks when it will sit for five days. This means that the required 15 sitting days for tabling legislative instruments will lapse within a shorter period than usual. The Committee understands that the Clerk of the Senate has written to the heads of all Departments of State pointing this out and advising of the need for prompt tabling. The Committee supports this action.

APPARENT BREACH OF PARLIAMENTARY PROPRIETY
SENATOR O'CHEE, SENATE HANSARD, 12 DECEMBER 1996, P.7352

6.32 Honourable Senators are aware that the Standing Committee on Regulations and Ordinances scrutinises all disallowable legislative instruments to ensure that each instrument complies with its high standards of personal rights and parliamentary propriety. The Committee then reports to the Senate on any breaches of these standards and on action which it has taken to correct the problem. Usually the responsible Minister will meet these concerns by undertaking to amend the enabling Act or the instrument itself, or by giving further details about the background of the operation of the instrument which satisfies the Committee. It is therefore with regret that I report to the Senate on matters relating to a legislative instrument which the Committee believes has breached parliamentary propriety and in respect of which the Committee has not yet received satisfactory undertakings.

6.33 The instrument in question is the **Crimes Regulations (Amendment), Statutory Rules 1996 No. 7**, made on 24 January 1996. The Regulations were quite short and had only one purpose, which was to exempt the Australian Securities Commission from provisions of the Spent Convictions Scheme. That scheme provides for important personal rights whereby, if a person was convicted of an offence more than 10 years ago, was sentenced to less than 30 months imprisonment and has not reoffended, then the conviction is spent and the person is legally able to claim, on oath or otherwise, that they were never convicted of the offence. Also, other people who are aware of the offence must generally not disclose the conviction without the consent of the person affected and must not take the conviction into account in any decision making process. The enabling Act, however, provides for the Regulations to prescribe exemptions from the scheme. The Crimes Regulations in question exempted the ASC from the Spent Convictions Scheme in regard to all offences for the purposes of considering whether to prosecute, making submissions as to sentence, and assessing the suitability of a person to be employed by the ASC.

6.34 The Committee scrutinised the Regulations and noted the advice of its Legal Adviser, Emeritus Professor Douglas Whalan, that the parent Act provided for the Privacy Commissioner to receive applications for exemptions from the Scheme and to advise the Minister on whether an exemption should be granted. The Committee noted that neither the making words of the Regulations nor the Explanatory Statement even referred to this requirement, much less that it had been observed, or to the substance of the Privacy Commissioner's advice, the obtaining of which was mandatory. The Committee assumed that this was because the matter was routine in nature, with no unusual or unexpected features. Nevertheless, the Committee wrote to the Minister on 15 April 1996 asking for confirmation that the Privacy Commissioner was consulted and, if so, of the result of those consultations.

6.35 The reply from the Minister, dated three and a half months later, advised that the Privacy Commissioner was indeed consulted, as required by the Act, but that the Minister had overruled the Commissioner's advice that the exemption should not be granted.

6.36 This advice was of considerable concern to the Committee. It meant that the sole provision of the Regulations was contrary to an express recommendation of the Privacy Commissioner in respect of his statutory duty to provide such advice. The concern was compounded by the fact that, as a consequence of the delay in replying and of the making words

and the Explanatory Statement omitting any reference to the Privacy Commissioner, the Committee assumed that there was nothing untoward about the Regulations and did not give a protective notice of disallowance. Also, importantly, the incomplete Explanatory Statement also meant that individual Senators with an interest in legislation affecting personal rights were not alerted to a matter of interest.

6.37 The Committee emphasises that it did not draw any conclusions about the desirability or otherwise of the substance of the exclusion of the ASC from the Spent Convictions Scheme. The Committee was concerned, however, that the important questions which the Regulations raised were concealed, whether inadvertently or not, from the attention and scrutiny of the Senate. In this context I add that the non-partisan Committee stays well clear of policy issues, but does attempt to ensure openness and accountability so that Senators should have every opportunity to take whatever action they see fit in respect of individual instruments.

6.38 After receiving this startling advice from the Minister the Committee replied, setting out its concerns and suggesting that, in the circumstances, it may be appropriate for the Regulations to be repealed and remade, with a complete Explanatory Statement. The Committee noted that this would preserve the options of the Committee and the Senate but would not disrupt the present arrangements pending informed parliamentary scrutiny. The Committee also advised that it would write to the Privacy Commissioner and, after considering his reply, decide whether it would be appropriate for members of the Attorney-General's Department to attend a meeting of the Committee.

6.39 The Privacy Commissioner subsequently advised the Committee that he was not aware that the Explanatory Statement failed to refer to his views on the exemption and that he appreciated the continued support of the Committee in seeking to promote a more open approach by agencies in relation to differences of view with his office, particularly where legislation is concerned.

6.40 The Minister then replied to the Committee advising that, in his view, the Explanatory Statement was adequate because it set out the provision of the Act under which the Regulations were made and general background, even though it did not mention the statutory obligation to receive advice from the Privacy Commissioner, or the result of that adverse advice. The Minister also advised, however, that he was prepared to adopt a practice under which the views of the Privacy Commissioner, if not included in the Explanatory Statement, would be communicated to the Committee at the same time as any future Regulations were tabled. The Minister advised that he could not agree that the Regulations should be repealed and remade.

6.41 The Committee then met with officers of the Attorney-General's Department to discuss the matter. The Committee is grateful to the Minister for releasing these officers. The Minister also advised that the delay in replying was unfortunate. In addition, a member of the Minister's staff wrote to the Committee advising that the Minister was conscious of, and regretted, the delay.

6.42 After considering the Minister's reply and the discussions with the officers, the Committee advised the Minister that it remained concerned at the way in which this matter was handled. The Committee advised that, in its view, any suggestion that the Explanatory Statement for these Regulations need not advise either that the enabling Act expressly required the Privacy

Commissioner to receive and examine relevant requests for exclusion and to advise the Minister on whether an exclusion should be granted, or that the Privacy Commissioner in this case recommended against exclusion, but was overruled, is not supportable. In the present case the Committee considers that it is a breach of parliamentary propriety.

6.43 The Committee also advised the Minister that his offer to communicate the views of the Privacy Commissioner to the Committee at the time of tabling of any future Regulations, if they were not included in the Explanatory Statement, would not be a satisfactory solution. This was because Senators would not be informed of relevant matters. Individual Senators give many notices of disallowance which may not be directly related to issues raised by the Committee. For instance, Senators may wish to disallow an instrument, or a provision of an instrument, on policy grounds. The Committee, on the other hand, does not raise matters of policy and operates in a non-partisan fashion.

6.44 In this context the Committee advised the Minister that it noted that present Commonwealth drafting practice for legislative instruments appears to be to include sometimes lengthy recitals in the making words that statutory consultation requirements have been met. The Committee gave instances of such recitals. In the case of another instrument, which the Committee understands was drafted by officers of the Attorney-General's Department, the making words actually recite that the instrument was made after consultation with the Privacy Commissioner.

6.45 The Committee advised the Minister that it supports this practice and assumes that if the relevant consultations or advice led to results which were unusual or unexpected, such as a decision to override the Privacy Commissioner, that this would be explained in the Explanatory Statement.

6.46 The Committee advised the Minister that it would, therefore, appreciate his advice that any future Explanatory Statements intended for tabling should include advice of any mandatory statutory consultation before the instrument was made and of the result of that consultation.

6.47 With regard to the delay of three and a half months in replying to the Committee's first letter, with the result that the Committee did not give a protective notice of disallowance of the Regulations, the Committee advised the Minister that it accepted the advice that he regretted the delay.

6.48 The Committee also advised that it would write to the Minister responsible for the Federal Executive Council Handbook, asking for the Handbook to be amended to provide for Explanatory Statements to advise of any mandatory consultation. The current edition of the Handbook expressly refers to the Standing Committee on Regulations and Ordinances.

6.49 At this point I emphasise again that the Committee made no finding on whether the ASC should or should not be exempted from the Spent Convictions Scheme. This is a matter on which informed and well intentioned people may differ. It is, however, also a matter affecting the personal rights of those who come within the scheme and as such it is a matter upon which the Senate should have been fully informed. It is, as I say, a matter of regret that this was not done and a breach of parliamentary propriety.

6.50 I will report again when the Committee has received further replies. In the meantime the Committee considered that it should inform the Senate of its actions, which it is hoped will result in a better quality of both legislative drafting and of explanatory material.

LEGISLATIVE INSTRUMENTS MADE IN PREPARATION FOR THE SYDNEY 2000 OLYMPIC GAMES SENATOR O'CHEE, SENATE HANSARD, 6 MARCH 1997, P.1401

6.51 The purpose of this report is to advise the Senate on action taken by the Committee in respect of legislative instruments made in preparation for the Sydney 2000 Olympic Games.

6.52 Australia is a sporting nation and there are few events which excite the national imagination like major sporting events. In the year 2000 Sydney will host the Olympic Games, which is probably the greatest sporting spectacle of all. The preparations for the Games have attracted continuing community interest. For instance, since the Parliament rose in December the official Olympic mascots have been launched and there has been considerable discussion about the Australian Olympic Committee investment in the Reef Casino Trust in Cairns. The Games are also of interest to Governments; the Commonwealth has a Minister Assisting the Prime Minister for the Sydney 2000 Games, The Hon Warwick Smith MP, and New South Wales has a Minister for the Olympics. Also, the cost of staging the 2000 Games is estimated at $2 billion, of which the Commonwealth and the New South Wales Governments will each pay a share.

6.53 In recent years the Senate has had a leading role in sports administration in Australia. For instance, the Australian Sports Drug Agency was established in response to the recommendations of the then Senate Standing Committee on the Environment, Recreation and the Arts. Those recommendations had strong bipartisan support and under the legislative structure of the *Australian Sports Drug Agency Act 1990* and Regulations made under that Act, Australia has established an international leadership role in the fight against the use of prohibited drugs in sport. The Committee scrutinised these Regulations, in the course of which they were amended to meet our concerns. The Act was most recently amended in 1996 to allow ASDA to cooperate better with international sports organisations to conduct drug tests, to improve Australia's successful anti-doping program and to reduce the likelihood of technical legal challenges to a positive drug test. The second reading speech for those amendments advised that they were in the context of the goal of a drug free Sydney 2000 Games.

6.54 The Standing Committee on Regulations and Ordinances has now scrutinised a number of instruments affecting preparation for the 2000 Olympics, the most important of which being the **Australian Sports Drug Agency Regulations (Amendment), Statutory Rules 1996 No. 163.**

6.55 These present amendments of the Australian Sports Drug Agency Regulations implemented the 1996 changes made to the Act, in particular in relation to procedures for drug testing of athletes, the use of new drug testing equipment and the ability of the ASDA to comply with the requirements of international sporting federations. These were all important provisions, which the Committee scrutinised in the usual way to ensure compliance with its high standards of personal rights and parliamentary propriety. The Committee found a number of apparent defects in the Regulations and wrote to the Minister for advice.

6.56 The first problem was that a number of provisions appeared to affect personal rights. These diluted safeguards for competitors who are under 18 years, intellectually handicapped or who are unable to understand English, by providing only that the ASDA "may", rather than "must", notify a responsible person before asking such competitors for a sample. Further, those persons so notified "may" be the competitor's carer, coach, team manager or certain family members and, if the competitor is unable to speak English, ASDA "may" communicate with them through an interpreter. Finally, a drug control official making a request for a sample "may" identify themselves and tell the person that he or she is an ASDA official. The result was that compliance by ASDA with these safeguards was voluntary, not mandatory. In fact ASDA need not comply with any of the above safeguards when requiring a sample from, for instance, a 15 year old non-English speaking athlete or an intellectually handicapped deaf athlete. The Committee advised the Minister that it accepted that these provisions may be based on the intention of the amending Act to reduce legal challenges on technical grounds. However, the Committee suggested to the Minister that this object was achieved by another provision in the amendments, which expressly provided that substantial rather than strict compliance is required.

6.57 Secondly, the Regulations prescribed five private courier companies which could be used by ASDA. These included services operated by such well known Australian companies as Mayne Nickless and, at that time, TNT. The Committee was concerned that the Explanatory Statement gave no indication of how these were selected to provide what is presumably a commercially profitable service.

6.58 Thirdly, the Information Sheet prescribed by the Regulations advised athletes that different procedures may apply for their tests if they were not Australian. The Committee asked the Minister whether the same procedures and safeguards would apply to non-Australian as to Australian athletes.

6.59 Fourthly, the Information Sheet provided only one telephone contact number for the ASDA, which was in Canberra and which did not appear to be a free call. Given that the Regulations were at least partly in the context of the Sydney 2000 Olympic Games, the Committee asked the Minister whether the Information Sheet would be amended to provide a Sydney number as well as the Canberra number.

6.60 The Minister's detailed reply advised the Committee that, while the requirement for substantial rather than strict compliance was sufficient to prevent legal challenges on technical grounds, it was necessary for the ASDA to retain a discretion in respect of individual competitors to ensure that drug testing was smooth and efficient. In relation to the courier service the Minister advised that the provision did not oblige the ASDA to use one or more of the services, but the list would be reviewed and expanded if other courier services could demonstrate that they can provide the required service. In relation to the Information Sheet, non-Australian athletes are subject to different result management procedures. Also, notwithstanding that the amendments are partly in the context of the Sydney 2000 Olympics, drug testing is conducted in all States and Territories so it is preferable that any questions that cannot be answered on the sport by the Drug Control Officer should be directed to ASDA head office in Canberra.

6.61 The Committee noted the Minister's advice but still had concerns about the Regulations, largely in the context of the Sydney Olympics, and therefore wrote again to the Minister. The Committee suggested that while the Minister's advice on permissive rather than mandatory procedures could apply to athletes under 18 years of age or who did not speak English, it could not apply to intellectually disabled competitors. In relation to the courier services the Committee advised the Minister that his advice did not appear to be correct, in that the Act provides for prescribed courier services and a notice delivered by any other courier service would not be validly given. The Committee suggested that the Regulations should be amended to provide mandatory safeguards for intellectually handicapped athletes and for companies to apply to be prescribed as courier services, with AAT review for any company which failed to demonstrate that it could provide the required services. The Committee also asked whether the ASDA telephone inquiry procedures could be reviewed before the 2000 Olympics. The Committee emphasised again that it was particularly concerned at these provisions because they would affect the operation of the Sydney Games.

6.62 Shortly after this letter, on behalf of the Committee, the Chairman met with officers of the ASDA, including the Chief Executive Officer, and discussed those concerns. The Committee is grateful for the assistance of these officers. The Minister then wrote to the Committee advising that the Regulations would be amended to meet our concerns and that the telephone procedures would be reviewed. The Committee appreciates this cooperation from the Minister, the Hon Warwick Smith MP, which demonstrates a commitment to personal rights and parliamentary propriety.

6.63 The next instrument dealing with the Sydney 2000 Olympic Games was the **Trade Marks Regulations (Amendment), Statutory Rules 1996 No. 184**, which provided the Sydney Organising Committee for the Olympic Games and the Sydney Paralympic Organising Committee with trade mark protection for their logos and mascots while maintaining secrecy up until the time of their official launch.

6.64 To obtain this protection and secrecy the Regulations postponed the publication of trade mark applications by SOCOG and SPOC for three months, thus exempting those applications from the requirement that trade mark applications must be published as soon as possible after an application is filed, which in practice is two to three days after filing. The Explanatory Statement for the Regulations advised that public release of the 2000 Games logo and mascots prior to the official launch would have serious consequences for the promotional impact of the launch, which would affect not only the organisational credibility of SOGOC and SPOC, but also possibly good standing of the Commonwealth government in relation to support for protection of the intellectual property rights of the Games.

6.65 The Explanatory Statement further advised that the cost of staging the Sydney Games is estimated at about $2 billion, which will be shared by SOCOG, SPOC, the government of New South Wales and the Commonwealth government. The ability of SOCOG and SPOC to market the Games is important for a good budget outcome. In these circumstances, the Explanatory Statement continued, the real benefit of postponing publication far out weighed any potential inconvenience to other applicants.

6.66 The Committee was concerned at the advice that this unusual privilege provided for by the Regulations could cause potential inconvenience to other people and wrote to the Minister. The Minister advised the Committee that in principle a person who applies for registration of a trade mark which conflicts with a Games trade mark would lose the application fee or, if already using a trade mark in the mistaken belief that it did not conflict with any earlier filed application from Games organisers, might be required to cease using the mark and thus incur financial loss. The Minister further advised, however, that the likelihood of a person proposing, in good faith, to register or use a similar trade mark would be extremely slight and in reality there is very little potential for anyone to suffer disadvantage. The Committee accepted this advice.

6.67 Although not directly related to the Sydney 2000 Games the **Protection of Movable Cultural Heritage Regulations (Amendment), Statutory Rules 1996 No. 244**, is of significance to those interested in the legislative supervision of sport. Those Regulations extended the protection of the enabling *Protection of Movable Cultural Heritage Act 1986* to documents, more than 30 years old, relating to the Melbourne 1956 Olympic Games. The Regulations included such documents in the movable cultural heritage of Australia, which is subject to export control. The Committee did not have any concerns with these Regulations.

6.68 The Standing Committee on Regulations and Ordinances will continue to scrutinise legislative instruments affecting the Sydney 2000 Games and will report to the Senate on any interesting or unusual provisions. The Committee will be particularly vigilant in examining such instruments, given the earlier role of the Standing Committee on the Environment, Recreation and the Arts and the continuing public interest in the administration of sport and in the Sydney Olympics.

Scrutiny of High Court Rules
Senator O'Chee, Senate Hansard, 23 June 1997, p.4868

6.69 Recently there has been considerable discussion in Australia about the role and actions of the Courts and the judiciary. At the Federal level this discussion has included aspects of the doctrine of the separation of powers, of the independence of the judiciary and of public statements by judges on matters of present political controversy. It is, however, perhaps less well known that Federal judges also make legislation, with enabling Acts providing for the judges of the High Court, the Federal Court, the Family Court and, at least until recently, the Industrial Relations Court, to make rules of Court for these respective Courts. These rules are subject to tabling and disallowance and, like all disallowable instruments, are scrutinised by the Standing Committee on Regulations and Ordinances to ensure that they comply with its high standards of personal rights and parliamentary propriety. This obligation is contained in the terms of reference given to the Committee by the Senate in 1932 and amended in 1979 to take into account the creation of the Administrative Appeals Tribunal.

6.70 The Senate will recall that the Committee's 101st Report, tabled on 8 June 1995, reported on action by the Committee in respect of the principal **Industrial Relations Court Rules, Statutory Rules 1994 No. 110**, which were not gazetted until more than five weeks after they were expressed to come into operation and which therefore appeared to be void for prejudicial retrospectivity. After some discussion the Acting Chief Justice advised that, to avoid doubt, the Rules would be repealed and re-made in order to operate with unambiguous validity. This was

subsequently done, with the exception of one provision which everyone seemed to agree was void. This action could not validate the earlier Rules but would at least ensure that the re-made Rules were valid. Two years later two sets of amending Rules were not tabled within the statutory period and subsequently ceased to have effect.

6.71 At present the Committee is scrutinising the **High Court Rules (Amendment), Statutory Rules 1997 No. 11**, which amend the amounts of costs which solicitors who are entitled to practise in the High Court may charge. The Committee was concerned about a number of apparent defects in the Rules and wrote to the Chief Justice. Firstly, the Rules included a number of Notes. Notes included in Commonwealth legislation are usually regarded as illustrative or informative and not part of the legislation itself. These Notes, however, appeared to intend to provide for matters which would normally be included in substantive Rules. Furthermore, the Notes were drafted in a hybrid style which was neither legislation nor information. Moreover, one Note gave the Taxing Officer putative unlimited discretion to override amounts in some items of costs but a discretion up to a limit for other costs and no discretion at all in respect of other costs. Additionally, the Rules provided for witnesses called because of their professional, scientific or other skills or knowledge to be paid $610 a day in addition to lost earnings while other witnesses are paid only $64 a day in addition to lost earnings. This appeared most unfair. Finally, the Rules included gender specific language although for more than a decade this has not been Commonwealth legislative drafting practice.

6.72 The Registrar of the High Court replied to our letter advising that the Notes were in fact intended to have substantive effect. This was unexpected advice because, as outlined earlier, this would not usually be the case in Commonwealth legislation which, of course, includes the Rules of the High Court. The Registrar also confirmed our understanding of the Taxing Officer's discretions. The Registrar justified the tenfold difference in costs between what he referred to as "professional" witnesses and, in his words, "ordinary" witnesses, by advising that witnesses rarely appeared before the High Court. Finally, the Registrar advised that the gender specific language would be redressed.

6.73 The Committee was not satisfied with the reply and wrote again to the Chief Justice, advising that it prefers that its letters are answered by those to whom they are addressed, although the Committee was grateful to the Registrar for his reply. The Committee asked for further advice on the intention and effect of the Notes, suggesting that if it was wished to provided for the matters in the Notes as legislation, that it may be appropriate to draft and number the provisions in accordance with conventional legislative drafting practice. The Committee also asked about the reasons for the different discretions given to the Taxing Officer and about the apparently unfair provisions for costs of witnesses. The Committee advised the Chief Justice that, in order to preserve its options, the Committee had given a protective notice of disallowance of the Rules.

6.74 The Committee's letter was again answered by the Registrar, despite the Committee indicating that it would prefer to have its letters answered by the Chief Justice, because the enabling Act provides for the judges of the High Court, rather than the administrative staff, to make the Rules. The Committee was surprised by this, although we quite understand that the Chief Justice would wish to distance himself from the matters which the Committee raised. The reply was, however, positive in that it advised that a present review would most likely recommend a complete revision of the relevant parts of the Rules which would take into account

the Committee's concerns about drafting style. On behalf of the Committee I will be writing to the Chief Justice for the third time about other aspects of the Rules.

6.75 The Committee notes that the Legislative Instruments Bill 1996 presently before the Senate provides that the Principal Legislative Counsel may provide assistance in drafting Rules of Court if the relevant Chief Justice seeks it. These provisions are appropriate. In the meantime the Committee understands that no statutory provision is needed for the Office of Legislative Drafting to assist the judges when they legislate. For instance, during the scrutiny of the Industrial Relations Court Rules the Acting Chief Justice of that Court advised the Committee that officers of the Attorney-General's Department had offered to assist the Court to re-make the Rules.

6.76 The Scrutiny by the Committee of the present High Court Rules and the earlier scrutiny of the Industrial Relations Court Rules illustrate the need for supervision by the Committee, on behalf of the Senate, of delegated legislation made by judges. In these cases the Rules did not comply with the standards which the Senate could reasonably expect and action by the Committee has at least partly alleviated the situation. In this context any discussion of the separation of powers usually includes reference to the related doctrine of checks and balances between the legislative, executive and judicial branches. Here it is clear that it was useful and appropriate for the Parliament, which in practice means the Senate, to provide a check and a balance for the High Court judges in their formal legislative role.

A REVISION OF THE *FEDERAL EXECUTIVE COUNCIL HANDBOOK* IN RESPECT OF EXPLANATORY STATEMENTS FOR DELEGATED LEGISLATION
SENATOR O'CHEE, SENATE HANSARD, 25 JUNE 1997, P.5190

6.77 The Standing Committee on Regulations and Ordinances has initiated or expanded many personal and parliamentary safeguards in respect of delegated legislation. Not least of these is the acceptance that every disallowable legislation instrument must be accompanied by an Explanatory Statement to assist Senators and Members and those whose rights are affected. The Federal Executive Council Handbook recognises the interests of the Committee in this regard, advising that explanatory statements are mandatory for regulations and are prepared for circulation to Senators and Members and to the Committee. This is not to say that all explanatory statements are of acceptable quality. In fact every year the Committee writes to minister about defects in explanatory statements. In such cases, however, the minister has always provided the Committee with additional information which has enabled the Committee to complete its scrutiny of the instrument. Recently, however, the Committee has had a difference of view with the responsible minister about two aspects of what matters should properly be included in explanatory statements.

6.78 On behalf of the Committee I am pleased to report that these differences have now been resolved to the Committee's satisfaction, with the Secretary of the Federal Executive Council advising that a circular, which will serve as a revision of the Handbook, will be sent to all departments and agencies, advising of the Committee's requirements.

6.79 I have already reported in detail to the Senate, on 12 November 1996, on action by the Committee in respect of the first of these differences with the minister, but I was not able at that time to report a satisfactory outcome. I will now briefly outline the concerns and the earlier activities of the Committee before reporting on our finalisation of this matter.

6.80 The **Crimes Regulations (Amendment), Statutory Rules 1996 No. 7**, exempted the Australian Securities Commission from some of the privacy safeguards of the spent convictions scheme. The Committee ascertained that the relevant provisions of the enabling Act provided for the involvement of the Privacy Commissioner in such exemptions. The Explanatory Statement, however, did not advise whether the Privacy Commissioner was consulted before the Regulations were made or, if so, of the result of any such consultations. The Committee wrote to the minister about these matters. The minister replied three and a half months later, advising that the Privacy Commissioner was consulted and had recommended that the ASC not be granted an exemption, but that the Privacy Commissioner's recommendation was rejected.

6.81 The Committee wrote again to the minister advising that it was concerned that the Explanatory Statement for the Regulations did not advise that their provisions were contrary to an express recommendation of the Privacy Commissioner in respect of an application which was referred to him under a statutory duty. The Committee advised that, in the circumstances, it would be appropriate to repeal and remake the Regulations, with a proper Explanatory Statement. This would preserve the options of the Senate in respect of disallowance but would not disrupt the existing arrangements pending informed parliamentary scrutiny. The Committee also advised the minister that it would obtain the views of the Privacy Commissioner on the Regulations and would then decide whether it would be helpful for officers of the department to meet with the Committee.

6.82 The Privacy Commissioner subsequently advised the Committee that he was not aware that the Explanatory Statement omitted to refer to his views and that he appreciated the continued support of the Committee in seeking to promote a more open approach by agencies in relation to differences of view with his office, especially where legislation is concerned. The Committee therefore asked the minister if officers of the department could attend its next meeting. The minister wrote back to the Committee, advising that officers would attend, but also advising that, while the Committee correctly required departments to provide explanatory statements, the present Explanatory Statement was adequate. The minister advised that it was not appropriate to include matters relating to the internal working of government in a document having such a wide circulation as the Explanatory Statement. The minister was prepared to adopt a future practice under which the views of the Privacy Commissioner were communicated to the Committee at the same time as Regulations were tabled, but he could not agree that the failure to included those views in the Explanatory Statement was a procedural defect. A member of the minister's staff also wrote to the Committee advising that the minister was aware of, and regretted, the delay in replying to the Committee's original letter.

6.83 The Committee subsequently met with officers of the department. At the meeting the five Members present expressed emphatically their view that explanatory statements should include advice of any mandatory consultation before the instrument was made and of the result of that consultation. The Committee then wrote to the minister suggesting that in the present case the failure to do so was a breach of parliamentary propriety. The Committee noted that present Commonwealth drafting practice appeared to be to include sometimes lengthy recitals in

the making words for instruments that statutory consultation requirements have been met. The Committee gave 11 instances in one year where this had occurred, including one instrument which referred to consultation with the Privacy Commissioner. The Committee advised that it supported this practice and assumed that if the relevant consultations or advice led to results which were unusual or unexpected, such as a decision to reject a recommendation of the Privacy Commissioner, that this would be explained in the Explanatory Statement. Finally, the Committee advised that it would write to the minister responsible for the Federal Executive Council Handbook, asking for the Handbook to be amended to require explanatory material to advise of any mandatory consultation. The Committee did this.

6.84 Three months later the minister advised the Committee that, in light of the Committee's views on the matter, he now agreed that the information about any mandatory consultation should be included in the Explanatory Statement and that he would instruct officers of his Department to adapt that practice in future. The Committee is grateful for this helpful cooperation from the Attorney-General, the Hon Daryl Williams AM QC MP.

6.85 The second area of concern by the Committee about the contents of explanatory statements related to acknowledgment of the role of the Committee in the making of particular instruments. Many legislative instruments are made, either wholly or in part, to implement undertakings given by ministers to the Committee to amend principal instruments to meet its concerns. In such cases the Committee considers that the Explanatory Statement should mention this fact, so that the Senate is kept informed of the types of matters raised by the Committee. From time to time explanatory statements fail to do this and the Committee writes to the minister who then replies that he or she has asked the department to comply with the Committee's request.

6.86 The Committee was, therefore, surprised by its scrutiny of the **Family Law (Child Abduction Conventions) Regulations (Amendment), Statutory Rules 1996 No. 74**, which corrected a significant breach of personal rights detected earlier by the Committee. The Explanatory Statement, however, did not refer to the Committee. The Committee then wrote what it thought was a fairly routine letter to the minister asking if he could advise the Committee that he had asked the department to ensure that explanatory statements include this information. The minister unexpectedly replied to the effect that on one view that there might be some advantage in limiting an Explanatory Statement to the purpose and effects of amendments without reference to their policy or other background. This would ensure that explanatory statements are not complicated. The minister further advised that the Committee should seek the advice of all ministers who issue explanatory statements if it wished to pursue its views.

6.87 The Committee was, as I say, surprised by this advice. In reply the Committee advised the minister that inclusion of the role of the Committee in explanatory statements was a long standing and universally accepted convention which had been established for some 15 years. The Committee gave instances where the convention had been implemented by successive Attorneys-General, Ministers for Justice and by the Attorney-General's Department. One of these explanatory statements mentioned the role of the Committee in the first sentence. Another was an Explanatory Statement for earlier amendments of the same principal regulations in respect of which the minister now had reservations. The Committee advised that it was grateful for this previous cooperation, which was in accordance with the general acceptance of the convention by all portfolios. The Committee advised the minister, however, that there may be

merit in amending the Federal Executive Council Handbook to recognise the convention and that the Committee would ask that this be done. The Committee then did this. Subsequently the minister advised the Committee that if its proposal was to be adopted by all ministers then an amendment to the Handbook would be appropriate to ensure that explanatory statements include the relevant material. The Committee is grateful for this helpful cooperation from the Attorney-General, the Hon Daryl Williams MP.

6.88 The Committee wrote separate letters to the Parliamentary Secretary (Cabinet) to the Prime Minister, the Hon Chris Miles MP, about each of the two matters of concern in respect of explanatory statements. The letter about notification of mandatory statutory consultation attached a copy of the statement which I made to the Senate on behalf of the Committee on 12 November 1996, advising that in the light of the conclusions in that statement that the Federal Executive Council Handbook should be revised as soon as possible to include a requirement that the Explanatory Statement should refer to the provisions of the enabling act under which an instrument is made and of any mandatory statutory procedures before making. The letter about acknowledging the role of the Committee attached a copy of its most recent letter to the Attorney-General, which set out its views in detail.

6.89 The Committee is now pleased to report that both its proposals have been accepted. The Secretary of the Federal Executive Council has advised the Committee that a circular will be sent to all departments and agencies advising of the Committee's requirements. The circular will have the effect of a revision of the Federal Executive Council Handbook. This is a most satisfactory outcome, which will assist the Committee and individual Senators to scrutinise legislative instruments. The Committee is grateful for the cooperation of the Parliamentary Secretary, the Hon Chris Miles MP, which demonstrates a commitment to parliamentary propriety. The Committee also thanks the Secretary of the Federal Executive Council.

CHAPTER 7

LEGISLATIVE INSTRUMENTS BILL 1996

7.1 The Committee gave detailed consideration to the Legislative Instruments Bill 1996 during 1996-97. As a result of the Committee's examination of the Bill, the Chairman made two special statements to the Senate and incorporated in Hansard a paper presented by the Chairman at the Fourth Commonwealth Conference on Delegated Legislation held in Wellington, New Zealand on 10-13 February 1997. The paper and statements are set out in this Chapter.

LEGISLATIVE INSTRUMENTS BILL 1996
SENATOR O'CHEE, SENATE HANSARD, 21 NOVEMBER 1996, P.5744

7.2 As chairman of the Standing Committee on Regulations and Ordinances I would like to report to the Senate on aspects of the Legislative Instruments Bill 1996, which will make important changes to the ability of parliament to scrutinise and, if the Senate wishes, to disallow legislative instruments. The Committee believes that it should report on the bill before the second reading debate, so that Senators can come to the debate with forewarning of a number of issues which the Committee regards as matters of concern. At the outset, however, I am pleased to say that the Committee supports the bill, subject to a number of important exceptions which I will address shortly.

7.3 The basic structure and purpose of the bill is encouraging, resulting generally from recommendations of a 1992 Report by the Administrative Review Council, Rule Making by Commonwealth Agencies. An earlier bill to implement these recommendations was introduced into the Senate on 30 June 1994. The Selection of Bills Committee then referred the bill to the Regulations and Ordinances Committee. I am pleased to recall that the then government accepted all of the major recommendations of the Committee, which has therefore already had a significant input into the bill.

7.4 In my remarks on the bill I will concentrate on its effects on parliament. The bill will in a number of ways enhance the ability of parliament to scrutinise delegated legislation. The bill will increase the types of legislative instruments which are subject to tabling and disallowance, numbers of which at present may be made and operate without any parliamentary oversight at all. Also, the bill requires legislative instruments to be tabled within six sitting days, instead of the present 15. This is a considerable improvement, because 15 sitting days can cover a period of months, during which parliament may not be even be aware that an important instrument has been made and is in operation. The bill provides for tabling of Explanatory Statements. This again is an improvement. Although the efforts of the Regulations and Ordinances Committee have ensured that all legislative instruments are now accompanied by adequate explanatory material, formal provision for this is appropriate. A House of the parliament may also now require material which is incorporated in an instrument to be made available. Here also the Regulations and Ordinances Committee has not had any problems when requesting such

material, but provision for this in the bill is not inappropriate. The bill also provides for motions of disallowance to be postponed for up to six months and in some situations this could be useful.

7.5 The bill, therefore, promises much, the second reading speech advising of a significant shift in control over delegated legislation back towards the parliament. However, the actual provisions include a number of exemptions which diminish that parliamentary role.

7.6 The Committee has initiated considerable correspondence with the Attorney-General and with other Ministers about its concerns with the areas of the bill which dilute parliamentary control. Together with the Committee's Legal Adviser, Emeritus Professor Whalan, I have had several lengthy meetings with the Attorney-General to discuss these concerns and the Committee is grateful for this courtesy by the Minister. The efforts of the Committee resulted in government amendments to the bill in the House of Representatives to meet some of our concerns and here again the Committee is grateful for this action by the Attorney-General. Nevertheless, four areas of concern remain.

7.7 The first area of concern to the Committee is a provision under which the Attorney-General may give a conclusive certificate that an instrument is either legislative or not legislative. If the Attorney certifies that the instrument is not legislative then parliament has no powers at all in respect of that instrument. The executive can then make any laws it likes under that particular provision without parliament even knowing, far less having the opportunity to disallow the instrument. Such a certificate by the Attorney is reviewable by the Federal Court under the Administrative Decisions (Judicial Review) Act, but review under that act is only available in respect of procedural legalities. In any event, anyone wishing to take action in the Federal Court would apparently have to pay tens of thousands of dollars in lawyers' fees. The power of the Attorney to give conclusive certificates, reviewable only on the procedural formalities, is a serious diminution of the rights of parliament.

7.8 The Committee believes that these conclusive certificates should be subject to disallowance by either House. This will ensure the proper position of parliament in what is really the starting point of the scrutiny of legislation. Delegated legislation only exists because it is authorised by parliament and it is appropriate that parliament should decide whether such instruments should be subject to scrutiny. In this context I note that the Regulations and Ordinances Committee and the House of Representatives Legal and Constitutional Affairs Committee both recommended that certificates be disallowable. Of course, making the Attorney's conclusive certificate subject to disallowance will not affect the right of anyone to seek Federal Court review, if that is their wish.

7.9 Secondly, the bill generally excludes instruments which provide for national schemes of legislation from parliamentary disallowance. These schemes, which involve the Commonwealth and the States and Territories, are likely to become more important and it would seem to be quite fundamental that parliament should scrutinise this legislation. To exclude it from parliamentary control would not seem to be compatible with the stated aim of the bill to give parliament a greater scrutiny role. The Committee believes that parliament should have the same options over such instruments as it has over other legislation, much of which is of far less consequence than national schemes. It is incongruous that the national parliament should not have control over national legislation. At present the Committee scrutinises uniform national scheme regulations and, as the then chairman of the Committee, Mal Colston, reported to the

Senate on 19 September 1995, the Committee has received good cooperation from ministers in this scrutiny.

7.10 Thirdly, the bill excludes Quarantine Act proclamations from disallowance, although not from tabling. This exemption was not originally provided for in the present bill, but was introduced as a government amendment. The supplementary explanatory statement gives no explanation at all for the exclusion of disallowance, which appears to be another unnecessary limit on parliamentary control. Breaches of these proclamations incur various penalties of up to 10 years imprisonment and a fine of up to $100,000. It is inappropriate that legislation resulting in such penalties should not be subject to disallowance.

7.11 Fourth and finally, but not least, the bill provides that prescribed instruments providing for terms and conditions of commonwealth employees are deemed not to be legislative instruments. This means that such instruments will not even be tabled in, much less be subject to disallowance. This exemption could include, for instance, determinations of the Remuneration Tribunal which provide for salaries and conditions of ministers, parliamentarians, judges and members of Commonwealth statutory authorities. At present, of course, these are subject to full parliamentary disallowance. Last year the Regulations and Ordinances Committee scrutinised 300 of these instruments which the bill now proposes may be excluded from the control and even knowledge of. Most of these were made under delegation or supervised by officers of the Department of Industrial Relations. The Committee finds numerous defects in these instruments. In the last week alone I have signed letters to the Minister for Industrial Relations about one Determination which was certainly invalid, another which appeared to be invalid and others which did not comply with the enabling act. Here again this provision is incompatible with the stated aim of the bill to shift control over delegated legislation back towards the parliament. The fact that such exclusions must be prescribed is not a satisfactory safeguard, because there could be a period of some months between making and the next sitting day, during which defective instruments could be made and which would remain in force even if the regulations were disallowed.

7.12 In summary, then, the Regulations Ordinances Committee supports the general thrust of the bill and the great majority of its provisions. The bill will assist the Committee to carry out its function of ensuring that legislative instruments are of high quality and, as I mentioned earlier, will in most areas improve the position of parliament as against the makers of legislative instruments. However, there are exemptions to the main principles of the bill which exclude parliament from its proper scrutiny role and which may even take away scrutiny powers which parliament presently enjoys. On behalf of the Committee I draw these defects to the attention of the Senate.

A PAPER ENTITLED *SIR HUMPHREY APPLEBY IS ALIVE AND WELL: THE LEGISLATIVE INSTRUMENTS BILL 1996*, PRESENTED BY SENATOR O'CHEE TO THE FOURTH COMMONWEALTH CONFERENCE ON DELEGATED LEGISLATION, WELLINGTON, NEW ZEALAND, 10-13 FEBRUARY 1997
SENATOR O'CHEE, SENATE HANSARD, 6 MARCH 1997, P.1403

7.13 The Legislative Instruments Bill 1996 is now before the Senate. This bill introduces what is stated in the second reading speech to be the most comprehensive reforms to delegated legislation in Australia. The purpose of this paper is to set out the consequences of the bill for Parliament, which effectively means the Senate, and the role of the Standing Committee on Regulations and Ordinances in ensuring that the bill recognises all proper aspects of parliamentary propriety.

7.14 At this stage I point out that the entire project which led to this bill originally resulted from suggestions made by the then Chairman of the Senate Standing Committee, Senator Bob Collins, and its legal adviser, Professor Douglas Whalan, at the Second Conference of Australian Delegated Legislation Committees held in Canberra in April 1989. I add that this particular conference was graced by delegates from our present hosts, New Zealand, and by several other commonwealth countries. Some of the delegates from that conference are with us now. These hardy veterans include Tom Helm, Victor Perton and Rick Setter.

7.15 At that conference in Canberra Professor Whalan described how there were many Commonwealth legislative instruments which were not subject to disallowance. In one act, instruments made under one provision of the act were disallowable while instruments made under another very similar provision were not. Senator Collins then observed that it would be an interesting exercise to look at this, particularly because it was not easily possible for members of the public to find out what laws were in force in any individual case. After further discussion, Professor Whalan suggested to Dr Cheryl Saunders, President of the Administrative Review Council, that this was the kind of matter which the ARC could investigate. Dr Saunders then confirmed that it would be the ARC which would be likely to do this sort of project.

7.16 The Administrative Review Council, which is a statutory body with the function of advising the government on administrative law, then adopted these suggestions and in 1992 produced a report which found that Commonwealth delegated legislation varied in quality and was inaccessible and obscure. The report recommended that a new act address these problems. The then government subsequently introduced a bill in 1994 to implement those recommendations of the ARC, which it had accepted. At this point I should make it clear that there were two Legislative Instruments Bills, one introduced in 1994 which lapsed when Parliament was prorogued before a Federal election on 2 March 1996 and another introduced later in 1996.

7.17 The 1994 bill provided for registration of all new and existing delegated legislation and for a consultation process for instruments which affect business. More importantly, however, from the point of view of the Committee, the bill provided for Parliament to have a greater role in the scrutiny of delegated legislation. All legislative instruments, with limited exceptions, were to be subject to tabling and possible disallowance. This was a major reform, because legislative instruments have heretofore only been disallowable if the enabling act

expressly provided for this. Also, the bill required instruments to be tabled within six sitting days, which was a considerable advance on the present 15 sitting days. The bill also provide for a new procedure under which a House may defer a disallowance motion for up to six months.

7.18 The Committee was especially concerned that the bill should recognise the proper position of the Parliament in relation to delegated legislation, the essence of that position being parliamentary supremacy over the executive. Delegated legislation only exists because Parliament provides for such power in acts. There is no independent power for the executive to make laws, even though public administration would be impossible without delegated legislation to provide for the day to day operation of acts. Also, Parliament has delegated, but not abrogated, its responsibilities with respect to legislation. Parliament must, therefore, establish and maintain control over delegated legislation by ensuring that legislative instruments are subject both to tabling and to disallowance. Unfortunately, the executive does not fully appreciate this and the bill included a number of provisions which appeared to be inspired by Sir Humphrey and which in some cases even represented a reduction in the existing safeguards.

7.19 In Australia there is a further dimension to Parliamentary propriety in the context of delegated legislation. This is that the Commonwealth of Australia has a federal, rather than a unitary, parliamentary system. I know that our hosts here in New Zealand, and the home parliaments of a number of other delegations, have a unitary system where the problem of the executive attempting to usurp the role of Parliament may, and I emphasise may, be less acute than in Australia. There has been a recent tendency in Australia for Commonwealth, State and Territory governments to address specific areas of legislative concern, such as companies law, by agreeing to so-called national schemes of legislation, under which the different levels of government make complementary and cooperative legislation. The executive now asserts that such schemes should be exempt from disallowance, apparently on the basis that the delegated legislation providing for the schemes is so important that it can't be disturbed, even by the Parliaments which are the sole source of the power to make these laws. The Chairs and Deputy Chairs of the various Australian legislative scrutiny Committees have now tabled, in every Parliament in Australia, all nine of them, a Position Paper on Scrutiny of National Schemes of Legislation. My colleague and good friend, Senator Barney Cooney, will present a paper at this conference on this topic so I shall not traverse the matter further other than to say that my Committee believes that the position of the executive on parliamentary scrutiny of national legislative schemes shows the necessity for continuing vigilance.

7.20 The Senate referred the 1994 bill to the Committee for inquiry and report. During our inquiry the Committee received submissions from, among others, the Law Council of Australia, the Attorney-General, the Administrative Review Council, the Business Council of Australia, the National Farmers' Federation, the Australian Council of Social Services and last, but certainly not least of this august company, from Victor Perton on behalf of the Victorian Committee. Our inquiry into the bill was revealing. Although the general structure of the bill was commendable, it included a number of provisions which appeared to reflect the views of Sir Humphrey Appleby.

7.21 The Committee noticed immediately a quite fundamental problem in the 1994 bill which would have emasculated the power of Parliament to supervise effectively the making

of delegated legislation. The bill provided for the Parliament to disallow only an entire legislative instrument, displacing the existing provision under which Parliament may disallow any individual provision of an instrument. I point out to delegates that 1989 this power was the subject of a court challenge in the case of *Borthwick v. Kerin,* (1989) 87 ALR 527. The essentials of the matter were that the Senate had advanced a broad interpretation of the disallowance power, while the Attorney-General's Department and the Solicitor-General argued for a narrower power. The Federal court came down decisively on the side of the Senate and the government did not choose to appeal against the decision, although it could have done so. In any event the Committee was startled to notice this restricted power in the bill, which would oblige a House to disallow the whole of a lengthy instrument, even if it only objected to a single provision of only a few lines. In reply to the Committee's inquiry the government informed us that the omission was an oversight and that amendments would be circulated to address the dozens of times that the oversight occurred in the bill.

7.22 The Committee also had, and in fact still has, problems with a provision which required the Attorney-General, on request by a rule-maker, to issue a conclusive and unreviewable certificate as to whether or not an instrument is legislative. This could be a judicial power exercised contrary to the Australian constitution. In any case, if the power was administrative, the bill not only removed the review power of the Federal Court, but failed to provide for review by the Administrative Appeals Tribunal. Also, even if the clause was technically valid, the Committee pointed out that laws should be interpreted by an impartial court and not by a Minister of the government of the day. In addition, the issue of a certificate may mean that in some cases an instrument will not be disallowable even if Parliament assumed that such instruments were legislative when the enabling act was passed.

7.23 The Committee therefore had considerable reservations about this power when it reported to the Parliament in 1994. It considered that the question of whether an instrument was legislative should be determined in accordance with the terms of the bill and be subject to judicial adjudication if required, as with all other such questions arising under legislation. Nevertheless, the Committee advised that it was prepared to accept the provision subject to acceptance of its recommendation that such certificates themselves be disallowable. Also, if a certificate determining that an instrument is not legislative was disallowed, the Committee recommended that the instrument in question should be deemed to be legislative. This would alleviate the possible problem of the Minister and the Senate having different views on the status of an instrument. Given that officers of the Attorney-General's Department had officially informed the Committee that there would be very few such certificates the Committee noted that this solution would have little effect on the operation of the bill. The previous government then accepted the views of the Committee and circulated amendments to this effect. This, we consider, was a major and welcome change.

7.24 The bill also did not provide for sunsetting of legislative instruments, although this was recommended by the ARC. The reason for the exclusion was the resource intensive nature of the work needed. Instead, the bill provided for staged backcapturing of instruments, under which all instruments in force would eventually be registered, but would not be subject to disallowance. A future review would examine the need for sunsetting. The Committee did not oppose this, because any amendments of existing instruments would be subject to full parliamentary scrutiny.

7.25 In addition, the bill provided for a specific regime for rules of court made by Federal courts, on the basis that any supervision of these rules by the executive risks interference with the independence of the judiciary. The Committee did not object to this, but did point out that, as presently drafted, the separate regime need not be subject to parliament scrutiny. The government accepted this and circulated amendments to the effect that rules of court would continue to be subject to tabling and disallowance.

7.26 The Committee also commented on a new provision which had no counterpart in the Acts Interpretation Act, under which a House may defer consideration of a motion of disallowance for up to six months. This is in contrast to the present position under which, after tabling, notice of disallowance may be given within 15 sitting days and must be dealt with in a further 15 sitting days. These provisions ensure relatively swift action. The Committee did not oppose this new provision but did note that, while appearing to strengthen parliamentary control of legislative instruments, in practice it might favour the government. A Minister could use the existence of the provision to urge deferral of disallowance to order to allow time to amend the unacceptable provision. The experience of the Committee is that at the end of this time the Minister would probably say that circumstances have changed, that it is no longer practical to amend and that in any case the provision should remain because it has been in force for six months. The Committee concluded, however, that there were circumstances where the new provision would be useful, but that the Senate should remain alert to any misuse by the executive.

7.27 The bill also did not provide for tabling of reasons for several types of statutory decisions, including a decision that consultation is not required. Here again the previous government agreed with the Committee that this should be done and circulated amendments to this effect.

7.28 The Committee also noted that the bill did not provide for an annual report to Parliament on the operation of the scheme which it proposed. The Committee, however, accepted advice from the government that such a report would be included in the annual report of the Attorney-General's Department.

7.29 Finally in respect of the 1994 bill the Committee accepted the view of the Vice-Chancellor of the Australian National University that the bill should not apply to legislative instruments made by that institution which affected the content of academic courses. The Committee was assisted in its consideration of this matter by its then Chairman, Senator Mal Colston, who has for many years represented the Parliament as a member of the Council of the ANU. Unfortunately the government was unable to agree with the Committee on this point.

7.30 Nevertheless, the final form of the 1994 bill, taking into account the agreed amendments, was acceptable to the Committee. The bill, however, had not been enacted when a federal election was called for on 2 March 1996 and so lapsed. After the election a fresh Legislative Instruments Bill was introduced in the House of Representatives and, following passage in that House, subsequently in the Senate where it is still to be debated. The structure of the new bill is essentially the same as the previous bill, with similar

procedural safeguards which represent, to quote the new second reading speech, a significant shift in control of delegated legislation back to Parliament.

7.31 The Committee thoroughly scrutinised the new bill for any dilution or diminution of parliamentary power, particularly in light of advice in the second reading speech that the bill imposed a uniform regime on legislative instruments with only, to quote the Minister, "very limited exemptions". Unfortunately the Committee found that the bill included some provisions which would derogate from the proper role of Parliament. At this point I emphasise again that the intention and overall scheme of the bill is commendable. For instance, the bill now accepts the position of the Committee with respect to rules or orders made under the Courses and Degrees Statute of the Australian National University. There are, however, problem areas which detract from the ability of Parliament to supervise the government when it makes law and which do not recognise parliamentary supremacy over legislative instruments. I will now outline these areas of concern.

7.32 First, the bill still provides for the Minister to issue a conclusive certificate that an instrument either is or is not legislative, but this time with no provision for disallowance. The bill now provides that the Federal Court may review the decision to issue a certificate. Such review, however, will examine only the procedures and not the merits of a decision. Also Federal Court actions are expensive. The basic objection of the Committee to this provision, which I outlined earlier, still remains. On behalf of the Committee, I met twice, at some length, with the Commonwealth Attorney-General, the Honourable Daryl Williams, to discuss our concerns with the bill, although most of this time was spent on the conclusive certificate. The Committee appreciates the time which the Attorney spent personally on the matters which the Committee raised. We have now received formal advice from the Minister that he is unable to accede to our request that the bill should provide for disallowance of conclusive certificates. The Minister advised that the certificates were in essence legal opinions and that disallowance was therefore not appropriate; this was an issue of principle which should not be set aside.

7.33 Next, the bill provides that instruments providing for national legislative schemes should not be subject to disallowance, although they would be tabled. A similar provision was included in government amendments to the 1994 bill, but not in the bill as originally introduced. I think that these amendments were issued after the Committee's 1994 report. However, as I have mentioned earlier, the Committee considers that Parliament should have the same options over such instruments as it has over other legislation, much of which is of far less consequence than national schemes. The Minister has now advised the Committee that the exemption should remain until a statutory review of the operation of the act in three years time. The Committee supports the idea of a review, but considers that in the meantime the bill should provide for parliamentary scrutiny of instruments in this important area.

7.34 The bill also provides that prescribed instruments dealing with Commonwealth employment are not legislative instruments, thereby removing them altogether from the operation of the bill. They would not even be tabled, much less be subject to disallowance. These instruments could include determinations made by the Remuneration Tribunal which provide for the salary and allowances of senior government judicial and administrative officials, which are of obvious interest to Parliament, and other determinations providing for the pay and conditions of public servants and defence personnel. There were 265 such

determinations tabled in the Senate in 1996, many of which were defective. The Committee has advised the Minister of its view that the determinations should continue to be subject to full parliamentary scrutiny, but we have not yet received a reply.

7.35 Finally, the bill provides for certain quarantine proclamations to be subject to tabling but not to disallowance. This provision was a late entry, not being included in the old bill or the new bill as introduced but rather included as a government amendment. In fact, it was such a late starter that the explanatory memorandum gives no reason for its inclusion. However, the Committee thinks that this late starter should be an early scratching. Scrutiny by the Committee revealed that penalties for breach of the proclamations in question included imprisonment for 10 years and a fine of $100,000. Unfortunately the Minister has advised that he is unable to agree with the Committee.

7.36 I have reported to the Senate on the Committee's concerns with the bill which, as I say, has yet to be debated. While we do not know the result of that debate I can advise this Conference that action by the Committee has already resulted in more appropriate recognition of parliamentary propriety. Sadly, I can also advise that certain other provisions of the bill would bring a smile and a nod of recognition and approval from Sir Humphrey Appleby. These provisions are defects in which is otherwise a worthwhile reform.

LEGISLATIVE INSTRUMENTS BILL 1996
SENATOR O'CHEE, SENATE HANSARD, 23 JUNE 1997, P.4870

7.37 On 21 November 1996 I reported to the Senate on behalf of the Committee about its scrutiny of the Legislative Instruments Bill 1996, which will make numbers of changes to the ability of Parliament to scrutinise and, if the Senate wishes, ultimately to disallow legislative instruments. I reported that, following considerable correspondence with Ministers, several meetings with the Attorney-General and government amendments of the Bill in the House of Representatives, the Committee supported the Bill, subject to a number of important exceptions.

7.38 The Committee has continued its correspondence with Ministers, sending or receiving a further 14 letters on this matter since I last reported to the Senate, with more which I intend to send shortly. Unfortunately three of the four major defects in the Bill still remain, with the responsible Ministers advising the Committee that they will not sponsor government amendments to remedy them. The first defect is a provision for the Attorney-General to issue conclusive certificates that an instrument is or is not legislative. These certificates would be unreviewable on their merits and not disallowable. The Attorney-General had argued that such certificates are not legislative in character, but are merely opinions. If that is the case the Senate should have the capacity to express a contrary opinion, and hence such certificates should be disallowable. The second defect is that the Bill excludes instruments providing for national schemes of legislation from parliamentary disallowance. The third defect is that the Bill excludes quarantine proclamations from disallowance, even though breaches of these proclamations incur penalties of up to 10 years imprisonment and a fine of up to $100,000. The fourth defect related to instruments made in respect of Commonwealth employment. There was some progress in this area, with the Minister undertaking that government amendments would

address some of the Committee's concerns although, as I will discuss later, problems remain in one important area.

7.39 Government amendments of the Bill as before the Senate have now been drafted. The Committee wrote to the Attorney-General, the Hon Daryl Williams, as soon as the amendments were prepared, asking for a copy. The Attorney responded at once, in the helpful manner which, as I have reported previously to the Senate, has assisted the Committee in its deliberations on this matter.

7.40 The government amendments are relatively brief and are mainly of a type which would not attract the concerns of the Committee. There are, however, two defective aspects of the amendments which the Committee wishes to draw to the attention of the Senate, both of which dilute the scheme of the Bill in relation to parliamentary control of legislative instruments.

7.41 The first problem is that the Bill exempts from disallowance all legislative instruments (apart from regulations) made under the key parts of the *Migration Act 1958* dealing with the control of the arrival and presence of non-citizens and with important aspects of the administration of that Act. It is fair to say that without the parts which are exempted the Migration Act would be effectively inoperative. The exempt control parts, for instance, deal with immigration status, unlawful non-citizens, visas, the "points" system, immigration clearances, search and detention, detention centres and deportations. The exempt administration parts include, among other things, obstructing persons administering the Act, tampering with movements records, offences in relation to escaping from custody, commencement of prosecutions, jurisdictions of courts and review of decisions. In addition, there are numbers of exempt administrative matters which deserve special mention. These include provisions under which the Minister may give general policy directions, exercise a "special" power to refuse or to cancel a visa or to declare a person to be an excluded person. These matters, of course, include the most sensitive areas of immigration and many of them affect personal rights of the most basic kinds. Under the government amendments any legislative instruments made under these provisions will not be subject to parliamentary control.

7.42 Legislative instruments made under parts of the Migration Regulations will also be exempt from parliamentary disallowance. The Migration Regulations are actually much longer than the Migration Act and include exempt provisions relating to, among other things, adoption, criminal detention, domestic violence, visa cancellation and giving medical treatment by force to a person in detention. Here again these provisions affect basic personal rights and legislative instruments make under them will not be disallowable.

7.43 The Committee draws the attention of the Senate to these exemptions relating to migration as a further instance of the dilution of a fundamental principle of the Bill that Parliament should have full control over legislative instruments. In this context the Committee recalls that on 20 September 1990 the then Deputy Chairman, Senator Bronwyn Bishop, made a statement to the Senate on behalf of the Committee on quasi-legislation, tabling the Procedures Advice Manual of the then Department of Immigration, Local Government and Ethnic Affairs. The Manual was, or perhaps still is, the quasi-legislation used to administer the Act and the Regulations on a day-to-day basis. The Manual consisted of 195 booklets of some 3,300 pages - in total, as amended by 41 policy control instructions. The cost of the complete Manual was about $300, with special folders to keep the booklets, which could be bought separately, costing

another $100. Much of the Manual or its present day equivalent would be genuinely administrative in nature and thus not appropriate for parliamentary disallowance. On the other hand, however, it seems that portions of it would come within the definition of legislative instrument in the Bill. As such these will be subject to all of the procedural safeguards of the Bill, including registration and tabling, except for disallowance. The Committee suggests that there may be a case for providing for disallowance as an additional parliamentary safeguard.

7.44 The other aspect of the government amendments which the Committee draws to the attention of the Senate is the effect of proposed changes to the *Defence Act 1903*, the *Public Service Act 1922* and the *Remuneration Tribunal Act 1973*. The provisions affected deal with remuneration and conditions of service of, respectively, members of the Australian Defence Force, of the Australian Public Service and of the holders of public office, including among others judges, permanent heads of departments and members of statutory authorities.

7.45 The amendments of the Defence Act and the Public Service Act appear to provide for appropriate parliamentary scrutiny and control of determinations affecting members of the ADF and the APS, which will be deemed to be disallowable non-legislative instruments. The Committee would prefer that these be brought under the general umbrella of the Bill, but the provisions do recognise the rights of Parliament. Indeed, the existing safeguards are improved by requiring determinations to be tabled within six days, instead of the present 15 days, of making. They also provide for the Senate to defer disallowance for six months.

7.46 The Committee does, however, have concerns about proposed government amendments to the Bill which will affect the Remuneration Tribunal Act. The proposed amendments to that Act implement long-standing undertakings given to the Committee by successive Ministers that a defect in the Act would be corrected. The defect is that there is no time limit in respect of a requirement that the Tribunal give a copy of each determination to the Minister, following which the Minister must table the disallowable determination. These undertakings followed the discovery by the Committee that in one case the Tribunal had waited for nine months before giving a determination to the Minister. The government amendments require the Tribunal to give a determination to the Minister within seven days of making. This amendment is appropriate. Unfortunately, there are other significant defects in the Remuneration Tribunal Act, which are not addressed by the amendments and which mean that Tribunal determinations are subject to less effective parliamentary scrutiny then legislative instruments subject to the Bill or disallowable non-legislative instruments. The Remuneration Tribunal Act still only requires tabling within 15 sitting days of receipt by the Minister, rather than the new standard of six sitting days. More importantly, that Act still requires that any disallowance must take place with 15 sitting days of tabling, rather than the established time, recognised in the Bill, of within 15 sitting days after notice which may itself be given 15 sitting days after tabling. The Bill also provides for a House to defer consideration of a disallowance motion for up to six months, which will not be an option in respect of Tribunal determinations.

7.47 The Committee wrote earlier to the Minister about these defects and we have now received a reply. In his reply the Minister advised the Committee that it would be "unfair", to use the Minister's expression, for the judges, permanent heads of government departments and others affected by the Tribunal determinations, to be subject to the "uncertainty" associated with the extension of parliamentary scrutiny of "such significant remuneration outcomes". At the same time the government amendments affecting our ordinary servicemen and women and

lower level public servants extend their present "uncertainty" by up to six months while shortening the onset of the uncertainty from a possible 15 sitting days to a possible six sitting days. In other words, the Minister has advised that it would be unfair for those to whom the Minister refers as "the most senior office-holders in the Commonwealth sector" to be subject to greater scrutiny of their remuneration, while it is apparently acceptable and even desirable for the same amendments to provide for additional parliamentary oversight of the remuneration of the lower levels of Commonwealth employment. The Committee was surprised by this advice, which on its face appears to breach principles of equity and fairness and to fly in the face of Australian egalitarian traditions. On behalf of the Committee I will write to the Minister asking for a detailed explanation.

7.48 In the meantime the Committee draws to the attention of the Senate the government amendments to the Bill affecting instruments made under the Migration Act and Remuneration Tribunal Act as two more instances where the principles of the Bill are diluted and Parliament is denied its proper scrutiny role.

Bill O'Chee
Chairman

APPENDIX 1

CLASSIFICATION OF LEGISLATIVE INSTRUMENTS UNDER THE HEADING 'MISCELLANEOUS' IN PARAGRAPH 1.8

Accounting standards	9
Marine orders	9
Superannuation instruments	9
Social security instruments	9
ATSIC determinations	9
Currency determinations	8
Life Insurance Commissioner's rules	8
Export control orders	7
Life insurance actuarial standards	7
Income tax assessment determinations	4
Motor vehicle standards instrument	4
Native title instruments	4
Privacy instruments	4
Safety, rehabilitation and compensation instruments	4
Great Barrier Reef Marine Park zoning plans	3
National capital plan	3
Parliamentary presiding officers' determinations	3
Employment services instruments	2
Export development grant determinations	2
Wildlife protection declaration	2
Broadcasting instruments	1
Federal Airports Corporation by-law	1
National Road Transport Commission determination	1
Rules of Court	1
States grants (petroleum products) instrument	1
Sydney curfew dispensation guidelines	1
Trade practices determination	1
Quarantine determination	1
	118

APPENDIX 2

DISALLOWABLE INSTRUMENTS TABLED IN THE SENATE 1996-97

During the year 1996-97 there were 1791 disallowable legislative instruments considered by the Committee. Of these, 395 were included in the statutory rules series, which are easily accessible to users, being part of a uniform series which is consecutively numbered, well produced, available on ADP, indexed and eventually included in annual bound volumes. However, the other 1396 instruments are generally less accessible, possessing less advantages than statutory rules. These other series are listed as follows:

Aboriginal and Torres Strait Islander Commission Act 1989	determinations, ss.4A,119,194 notices, s.116 rules (zone election), s.138 statements, s. 122A
Aboriginal Land Grant (Jervis Bay Territory) Act 1986	declarations, s.9A
Aged or Disabled Persons Care Act 1954	determinations, s.10
Agricultural and Veterinary Chemicals Act 1994	principles, s.23
Air Navigation Act 1920	determinations, s.5A
Audit Act 1901	guidelines, s.73
Australian Capital Territory (Planning and Management) Act 1988	territory plans, s.21
Australian Communications Authority Act 1997	determinations, s.53
Australian Horticultural Corporation Act 1987	orders, s.4
Australian National Railways Commission Sale Act 1997	agreements, s.67AZR
Broadcasting Services Act 1992	notices, s.31
Chemical Weapons (Prohibition) Act 1994	approvals, ss.17,20,24,29,93

Child Care Act 1972	guidelines, s.12A
Christmas Island Act 1958	list of Acts of Western Australian Parliament, s.8B ordinances, s.10
Civil Aviation Act 1988	orders, s.98(5) amendments, r.252 exemptions, r.308
Cocos (Keeling) Islands Act 1955	list of Acts of Western Australian Parliament, s.8B ordinances, s.13
Corporations Act 1989	accounting standards, s.32
Currency Act 1965	determinations, s.13A
Customs Act 1901	instruments of approval, s.4A notices, s.164
Defence Act 1903	determinations, ss.52,58B
Employment Services Act 1994	determinations, s.37
Excise Act 1901	notices, s.78A
Excise Tariff Act 1921	guidelines, s.3A
Export Control Act 1982	orders, s.25
Export Market Development Grants Act 1974	approvals, s.40BH determinations, s.13K
Federal Airports Corporation Act 1988	by-laws, s.72
Fisheries Management Act 1991	determinations, s.17 directions, s.17 management plans, s.17
Great Barrier Reef Marine Park Act 1975	zoning plans, s.32

Health Insurance Act 1973	declarations, s.124X determinations, ss.3C,23DNB guidelines, s.23EA orders, s.6
Hearing Services Act 1988	determinations, s.8
Hearing Services Administration Act 1997	determinations, s.5 rules, s.17
Hearing Services and AGHS Reform Act 1997	determinations, s.94
Higher Education Funding Act 1988	determinations, ss.15,16,24,27A guidelines, ss.20A,27,35
Horticultural Research and Development Corporation Act 1987	orders, s.4
Housing Assistance Act 1996	determinations, s.5
Income Tax Assessment Act 1936	determinations, s.82CE
International Air Services Commission Act 1992	policy statements, s.11
Jervis Bay Territory Acceptance Act 1915	ordinances, s.4F
Judiciary Act 1903	rules of court, s.86
Life Insurance Act 1995	actuarial standards, s.101 commissioner's rules, ss.244,252
Meat and Live-stock Industry Act 1995	orders, s.68
Motor Vehicle Standards Act 1989	determinations, s.7
National Health Act 1953	declarations, s.85 determinations, ss.4,47,98,99 guidelines, s.135AA notices, s.40AA,40AH principles, ss.40AA,48,
Native Title Act 1993	determinations, ss.23,43,202,251
Navigation Act 1912	marine orders, s.19
Pasture Seed Levy Act 1989	declarations, s.9

Privacy Act 1988	determinations, s.18K guidelines, s.17
Private Health Insurance Incentives Act 1997	principles, s.12
Public Service Act 1922	determinations, s.82D determinations (FAT), s.82D determinations (LES), s.82D determinations (SES), s.82D determinations (Parliamentary), s.9
Quarantine Act 1908	determinations, s.86E
Radiocommunications Act 1992	class licences, s.132 determinations, ss.98,107,115,119, 131AC,179,300 plans, s.30
Radiocommunications (Receiver Licence Tax) Act 1983	determinations, s.7
Radiocommunications Taxes Collection Act 1983	determinations, s.7
Radiocommunications (Transmitter Licence Tax) Act 1983	determinations, s.7
Remuneration Tribunal Act 1973	determinations, ss.7,8,37
Retirement Savings Accounts Act 1997	determinations, s.51
Safety Rehabilitation and Compensation Act 1988	notices, ss.4,5
Seat of Government (Administration) Act 1910	ordinances, s.12
Social Security Act 1991	determinations, ss.198,1069,1157 guidelines, s.739C
States Grants (Petroleum Products) Act 1965	amendments, s.4
Superannuation Act 1976	determinations, ss.238,240,241
Superannuation Act 1990	deeds, s.5
Sydney Airports Curfew Act 1995	guidelines, s.20

Telecommunications Act 1991	codes, s.117 declarations, s.50 determinations, s.242 directions, s.87P notices, s.246,267,280
Telecommunications Act 1997	declarations, s.63 determinations, s.265
Telecommunications (Numbering Charges) Act 1991	determinations, ss.9,11
Telstra Corporation Act 1991	determinations, ss.20,21,23
Therapeutic Goods Act 1989	orders, s.10
Trade Practices Act 1974	declarations, s.10
Veterans' Entitlements Act 1986	approvals, s.90A determinations, s.52ZC principles, s.196B
Wildlife Protection (Regulations of Exports and Imports) Act 1982	declarations, s.9

APPENDIX 3

ALPHABETICAL INDEX OF LEGISLATION AND DELEGATED LEGISLATION WITH PARAGRAPH REFERENCES

A

B

C

D

E

F

G

H

I

L

M

N

O

P

R

S

T

V

W

Z