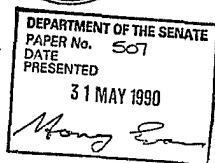


The Parliament of the
Commonwealth of Australia



SENATE STANDING COMMITTEE
ON
REGULATIONS AND ORDINANCES

EIGHTY-SIXTH REPORT
MAY 1990

Overview, Issues and Roles
Guidelines on the Application of the Committee's Principles
Legislation Considered 1988-1989

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SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

MEMBERS OF THE COMMITTEE

JULY 1988-JUNE 1989

Senator R. Collins (Chairman)
Senator B.K. Bishop (Deputy Chairman)
Senator J.P. Faulkner 1
Senator P.J. Giles
Senator R.F. McMullan 2
Senator K. Patterson
Senator J.O. Stone

1. Appointed 30 May 1989
2. Discharged 30 May 1989

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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

JULY 1988 - JUNE 1989

Introduction

- 1.1 The Senate Standing Committee on Regulations and Ordinances was established in 1932 and, apart from certain "domestic" Committees, is the oldest Senate Committee. In broad terms its function is to examine instruments of delegated legislation made under the authority of Acts of Parliament to ensure that they comply with certain non-partisan principles of personal liberty and parliamentary propriety.
- 1.2 The Committee has six members, with a government Chairman and a non-government Deputy Chairman. The Committee is a non-partisan, technical legislative scrutiny Committee. This means that it avoids any examination of the party political policy or merits of delegated legislation, and concentrates instead on applying agreed standards of legal and parliamentary principles to subordinate laws. A measure of the Committee's success is that in the 58 years of its existence the Senate has never refused to support a recommendation of the Committee that a flawed instrument should be disallowed because a Minister was not willing to amend it.

- 1.3 The general requirements of personal liberty and parliamentary propriety which guide the operations of the Committee are further refined into four principles, designed to ensure that delegated legislation is in accordance with the statute, that it does not trespass unduly on personal rights and liberties, that it provides proper avenues of appeal against discretionary administrative decisions and that it does not contain provisions more suitable for parliamentary enactment. The continuity and resilience of the Committee's functions are illustrated by the fact that its principles have been changed only once since 1932. This was in 1979 to reflect the introduction of a Commonwealth review body, the Administrative Appeals Tribunal.

Membership Change

- 1.4 On 30 May 1989 Senator Bob McMullan, a Member of the Committee since 24 February 1988, was replaced by Senator John Faulkner (see Journals of the Senate No. 161 p.1740). During his membership of the Committee Senator McMullan took a particular interest in A.C.T. Ordinances, Regulations and instruments.

Independent Legal Adviser

- 1.5 The Committee is advised by an independent legal adviser, who prepares reports on all delegated legislation, comments on all correspondence with Ministers, writes specialised legal papers and attends meetings of the Committee on occasions when his expertise is required. During the reporting period the independent legal adviser was Emeritus Professor Douglas Whalan of the Law Faculty of the Australian National University. Professor Whalan has been the Committee's legal adviser since 1982. He receives an honorarium in

return for providing expert advice about each of the more than 1,000 instruments of delegated legislation referred to the Committee each year.

Committee Staff

- 1.6 The Committee secretariat, along with that of the other legislative scrutiny committee, the Scrutiny of Bills Committee, has a smaller staff than any other Senate Committee engaged in the continuous review of an activity of the executive. The secretariat consists of a Secretary, a part-time research officer, a clerical officer and a typist.
- 1.7 The Committee is grateful to all the above staff for their efforts throughout the year under review.

Statistics

- 1.8 General statistics of the operations of the Committee indicate the volume and intensity of its work. During the year the Committee met 19 times, and considered 51 Reports from the independent legal adviser relating to 1,352 separate instruments of delegated legislation. On a number of occasions the adviser attended Committee meetings and gave oral advice.

Number of Instruments Scrutinised

- 1.9 The Committee examined the following instruments, set out below by type and number.

TABLE 1

Statutory rules	398
Public service and defence legislation determinations	386
A.C.T. and other territory ordinances, regulations and other instruments	265
Civil aviation orders	120
Primary industry plans, notices, orders and other instruments	52
Health legislation determinations, declarations approvals, principles and notices	35
Statutory authority by-laws	23
Miscellaneous instruments (details of which are in Appendix 1)	73
	<hr/>
	1,352

- 1.10 This year saw the greatest number of instruments ever examined by the Committee during a reporting period. The table below shows the increase in recent years.

TABLE 2

1986-87	832
1987-88	1,032
1988-89	1,352

- 1.11 The Committee noted at least prima facie deficiencies in 136 of these instruments, or 10%. In almost all of these cases the Chairman, on behalf of the Committee, wrote to the Minister responsible for administering the parent Act under which the instrument was made, or to the statutory authority which made the instrument. In a few cases, such as minor typographical errors not affecting validity or user convenience, the Committee directed its Secretary to write to the department. In order to preserve its freedom to make an appropriate

recommendation to the Senate if a reply from a Minister to one of these inquiries should be unsatisfactory the Chairman gave 28 "protective" notices of motion of disallowance of the instrument in question. Notices of motion were also carried over from the previous reporting period. In each one of these cases, whether or not a protective notice had been given, the Minister agreed either to amend the parent Act, amend the instrument in question, review the legislation, take administrative action to meet the concerns of the Committee, direct others to take administrative action, or explained the operation or other aspects of the instrument to the satisfaction of the Committee.

- 1.12 The Committee received 25 undertakings to amend legislation to comply with its principles. Some correspondence of course, was outstanding at the end of the reporting period but the outcome of matters raised during the period has been included in the detailed reports of legislation considered in Chapters 3 and 4. Similarly matters raised in the previous reporting period but finalised during this reporting period have been included. Some 58 ministerial and other undertakings, given both before and during the reporting period, were implemented.

Ministerial Undertakings

- 1.13 The success of the Committee may be largely measured by the extent to which its standards and requirements have been incorporated into delegated legislation and have been accepted as norms for the future. To this extent, undertakings by Ministers to amend legislation indicate that where these standards have not yet been completely assimilated into the mainstream of executive law-making, the influence and prestige of the Committee is such that

deficiencies which it identifies are usually quickly corrected. Each undertaking by a Minister is important not only to improve aspects of the individual instrument in question, but to demonstrate the willingness of the executive to conform to the standards of the Senate in questions of personal liberties and parliamentary proprieties.

- 1.14 During the reporting period the following undertakings were given to amend delegated legislation.

Compliance with the parent Act and parliamentary propriety.

- . to correct typographical errors which may have resulted in invalidity, uncertainty or confusion to users
- . to clarify confusing or inappropriate drafting
- . to table a commercial agreement which, although not suitable for disallowance procedures, should nevertheless be scrutinised by Parliament
- . to remove a possibly confusing reference to a court
- . to provide that powers should be exercised legislatively through Statutory Rules rather than ambiguously by means of mere gazettal notices
- . to require that forms to be used in association with law enforcement should be subject to tabling and disallowance in Parliament
- . to remove the possibility that prejudicial retrospectivity might be lawfully imposed through a particular form of words

- . to provide numbering and citation for instruments
- . to provide general procedures to remove the need for "one off" determinations
- . to correct a misleading heading in an instrument
- . to clarify the definition of a Minister
- . to repeal and validly re-make Statutory Rules not authorised by the parent Act at the time of first making
- . to include, improve or correct Notes in the body of a legislative instrument
- . to improve presentation of Plans incorporated in an instrument
- . to correct an ambiguity relating to dates of effect of an instrument
- . to table again an instrument invalidly tabled
- . to replace incorrectly numbered pages in a loose leaf consolidation of subordinate laws
- . to place beyond doubt that "approvals", which would have been invalid if legislative in nature, were merely administrative in nature
- . to ensure that documents purportedly incorporated by reference in to a subordinate instrument and thereby into the corpus of Commonwealth law, were not invalidly incorporated

- . to remove a reference to possibly mandatory use of forms where the forms themselves were not made subject to tabling or disallowance

Personal Rights and Liberties

- . to require minimum qualifications for the appointment of certain statutory officers
- . to require the filling of vacancies on public authorities
- . to limit wide powers of private officials to give directions and conduct personal searches
- . to limit rights of entry to private property by public officials
- . to require that certain decisions be notified to the persons affected
- . to require certain procedures to be set out in a statutory Manual
- . to enable a party to certain proceedings before the Industrial Relations Commission to challenge evidence
- . to provide criteria for the calculation of certain compensation
- . to require public officials to carry and produce appropriate identification when exercising certain powers
- . to require the Secretary of a Department to deal with an application within a reasonable time

- . to provide for the defence of reasonable excuse in certain otherwise strict liability and dual liability prosecutions
- . to remove a "conclusive proof certificate" provision
- . to relieve certain primary producers from keeping unnecessary records of transactions

Administrative Review and Other Protections Against Arbitrary Decisions

- . to provide for AAT review of decisions to refund or remit charges
- . to set a limit on a discretion to fix a monetary level of assistance
- . to list in Notes in the body of an instrument decisions which are subject to review
- . to limit the exercise of certain discretions to a Minister rather than to his or her delegates
- . to include criteria for the exercise of a discretion
- . to remove unintended discretions
- . to replace a discretion to exempt with objective legislative exemptions

1.15 Other undertakings were given to amend Acts, to review legislation, to seek further advice from such organisations as the Attorney-General's Department or

the Administrative Review Council, to supply additional material to the Committee or to take administrative action such as to improve the quality of Explanatory Statements or other supporting documentation. Details of undertakings are given in Chapters 5 and 6.

Committee Reports

- 1.16 On 15 June 1989 the Committee tabled its Eighty-Fifth Report, a general Report on the work of the Committee on the previous reporting period, from 1 July 1987 to 30 June 1988. The Report included a summary of the work of the Committee, its goals and role and a detailed description of the application of its principles and its treatment of individual instruments, including the outcome of its correspondence with Ministers.
- 1.17 At the conclusion of each Sittings a major statement is made by the Chairman setting out the work of the Committee during that Sittings. This was done by the Chairman, Senator Bob Collins, on 21 December 1988 and 15 June 1989. In addition, Senator Collins made statements in the Senate on the following matters:-
1. The Committee's scrutiny of the Imperial Ordinances Repeal Ordinance, A.C.T. Ordinance No 94 of 1988, 11 May 1989 (see Chapter 8);
 2. The Second Commonwealth Conference of Delegated Legislation Committees, 2 May 1989;
 3. Self-government in the A.C.T., 11 May 1989 (see Chapter 7).
- 1.18 It is also the practice of the Chairman to report fully to the Senate on the outcome of the Committee's examination of an instrument when the relevant

protective notice of motion given on behalf of the Committee is to be withdrawn.

- 1.19 The Deputy Chairman, Senator Bronwyn Bishop, and Senator Pat Giles, Senator Kay Patterson and Senator John Stone, have also spoken in the Senate on Committee matters.
- 1.20 These contributions and the general interest of the Chamber in the Committee's watchdog role give the Regulations and Ordinances Committee perhaps a higher chamber profile than most other parliamentary committees.

CHAPTER 2

ISSUES AND ROLES

- 2.1 At the end of each of the Sittings during the reporting period the Chairman made a detailed statement to the Senate on the activities of the Committee including a discussion of current issues. The following are extracts from those statements.

Senator Collins, 21 December 1988, Senate Weekly Hansard p. 4780

- 2.2 "During the last year the Senate Standing Committee on Regulations and Ordinances has maintained its accustomed volume and intensity of operations. A detailed report on the activities of the Committee will, as usual, be presented to the Senate early in the next sittings. This statement, however, now highlights some of the main episodes and directions of the Committee.

- 2.3 "The quantitative volume of delegated legislation has not declined. There are now some 115 categories of instruments made under Acts and subject to disallowance or disapproval by either House of Parliament. These 115 include under a single heading those that would normally be regarded as separate categories. For example the single category of "By-laws" includes By-laws made by 10 separate organisations, among which are vast Commonwealth business enterprises such as Telecom and Australia Post. Regulations are made under only one category of disallowable instrument. Again, the Ordinances of eight Australian Territories are subject

to disallowance although these come under only one category of disallowable instrument. Regulations made under the Ordinances of these various territories similarly come only within one category. Another illustration of the extent of delegated legislation is the number of Acts of Parliament providing for disallowable instruments of one kind or another to be made under their authority. Almost all Acts which establish programs or implement schemes provide at least for Regulations to be made, regardless of any other categories of delegated legislation...

- 2.4 "While this year has seen the number of instruments of delegated legislation maintained at a high level, it is possible to detect a qualitative change for the better in aspects of concern to the Committee, particularly those affecting the rights and liberties of the individual. Largely as a result of the vigorous insistence of the Committee over the last few years matters of former controversy in delegated legislation are no longer so; safeguards initiated by the Committee in the face of resistance by some administrators are now included in delegated legislation as a matter of course. Disagreements over the qualitative issues have largely been won; the Committee's proposals originally regarded as undue interference with bureaucratic discretion are now followed as a matter of routine.
- 2.5 "As a corollary of this administrators' responses to formal inquiries from the Committee have altered to a degree. It is now recognised that written suggestions from the Committee are serious matters and the tendency is to accept proposed changes without the somewhat unnecessary resistance of the past.
- 2.6 "In short the operations of the Committee should now be perceived in departments as part of the main stream of the development of delegated legislation, rather than an

irritant. The Committee still has problems with administrators about delays in implementing undertakings given to it and other matters and these will be discussed in more detail shortly. In the meantime, however, it is gratifying to report that the most important characteristic of the legislation examined by the Committee has been its qualitative improvement.

- 2.7 "This increase in the quality of delegated legislation can be seen in all the important areas of concern to the Committee. Some of the principles and precedents which the committee struggled hard to establish, today seem obvious. Examples include: review on the merits by the Administrative Appeals Tribunal of discretionary decisions affecting individuals, the specification of criteria to be followed by officials in the exercise of discretions, including the defence of reasonable excuse in penal provisions, strict limits on search and entry powers, proper identification of officials with powers over individuals and the application of tabling and disallowance provisions to certain forms and instruments affecting the public. Infringement of these kinds of standards now seems unthinkable but without the efforts of the Committee delegated legislation would still be deficient in these vital aspects.

- 2.8 "At this point it is appropriate to discuss the role of Ministers in the operations of the Committee. All formal correspondence of the Committee (except in the case of statutory authorities or other organisations, such as courts, which make delegated legislation themselves) is conducted through the Minister. In practice, of course, it is usually departmental officials who deal with the minutiae of delegated legislation and who prepare submissions and drafts for the Minister on what are, after all, non-policy matters. It appears, however, that when papers finally reach the Minister's desk, the ministerial decision in any

contentious area usually favours the Committee. The Committee over the past year has generally received strong backing from Ministers, who have been supportive both generally and in the Committee's dealings with their departments. The Committee gratefully acknowledges this positive contribution of the Ministers...

2.9 "As a result of the qualitative improvement in delegated legislation, of better departmental attitudes towards the Committee and of the helpful support of Ministers, the Committee has managed largely to finalise its scrutiny of material laid before it during the year. There are no notices of motion of disallowance at present before the Senate on behalf of the Committee, the many which were placed all have been resolved to its satisfaction, either by explanation or by undertakings to amend the legislation. The other matters relating to individual legislation which remain on the agenda are of lesser immediate importance to the Committee and no notice of motion is needed.

2.10 "There are some areas of serious concern to the Committee in its operations. The first of these is the length of time taken to implement undertakings given to the Committee. The statement to the Senate this time last year discussed this matter in some detail and in strong terms. As have mentioned previously, Ministers have usually been most helpful in giving undertakings to the Committee to meet its concerns. Ministers have, however, often been let down by their officials in the implementation of these. As mentioned last year, 6 months would be a reasonable time for an undertaking to be met. The Committee expected that where a Minister gives an undertaking to amend delegated legislation, departmental officials should prepare and dispatch drafting instructions at once indicating that the matter is to receive priority over other instructions from that

department. These instructions should not be difficult, as they will usually involve amendment of the very recent delegated legislation. Similarly it is hard to conceive of other matters which would take precedence over undertakings given to the Committee in relation to protection of individual rights and liberties. Where drafting is carried out within a department or instrumentality the Committee expects even more prompt action, with the matter finalised with weeks.

2.11 "The Committee expressly wishes the implementation of undertakings to be as satisfactory and complete as the spirit in which they were given. The Committee will not stand by while Ministers who have given personal undertakings are not actively supported by their officials. In cases involving lengthy delay for no apparent reason the Committee may feel obliged to summon before it the responsible officials.

2.12 "The Committee has experienced other difficulties regarding delay and managerial inadequacies in its dealings with departments. On several occasions departments have been unaware of a notice of motion of disallowance in respect of portfolio delegated legislation until reminded by the Committee secretariat literally on the eve of disallowance. The Committee expects departmental staff to establish procedures so that the initiatives of the Committee in the Senate are closely monitored and departmental officers at the most senior levels constantly briefed on relevant developments. It is a matter of some concern that lack of efficient management practices within departments could leave their Minister embarrassed should legislation be disallowed merely through bureaucratic inadvertence.

- 2.13 "Allied to this concern is the length of time taken by officials to prepare recommendations for the Minister to consider where no notice of motion of disallowance is involved. This is also a matter raised last year. There have been delays of months in preparing drafts for Ministers in reply to formal correspondence from the Chairman. Here again such delay shows small respect for the Committee and the Senate, exposes the Minister to criticism and reveals poor internal control and communications by department management.
- 2.14 "It is emphasized that all Committee matters should have the highest priority in departments and receive attention and supervision at a suitably very senior level.
- 2.15 "Over the years the Committee has dealt in detail with the Ordinances and Regulations of the Australian Capital Territory. With the passage through the Parliament of legislation providing for self-government in the A.C.T. some of this legislation will become the responsibility of the new territory legislature. With respect to this legislation the then Minister for the Arts and Territories, the Hon. Gary Punch, M.P., informed the Committee that he would direct the A.C.T. Administration to do everything possible to clear any outstanding undertakings given to the Committee. In respect of undertakings not able to be completed the Minister undertook to recommend appropriate and urgent amendment to the new A.C.T. Government. The Committee thanks the Minister for this.
- 2.16 "Finally, the Committee draws attention to a possible area of future activity. Continued vigilance about rights and liberties will remain the most important aspect of the work of the Committee and the Committee will main the most stringent scrutiny of delegated legislation to ensure its standards are met. The

Committee is also concerned that individuals may be penalised by other aspects of delegated legislation. Thus although Statutory Rules and a few other categories of instrument are disseminated to the public in a fashion equal to the excellent presentation of Commonwealth Acts, much other delegated legislation is not properly indexed, no consolidations are prepared, production is often poor, ADP aspects undeveloped, citation cumbersome and access and reference deficient. The Committee considers that not only must delegated legislation meet the standards of the Senate regarding fairness and propriety but that it should be seen to do so.

- 2.17 "Members of the Committee thank their colleagues in the Senate for their commitment to its bipartisan operation."

Senator Collins, 15 June, 1989, Senate Weekly Hansard, p. 4126

- 2.18 "Over the past sittings the work of the Committee has been characterised by two main features.
- 2.19 "The first of these is the continued high volume of delegated legislation which has come before the Committee for scrutiny.
- 2.20 "The number and types of instrument confirm the continued reliance of the executive on delegated legislation as a standard mechanism to facilitate day to day Commonwealth public administration. As such the work of the Committee is doubly valuable to the Parliament in both scrutinising the results of the law-making power which it has delegated and in supervising the actions of the executive itself.

- 2.21 "Indeed, the volume of delegated legislation suggests that directives and instructions of the executive which previously may have been confined to the corridors of power in the different departments of state, are now subject to parliamentary scrutiny. The role of the Parliament in the oversight of the administration of its Acts is thereby strengthened. The domain of Ministers and their senior departmental advisers has been subject to the fresh air of tabling and the brisk wind of possible disallowance.
- 2.22 "This tendency is only welcome, however, as long as the delegated legislation is justified in terms of filling-in administrative details, prescribing lengthy objective technical standards or providing for situations where frequent minor changes are necessary to schemes or programs. The instruments themselves must also, of course, comply with the Committee's standards of personal liberties and parliamentary propriety. In this context of the proper use of delegated legislation the Committee has detected some disturbing tendencies, which will be discussed in detail later in this statement. In the meantime, the attention of Honourable Senators is drawn to ... the various instruments actually considered by the Committee during the present sittings. The list covers the entire sweep of Commonwealth administration, with delegated legislation made on the advice of virtually every department of state and important statutory authority. Honourable Senators are reminded that, for example, the Statutory Rules alone, which are the most numerous single type of instrument considered, and which come under a single item in the list, are made on advice from almost every executive portfolio...
- 2.23 "The second important characteristic of the legislation examined by the Committee in the past sittings was the tendency for instruments to contain various provisions

dealing with rights, appeals and tabling, which have been recommended by the Committee during the course of scrutiny of instruments during previous periods.

- 2.24 "This trend follows the statement by the Committee at the conclusion of the last sittings, which encouraged Ministers and advisers to pursue a qualitative improvement in those aspects of delegated legislation of concern to the Committee, particularly in relation to personal rights and liberties. It is not possible to say whether this will continue, particularly as the standards of the Committee are not static but are continually expanded and refined, but at present it is an important justification for the past efforts and initiatives of the Committee. The Committee is pleased with the co-operation it has received and continues to receive from Ministers and officials.
- 2.25 "The reasons for this may be that the Committee's efforts to set high standards for delegated law making has resulted in the acceptance of such standards by competent administrators and drafters. The goal of the Committee's advocacy of civil liberties and parliamentary proprieties is to see its principles incorporated into the mainstream of administrative practice and this is an on-going process.
- 2.26 "All of the protective notices of motion given by the Committee were satisfactorily resolved and none are now before the Senate on behalf of the Committee. The Committee has however, continued its traditional very active level of activity. At present there are some three dozen items on the Committee's agenda, ranging from typographical errors to questions of broad principle.

- 2.27 "In previous statements at the conclusion of a sittings, it has also been usual to draw attention to matters of concern to the Committee in its continuing task of technical scrutiny. Over the last few years there has been some repetition of these themes; inadequate Explanatory Statements, delays in answering correspondence, tardy implementation of undertakings, and some lack of appreciation of Committee standards.
- 2.28 "While not wishing to play down the importance of these, there have been some improvements here just as there have been in the substantive contents of delegated legislation dealing with civil liberties and parliamentary proprieties, and probably for the same reasons. These particular problems continue to be in the forefront of issues pursued by the Committee. They have, however, been dealt with exhaustively in the present Eighty-Fifth Report and in previous statements and reports.
- 2.29 "The most important area of concern to the Committee at present is more threatening to its standards and has more potential to damage its achievements. This concern is the increasing use of new legislative and administrative techniques outside the usual experience of legislative scrutiny. The conceptual framework of delegated legislation is straightforward; an Act of Parliament will set out the broad scheme of a policy or program within a fairly detailed framework, with executive law-making confined to matters too technical, trivial, detailed or changing to justify the procedural solemnity and rigor of an Act of Parliament.
- 2.30 "These new techniques of "quasi-legislation", however, stand the established theory on its head. Acts may now be mere skeletons, with considerable detail made by legislative or quasi-legislative instrument. In a parallel development this added detail is not technical

or minor but can tend to be the substantive core of the scheme. Finally, this quasi-legislation is expressed in terms which are difficult to classify. Typically, an Act will provide for "guidelines" or "directions" to be issued in respect of a particular matter. These will not always be subject to disallowance or even tabling. Even where they are so subject their terminology and content is such that it is difficult to tell whether they are mandatory and prescriptive. It is, for example, an improper exercise of a discretion under the Administrative Decisions (Judicial Review) Act, to apply a guideline without further consideration. There is a serious danger to parliamentary propriety if such instruments by-pass the scrutiny and supervision of the Parliament. Expansion of the use of these instruments at the expense of detailed provisions in Acts and the more orthodox instruments of delegated legislation may increase the power of the Government at the expense of the Parliament.

- 2.31 "It goes without saying that such quasi-legislative instruments are usually not subject to the presentational discipline of the Statutory Rules Publication Act, with consequential deficiencies in access, presentation and citation.
- 2.32 "The challenge of this quasi-legislation is particularly difficult. One response must be to liaise closely with the other Senate legislative scrutiny committee, the Scrutiny of Bills Committee, to co-ordinate information and responses. This has the potential at least for the Senate to be informed of the extent of these practices. No Commonwealth agency, for example, has a complete record of all delegated legislation and quasi-legislation. As well as information and publicity, however, the reply to the challenge may require a wider and more flexible range of options to be available to the Committee.

- 2.33 "Such options could include the right of partial disallowance and amendment of delegated legislation; the Senate could then debate and vote upon individual parts of a quasi-legislative instrument, in the same way as it does on a Bill. This would avoid the situation where the Senate is presented with an all or nothing option in considering delegated legislation.
- 2.34 "Another would be to develop mechanisms that would assist the Committee's scrutiny. For example, the accompanying documents could contain an assessment of the impact of instruments on the rights of people and Parliament. More hearings by the Committee could be useful, not only with public officials but with personal representations and evidence from members of the public who may feel that their rights are unduly diminished by legislation. These changes could be complemented by provisions for the possible suspension of the operation of quasi-legislative instruments during a long adjournment, if those instruments appear to infringe the Committee's principles.
- 2.35 "It may be that the time is fast approaching when the Government should re-examine long standing delegated legislative instruments which are known to affect individual rights for reasons which may not be as persuasive as they were when those instruments were made.
- 2.36 "A requirement that the instruments comply with the Statutory Rules Publication Act would also be very useful.
- 2.37 "Most of these remedies require statutory provision but some could be instituted or developed on the initiative of the Committee, which is now considering courses of action. Many of the above suggestions are not merely

speculative but have been introduced in various States. Any additional options open to the Committee would also improve its scrutiny of the more usual types of delegated legislation apart from quasi-legislation.

- 2.38 "Another significant aspect of the work of the Committee since the previous Sitting has been the holding of conferences, meetings and seminars which have discussed the issues and challenges of bipartisan, technical, legislative scrutiny...
- 2.39 "Recently the Regulations and Ordinances Committee and the Scrutiny of Bills Committee jointly hosted a meeting with the Administrative Review Council, one of the most important organisations in the Commonwealth administrative law system. The meeting allowed the Committee and Council members and their respective staffs to discuss their roles and operation. The meeting was addressed by the Chairman of the Regulations and Ordinances Committee, Senator Collins; by the Chairman of the Scrutiny of Bills Committee, Senator Cooney; and by the President of the ARC, Dr Cheryl Saunders.
- 2.40 "Senator Collins emphasised the possible danger of new final specialist tribunals diluting the functions of the AAT itself, Senator Cooney discussed ministerial discretion and administrative review, while Dr Saunders stressed the need for the Council and parliamentarians to exchange views regularly on developments in administrative law and the role of the law in making public administration fair and accountable.
- 2.41 "These seminars are particularly important, not only to disseminate the standards and principles of the Committee, but to influence the administrative processes during which delegated legislation is formulated and made. They emphasise prevention rather than cure and

represent the pre-emptive rather than the re-active nature of the Committee's operations. The seminars complement Committee hearings, which are usually in respect of a single instrument. The seminars, on the other hand, are designed to improve compliance with the Committee's concerns over the whole range of delegated legislation.

2.42 "The members of the Committee take this opportunity to thank their colleagues in the Senate for their continuing support and commitment to its bipartisan work."

CHAPTER 3

GUIDELINES ON THE APPLICATION OF THE PRINCIPLES OF THE COMMITTEE

Introduction

- 3.1 This Chapter sets out the application of the four Principles which are the terms of reference of the Committee and which appear at the beginning of this and every report of the Committee. Under each of the Principles areas of concern are listed with a brief discussion and a summary of actual instruments considered in the light of the Principles. The Committee does not scrutinise delegated legislation in a static or rigid framework, but rather regards its Principles as expanding and evolutionary. Those officers in Departments of State and statutory authorities who are responsible for the development of delegated legislation should, therefore, find this Chapter of assistance in meeting the requirements of the Committee.

PRINCIPLE (A)

IS DELEGATED LEGISLATION IN ACCORDANCE WITH THE STATUTE?

During the reporting period this Principle has been interpreted in the following ways.

Failure to indicate the role of the Parliament or one of its committees in influencing the content of an instrument of delegated legislation.

- 3.2 Where delegated legislation implements undertakings given by Ministers or other executive law makers to amend instruments to meet the concerns of the Committee, the role of the Committee should be acknowledged in the Explanatory Statement. This is so that the public and other Departments may be aware of the kinds of concerns raised by the Committee and of the matters which it considers should be rectified. Explanatory Statements should set out the principle of personal rights or parliamentary propriety which prompted the concerns of the Committee and indicate that the amendment implemented ministerial undertakings given to the Committee.
- 3.3 Although the sole purpose of the Agents (Amendment) Ordinance 1989, A.C.T. Ordinance No 4 of 1989, appeared to be to implement a ministerial undertaking given to the Committee, the Explanatory Statement did not mention the Committee or its concerns. The committee asked the Minister that this requirement be brought to the attention of officials.
- 3.4 Examples of other such instruments were the Agents (Amendment) Ordinance 1989, A.C.T. Ordinance No 4 of 1989; the Children's Services Regulations (Amendment), A.C.T. Regulations 1989 No 6; the Horticultural Export Charge Regulations (Amendment), Statutory Rules 1989 No 41; the Horticultural Levy (Citrus) Regulations (Amendment), Statutory Rules 1989 No 42; and the Horticultural Levy Collection Regulations (Amendment), Statutory Rules 1989 No 43.

Incorrect or misleading citations in Explanatory Statements

3.5 The Committee is concerned where Explanatory Statements contain inaccurate or misleading technical statements. Delegated legislation may only be made under the authority of an Act of Parliament and it is essential that all references in Explanatory Statements to Acts or to other delegated legislation should be correct. The Committee writes to the Minister in such cases requesting that officials comply with this requirement. For example, the Explanatory Statement which accompanied the Horticultural Levy (Apple and Pear) Regulations (Amendment), Statutory Rules 1989 No 44, although correctly headed, referred to a completely different set of Regulations.

3.6 A sentence in the Explanatory Statement to the Rules of the Supreme Court of the Australian Capital Territory (Amendment), Statutory Rules 1988 No 257, read "The Master has been given authority to exercise the jurisdiction of the Court following the amendment to section 8 of the Supreme Court Act 1933 under the Statute Law (Miscellaneous Provisions) Ordinance 1988". The parent Act was actually the Australian Capital Territory Supreme Court Act 1933, section 8 was not amended but repealed and a new section 8 substituted, together with three other sections and a new Part, with amendments of three other sections, and these changes were in fact made by the Statute Law (Miscellaneous Provisions) Act 1988. No explanation was included in the Explanatory Statement of these apparently substantial changes. The Chief Justice supplied a fresh Explanatory Statement to the Committee.

3.7 The Explanatory Statement which accompanied the Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1988 No 183, advised that the Student Assistance Act 1973 established both the Tertiary Education Assistance Scheme (TEAS) and the Postgraduate

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Awards Scheme. The Committee noted that the Student Assistance Amendment Act 1986 abolished the TEAS. The continued justification for an exemption from the operation of the Sex Discrimination Act 1984 appeared, therefore, to be based in part on provisions that did not exist. The Minister advised that the reference was a mistake. The correct scheme was AUSTUDY.

Failure to indicate clearly the period during which an instrument remains in force

3.8 The Committee believes that the drafting precision of instruments of delegated legislation should be not less than that of Acts. In the case of Fisheries Notice No 212 the Committee was uncertain whether the instrument, which gave effect to the Development Plan for the Western Deep-Water Trawl Fishery, was intended to have a "sunset clause", as the Plan was expressed to cease to have effect after 31 July 1989. It is a requirement of the Committee that Parliament and the public should be aware of which instruments are in force at any given time and that provisions for commencement and termination should be clear. The Minister advised that the Notice was not intended to have a "sunset clause" and that the instrument would remain in operation after the Plan ceased to operate.

3.9 Although the Explanatory Statement which accompanied Public Service Determination No 159 of 1988 advised that a retirement scheme was to be reviewed after three years, there was no "sunset" provision in the instrument itself. The Committee was advised that a review of the scheme would be commenced well before the three year period and, on balance, it had been decided not to include an express "sunset" provision.

Lack of numbering or citation of instruments

- 3.10 It is essential that instruments of delegated legislation include some system of citation and numbering for the assistance of Parliament and the public. The Committee has had considerable success in ensuring this requirement is met and almost every series of delegated legislation now has some form of citation. Most of these are less satisfactory, however, than the high standards of presentation of the Statutory Rules series.
- 3.11 Two Declarations under s.34(1) of the Telecommunications (Interception) Act 1979, which had important implications for civil liberties, dealing with what is popularly referred to as "telephone tapping", had no numbering or citation. Registering or accessing these for retrieval purposes, whether by the legal profession or by the general community was, therefore, almost impossible. The Minister advised that, given the small number of Declarations and their audience, there did not appear to be a need for numbering or citation. Explanatory Statements would be provided, however, and these would indicate the numbers of Declarations made.
- 3.12 The Committee was concerned that the Notice of Declarations and Specifications made under the Commonwealth Employees' Rehabilitation and Compensation Act 1988 did not include any system of numbering or citation. The Committee believed that all delegated legislation should have a simple citation for the assistance of users. In such a case as the present the next Notice could include in its title words such as "Notice No 1 of 1989" or "Notice 1989/1". Each Notice should also include at the end of a list of previous Notices with the dates made. The Minister advised that he had asked the Commission for the Safety,

Rehabilitation and Compensation of Commonwealth Employees to comply with the requirements of the Committee.

Possible technical invalidity

- 3.13 It is a breach of parliamentary propriety for delegated legislation to be incorrect in any procedural or formal aspect. These requirements should be observed in a meticulous fashion, in the same way as legislation made by the Parliament. The Committee was concerned that its copy of the Export Control (Dried Fruits) Orders as amended (Amendment), Export Control Orders No 12 of 1988, was neither signed nor dated. The Minister advised that the Orders had been correctly signed, but that due to an oversight the copy provided did not include the signature.
- 3.14 The Seamen's War Pensions and Allowances (Amendment), Statutory Rules 1988 No 49, and the Veterans' Entitlements Regulations (Amendment), Statutory Rules 1988 No 50, may not have been validly made. Both Regulations expressly purported to prescribe certain matters for the purposes of a particular provision of the parent Acts. At the time the Regulations were made, however, those provisions were in Bills which had not been enacted by Parliament. It was doubtful whether the general regulation making powers in the parent Acts were sufficiently wide to cover the Regulations in question. If they were then those specific provisions of the Bills would be redundant. It was more likely that a court would treat those provisions as the exclusive source of prescriptive power of the kind purportedly exercised in the Regulations. The Minister advised that the Regulations would be repealed and re-made.

3.15 The Committee was concerned at the validity of the Rules of the Australian Industrial Relations Commission, Statutory Rules 1989 No 46. The parent Industrial Relations Act 1988 provided that the President, after consultation with members of the Commission, may make Rules. The making of Rules was an important power which in the High Court, the Federal Court, the Family Court and the Supreme Court of the A.C.T. was exercised in a collegiate manner, the Rules being made and signed by all or most judges of those Courts. The Committee did not doubt that the required consultation had taken place but there was no recital of that fact in the Rules themselves or in the Explanatory Statement. The President advised that the Rules had been made after consultation with members of the Commission.

3.16 Fisheries Notice No 213 was accompanied by explanatory material in the form of Fishery Legislation Bulletin No 33, which advised that the Notice would be gazetted and enter into force when the catch of the particular species of fish approached a total catch for the 1988 season of 3,000 tons. The Committee was concerned that the Notice, already tabled in the Senate, may have had to be tabled again with 15 sitting days of its gazettal if it was to be a valid Notice under the Fisheries Act 1952. Although the matter was not certain, it may have been that under s.8A of that Act the obligation to table Fisheries Notices arises upon publication in the Gazette. It could have been that a Fisheries Notice could not be properly tabled in anticipation and satisfaction of an obligation to table which would actually arise on and from some date in the future. The Committee suggested to the Minister that legal advice should be obtained from the Attorney-General's Department on the validity of the tabling. The Minister replied that advice from the Attorney-General's Department was that tabling was required by the Act within 15 sitting days of the instrument being made. As

Notices were made by gazettal tabling was required after this occurred. The Minister undertook to table the instrument again.

- 3.17 The space for notification of the date of gazettal of the Telecommunications (Charging Zones and Charging Districts) By-laws, Amendment No 88, was blank. There was, therefore, no indication of either gazettal date or Gazette number. The Committee was advised that, following an earlier failure to table an Amendment, arrangements were made to forward By-laws for tabling and for consideration by the Committee without waiting for confirmation of their notification in the Gazette to be received. This procedure was noted in covering letters and a subsequent letter notified the date of gazettal and Gazette number.

Defects in drafting and presentation

- 3.18 The Committee is, of course, concerned at incorrect citations in instruments themselves as well as such defects in Explanatory Statements. It is a breach of parliamentary propriety for legislative instruments made by the executive to refer incorrectly to parent Acts, to other Acts, to other delegated legislation or to provisions of the same instrument. The standards of drafting and presentation of delegated legislation should not be less than that of Acts of Parliament. In the case of the Building (Amendment) Ordinance 1988, A.C.T. Ordinance No 73 of 1988, the Committee wrote to the Minister concerning an incorrect citation of another provision of that Ordinance. The Minister advised that the Ordinance would be amended to correct the citation.
- 3.19 In Determinations Nos T1-T8/1989 made under the Higher Education Funding Act 1988, the actual determining words of one instrument referred to "subsection 24" when

"section 24" was meant, another provision referred to "paragraphs 31(2)" when "subsection 31(2)" was meant and parts of three other instruments were so poorly produced they could not be read. The Minister advised that departmental officers had been asked to meet with staff of the Committee to clarify requirements.

3.20 Meat Inspection Orders No 5 of 1988 did not contain the usual Note in the instrument itself indicating that a new Schedule had been added by the Orders in the instrument itself. The Minister advised that the omission of the Note was an oversight which would be rectified.

3.21 The Committee was concerned at a possible drafting error in the Mutual Assistance in Criminal Matters Regulations, Statutory Rules 1988 No 126. A number of provisions with respect to forms used the words "shall be in accordance with Form ...", indicating a mandatory use of the form. Another provision used the words "may be in accordance with Form ...", indicating that the form could be replaced by a form in an alternative style. The Explanatory Memorandum advised in respect of this particular Form, however, that it "shall be in accordance with Form ...", resulting in an apparent discrepancy between the effect of the law and the Minister's expressed intention. The Minister advised that the Explanatory Statement should have used the expression "may be" for this particular provision.

3.22 The presentation of the Northern Prawn Fishery Management Plan (Amendment), Northern Prawn Fishery (Special Provisions) Management Plan (Repeal), Plan of Management No 16 was poor. This Plan was in the form of an A4 size photocopy of an earlier print of the Plan on which were made a number of typographical corrections. There were no Notes or gazettal information. The Committee noted that presentation of Plan of Management

No 17 was a final printed version of an instrument which effected changes to the principal Plan by means of the removal of pages and their replacement with new pages (the loose-leaf amendment procedure). This Plan also contained no gazettal information, although Notes to different paragraphs were included. Plan of Management No 18, on the other hand, was a final printed version with Notes at the foot of various provisions and advice of the date of gazettal. The Committee sought an indication of policy in regard to the general presentation standards of Plans of Management. The Minister advised that Plan of Management No 16 was not in the form finally printed as it involved new levy payment arrangements introduced at very short notice. Further "loose ends" from the hasty development of this Plan would be picked up and the loose-leaf format would be used in future for all new Plans and amendments to new Plans.

3.23 The Southern Shark Fishery Management Plan (Amendment), Management Plan No 23, effected changes to the Plan through the loose-leaf amendment system, which has benefits relating to consolidation, citation and reference, although unfortunately not subject to all the provisions of the Statutory Rules Publication Act 1903. The Committee was concerned about the validity of the Amendment, which stated that New Pages 13-14 were to replace Existing Pages 13-14. In fact the new pages were numbered 13 and 13.1. The Committee wrote to the Minister on 1 June 1989, who undertook to remake the instrument.

3.24 The Committee wrote to the Minister pointing out a small typographical error which could, however, have affected the operation of Public Service Determination No 59 of 1989. A salary rate read as 21-341 rather than 21,341.

Such deficiencies, as well as affecting the rights of individuals, are also a breach of parliamentary propriety.

3.25 The Notes to the various clauses of the Export Control (Dried Fruits) Orders as amended (Amendment), Export Control Orders No 12 of 1988, were inconsistent and incomplete. The Minister advised that in future the Notes would meet the requirements of the Committee.

3.26 The Committee does not usually write to a Minister about typographical errors unless they are likely to affect the operation of an instrument or unless some other aspect of the instrument warrants attention. In such cases the Committee Secretary writes to the Department concerned. The Committee wrote to the Minister, however, about an aspect of a new list of marine wildlife in a Declaration under section 9(1) of the Wildlife Protection (Regulation of Exports) Act 1982. The Committee noted a reference to a fish with the "common name" of "yellow emporer". The Committee suggested that this might be "yellow emperor", although scarcely a common name. On the other hand, the Committee advised that it was in the hands of the Minister as to whether the "amblyglyphidodon leucogaster" really was a "white belly damsel", or whether the "sweetlips" and the "lipstick tang" were related. The Committee knew, however, that the "rhinecarthus rectangulus" was the "picasso trigger" because the rectangle bit gave it away.

Incorporation of documents in delegated legislation

3.27 The Export Control (Fish) Orders as amended (Amendment), Export Control Orders No 2 of 1988, incorporated other documents which thereby became legislative in effect.

These included National Health and Medical Research Council standards, published methods of the Association of Official Analytical Chemists and standard methods published by the Standards Association of Australia. The present Orders appeared to be subject to s.49A of the Acts Interpretation Act 1901 which provides, in effect, that only Commonwealth Acts and regulations may be applied, adopted or incorporated into Orders to the extent that those Acts or regulations are "in force from time to time". Where other instruments are incorporated by reference, only those which are in force or existing when the incorporating Order takes effect, may be validly incorporated. The drafting of the present Orders left considerable doubt as to whether possible future documents were intended to be incorporated by reference. The Minister advised that the Orders would be amended to meet the concerns of the Committee.

Unexpected use of delegated powers

- 3.28 Powers granted by Parliament to the executive to make laws should not be exercised in a way that could not have been contemplated, or which is unusual or unexpected. In particular, any provisions which purport to subdelegate legislative powers will be questioned. Provisions of the Prescribed Goods (General) Orders as amended (Amendment), Export Control Orders No 3 of 1988, permitted the Secretary to delegate all or any of his or her powers, except the power of delegation, to any officer of the department and to delegate to a Senior Executive Service officer all of his or her powers including the power of delegation. While these Orders were an unexpected or unusual use of powers, they were not necessarily invalid if administrative rather than legislative in nature. The Minister advised that the Orders would be amended to make clear that it was not intended that a Senior Executive Service officer could further delegate the power to delegate.

- 3.29 The Export Control (Fish) Orders as amended (Amendment), Export Control Orders No 2 of 1988, provided for "approvals" by the Secretary. If these were legislative in nature they would be beyond the scope of Orders made under the Regulations and therefore invalid. The Minister advised that the Orders would be amended to meet the concerns of the Committee.

Failure to effect legislative intent

- 3.30 All delegated legislation should effect any intentions evident on its face or advised in the explanatory material. The legislative intent of the Prescribed Goods (General) Orders as amended (Amendment), Export Control Orders No 4 of 1988, may not have been effected. The Explanatory Statement advised that one of the purposes of the instrument was to change an item in the Schedule to read "frozen fruits and vegetables" rather than "processed fruits and vegetables". In the Committee's copy of the legislation, however, the item still read "processed fruits and vegetables". The Minister advised that the copy of the instrument sent to the Committee was incorrect due to a collation error.
- 3.31 Although Quarantine Determinations No 2 were made on 24 March 1988 and gazetted on 31 March 1988, paragraph 1 provided that "The Determinations No 1 of 1988 ... published in the Gazette on 31 March 1988 are revoked". Quarantine Determinations No 1 were made on 17 March 1988. Under provisions of the parent Quarantine Act 1908 Determinations take effect upon publication in the Gazette. Because of the unusual sequence of dates the legislative intent was uncertain. The Minister advised that the two Determinations were made to enable the Senate to have a fuller picture of the merits of the matters dealt with.

Absent or inadequate explanatory material

- 3.32 The Committee has long taken the position, now universally accepted by Ministers, that each instrument of delegated legislation tabled in Parliament should be accompanied by an Explanatory Statement or other explanatory material (See Chapter 3 of the Eighty-Third Report and Chapter 3 of the Eighty-Fifth Report). In some cases, however, departmental officials neglected to prepare such material or have prepared poor quality explanatory documents. No Explanatory Statement accompanied Remuneration Tribunal Determination No 2 of 1989, a Notice of Declarations and Specifications made under the Commonwealth Employees' Rehabilitation and Compensation Act 1988, Quarantine Determinations No 2 of 1988 or Declarations under s.34(1) of the Telecommunications (Interception) Act 1979. In all these cases the Committee was advised that Explanatory Statements would be provided.
- 3.33 Determinations Nos T1-T8/1989 made under the Higher Education Funding Act 1988 were accompanied by only one Explanatory Statement of seven lines. This brief and uninformative document was less than satisfactory to explain the allocation of \$3.2 billion. The Minister advised that departmental staff would meet with Committee staff to clarify requirements. The Explanatory Statement for Meat Inspection Orders No 5 of 1988 gave no reasons or background for the changes in the law. The Committee wrote to the Minister advising of its requirements.
- 3.34 Where delegated legislation operates retrospectively the Explanatory Statement should indicate that such operation does not prejudice any person other than the Commonwealth. Reasons should also be given for the retrospective operation. Explanatory Statements which accompanied the Bounty (Ships) (Reservation of Bounty)

Regulations, Statutory Rules 1988 No 359; Defence Determination No 35 of 1988; Remuneration Tribunal (Members' Fees and Allowances) Regulations (Amendment), Statutory Rules 1988 No 357; Fringe Benefits Tax (Application to the Commonwealth) Regulations, Statutory Rules 1989 No 11; Defence Determination No 15 of 1988 and Remuneration (Amendment) Ordinance 1988, A.C.T. Ordinance No 50 of 1988, were defective in this regard.

3.35

The Committee was concerned at prejudicial retrospectivity and consequent invalidity under s.48(2) of the Acts Interpretation Act 1901 of Telecommunications (Charging Zones and Charging Districts) By-laws, Amendment No 82, and Telecommunications (Community Calls) By-laws, Amendment No 53. The Australian Telecommunications Commission (Telecom) had previously supplied the Committee with a copy of advice from the Attorney-General's Department, obtained at the suggestion of the Committee, that validating legislation would be necessary to deal with retrospective aspects of earlier By-laws which were void as a result of a failure to table within the required period. It appeared that these later Amendments, as well as the earlier, also required validating legislation. The Committee was advised that Telecom was extremely concerned at the failure of some of its mechanisms and that elaborate measures were in hand to deal with these. The proposed validating legislation would include any retrospective aspects of the present Amendments. The Minister also advised that he had sought a report from Telecom on this matter under section 10 of the Telecommunications Act 1975. The Committee was supplied with a copy of the Report.

Inappropriate use of retrospective provisions

3.36 There may be circumstances, however, where the length of the retrospectivity or other circumstances may make such provisions inappropriate, even though only the Commonwealth may be adversely affected. The Committee does not accept that lengthy retrospective legislation is an effective substitute for effective procedures in Departments. Public Service Determination No 197 of 1988 provided a long period of retrospectivity, two years in one case and one year in another, for the payment of certain re-location allowances to the widow of a particular officer. No person except the Commonwealth was prejudiced by the retrospectivity, but given the circumstances of the Determination the Committee questioned the delay. The Committee was advised of detailed reasons for the delay, which was regretted. The Determination was a "one off" payment rather than being retrospective in the sense of back payment of, for example, an allowance with general application. New determinations were being drafted which should remove the necessity for "one off" determinations such as the present.

3.37 Public Service Determination No 37 of 1988 operated retrospectively for two years. The Explanatory Statement advised in effect that during that time an allowance of Commonwealth monies was in fact paid to officers who were morally, but not legally, entitled to it. The Committee recognised that resort to retrospectivity was the only way in which to legitimate the situation without disadvantaging the officers. The Committee drew attention, however, to comments in its Eighty-Third Report (18 April 1988, p.41), that "Ministers and departmental managers with delegated law-making powers must demand a high level of competence in the monitoring of possible changes to entitlements if the use of retrospectivity is not to be seen merely as a

painless alternative to the demands of efficiency". The Secretary of the Department of Industrial Relations, who made the Determination, advised that he agreed with the Committee's views and had taken administrative action to monitor situations of this kind.

Failure to provide for tabling and disallowance of mandatory legislative instruments

- 3.38 Delegated legislation often provides for the mandatory use of instruments, often as "Forms", for making applications or for initiating other administrative procedures. The Committee scrutinises such instruments to ascertain whether they are legislative in character. If so, provisions for tabling and disallowance should be included.
- 3.39 Clauses of Defence Determination No 17 of 1988 amended other Determinations to include references to the Defence Force Remuneration Tribunal (DFRT). While Determinations of the Remuneration Tribunal are subject to tabling and disallowance and therefore come before the Committee for scrutiny, Determinations of the DFRT are subject only to tabling. There was no indication in the Explanatory Statement of the effect DFRT Determinations would have on the volume of Defence Determinations subject to scrutiny by Parliament. The Minister advised that although some Determinations previously subject to disallowance had been effectively replaced, the number and range of Determinations subject to scrutiny would not be significantly affected. Consideration would be given to whether DFRT Determinations should be made subject to disallowance when the Defence Act 1903 was next reviewed.
- 3.40 Both the Meat Inspection Orders No 6 of 1988 and the Export Control Orders No 11 of 1988 provided for

applications and determinations to be "in a form approved by the Secretary", with no apparent provision for tabling or disallowance of these forms. The Minister advised that the Secretary's discretion to approve the forms was administrative in nature. The intention was to provide for easy rectification of any difficulties encountered with a particular form. The power did not allow the Secretary to determine the details to be included in a form, which were set out elsewhere in the Orders.

- 3.41 Under the Passport Regulations (Amendment), Statutory Rules 1989 No 39, applications for Australian passports and other travel documents and for certain endorsements and renewals "shall be in accordance with a form approved by the Minister". Such forms were not subject to tabling and disallowance and there appeared to be no criteria to guide the Minister in the exercise of the power. The Minister advised that much of the forms was information and guidance for the public on matters of fact, together with personal particulars for inclusion in the passport. Although there was a need for parliamentary scrutiny of the general matters covered by the Regulations the forms and other documents were administrative in character.

PRINCIPLE (B)

DOES DELEGATED LEGISLATION TRESPASS UNDULY ON PERSONAL RIGHTS AND LIBERTIES?

Safeguards and restrictions on warrants authorising entry of public officials upon private premises

- 3.42 The Committee believes that entry of public officials upon private residential or business premises should not only be clearly authorised but that officials seeking

entry under such powers should exercise those rights reasonably and with the fullest possible protection of land owners or occupiers. Under the Civil Aviation (Buildings Control) Regulations, Statutory Rules 1988 No 161, a person authorised in writing by the Civil Aviation Authority could enter certain areas. There was no requirement, however, for the authorised person to show any identification when entering under the power. The Minister advised that the Regulations would be amended to meet the concerns of the Committee.

- 3.43 Both the Horticultural Export Charge Regulations, Statutory Rules 1988 No 190, and the Horticultural Levy Collection Regulations, Statutory Rules 1988 No 191, provided for a warrant authorising entry upon private premises which "may be" in a particular form. The Committee believed, however, that for such an important process the form of a warrant should be standardised. In relation to other specified forms in the Regulations the words "shall be" were used, indicating a standard approach. Following advice from Attorney-General's Department, the Minister advised that both sets of Regulations would be amended to meet the concerns of the Committee.

Criteria for ascertaining amount of financial compensation

- 3.44 Administrative discretions granted by delegated legislation should not be "open ended" but rather should be limited by criteria to as narrow a range as possible. Such limits to executive power help to safeguard individual rights. The Civil Aviation (Buildings Control) Regulations, Statutory Rules 1988 No 161, provided for compensation to be paid in certain situations. No criteria, however, were provided for the method by which such compensation was to be calculated. This was in contrast to another provision in the same

Regulations which did provide such criteria for the protection of the rights of a person who had suffered loss, damage or expense. The Minister advised that the Regulations would be amended to meet the concerns of the Committee.

Uncertain rights or obligations

3.45 It is a basic requirement of personal liberty that any rights or duties given or imposed by executive law making should be certain and defined. Criteria for promotion of certain officers were not set out in the Air Force Regulations (Amendment), Statutory Rules 1988 No 129, but were to be "determined, by instrument, by the Chief of the Air Staff". Similarly, in relation to the procedures for promotion, the Chief of the Air Staff could "by instrument, determine the procedures for the selection of officers for promotion". These instruments, which appeared to be legislative in nature, did not include criteria to limit and guide the exercise of the discretion, nor were they subject to tabling and disallowance in the Parliament. The Minister advised that the Regulations would be amended to include guidelines for the exercise of the powers by the Chief of the Air Staff.

3.46 Under the Bounty (Ships) Regulations, Statutory Rules 1988 No 148, vessels prescribed for purposes of the parent Act included "bulk carriers", "fishing vessels", "rig service vessels" and "tugs". These vessels attracted bounty, yet apart from "fishing vessels" there was no definition in either the Act or the Regulations describing such vessels. The Minister advised that the terms possessed an established meaning. During the drafting process an attempt was made to include definitions, which resulted only in such expressions as a tug being a vessel "specifically designed for pushing

or pulling other vessels". In any event, any adverse decision in respect of bounty was subject to review by the AAT.

- 3.47 Fisheries Notice No 206 prohibited certain prawn fishing "during the period commencing ... on 15 April and ending ... on 1 August". The Committee was concerned that the period of the prohibition may have been ambiguous. On the face of it the period referred to 15 April and 1 August in the same year. However, Fishery Legislation Bulletin No 18, which accompanied the instrument, advised of the "... seasonal closure of the southern portion of Joseph Bonaparte Gulf to prawning from 15 April to 1 August the following year...". Some ambiguity or confusion may arise if the year was not specified in instruments where there are references to months. The Minister advised that the Notice would be amended to meet the concerns of the Committee. The Minister also advised that the ambiguity in Fisheries Legislation Bulletin No 18 had been rectified by an amendment.

Reasonableness of charges, fees and penalties

- 3.48 One of the most important areas of personal rights is protection from penalties which are unreasonable because of their severity or the circumstances in which they may be imposed. Similarly fees and charges imposed by delegated legislation should not be set at unusual levels or increased abruptly without full explanation and justification. The Australian National Railways Commission General By-law Amendment No 2 created an offence which included both strict liability and dual liability. The owner of an illegally parked motor car was liable to a penalty even if someone else left the car on ANRC property. In addition, in certain situations both the driver and owner were liable to a

penalty. There were no provisions similar to those in other jurisdictions dealing with situations where the car was used illegally or used by a person other than the driver. The same instrument provided for the issue of a "conclusive proof certificate". Such certificates are inappropriate for modern legislation. Provisions should comply with the suggestions in the 1982 Report on the Burden of Proof in Criminal Proceedings by the Senate Standing Committee on Legal and Constitutional Affairs. The Chairman of the ANRC advised that the By-law would be amended to meet the concerns of the Committee.

- 3.49 The Committee was concerned at the variety of ways in which the death penalty was dealt with in the various treaties of extradition appended to some 25 different Statutory Rules made under the Extradition Act 1988. These variations appeared to reflect the age of the treaty with the newer treaties being more definitely against the death penalty. The acting Minister advised that although there were differences in death penalty articles of extradition treaties all satisfied Australia's domestic requirements provided in the parent Act. All death penalty articles in treaties were carefully negotiated and drafted to ensure that an accused person would not be extradited to face such a penalty.
- 3.50 The Export Control (Fees) Orders as amended (Amendment), Export Control Orders No 16 of 1988, increased the fee for Quality Assurance System services from \$3,000 to \$5,218. There was no explanation in the Explanatory Statement for the large increase. The Minister advised in detail the basis for the increase.

Protection of parties in proceedings before courts and tribunals

3.51 Although most delegated legislation is made by the executive other legislative instruments are also made by the judiciary or by tribunal members. Such instruments are scrutinised by the Committee in the same way as those made by executive law makers. The Industrial Relations Regulations, Statutory Rules 1989 No 12, provided that where evidence was given (whether orally, by statutory declaration or otherwise) before the Court, the Commission or the Registrar, that evidence may, in the discretion of the Registrar, be used in any subsequent proceedings before the Registrar. The Committee acknowledged that there may be situations where the re-use of such evidence may save time and money. If, however, such evidence could be used in proceedings involving a party who was not able to challenge the evidence when it was given originally, then the re-use of the evidence may be prejudicial to that party. The Minister advised that the Regulations would be amended at an early opportunity to enable a third party to object to the use of such evidence rather than rely merely on the favourable exercise of a discretion by the Registrar.

3.52 Under the Rules of the Supreme Court of the Australian Capital Territory (Amendment), Statutory Rules 1989 No 145, the Supreme Court could, where proceedings were removed from a court or tribunal to the Supreme Court, give any directions that could have been given by the court or tribunal where the proceeding was pending. There was no explanation in the Explanatory Statement of the reasons for this provision, which had no parallel in recent equivalent amendments to the Federal Court Rules, Statutory Rules 1988 No 144, or the Family Court Rules, Statutory Rules 1988 No 166. There may have been an hiatus in the Rules of those Courts. In addition, provisions of the Jurisdiction of Courts (Cross-vesting)

Act 1987 appeared to cover the matter. The Chief Justice advised that the Rule was a machinery provision which applied only to the Supreme Court of a Territory, in the same way as similar State provisions applied to the State Supreme Courts.

Possible valid operation of prejudicial retrospectivity

- 3.53 Prejudicial retrospectivity in delegated legislation, apart from provisions prejudicial to the Commonwealth, is generally void and of no effect pursuant to subsection 48(2) of the Acts Interpretation Act 1901. Such retrospectivity is a breach of the first principle of the Committee in that it does not conform to this Act. There may be situations, however, where delegated legislation could have prejudicial retrospective effect without necessarily breaching that Act. The Committee in such cases demands an assurance that no individual is adversely affected.
- 3.54 The Interpretation (Amendment) Ordinance 1988, A.C.T. Ordinance No 36 of 1988, provided that regulations made under an Ordinance shall take effect, if they so provide, "on the commencement of a specified Ordinance or a specified provision of an Ordinance". This wording might enable regulations to be expressed to take effect from the commencement of a specified Ordinance already in force, thereby lawfully imposing retrospective liability. A similar provision in the original form of the amendment to the Acts Interpretation Act 1901 proposed in the Statute Law (Miscellaneous Provisions) Bill 1987 was, inter alia, the subject of the Committee's Eighty-Second Report. Following the Committee's comments and concerns the Minister administering that Act agreed to amend the provision. The Minister undertook to amend the Ordinance.

3.55 The Rates and Land Tax (Amendment) Ordinance 1988, A.C.T. Ordinance No 63 of 1988, appeared to impose rates and land tax retrospectively. The Committee was concerned that such imposition may operate prejudicially. The Minister advised that the relevant provisions only affected land which had not been previously valued or revalued at the last general revaluation. There was no retrospective change to a landowner's obligation to pay taxes, although the amount would not be known until valuation by the new procedures. There was a right of review by the AAT where the amount of the valuation was disputed.

3.56 The Long Service Leave (Building and Construction Industry) (Amendment) Ordinance (No 3) 1988, A.C.T. Ordinance No 64 of 1988, and the Long Service Leave (Building and Construction Industry) Regulations (Amendment), A.C.T. Regulations 1988 No 16, preserved long service leave entitlements of certain employees in the building and construction industry. The Committee was concerned that a retrospective operation of more than two years, while of benefit to employees, may have a prejudicial effect upon employers. The Minister advised the Committee that the period of retrospectivity had become undesirably lengthy due to other priorities in legislation. The Minister did not consider, however, that employers had suffered any detriment. The Minister did not consider that any employer would seek to diminish his or her responsibility to employees on the basis of a technicality.

Dilution or removal of existing rights or safeguards

3.57 The Committee is extremely reluctant to sanction any diminution of existing personal rights. If an instrument of delegated legislation appears to dilute or remove existing rights the Committee insists on a full

explanation from the law maker. The Liquor (Amendment) Ordinance 1988, A.C.T. Ordinance No 27 of 1988, increased the requirement to hold an election for the management committee of a licensed club from annually to once every three years. The Committee was concerned that the rights of club members had been eroded by this provision. In addition, the explanation of the change in the Explanatory Statement may have confused management committees and club members. The Minister advised that the changes were supported by the Licensed Clubs Association of the ACT Inc and that any decision to change election arrangements would remain in the hands of club members.

3.58 The Magistrates Court (Amendment) Ordinance 1988, A.C.T. Ordinance No 45 of 1988, and the Magistrates Court Rules (Amendment), A.C.T. Regulations No 15 of 1988, removed the right of certain classes of people to receive, free of charge, one copy of the transcript of proceedings in the A.C.T. Magistrates Court. There was no explanation in the Explanatory Statement for the removal of this right. The Minister advised that the government had decided to place the Commonwealth Reporting Service, which prepares the transcripts, on a partial cost-recovery basis. There were also no equivalent provisions for the supply of a transcript in the A.C.T. Supreme Court, the Family Court or the AAT.

3.59 The Committee was concerned that the Subordinate Laws Ordinance 1989, A.C.T. Ordinance No 24 of 1989, which the Explanatory Statement advised was intended to restate the previous law, did not provide the same safeguards included in the corresponding (Commonwealth) Acts Interpretation Act 1901 and the Seat of Government (Administration) Act 1910. Thus, provisions relating to the commencement of delegated legislation used the old, unamended forms of sections rather than the new amended forms included not only in the Commonwealth legislation,

but also in the earlier A.C.T. provisions by the Interpretation (Amendment) Ordinance 1988. Similarly, the old form of drafting of legislation being "void and of no effect" is used rather than the new formula "cease to have effect", introduced by the Statutory Instruments (Tabling and Disallowance) Legislation Amendment Act 1988 into both the Acts Interpretation Act and the Seat of Government (Administration) Act. Finally, an outmoded formula on retrospectivity meant the possibility of prejudicial retrospectivity. The Committee has unsuccessfully recommended amendment of this formula, which also is used in the Acts Interpretation Act, to remedy its present narrow interpretation.

- 3.60 There also appeared to be no provision to cover the tabling and disallowance problem reported in the Eighty-Second Report of the Committee, "The Repeal and Re-enactment Device", November 1987, which resulted in the Statutory Instruments (Tabling and Disallowance) Legislation Amendment Act. This problem, remedied by that Act, was that the disallowance powers of the Senate could be by-passed by a repeal and re-enactment procedure. The Committee asked the Minister for the Arts, Tourism and Territories, the Hon Clyde Holding MP, to draw the concerns of the Committee to the attention of the A.C.T. government.

Proper Controls over public officials and public authorities

- 3.61 Much delegated legislation is concerned with the powers and duties of public officials and public authorities. The Committee is vigilant to ensure that these provisions are not such that personal rights will be adversely affected by inappropriate grants of power. The Remand Centres (Amendment) Ordinance 1988, A.C.T. Ordinance No 51 of 1988, provided for the appointment,

remuneration and removal of Official Visitors to Remand Centres. The Committee was concerned about a provision which prevented the appointment of a person unless he or she possessed relevant qualifications or experience. There were no criteria in the Ordinance, however, to specify what these qualifications and experience might be. There were, therefore, no criteria for the appointment of persons whose duties are to protect rights. The Minister advised the Committee that it was intended that the criteria for appointment as official visitor should be considerable experience in and understanding of criminal processes including the role of remand, an understanding of processes for resolving grievances and matters relating to basic human rights and eminence in a professional field relating to criminal law, the courts or adult corrections.

- 3.62 The Community and Health Service (Amendment) Ordinance 1988, A.C.T. Ordinance No 28 of 1988, provided for the Minister to give directions to the Community and Health Service in the performance of its functions. This was in contrast to the lesser powers of the Minister in relation to the Electricity and Water Authority. The Committee wished to be assured that authorities established by delegated legislation and which provided services to the public were subject to appropriate Ministerial control. The Minister advised that the provision in question was in different terms to the Electricity and Water Authority Ordinance as that Authority was a self-funding commercial enterprise, largely independent of Ministerial control. The Service, on the other hand, was a budget-funded organisation whose greater community responsibilities were recognised by broader Ministerial control.

PRINCIPLE (C)

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

Right to practise a trade, business or profession

- 3.63 The right of an individual to earn a living or carry on a business is of such fundamental importance that the Committee closely scrutinises all situations where these rights may be curtailed by administrative discretion. In such cases the Committee normally insists on independent, external merits review or on detailed criteria to guide and limit the exercise of the discretion.
- 3.64 The Customs (Prohibited Imports) Regulations (Amendment), Statutory Rules 1989 No 60, criteria to define and guide the exercise of a discretionary power to refuse permission to import radioactive substances, even though there was no review of adverse decisions. The Committee accepted the explanation in the Explanatory Statement that AAT review may not have been appropriate in this case, given the nature of the imports in question, and that only the Minister may refuse permission, for high government policy grounds of public safety and relations between the Commonwealth and the States. The Committee believed, however, that criteria might have been provided. For example, similar provisions elsewhere in the principal Regulations required the Minister to have regard to specified international agreements. The Minister advised there were no relevant international agreements to which reference could be made.

3.65 Public Service Determination No 159 of 1988 conferred a discretion on the Chief Executive Officer of the Civil Aviation Authority to withhold certain retirement benefit payments if he or she was satisfied that the retirement of the officer was not in the interests of the Australian Public Service. There were no criteria for the exercise of this discretion, nor were review rights apparent in the instrument or mentioned in the Explanatory Statement. The Committee noted that efficient officers may have retirement benefits withheld whereas less efficient officers might be granted such benefits. The Committee was advised of considerable inconvenience if numbers of officers sought to retire at the same time. There were, however, administrative criteria to select staff who should be given priority for retirement. A points system based on the sum of the age and years of service of an employee was both objective and accepted by staff.

3.66 The Committee was concerned that Marine Orders, Part 51 - Fishing Vessels, Navigation Orders - Order No 1 of 1989, included no apparent provision for external review of the merits of adverse decisions to exempt persons from compliance with the Orders or to be satisfied that evidence of knowledge and experience was sufficient for a person to be part of the crew of a fishing vessel. The Navigation (Marine Council and Committees of Advice) Regulations (Amendment), Statutory Rules 1989 No 155, similarly did not appear to provide a right of review of adverse decisions affecting qualifications for employment at sea. The discretions in both cases may have been subject to review following amendment of the parent Navigation Act 1912 but there was no indication of this either in the instruments themselves or in the Explanatory Statements. The Minister advised that a right of review by the AAT was provided by the parent Act and that this would be included in future Explanatory Statements and Notes to the Orders.

- 3.67 Defence Determination No 14 of 1988 granted a discretion for the payment of financial entitlements to the dependents or estate of a former member of the Australian Defence Force. The Committee considered that it may have been more appropriate to provide for mandatory payments, since there appeared to be no criteria either in the instrument itself or mentioned in the Explanatory Statement for the exercise of an apparently wide and unreviewable discretion. The Minister advised that criteria for the exercise of the discretion appeared in an earlier Determination.

Ministerial discretions

- 3.68 Although Ministers are subject to personal scrutiny in the Parliament in respect of their actions, the Committee still question provisions in delegated legislation which grant discretions to Ministers and which are not subject to merit review.
- 3.69 The Committee was concerned, for example, that the Customs (Prohibited Exports) Regulations (Amendment), Statutory Rules 1988 No 195, granted a discretion to the Minister to impose conditions, requirements and time limits on the export of ships and aircraft which did not appear to be subject to independent review. The Minister advised that AAT review was not provided as the Regulations were to be amended to apply only to ships and aircraft designed or adapted for military purposes, and decisions would be made on defence and foreign policy grounds. The Regulations would also be amended to make clear that only the Minister may refuse permission.

PRINCIPLE (D)

DOES DELEGATED LEGISLATION CONTAIN MATTERS MORE APPROPRIATE FOR PARLIAMENTARY ENACTMENT?

Delegated legislation which contains matters more appropriate for parliamentary enactment

3.70 The Committee has set out the areas where delegated legislation may be defective because it contains matters more appropriate for parliamentary enactment, see Seventy-Seventh Report (March 1986). These are instruments which -

- . manifest a fundamental change in the law, intended to alter and redefine rights, obligations and liabilities
- . are lengthy and complex
- . introduce major innovation into pre-existing legal, social or financial concepts
- . impinge in a major way on the community
- . are calculated to bring about radical changes in relationships or attitudes of people in a particular aspect of life
- . are part of a major uniform, or partly uniform, scheme which has been the subject of debate and analysis in one or more of the State or Territory Parliaments but not in the Commonwealth Parliament
- . take away, reduce, circumscribe or qualify the fundamental rights and liberties traditionally enjoyed in a free and democratic society

3.71 In this context the Committee was concerned at Exemptions from section 19 of the Credit Ordinance 1985, Exemption No 4 being credit notice No 15L and Exemption No 5 being credit notice No 15M. These instruments exempted the National Mutual Royal Savings Bank (NSW) Limited from many provisions of the Ordinance, to protect credit and loan contracts of the previous United Permanent Building Society Ltd, which had in effect become part of the recently established Bank. It may have been more appropriate to amend the parent Ordinance, as the existing provisions did not really contemplate exemptions being used for this purpose. The Minister advised the Committee that he shared its view that the operation of the Ordinance should be reviewed. The Minister as a first step undertook that the matter would be examined in detail by the Standing Committee of Consumer Affairs Ministers Working Party on Consumer Credit.

3.72 The Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1988 No 183, prolonged for a further 12 months the existence of certain legislation which would otherwise be in breach of the Sex Discrimination Act 1984. At the expiry of this extension period five years would have elapsed since the provisions of the Sex Discrimination Act were proclaimed. The Committee considered that, at the end of this 12 month period, the necessity for such a long extension of discriminatory provisions should be at an end. Further extension of exemptions from the parent Act should only effected by Parliament. The Minister advised that the length of time the exemptions have been continued was a matter for concern and in principle it would be desirable not to continue to extend exemptions by regulation. In practice, however, this would involve amendment of the Act to prolong the discriminatory provisions of a number of pieces of legislation and the Attorney-General would not wish to do this unless

satisfied that no immediate improvement would be possible. In the meantime, the present procedure ensured that the need to exempt discriminatory legislation was brought periodically under review.

CHAPTER 4

LEGISLATION CONSIDERED IN DETAIL

Introduction

- 4.1 This Chapter describes in detail, scrutiny by the Committee of some of the more important instruments which came before it during the period under review. In particular it illustrates how instruments may be defective under more than one of the Committee's principles. It is designed to complement the broader themes discussed in the previous Chapter.

Agents (Amendment) Ordinance (No 2) 1988

A.C.T. Ordinance No 47 of 1988

- 4.2 This Ordinance broadly provided for the A.C.T. to join the national travel compensation scheme for the protection of the interests of those who deal with licensed travel agents. The Ordinance contained many references to a Participation Agreement and to an associated Travel Compensation Fund Trust Deed, which were not furnished to the Committee for examination. The Committee believed that it may have been appropriate to incorporate these documents in the Ordinance. Secondly, provision was made for a warrant to enter premises to be effective at particular hours or "at any time of the day or night". Thirdly, mandatory forms were to be made available by a Board with no provision for tabling or disallowance of the forms.

4.3 The Committee wrote to the Minister for the Arts and Territories, the Hon Clyde Holding MP, on 1 September 1988. On 8 November 1988 the Minister supplied the Committee with copies of the documents and advised that none of the States had incorporated the Agreement in legislation although three States had incorporated the Trust Deed in regulations. The Minister explained that it was considered the present arrangements provided flexibility for amendment of the Trust Deed, which was available to the public. The Minister also advised that some unlicensed travel agents operated outside normal office hours and the Ordinance therefore authorised possible entry at times appropriate to these unusual operations. The Minister declined to amend the Ordinance to prescribe the mandatory forms, as they were administrative in nature and would not be intrusive. Following further representations from the Committee on 25 November 1988, however, the Minister undertook on 30 November 1988 to remove references to forms, so that applications need only be in writing and be signed by the applicant. This undertaking was implemented by the Agents (Amendment) Ordinance 1989, A.C.T. Ordinance No 4 of 1989, of 22 February 1989.

Air Navigation Orders

Air Navigation Act 1920

4.4 The Committee was concerned that these mandatory Orders were not subject to proper parliamentary scrutiny through tabling and possible disallowance. The Orders were legislative in character and conferred various important discretionary powers on officials. Some of these discretions involved considerable financial consequences for the owners and operators of aircraft. Although technical in nature the orders were similar to other legislation, such as Navigation Orders in respect of ships and their crews, which were subject to tabling

and disallowance. There appeared to be no provision for external review of the merits of adverse exercise of these powers. Often no criteria were included to limit and guide the exercise of discretions. It is a matter of fundamental parliamentary propriety that no area of law-making delegated by the Parliament to the executive and its officials should remain beyond the reach of parliamentary scrutiny.

- 4.5 The Committee wrote to the Minister for Transport and Communications, Senator the Hon Gareth Evans, on 20 May 1988. On 27 June 1988 the Minister advised that the Civil Aviation Act 1988, which received Royal Assent on 15 June 1988, provided that Civil Aviation Orders would be disallowable instruments from 1 July 1988.

**Air Navigation Regulations (Amendment)
Statutory Rules 1988 No 159**

- 4.6 These Regulations amended the principal Regulations with respect to establishment and use of aerodromes, licensing of aircraft operations and associated matters. The Secretary of the Department was granted discretions to issue licences, approve flights, approve the form, duration and renewal of licences and cancel or suspend licences and contracts. There appeared to be no provision for review of these discretions. The matter was particularly important as the amending Regulations repealed previous review rights in the principal Regulations. Secondly, as with the Civil Aviation Regulations, Statutory Rules 1988 No 158, authorised persons were given wide powers but were not required to carry or produce proper identification. An authorised person was empowered, for example, to discharge a firearm over a Federal airport for aircraft security purposes. Such an authorised person was not required to produce or wear any form of identification.

4.7 The Committee wrote to the Minister for Telecommunications and Aviation Support, the Hon Gary Punch MP, on 30 August 1988. On 1 November 1988 the Minister advised that the controls provided were necessary to meet obligations under both bilateral and multilateral agreements with other countries. The Regulations would be amended as soon as possible, however, to meet the concerns of the Committee regarding identification of authorised persons. This undertaking had not been implemented at the end of the reporting period.

Approval of Forms of Undertaking APP3, APP3-A and APA3-A Under the Health Insurance Act 1973

4.8 These Approvals related to a new form of undertaking by persons applying to become approved pathology practitioners and to new forms of application to become approved pathology practitioners or approved pathology authorities. Two of the Approvals referred in "Notes" to Important Notes which should be consulted before the Forms were completed. The Committee was not supplied with these Important Notes. Secondly, one Form referred to "paragraph 23DF(b) of the Act". There were many references to "(b)" in section 23DF. From internal comparisons it was possible to deduce that paragraph 23DF(1)(b) was probably meant but this was not certain. Thirdly, the Forms included a number of questions preceded by the words "After due inquiry". Serious consequences flowed from answering questions inaccurately yet there was no indication of what inquiries were expected.

4.9 The Committee wrote to the Minister for Community Services and Health, the Hon Neal Blewett MP, on 30 September 1988. On 3 November 1988 the Minister

supplied a copy of the Important Notes, advised that the Form would be amended to clarify drafting and undertook to provide an explanation of the expression "After due inquiry" in the Important Notes. This undertaking had not been implemented at the end of the reporting period.

**Australian Horticultural Corporation (Apple and Pear Export Control) Regulations
Statutory Rules 1988 No 187**

- 4.10 These Regulations provided for the control of the export of apples and pears. Certain persons or licensees were required to use an "approved form", defined as a form approved by the Corporation for general use or for use in a particular case. These forms were not subject to legislative scrutiny through tabling and disallowance. Other similar forms in the Horticultural Export Charge Regulations, Statutory Rules 1988 No 190, and the Horticultural Levy Collection Regulations, Statutory Rules 1988 No 191, were reproduced in the Schedules to those Regulations. Secondly, the Corporation was required in deciding whether to grant a licence to have regard to, among other matters, "financial guarantees that the Corporation considers to be satisfactory". This was a wide discretion, especially in regard to previous provisions, with considerable commercial implications, and the Committee sought clarification of review rights. Thirdly, the instrument provided that the Corporation may charge such fees as it considered necessary to enable it to recover costs incurred in controlling the export of apples or pears, with no provision for parliamentary scrutiny of the fees.
- 4.11 The Committee wrote to the Minister for Primary Industries and Energy, the Hon John Kerin MP, on 1 September 1988. On 28 September 1988 the Minister advised that the Regulations give guidance as to what

may be required in the forms, that there was a right of review to the AAT in respect of an adverse decision on financial guarantees, and that consideration would be given to amend the Regulations to provide parliamentary scrutiny of fees. The outcome of this undertaking had not been notified to the Committee at the end of the reporting period.

Casino Control Ordinance 1988

A.C.T. Ordinance No 72 of 1988

4.12 This Ordinance provided for the establishment of a Casino in the A.C.T. The Committee was concerned at drafting, parliamentary supervision, personal rights and review aspects of the Ordinance.

(a) The Commissioner of Police was empowered to direct a casino licensee to exclude certain persons from the casino. The casino licensee was required to keep a list of such people or incur a severe penalty. The Committee believed that the Commissioner should be required to keep the list, upon which names are placed only following action by the Commissioner. Any person on the list should also be informed of that fact.

(b) The Minister was empowered to appoint any public servant or employee as chief casino inspector. No level of officer or qualifications were specified for this important officer, which concerned the Committee. Inspectors were also given wide powers to require certain acts by notice in writing, or orally where the inspector is satisfied that special circumstances make it appropriate. The Committee believed the power to give oral

directions should be limited by more detailed criteria, by requiring an emergency situation or, at least, by a test of reasonableness.

- (c) The drafting of provisions relating to payment of fees and taxes upon the suspension of a licence, were unclear.
- (d) Certain financial transactions were subject to tabling but not disallowance.
- (e) A Chairperson and four other members of the Authority were to be appointed by the Minister, who was also granted a discretion to fill a vacancy. As the role of the Authority is central to the operation of the scheme the Committee suggested that, unless it was very near the end of a term, it should be obligatory to fill vacancies.
- (f) The Authority was given power to make recommendations to the Minister as to the suitability of a proposed lessee but not of the actual casino licensee.
- (g) It was provided that the Authority "may" approve equipment whereas the Committee considered that "shall" was more appropriate.
- (h) Provision was made for classes of persons to be asked to leave the casino. The licensee committed an offence for "knowingly or recklessly" failing to remove certain of these classes, but not another.
- (i) The period for presentation of cheques was to be specified by the Minister by notice in the Gazette. The Committee believed that this would be more

appropriated prescribed by regulation, so that Parliament would be aware of the matter and it would be subject to disallowance.

- (j) The word "dice" was used as a singular noun.
- (k) Although many important decisions were subject to external review of their merits by the AAT, others that appeared similar were not.
- (l) Many provisions of the Ordinance referred to forms approved by the Minister. The Committee was concerned that mandatory forms should as far as possible be made by regulation and thus be subject to tabling and disallowance.
- (m) There appeared to be no requirement for an annual report to be made by any person to the Minister or for the tabling of any such report in Parliament.

4.13 The Committee wrote to the Minister for the Arts and Territories, the Hon Clyde Holding MP, on 3 November 1988. On the same day the Minister advised the Committee that the Ordinance would be amended to meet its concerns expressed in (a), (b), (c), (e), (g), (h), (i), (j), (l) and (m). With respect to (d) the Minister explained that the information related to commercial transactions which were appropriate for tabling but not disallowance. Under (f) other provisions of the Ordinance met the concerns of the Committee. Under (k) the Minister undertook to provide for AAT review of some decisions and to include criteria for the exercise of other discretions. Some decisions, however, were of a commercial and policy nature which the Minister believed were not suitable for review. This undertaking had not been implemented at the date of A.C.T. self-government on 11 May 1989.

Casino Control Ordinance 1988

Territory of Christmas Island Ordinance No 4 of 1988

4.14 This Ordinance provided for the establishment of a casino on Christmas Island. The Committee was concerned at parliamentary supervision, presentational, personal rights and review aspects of the Ordinance.

- (a) The main Agreement, defined in the Ordinance, was not required to be tabled, although variations to that Agreement were subject to tabling although not to disallowance.
- (b) Certain review rights, which on the mainland would be conferred on the AAT, were conferred on the local Magistrates Court. There was possible confusion with other provisions which conferred criminal jurisdiction on the Supreme Court.
- (c) There were no qualifications at all required for members of the Casino Surveillance Authority, in contrast to the strict provisions in the Casino Control Ordinance 1988 A.C.T. Ordinance No 72 of 1988.
- (d) Powers of inspectors in certain situations to give oral directions should be limited by criteria. In addition, although inspectors might only conduct personal searches with consent, the usual protective words presuming initial absence of consent, were missing.
- (e) Any Police officer was granted certain powers of entry whereas the equivalent provision of the A.C.T. Casino Control Ordinance 1988 restricted such powers to a sergeant or an officer authorised by an officer of sergeant's rank or above.

- (f) There was a wide power of delegation of all or any of the powers of the Authority to any of its Members or, with the approval of the Minister, to any person at all. The Committee was concerned that such delegation could dilute the powers of the Authority.
- (g) The Minister was granted an apparently exclusive power to cause investigations to be conducted, with no provision for advice from the Authority.
- (h) The period for presentation of cheques was to be notified in the Gazette by the Minister. The Committee believed this would be better provided by regulation, with consequent scrutiny by Parliament.
- (i) The Authority was empowered to terminate, or reduce the period of, the suspension of certain licences. There was no provision, however, for the person affected to be notified of this.
- (j) Although many discretions were subject to review, albeit to the Magistrates Court rather than to the AAT, other seemingly important discretions were not.
- (k) There were numerous references to approved forms with no requirement for tabling or disallowance of those forms.

4.15 The Committee wrote to the Minister for the Arts and Territories, the Hon Clyde Holding MP, on 7 November 1988. On 23 November 1988 the Minister advised that:

- (a) The main Agreement was an existing commercial contract which had been tabled previously in Parliament. Variations would also be commercial in nature and therefore suitable for tabling but not disallowance.
- (b) The geographic isolation of Christmas Island made review by the Magistrates Court more appropriate in the circumstances. This decision had been taken after consultation with the Attorney-General's Department. The Ordinance would be amended to remove the possible confusion mentioned by the Committee.
- (c) It would not be realistic to specify strict qualifications for Authority members given the small population of the Territory and its geographic isolation. The Ordinance would be amended, however, to set minimum qualifications for the Casino Controller, Deputy and Inspectors, and to make the filling of a vacancy on the Authority mandatory.
- (d) The Ordinance would be amended to meet the concerns of the Committee.
- (e) The Ordinance would be amended to meet the concerns of the Committee.
- (f) It was not expected that use of the delegation power would dilute the power of the Authority.
- (g) There was adequate provision elsewhere in the Ordinance for the Authority to advise the Minister.
- (h) The Ordinance would be amended to meet the concerns of the Committee.

- (i) The Ordinance would be amended to meet the concerns of the Committee.
- (j) The discretions in question were of a commercial and policy nature and not appropriate for review.
- (k) The Ordinance would be amended to meet the concerns of the Committee.

4.16 This undertaking had not been implemented at the end of the reporting period.

**Civil Aviation Regulations
Statutory Rules 1988 No 158**

4.17 These Regulations dealt with a variety of matters consequential upon the creation of the Civil Aviation Authority. Notification of decisions were to be served by post on a person "or otherwise brought to his or her attention". The latter phrase was unfamiliar to the Committee. Such a loose form of words could lead to problems and potential disputes about proof. Criteria could have been provided to protect the rights of a person being notified. Secondly, a considerable number of important powers were given to "an authorised person". There was, however, no requirement for an authorised person to carry and produce appropriate proof of identity when exercising these powers. Thirdly, reference to a form approved by the Authority did not include provision for tabling and disallowance of the forms in Parliament.

4.18 The Committee wrote to the Minister for Telecommunications and Aviation Support, the Hon Gary Punch MP, on 30 August 1988. On 1 November 1988 the Minister advised that the Regulations would be amended to meet the concerns of the Committee relating to the

protection of personal rights. The form approved by the Authority referred to classes of information, not to the design of a form to be completed by members of the public. This undertaking had not been implemented at the end of the reporting period.

Drugs of Dependence Ordinance 1989

A.C.T. Ordinance No 11 of 1989

4.19 The Committee was concerned with drafting, personal rights and review aspects of the Ordinance, which provided for a comprehensive system of drug regulation.

- (a) Commencement of the Ordinance was to be on a date fixed by the Minister by notice in the Gazette. The Committee was concerned that such provisions might mean that commencement could be delayed for years at the discretion of the Minister. Commencement provisions in delegated legislation should be identical to those in Acts, in the same way that every aspect of delegated legislation should not be in any way inferior to Acts. The Committee drew the attention of the Minister to Drafting Instruction No 2 of 1989, of 10 February 1989, the Office of Parliamentary Counsel, which indicated that commencement provisions for Acts would be drafted so that, in effect, provisions would commence within six months of Royal Assent.

4.20 Similar commencement problems were also noted with respect to the following Ordinances:-

Wills (Amendment) Ordinance 1989

A.C.T. Ordinance No 16 of 1989

**Administration and Probate (Amendment) Ordinance
1989**

A.C.T. Ordinance No 17 of 1989

Family Provision (Amendment) Ordinance 1989

A.C.T. Ordinance No 18 of 1989

**Administration and Probate (Amendment) Ordinance
(No 2) 1989**

A.C.T. Ordinance No 19 of 1989

- (b) Various provisions precluded, apparently absolutely and forever, the granting of licences to anyone convicted of an offence, however trivial, against the Ordinance. Correlative cancellation of licence provisions, however, provided a discretion in relation to a conviction. The Committee believed this anomaly was harsh.
- (c) Strict time limits were placed on the production of licences to officials for various reasons, with strict liability and serious penalties for breach. Requirements that the officials return the licences were not accompanied by time limits or even by a "reasonable time" provision.
- (d) There were many strict liability offences alongside offences with a "reasonable excuse" defence, with no obvious reasons for the differences.
- (e) "Recognised educational institution" was defined as the Australian Capital Territory Community and Health Service, the Australian National University or the Canberra College of Advanced Education. The Australian Defence Force Academy, with its strong science base for teaching and research, was not included.

(f) Adequate review rights, both internal and external, existed for certain discretions but not for others.

- 4.21 The Committee wrote to the Minister for the Arts and Territories, the Hon Clyde Holding MP, on 24 April 1989. A reply had not been received at the date of A.C.T. self-government on 11 May 1989.

Education (Amendment) Ordinance 1988

A.C.T. Ordinance No 48 of 1988

- 4.22 This Ordinance amended the principal Ordinance in respect of the provisional registration of schools. The heading of this instrument described the Minister of State for the Arts and Territories, the Hon Gary Punch MP, as "Attorney-General". Secondly, the instrument was also apparently delayed in making, as it referred to mandatory periods of nine and 12 months before certain procedures for the commencement of a school in 1989 and 1990 respectively. Any lesser period required the approval of the Minister. The date of making the instrument was within those periods of nine and 12 months, so it appeared impossible to comply with its provisions.

- 4.23 The Committee wrote to the Minister for the Arts and Territories, the Hon Clyde Holding MP, on 30 September 1988. On 8 November 1988 the Minister advised the Committee that the making of the Ordinance was undesirably delayed. Any applications received which were adversely affected by the Ordinance would be given the most favourable consideration. This was an example of where a Minister meets the concerns of the Committee by administrative action rather than by undertaking to amend the instrument in question.

Electricity and Water Ordinance 1988

A.C.T. Ordinance No 30 of 1988

4.24 This Ordinance established the A.C.T. Electricity and Water Authority and designated its functions. Statements in respect of the formation of companies, partnerships and joint ventures were merely required to be tabled in Parliament, without any provision for disallowance. Other instruments provided for in the same Ordinance were subject to tabling and disallowance. Secondly, an authorised person was given power in certain circumstances, without the authority of a warrant, to search a person and that person's clothing and immediate property. This appeared to be a substantial breach of personal rights which demanded full explanation and justification. Thirdly, a public body was given the power to refund or remit any charges under the Ordinance if that body considered it just and equitable. There appeared to be no review of this wide discretion. The Committee believes that any discretion to forgo money should, normally, be subject to external review.

4.25 The Committee wrote to the Minister for the Arts and Territories, the Hon Clyde Holding MP, on 31 August 1988. On 10 November 1988 the Minister advised that the statements were commercial in nature and were more suitable for scrutiny by means such as Parliamentary Questions, that the offending provision relating to personal search without a warrant had been repealed on 7 September 1988, subsequent to the Committee's letter, and that the Ordinance would be amended to provide for AAT review of the discretion to refund or remit charges. This undertaking was implemented by the Electricity and Water (Amendment) Ordinance 1989, No 28 of 1989, of 27 April 1989.

Export Control Orders No 10 of 1988

4.26 These Orders provided for the fees associated with the introduction of fee for service arrangements. Provision was made for fees to be paid "proportionately" in cases of shutdown or industrial action. The Committee wished to be assured that in such cases the proportion would be a mere mathematical calculation and not a discretion given to someone to fix proportions, as there appeared to be no provision for review. Secondly, the Secretary was given a wide discretion to remit the whole or a part of a fee "for a reason the Secretary thinks sufficient". There was no immediate indication that this discretion was subject to review.

4.27 The Committee wrote to the Minister for Resources, Senator the Hon Peter Cook, on 30 September 1988. On 22 November 1988 the Minister advised that the proportionate reduction of fees refers to the necessary mathematical calculations and did not provide a discretion for an official to determine proportions by any other method. There was also provision for review of the Secretary's discretion to remit fees elsewhere in the legislation.

Horticultural Levy (Citrus) Regulations

Statutory Rules 1988 No 188

Horticultural Levy (Apple and Pear) Regulations

Statutory Rules 1988 No 189

4.28 These Regulations provided for the payment of levy upon citrus fruit and apples and pears. Both instruments required producers to provide annual returns for levy purposes "after the commencement of these regulations", setting out information "in that calendar year". As both sets of Regulations did not come into effect until 1 August 1988 there was a possibility of prejudicial

retrospectivity in relation to transactions and records from 1 January 1988 to 31 July 1988. In any event, records may not have been kept before 1 August 1988.

- 4.29 The Committee wrote to the Minister for Primary Industries and Energy, the Hon John Kerin MP, on 1 September 1988. On 28 September 1988 the Minister advised that apple and pear producers were required to keep the relevant records under previous provisions. There were no such existing requirements for citrus producers, however, so an amendment of the reporting period for 1988 would be made to meet the concerns of the Committee. This undertaking was implemented by the Horticultural Levy (Citrus) Regulations (Amendment), Statutory Rules 1989 No 42, of 13 March 1989.

Information Provision Incentive Payment Rules Under s.99AAA of the National Health Act 1953

- 4.30 These Rules fixed the requirements, specifications and conditions for the payment of an incentive to pharmacists who set up a computer system for supplying information to the Department. A pharmacist who used a computer software system which ceased to be acceptable to the Department would not be entitled to particular claims processing of incentive payments. While recognising that computer compatibility was desirable, there appeared to be no review of an adverse decision by the Department. Secondly, pharmacists were required to enter in the computer system of the department the "unique identification" held by the pharmacist for each person for whom a general prescription had been written. The Committee was uncertain of the nature of this identification.

- 4.31 On 18 August 1988 the Minister for Housing and Aged Care, the Hon Peter Staples MP, advised that it was in the interests of the department to ensure that as many pharmacists as possible were approved as it was more expensive to process claims manually. In any case, pharmacists would always be reimbursed, although by the less efficient manual method. The unique identification was allocated by each pharmacist and would not enable identification of individual patients by the department or any other person.
- 4.32 On 25 August 1988 the Committee wrote to the Minister again asking whether it would be possible to include external review of the merits of a decision by the department not to accept a computer software system. On 28 September 1988 the Minister advised that the views of the Attorney-General would be sought. On 25 November 1988 the Attorney-General sought the views of the Administrative Review Council, the peak organization established, among other things, to advise the government on all aspects of administrative review. On 3 February 1989 the President of the ARC, Dr Cheryl Saunders, provided detailed advice on the matter. Following receipt of this advice the Minister, on 20 April 1989, advised the Committee that the approval of the Prime Minister had been sought to amend the Act to provide for AAT review of the discretions in question. In anticipation of this approval, drafting instructions were being prepared as a matter of urgency. This undertaking was partly implemented by Rules under s.99AAA of the National Health Act 1953 made on 19 April 1989, although amendment of the Act was still outstanding at the end of the reporting period.

Marine Orders, Part 3 (Seagoing Qualifications)
Navigation Orders - Order No 3 of 1988
Marine Orders, Part 9 (Health - Medical Fitness)
Navigation Orders - Order No 5 of 1988

- 4.33 Navigation Orders - Order No 3 of 1988 repealed and replaced the previous Orders relating to seagoing qualifications. Navigation Orders - Order No 5 of 1988 set out criteria for establishing medical fitness.
- 4.34 A number of discretions may not have had a right of review. These were to replace a certificate if it contained factual errors or if it could be proved that the certificate was lost, damaged or destroyed. These matters were factual and once the facts were established the replacement of the certificate should be mandatory rather than discretionary. Secondly, where a right of review was provided for certain other discretions a Note advised that review rights existed. Other provisions for review were not, however, accompanied by such a Note. Thirdly, the First Assistant Secretary of the Department could subdelegate powers to an authorised officer. As these powers involved sensitive matters the Committee sought further information on the circumstances in which an authorised officer would be appointed.
- 4.35 The Committee wrote to the Minister for Land Transport and Shipping Support, the Hon Bob Brown MP, on 30 September 1988. On 22 November 1988 the Minister advised that the provisions were not intended to grant a discretionary power but to clarify the ability to replace certificates. In any event, there was a general right of review to the AAT. In addition, it was intended to amend the Marine Orders to include a list of decisions which are subject to review, in the same way that penal provisions were already listed. Finally, it was intended that the First Assistant Secretary would

exercise the powers personally. Subdelegation would only be appropriate where a conflict of interest may arise, such as where a matter involved a departmental ship under the control of the First Assistant Secretary. This undertaking had not been implemented at the end of the reporting period.

**Marine Orders, Part 6 (Marine Qualifications - Radio)
Navigation Orders - Order No 4 of 1988**

4.36 Navigation Orders - Order No 4 of 1988 re-issued the previous Order relating to persons qualified to operate radio installations. A definition read "Minister means the Secretary of the Department of State administered by the Minister of State". Such a provision may have been an error. Secondly, a penal provision which required certain persons to produce on request evidence of qualifications did not include a defence of reasonable excuse. Similar provisions in the related Marine Orders did provide such a defence.

4.37 The Committee wrote to the Minister for Land Transport and Shipping Support, the Hon Bob Brown MP, on 30 September 1988. On 22 November 1988 the Minister advised that it was intended that "Minister" should have its usual meaning and that the Order would be amended. An amendment would also include a defence of reasonable excuse. This undertaking had not been implemented at the end of the reporting period.

**Noise Control Ordinance 1988
A.C.T. Ordinance No 71 of 1988**

4.38 This instrument provided for the control of noise in both residential and industrial settings. The Committee was concerned at lack of parliamentary supervision and

at personal rights aspects of the Ordinance. Provision was made for a Noise Control Manual which "may" set out instruments and procedures for measuring noise. The Committee believed that it should be mandatory for these to be set out in the Manual and then amended from time to time. Procedures which may affect rights and obligations should, as far as possible, be certain, identifiable and definitive. Secondly, the Committee believed provisions for identification of inspectors may have been incomplete and misleading. The identity card of an inspector under the Air Pollution Ordinance 1984 was also provided as an identity card for inspectors under this Ordinance. Thirdly, an Annual Report was to be furnished to the Minister without a requirement that the Report be tabled in Parliament. The Committee believes in the widest possible scrutiny by Parliament of not only the making, but also the operation, of delegated legislation.

- 4.39 The Committee wrote to the Minister for the Arts and Territories, the Hon Clyde Holding MP, on 20 October 1988. On 23 November 1988 the Minister advised that the Ordinance would be amended to meet the concerns of the Committee regarding the Manual and the Annual Report. The Minister also explained that identity cards for inspectors appointed under both Ordinances were issued by the Pollution Control Authority, which has functions under both Ordinances. This undertaking had not been implemented at the date of A.C.T. self-government on 11 May 1989.

Nurses Ordinance 1988

A.C.T. Ordinance No 61 of 1988

- 4.40 This Ordinance established a Nurses Board to supervise the administration, registration and enrolment of nurses. The Ordinance referred several times to the

"Australian Capital Territory Health Authority", which no longer existed. Fees were required to be paid to that non-existent Authority. Secondly, a strict liability offence was provided where, in the same Ordinance, a similar offence included a defence of reasonable excuse. Thirdly, although there were provisions for review of most important discretions, another was excluded. Similarly, although notification procedures for most important decisions were included, there were two situations where notification was not required, even though review by the AAT was provided for those two decisions. Fourthly, a particular certificate was to be sent to a person's "professional address". There appeared, however, to be no requirement in the Ordinance for a person to have a professional address.

- 4.41 The Committee wrote to the Minister for the Arts and Territories, the Hon Clyde Holding MP, on 30 September 1988. On 30 November 1988 the Minister advised that the Ordinance would be amended to meet the concerns of the Committee regarding the terminology of the public authority and the strict liability offence and to provide that the certificate be sent to a residential address. Provisions for review and notification in the cases raised by the Committee were, in effect, provided elsewhere in the Ordinance. This undertaking had not been implemented at the date of A.C.T. self-government on 11 May 1989.

Public Service Determination No 153 of 1988

- 4.42 This Determination provided for the payment of benefits to nine specified casual Court Reporters who ceased to be engaged during 1987. The Committee was concerned that there may not have been clear legislative authority in the parent Public Service Act 1922 for the making of this Determination, which provided for payments to nine

specified persons upon their ceasing to be engaged as casual employees. There were a number of possible provisions of the Act under which the Determination may have been made. The Committee believes that delegated legislation should indicate clearly the express source of authority for its making. Secondly, neither the instrument itself nor the Explanatory Statement provided enough information for the Committee to determine whether the persons affected by this Determination were given the full protection of other provisions of the Public Service Act.

- 4.43 The Committee wrote to the Secretary of the Department of Industrial Relations, who made the Determination, on 30 August 1988. On 27 September 1988 the Secretary advised the legislative authority for the Determination. The individuals affected, being short term casual employees, had no rights of appeal under the Act, the payments being negotiated between the Department and the Australian Journalists' Association and endorsed by the Conciliation and Arbitration Commission.

**South East Trawl Fishery Preliminary Management Plan as Amended
Plan of Management No 17**

- 4.44 This Plan amended provisions relating to the South East Trawl Fishery as set out in the Preliminary Management Plan. Several paragraphs appeared to confer a discretionary power on officials where it may well have been intended that there be no discretion. If such a discretion was not intended the drafting may be misleading. If a discretion was intended, however, then such decisions are not subject to review. Secondly, although the Explanatory Statement indicated that paragraph 10 had been amended there was no Note at the foot of the paragraph in the text of the Plan. Where the loose-leaf system is used to effect amendments to a

Plan it is important that changes are noted. The Explanatory Statement also referred to amendments to paragraph 11 when the amendments in the text of the instrument were to paragraph 10. Again, a Note at the foot of paragraph 15A stated that this provision had been inserted by Plan of Management No 15, although the Explanatory Statement advised that paragraph 15A was a new paragraph inserted by the current amendment. Thirdly, a discretion granted to a public official did not appear on the face of the instrument to be subject to review or to include criteria for its exercise.

- 4.45 The Committee wrote to the Minister for Primary Industries and Energy, the Hon John Kerin MP, on 26 May 1988. On 29 June 1988 the Minister advised that the paragraphs referred to by the Committee may be seen as creating a discretionary power where none was intended. The provisions would therefore be redrafted along lines suggested by the Committee. Accurate explanatory notes would also be included in Plans and Explanatory Statements would include details of how amended provisions had been altered. The parent Fisheries Act 1952 provided for review of the discretion. This undertaking was implemented by Plan of Management No 21 of 15 February 1989.

**Southern Shark Fishery Management Plan
Plan of Management No 18**

- 4.46 This Plan controlled fishing in the Southern Shark Fishery. On a presentational aspect, the instrument was not accompanied by an "indicative map" referred to in the Explanatory Statement. Secondly, as with Plan of Management No 17, several paragraphs were drafted as if to confer discretions on officials although the intention may not have been to do so. Thirdly, the instrument incorporated by reference certain criteria

published by the Department before the entry into force of the Plan. If these criteria had legislative or quasi-legislative status and effect they should have been made subject to tabling and disallowance in Parliament. Fourthly, the instrument conferred a discretion on the Minister or the Minister's delegate to exempt a class of boats from certain requirements. There appeared to be no criteria to guide the exercise of this discretion or of any provision for review of the merits of an adverse decision.

- 4.47 The Committee wrote to the Minister for Primary Industries and Energy, the Hon John Kerin MP, on 26 May 1988. On 29 June 1988 the Minister forwarded a copy of the "indicative map" to the Committee, and advised that the discretions identified by the Committee were unintended and would be removed, that the criteria were guidelines rather than mandatory requirements and that the discretion to exempt would be removed in favour of legislative exemptions effected through further amendments. This undertaking was implemented by Plan of Management No 20 of 26 September 1988.

Wool Marketing Regulations (Amendment)
Statutory Rules 1989 No 14

- 4.48 These Regulations established procedures for the registration of wool sampling sites and laboratories. The Explanatory Statement which accompanied the Regulations did not include the usual description of each separate provision of the instrument. In addition, there was no specific time limit, or even a "reasonable time" requirement, on the power of the Secretary of the Department effectively to decline to deal with an application for registration of a sampling site or

laboratory. Any delay in registration would be commercially disadvantageous to a person with possible costly premises unable to be used.

- 4.49 The Committee wrote to the Minister for Primary Industries and Energy, the Hon John Kerin MP, on 6 April 1989. On 11 April 1989 the Minister advised that the Regulations would be amended at the earliest opportunity to include a "reasonable time" requirement. This undertaking was implemented by the Wool Marketing Regulations (Amendment), Statutory Rules 1989 No 110, of 31 May 1989.

CHAPTER 5

MINISTERIAL UNDERTAKINGS IMPLEMENTED

- 5.1 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 previous reporting periods but were not implemented until the present reporting year.

A.C.T. Institute of Technical and Further
Education Ordinance (Amendment) 1987

A.C.T. Ordinance No 71 of 1987

- 5.2 The Minister for the Arts and Territories, the Hon Gary Punch MP, undertook to amend the Ordinance to provide that removal of the Director of the Institute be in specified circumstances only, to set a monetary limit for penalties and to establish AAT reviews of any administrative action that could result in the imposition of a penalty. See Eighty-Fifth Report, paragraphs 5.4-10. This undertaking was implemented by the A.C.T. Institute of Technical and Further Education (Amendment) Ordinance 1988, A.C.T. Ordinance No 82 of 1988, of 7 December 1988.

Agents (Amendment) Ordinance 1988

A.C.T. Ordinance No 5 of 1988

- 5.3 The Ordinance referred to a power of the Agents Board to suspend an agent's licence when in fact there was no

such power in the Principal Ordinance. Another provision gave the Agents Board power to appoint a receiver whenever an agent's licence had been suspended or revoked. The Minister for the Arts and Territories, the Hon Gary Punch MP, undertook to amend the Ordinance. See Eighty-Fifth Report, paragraphs 4.95-96. This undertaking was implemented by the Agents (Amendment) Ordinance (No 2) 1988, A.C.T. Ordinance No 47 of 1988, of 25 July 1988.

Agents (Amendment) Ordinance (No. 2) 1988
A.C.T. Ordinance No. 47 of 1988

5.4 The Minister for the Arts and Territories, the Hon. Clyde Holding MP, wrote to the Chairman on 30 November 1988 undertaking to amend the legislation to simplify procedural formalities. See paragraphs 4.2-3. This undertaking was implemented by the Agents (Amendment) Ordinance 1989, A.C.T. Ordinance No. 4 of 1989, of 22 February 1989

Air Force Regulations (Amendment)
Statutory Rules 1988 No. 129

5.5 The Minister for Defence Science and Personnel, the Hon. Ros Kelly MP, wrote to the Chairman on 18 October 1988 undertaking to amend the Regulations to provide guidelines for the Chief of the Air Staff in the exercise of powers of promotion. See paragraph 3.45.

5.6 This undertaking was implemented by the Air Force Regulations (Amendment), Statutory Rules 1989 No 20, 22 February 1989.

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

- 5.7 The then Minister undertook on 5 November 1986 to amend the legislation to provide for certain AAT appeal rights.
- 5.8 The undertaking was implemented by the Civil Aviation Act 1988.

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

- 5.9 The then Minister undertook on 7 October 1986 to amend the Regulations to provide a right of review.
- 5.10 This undertaking was implemented by the Transport and Communications Legislation Amendment Act 1989.

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

- 5.11 An undertaking to provide AAT review, given on 13 November 1986 by the Minister for Primary Industries and Energy, the Hon John Kerin MP, was implemented by the Australian Horticultural Corporation (Apple and Pear Export Control) Regulations, Statutory Rules 1988 No. 187, of 25 July 1988.

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

- 5.12 These Regulations did not provide a review of discretionary decisions by officials to refuse to provide duplicates of Australian citizenship documents.

The Minister for Immigration, Local Government and Ethnic Affairs, the Hon Mick Young MP, undertook to amend the Regulations. See Eighty-Fifth Report, paragraphs 8.18-19.

- 5.13 This undertaking was implemented by the Australian Citizenship Regulations (Amendment), Statutory Rules 1988 No 325, of 24 November 1988.

Australian Meat and Live-stock Corporation Order No MS12/1988

- 5.14 This Order by the Australian Meat and Live-stock Corporation invalidly purported to subdelegate to itself powers which had been delegated to the Corporation by the parent Australian Meat and Live-stock Corporation Act 1977. The Corporation undertook to amend the order. See Eighty-Fifth Report, paragraphs 4.51-55. The undertaking was implemented by the Australian Meat and Live-stock Corporation Order No MS13/1988, of 31 August 1988.

Australian Meat and Live-stock Corporation Order L5/1988

- 5.15 This Order contained a reproduction error affecting the general scheme of the Order. The Minister for Resources, Senator the Hon Peter Cook, undertook to revoke and remake the Order.
- 5.16 The undertaking was implemented by revised Australian Meat and Live-stock Order L5/1988, of 10 August 1988.

Australian National Railways General By-law Amendment No 1

- 5.17 The Chairman of the Australian National Railways Commission wrote to the Chairman on 7 April 1988

undertaking to amend the By-law to clarify certain penalty provisions. This undertaking was implemented by Australian National Railways General By-law Amendment No. 3, of 29 March 1989.

**Canberra Sewerage and Water Supply Regulations (Amendment)
A.C.T. Regulations 1987 No. 19**

- 5.18 The Minister for the Arts and Territories, the Hon. Gary Punch M.P., wrote to the Chairman on 19 April 1988 undertaking to amend the Regulations to provide for a right of review to the Administrative Appeals Tribunal from two types of decision made by an official. See Eighty-Fifth Report, paragraphs 4.113-114. This undertaking was implemented by the Canberra Sewerage and Water Supply Regulations (Amendment), A.C.T. Regulations 1988 No. 17, of 27 September 1988.

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

- 5.19 The Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon. John Brown M.P., wrote to the Chairman on 9 December 1987 undertaking to amend of the Regulations to require licensees of child minding centres to record the name of a disease where that information is reasonably available. The Minister for the Arts and Territories, the Hon Gary Punch MP, wrote to the Chairman on 19 February 1988 undertaking to amend the Regulations to provide penalties for failure to comply with certain provisions and to clarify the responsibilities of carers to provide certain information. See Eighty Fifth Report, paragraphs 5.41-41.

- 5.20 These undertakings were implemented by the Children's Services Regulations (Amendment), A.C.T. Regulations 1989 No. 6, of 2 March 1989.

Credit Ordinance 1985

A.C.T. Ordinance No. 5 of 1985

- 5.21 The Minister for the Arts and Territories, the Hon. Gary Punch MP, wrote to the Chairman on 4 May 1988 confirming the undertaking given by the then Minister on 17 December 1987 to amend the Ordinance to remove the requirement for an independent witness of the signature of a debtor. This undertaking was implemented by the Credit (Amendment) Ordinance 1988, A.C.T. Ordinance No. 76 of 1988, of 27 October 1988.

Education (Amendment) Ordinance 1988

A.C.T. Ordinance No 48 of 1988

- 5.22 The Minister for the Arts and Territories, the Hon Gary Punch MP, issued a reprint of the Ordinance omitting an incorrect reference commented upon by the Committee. The first print had described the Minister as "Attorney-General" rather than "Minister of State for the Arts and Territories". See paragraphs 4.22-23.

Electricity and Water (Amendment) Ordinance 1988

A.C.T. Ordinance No. 30 of 1988

- 5.23 The Minister for the Arts and Territories, the Hon. Clyde Holding MP, wrote to the Chairman on 10 November 1988 undertaking to amend the legislation to require certain commercial activities to be included in the Annual Report and to provide for AAT review of a refusal to refund or remit charges. See paragraphs 4.24-25.

These undertakings were implemented by the Electricity and Water (Amendment) Ordinance 1989, No. 28 of 1989, of 27 April 1989.

Export Control (Animals) Orders
Export Control Orders No 15 of 1987

- 5.24 The parent Export Control Act 1982 authorised regulations which could empower the Minister to make Orders. Orders were made under the Export Control (Orders) Regulations which empowered the Secretary to determine rules of general application rather than decisions applying general rules to particular cases. There was no valid, legal authority for the Orders to subdelegate to other persons any power to issue legislative or quasi-legislative instruments. The Minister for Resources, the Hon Peter Morris MP, undertook to amend the Orders. See Eighty-Fifth Report, paragraphs 4.48-50. This undertaking was implemented by Export Control (Animals) Orders, Export Control Orders No 13 of 1988, 9 August 1988.

Fisheries Notice No. 206

- 5.25 The Minister for Primary Industries and Energy, the Hon. John Kerin MP, wrote to the Chairman on 29 June 1988 undertaking to amend the Notice to place beyond doubt that a reference to "periods" refers to periods in any year. See paragraphs 3.47. This undertaking was implemented by amendment of the Notice on 6 March 1989.

Foreign Fishing Boats Levy Regulations (Amendment)
Statutory Rules 1987 No. 296

- 5.26 The Minister for Primary Industries and Energy, the Hon. John Kerin M.P., wrote to the Chairman on 5 May 1988 undertaking to amend the Regulations to make clearer that the Secretary's responsibility is limited to ascertaining whether in fact a boat is Australian owned and that this function is subordinate to the principal effect of exempting Australian owned boats from levy. See Eighty-Fifth Report, paragraphs 4.97-99. This undertaking was complied with by the Foreign Fishing Boats Levy Regulations (Amendment), Statutory Rules 1988 No. 368, of 15 December 1988.

Horticultural Levy (Citrus) Regulations
Statutory Rules 1988 No. 188

- 5.27 The Minister for Primary Industries and Energy, the Hon. John Kerin M.P., wrote to the Chairman on 28 September 1988 undertaking to amend the Regulations to avoid possible prejudicial retrospectivity. See paragraphs 4.28-4.29. This undertaking was implemented by Horticultural Levy (Citrus) Regulations (Amendment), Statutory Rules 1989 No. 42, of 13 March 1989.

Horticultural Export Charge Regulations
Statutory Rules 1988 No. 190
Horticultural Levy Collection Regulations
Statutory Rules 1988 No. 191

- 5.28 The Minister for Primary Industries and Energy, the Hon. John Kerin M.P., wrote to the Chairman on 28 September 1988 undertaking to seek advice from the Attorney-General's Department on amending the Regulations to provide for standardisation of a form of

warrant to enter premises. The Department wrote to the Chairman on 20 October 1988 advising that favourable advice had been received and that the Regulations would be amended. See paragraph 3.43. This undertaking was implemented by the Horticultural Export Charge Regulations (Amendment), Statutory Rules 1989 No. 41, and the Horticultural Levy Collection Regulations (Amendment), Statutory Rules 1989 No. 43, of 13 March 1989.

Housing Assistance Ordinance 1987

A.C.T. Ordinance No. 36 of 1987

- 5.29 The Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon John Brown MP, wrote to the Chairman on 17 December 1987 undertaking to amend the Ordinance to include a tabling requirement for reports of the Commissioner for Housing. See Eighty-Fifth Report, paragraphs 4.200-21. This undertaking was implemented by the Housing Assistance (Amendment) Ordinance 1988, A.C.T. Ordinance No. 66 of 1988, of 8 September 1988.

Imperial Acts (Repeal) Ordinance 1988

A.C.T. Ordinance No. 94 of 1988

- 5.30 This Ordinance, made on 15 December 1988, implemented an undertaking made by the Attorney-General to retain in Parliament final control of law-making with respect to the repeal of Imperial Acts. The background to this was the disallowance by the Senate of the New South Wales Acts Application Ordinance 1985, A.C.T. Ordinance No 25 of 1985 which provided for the repeal of a large number of NSW Acts in force in the A.C.T. without expressly identifying them. See Chapter 8.

**Industrial Relations Regulations
Statutory Rules 1989 No. 12**

- 5.31 The Minister for Industrial Relations, the Hon Peter Morris MP, wrote to the Chairman on 11 April 1989 undertaking to amend the Regulations with respect to the re-use of evidence possibly prejudicial to third parties unable to challenge that evidence when first given, and to technical matters. See paragraph 3.5i. These undertakings were implemented by the Industrial Relations Regulations (Amendment), Statutory Rules 1989 No. 107, of 31 May 1989.

**Information Provision Incentive Payment rules under
s.99AAA of the National Health Act 1953**

- 5.32 The Minister for Housing and Aged Care, the Hon Peter Staples MP, wrote to the Chairman on 28 September 1988 undertaking to seek the views of the Attorney-General's Department) on the adequacy of appeal mechanisms under the Rules. The Attorney-General's Department referred the matter to the Administrative Review Council, who advised that it was suitable that the AAT review decisions under the Rules. The Minister advised the Chairman on 20 April 1989 that amendment of the National Health Act would proceed urgently. See paragraphs 4.30-32.
- 5.33 This undertaking was partly implemented by Rules made on 19 April 1989, although amendment of the Act was outstanding at the end of the reporting period.

Interpretation (Amendment) Ordinance 1988

A.C.T. Ordinance No. 36 of 1988

- 5.34 The Minister for the Arts and Territories, the Hon Clyde Holding MP, wrote to the Chairman on 25 October 1988 undertaking to amend the ordinance to place beyond doubt that it proscribed prejudicial retrospective regulations. See paragraph 3.54. This undertaking was implemented by the Interpretation (Amendment) Ordinance (No. 2) 1988, A.C.T. Ordinance No. 77 of 1988, of 24 November 1988.

Lakes (Amendment) Ordinance 1987

A.C.T. Ordinance No 49 of 1987

- 5.35 This Ordinance provided for up to six months imprisonment for a passenger in an unauthorised power boat. The previous penalty was \$100. Other more serious offences in the Ordinance attracted a \$500 fine. The Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon John Brown MP, undertook on 15 December 1987 to amend the Ordinance. See Eighty-Fifth Report, paragraphs 4.71-72. This undertaking was implemented by the Lakes (Amendment) Ordinance 1988, A.C.T. Ordinance No 67 of 1988, 8 September 1988

Long Service Leave (Building and Construction Industry) (Amendment) Ordinance 1987

A.C.T. Ordinance No 16 of 1987

- 5.36 The Committee was concerned at certain discretionary elements in an otherwise mathematical process for the calculation of long service leave and at other discretions relating to eligibility under the general scheme. There were no review rights of these particular

discretions although AAT review was provided for other similar discretions in the principal Ordinance. The Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon John Brown MP, undertook to amend the Ordinance. This undertaking was implemented by the Long Service Leave (Building and Construction Industry) (Amendment) Ordinance (No 2) 1988, A.C.T. Ordinance No 49 of 1988, 25 July 1988.

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

- 5.37 The Minister for the Arts and Territories, the Hon Gary Punch MP, wrote to the Chairman on 27 April 1988 undertaking to amend the Ordinance to provide that inspectors have photographic identity cards, and to clarifying drafting. See Eighty-Fifth Report, paragraphs 5.80-85. These undertakings were implemented by the Long Service Leave (Building and Construction Industry) (Amendment) Ordinance (No. 4) 1988, A.C.T. Ordinance No. 74 of 1988, of 7 October 1988.

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

- 5.38 These Regulations modified the parent Meat Inspection Act 1983 by including a new sub-section. That particular subsection number had, however, been previously used when the Act had been earlier amended. This could have had serious implications for the interpretation of the two subsections. The Minister for Resources, Senator the Hon Peter Cook, undertook on 24 May 1988 to amend the Regulations. See Eighty-Fifth Report, paragraphs 3.28-29. This undertaking was

implemented by the Meat Inspection (Modification) Regulations (Amendment), Statutory Rules 1988 No 227, 8 September 1988.

Meat Inspection (Fees) Orders (Amendment)

Meat Inspection Orders No. 5 of 1987

- 5.39 The Minister for Resources, the Hon. Peter Morris, M.P., wrote to the Chairman on 14 January 1988 undertaking to amend the order to include a right of review before the AAT in relation to the Secretary's discretion similar to that provided in other Orders. See Eighty-Fifth Report, paragraphs 4.120-121. This undertaking was implemented by Meat Inspection Orders No. 3 of 1988, advised in a letter to the Chairman from the Minister for Resources, Senator the Hon Peter Cook, on 23 May 1988.

Meat Inspection (South Australia) Orders

Meat Inspection Orders No 2 of 1987

- 5.40 The parent Meat Inspection Act 1983 provided that an Order may adopt any matter in an "instrument" as in force when the Order took effect. The Orders, however, invalidly purported to adopt relevant instruments as in force from time to time. The Minister for Primary Industries and Energy, the Hon John Kerin MP, undertook on 6 November 1987 to amend the Orders. See Eighty-Fifth Report, paragraphs 5.86-89. This undertaking was implemented by the Meat Inspection (South Australia) Orders, Meat Inspection Orders No 4 of 1988, of 1 June 1988.

Motor Traffic (Amendment) Ordinance (No. 3) 1988
A.C.T. Ordinance No. 11 of 1988

- 5.41 The Minister for the Arts and Territories, the Hon. Gary Punch M.P., wrote to the Chairman on 4 May 1988 undertaking to amend the legislation to provide an element of intention in an offence. See Eighty-Fifth Report, paragraphs 4.83-84. This undertaking was implemented by the Motor Traffic (Amendment) Ordinance (No. 7) 1988, A.C.T. Ordinance No. 70 of 1988, of 8 September 1988.

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

- 5.42 These Regulations created strict liability offences relating to killing or injuring protected species. In addition, there was inadequate provision for identification of police officers exercising certain powers under the Act. The Minister for the Environment and the Arts, Senator the Hon Graeme Richardson, undertook to amend the Regulations. See Eighty-Fifth Report, paragraphs 4.77-79.
- 5.43 This undertaking was implemented by the National Parks and Wildlife Regulations (Amendment), Statutory Rules 1988 No 226, of 8 September 1988.

Navigation Act 1912, Orders Nos. 3, 4 and 5 of 1988

- 5.44 The Minister for Land Transport and Shipping Support, the Hon. Bob Brown M.P., wrote to the Chairman on 22 November 1988 undertaking to amend the Orders to correct a drafting oversight and to provide a defence of reasonable excuse for an offence.

- 5.45 These undertakings were implemented by Order No. 1 of 1989, of 1 May 1989.

**Navigation (Orders) Regulations Order No. 7 of 1988
Marine Orders Part 2 (Fees)**

- 5.46 Implements an undertaking given on 22 December 1987 to remove a discretionary power.

Navigation Act 1912, Order No. 8 of 1987

- 5.47 The Minister for Land Transport and Infrastructure Support, the Hon Peter Duncan MP, wrote to the Chairman on 22 December 1987 undertaking to amend the Order to omit provisions concerning exemptions from examination fees and determinations of medical fees as their utility was spent. See Eighty-Fifth Report, paragraphs 4.47-48. This undertaking was implemented by Order No. 7 of 1988, of 18 September 1988.

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

- 5.48 The then Minister undertook on 3 November 1986 to introduce into a Bill rights of review made under the Orders. See Eighty-Fifth Report, paragraphs 5.117-119. This undertaking was implemented in the Transport Legislation Amendment Act 1989.

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

- 5.49 This Order did not exercise a power to fix a fee itself, but invalidly subdelegated that power to another

organisation. The Minister for Land Transport and Infrastructure Support, the Hon Peter Duncan MP, undertook to amend the order. See Eighty-Fifth Report, paragraphs 4.46-47. This undertaking was implemented by Marine Orders Part 2 (Fees) Order No 7 of 1988, 22 September 1988.

Public Service Board Determinations 1983/10 and 1984/46

- 5.50 The First Assistant Secretary, Co-ordination and Conditions Division, Department of Industrial Relations, wrote to the Chairman on 3 May 1988 advising that Public Service Determination 1988/63 of 3 May 1988 had implemented undertakings to omit certain references in the Determinations to the "public interest" and to substitute "the interests of the service" and to provide criteria for relevant factors to be taken into account in determining the interests of the service. An undertaking was also given in the letter to examine further the use elsewhere of the expression "public interest". See Eighty-Fifth Report, paragraphs 6.20-21.
- 5.51 This undertaking resulted in further amendments effected by Public Service Determination 1989/95, of 27 June 1989.

Public Service Determination 1988/75

- 5.52 The First Assistant Secretary, Pay and Classification Division, Department of Industrial Relations, wrote to the Secretary on 28 June 1988 undertaking to amend the Determination to correct typographical errors. This undertaking was implemented by Public Service Determination 1988/150, of 25 July 1988.

Remand Centres (Amendment) Ordinance 1987

A.C.T. Ordinance No. 30 of 1987

- 5.53 The then Minister undertook on 15 December 1987 to amend the legislation with respect to security of tenure and independence from Government of official visitors. See Eighty-Fifth Report, paragraphs 5.103-105. This undertaking was implemented by the Remand Centres (Amendment) Ordinance 1988, A.C.T. Ordinance No. 51 of 1988, of 1 August 1988.

Schools Authority (Amendment) Ordinance 1987

A.C.T. Ordinance No. 70 of 1987

- 5.54 The Minister for the Arts and Territories, the Hon Gary Punch MP, wrote to the Chairman on 19 April 1988 undertaking to amend the Ordinance to provide that certain powers be only exercised in writing. See Eighty-Fifth Report, paragraphs 5.105-108. This undertaking was implemented by the Schools Authority (Amendment) Ordinance (No 2) 1988, A.C.T. Ordinance No. 65 of 1988, of 8 September 1988.
- 5.55 The Minister for the Arts and Territories, the Hon. Gary Punch MP, wrote to the Chairman on 26 August 1988 advising that he was unable to implement that part of his undertaking given on 19 April 1988 with respect to the staff of the Authority as an Ordinance of the Territory is not competent to deal with conditions of service of Commonwealth Public Servants.

Seamen's War Pensions and Allowances Regulations (Amendment)
Statutory Rules 1988 No. 49
Veterans' Entitlements Regulations (Amendment)
Statutory Rules 1988 No. 50

- 5.56 The Minister for Veterans' Affairs, the Hon Ben Humphreys MP, wrote to the Chairman on 17 June 1988 undertaking to repeal and remake the Regulations as enabling amendments to Acts were not made at the time the Regulations purported to be made. See paragraph 3.14. These undertakings were implemented by the Veterans' Entitlements Regulations (Amendment), Statutory Rules 1989 No. 104, and the Seamen's War Pensions and Allowances Regulations (Amendment), Statutory Rules 1989 No. 105, both of 22 May 1989.

South East Trawl Fishery Preliminary Management
Plan as amended (Amendment)
Plan of Management No. 17

- 5.57 The Minister for Primary Industries and Energy, the Hon John Kerin MP, wrote to the Chairman on 29 June 1988 undertaking to amend the Plan to ensure that a discretionary power was not created where none was intended to exist. See paragraphs 4.44-45. This undertaking was implemented by Plan of Management No. 21, of 15 February 1989.

South East Trawl Fishery - Prohibition Relating to the
Taking of Gemfish
Fisheries Notice No 213

- 5.58 This instrument was not tabled in accordance with the parent Fisheries Act 1952. See paragraph 3.16.

- 5.59 The Minister for Resources, Senator the Hon Peter Cook, tabled a new form of the Notice.

**Southern Shark Fishery Management Plan (Amendment)
Plan of Management No. 18**

- 5.60 The Minister for Primary Industries and Energy, the Hon John Kerin MP, wrote to the Chairman on 29 June 1988 undertaking to amend the Plan to remove any unintended discretionary powers. The Plan would also be amended to remove a discretionary power which could be regarded as legislative rather than administrative in nature. See paragraphs 4.46-47. These undertakings were implemented by Plan of Management No. 20, of 26 September 1988.

**Stamp Duties and Taxes Ordinance 1987
A.C.T. Ordinance No. 39 of 1987**

- 5.61 The then Minister undertook on 24 November 1987 to amend the Ordinance to provide for rights of review and that certain decisions be mandatory rather than discretionary. See Eighty-Fifth Report, paragraph 4.132. This undertaking was implemented by the Stamp Duties and Taxes (Amendment) Ordinance 1988, A.C.T. Ordinance No. 55 of 1988, of 31 August 1988.

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

- 5.62 The Minister for the Arts,, Sport, the Environment, Tourism and Territories, the Hon John Brown MP, undertook on 24 November 1987 to amend the Ordinance to limit rights of search and seizure and to provide for review of certain decisions. See Eighty-Fifth Report, paragraphs 5.109-111. This undertaking was implemented

by the Taxation (Administration) (Amendment) Ordinance (No. 3) 1988, A.C.T. Ordinance No. 53 of 1988, of 31 August 1988.

Telecommunications (Community Calls) By-laws Amendment No. 53
Telecommunications (Charging Zones and Charging Districts)
By-laws Amendment No. 82

5.63 The Minister for Telecommunications and Aviation Support, the Hon Gary Punch MP, wrote to the Chairman on 2 November 1988 undertaking to seek the concurrence of the Prime Minister to legislation to cover all unauthorised zoning changes, to seek a report from Telecom on this matter and to furnish a copy of the report to the Committee. See paragraph 3.35. These undertakings were implemented by the Transport and Communications Legislation Amendment Act 1989 and by a letter of 5 April 1989 from the Minister for Transport and Communications, the Hon. Ralph Willis, MP, attaching a copy of the Telecom Report.

Wool Marketing Regulations (Amendment)
Statutory Rules 1989 No. 14

5.64 The Minister for Primary Industries and Energy, the Hon John Kerin MP, wrote to the Chairman on 11 April 1989 undertaking to amend the Regulations to require that mandatory inspections by public officials be carried out within a reasonable time. See paragraphs 4.48-49. This undertaking was implemented by the Wool Marketing Regulations (Amendment), Statutory Rules 1989 No. 110, of 31 May 1989.

CHAPTER 6

MINISTERIAL UNDERTAKINGS NOT YET IMPLEMENTED

- 6.1 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 1989, the end of the reporting period. Outstanding undertakings in respect of that A.C.T. legislation which since 11 May 1989 has been the responsibility of the A.C.T. government, is listed in Chapter 7, which reports generally on the effect of A.C.T. self-government on the operations of the Committee.

Administrative Proposals Order under section 6 of the Environment Protection (Impact of Proposals) Act 1974

- 6.2 The Minister for the Environment and the Arts, Senator the Hon Graham Richardson, wrote to the Chairman on 18 November 1987 undertaking to amend the Order to require public notification of certain matters, to establish procedures to give reasons for decisions, to limit power to define a member of the public and to clarify the power to exempt persons from the operation of the Orders.

Australian Horticultural Corporation (Apple and Pear Export Control) Regulations Statutory Rules 1988 No. 187

- 6.3 The Minister for Primary Industries and Energy, the Hon John Kerin MP, wrote to the Chairman on 28 September 1988 undertaking to give consideration to amending

regulation 18 to provide for Parliamentary scrutiny of fees charged by the Australian Horticultural Corporation, following a review of the present arrangements by AHC.

**Air Navigation Regulations (Amendment)
Statutory Rules 1988 No.159**

- 6.4 The Minister for Telecommunications and Aviation Support, the Hon Gary Punch MP, wrote to the Chairman on 1 November 1988 undertaking to amend the Regulations to require persons authorised to discharge firearms over a Federal airport to carry identification.

**Australian National Railways Commission General By-law
Amendment No.2**

- 6.5 The Chairman of the ANRC, Dr D.G. Williams, wrote to the Chairman on 11 April 1989 undertaking to amend the By-law to remove strict liability, dual liability and conclusive proof provisions.

**Approval of Forms of Undertaking APA1, APP1 and APL1
under the Health Insurance Act 1973**

- 6.6 The Minister for Community Services and Health, the Hon Neal Blewett MP, wrote to the Chairman on 18 February 1988 undertaking to amend the instruments to provide for the issue of photographic identity cards to persons authorised to enter premises, to provide a right of review of discretions affecting professional qualifications and to clarify particulars required for pathology services.

**Approval of Forms of Undertaking APP3, APP3-A and APA3-A
under the Health Insurance Act 1973**

- 6.7 The Minister for Community Services and Health, the Hon Neal Blewett MP, wrote to the Chairman on 3 November 1988 undertaking to amend the Forms to clarify drafting and to amend Important Notes to the Forms to explain the expression "After due inquiry".

**Casino Control Ordinance 1988
Territory of Christmas Island Ordinance No.4 1988**

- 6.8 The Minister for the Arts and Territories, the Hon Clyde Holding MP, wrote to the Chairman on 23 November 1988 undertaking to amend the Ordinance with respect to a number of concerns expressed by the Committee.

**Civil Aviation Regulations
Statutory Rules 1988 No. 158**

- 6.9 The Minister for Telecommunications and Aviation Support, the Hon Gary Punch MP, wrote to the Chairman on 1 November 1988 undertaking to amend the Regulations to describe methods of service of notifications and to require authorised persons to carry proof of identity.

**Civil Aviation (Buildings Control) Regulations
Statutory Rules 1988 No.161**

- 6.10 The Minister for Telecommunications and Aviation Support, the Hon Gary Punch MP, wrote to the Chairman on 1 November 1988 undertaking to amend the Regulations to provide criteria for the payment of compensation and to provide that authorised offices of the Civil Aviation Authority carry identification cards.

**Customs (Prohibited Exports) Regulations (Amendment)
Statutory Rules 1988 No.195**

- 6.11 The Minister for Science, Customs and Small Business, the Hon Barry Jones MP, wrote to the Chairman on 20 October 1988 undertaking to amend the Regulations to provide that only the Minister may refuse the export of military ships and aircraft.

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

- 6.12 The Minister for the Arts, Sport, the Environment, Tourism and Territories, Senator the Hon Graham Richardson, wrote to the Chairman on 17 May 1988 undertaking to amend the Ordinance to allow greater latitude in making representations in respect of a proposed plan of management, to limit fees which may be prescribed, to provide improved notice in respect of certain decisions and to provide for consistency in definitions. The Minister also undertook to consult with the Attorney-General's Department with respect to certain strict liability offences.

**Export Control (Fish) Orders as amended (Amendment)
Export Control Orders No.2 of 1988**

- 6.13 The Minister for Resources, Senator the Hon Peter Cook, wrote to the Chairman on 17 June 1988 undertaking to amend the Orders to specify actual instruments incorporated in the Orders and to provide to the Committee copies of those instruments. The Minister also undertook to amend the Orders to include criteria before certain approvals may be made by the Secretary.

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

- 6.14 The Minister for the Arts, Sport, the Environment, Tourism and Territories, Senator the Hon Graham Richardson, wrote to the Chairman on 18 February 1988 undertaking to amend the Regulations with respect to advertising restrictions of use by the public of Marine Parks, to provide a defence of reasonable excuse for certain offences and to provide for Administrative Appeal Tribunal review.

**Information Provision Incentive Payment Rules
under section 99AAA of the National Health Act 1953**

- 6.15 The Minister for Housing and Aged Care, the Hon Peter Staples MP, wrote to the Chairman on 20 April 1989 undertaking to amend the parent Act to provide AAT review of decisions under the Rules.

**Marine Orders, Part 6 (Marine Qualifications-Radio)
Navigation Orders ~ Order No.4 of 1988**

- 6.16 The Minister for Land Transport and Shipping Support, the Hon Bob Brown MP, wrote to the Chairman on 22 November 1988 undertaking to amend the instrument to clarify drafting and to provide a defence of reasonable excuse to a penalty provision.

**Meat Inspection (Fees) Orders as amended (Amendment)
Meat Inspection Orders No.5 of 1988**

- 6.17 The Minister for Resources, Senator the Hon Peter Cook, wrote to the Chairman on 22 November 1988 undertaking to rectify the omission of a note to section 1A of the Schedule to the orders.

**Merit Protection (Australian Government Employees) Regulations
(Amendment)**

Statutory Rules 1987 No.330

- 6.18 The Minister Assisting the Prime Minister for Public Service Matters, the Hon Ralph Willis MP, wrote to the Chairman on 17 May 1988 undertaking to seek an amendment of the parent Merit Protection (Australian Government Employees) Act 1984 to provide a sanction for a breach of confidentiality order.

Navigation Act 1912

Marine Orders

- 6.19 The Minister for Land Transport and Shipping Support, the Hon Bob Brown MP, wrote to the Minister on 22 November 1988 undertaking to amend the Marine Orders to include a list of decisions which are subject to review.

Navigation (Master and Seamen) Regulations (Amendment)

Statutory Rules 1988 No.154

- 6.20 The Minister for Land Transport and Shipping Support, the Hon Bob Brown MP, wrote to the Chairman on 10 October 1988 undertaking to correct a drafting oversight in the heading to a Regulation.

Prescribed Goods (General) Orders as amended (Amendment)

Export Control Orders No.3 of 1988

- 6.21 The Minister for Resources, Senator the Hon Peter Cook, wrote to the Chairman on 11 August 1988 undertaking to amend the Orders to clarify the intention that a delegated power does not permit further delegation.

Procedural Decisions of the Australian Broadcasting Tribunal

- 6.22 The Minister for Transport and Communications, Senator the Hon Gareth Evans, wrote to the Chairman on 22 February 1988 advising that in respect of the concern of the Committee about provisions for appeal on the merits of procedural decisions of the ABT that he was awaiting the outcome of an Administrative Review Council review. The review by the ARC had commenced but was not expected to finish until the end of 1989.

Public Service Determination 1988/197

- 6.23 The Department of Industrial Relations undertook to draft new Determinations to remove the need for "one off" instruments to deal with individual cases.

Southern Shark Fishery Management Plan (Amendment) Plan of Management No.23

- 6.24 The Minister for Primary Industries and Energy, the Hon John Kerin MP, undertook on 1 June 1989 to remake the instrument to overcome possible invalidity due to incorrect references in a loose-leaf amendment system.

CHAPTER 7

STATEMENT BY SENATOR COLLINS ON SELF-GOVERNMENT IN THE AUSTRALIAN CAPITAL TERRITORY

- 7.1 On 11 May 1989 the Chairman made a statement in the Senate on the introduction of self-government in the Australian Capital Territory (ACT). The statement is reproduced below -
- 7.2 "Senator COLLINS - All of us would be aware that today the Legislative Assembly for the ACT meets for the first time and Commonwealth statutory provisions will be proclaimed under which most ACT legislation will become the responsibility of that Assembly and will be administered through ACT Ministers. This means that those ACT Ordinances, and Regulations and other instruments made under them, will no longer be tabled in the Parliament or be subject to disallowance. The relevant ACT Ordinances will be deemed Acts and any future amendments or new legislation will be made by a legislature and not by executive law makers. Regulations and other instruments made under the new Acts will be made by ACT rather than Commonwealth Ministers. Many of the ordinances which today pass from the control of the Commonwealth Parliament have been improved by the technical scrutiny performed by the Senate Regulations and Ordinances Committee.
- 7.3 "Over the years scrutiny by the Committee has resulted in many ministerial undertakings to amend ACT legislation to provide, for example, for Administrative Appeals Tribunal review rights, for elimination of strict liability offences and for tabling in Parliament of important instruments. Some of the more recent

undertakings given to the Committee have not yet been implemented and there is some correspondence outstanding. This matter was addressed some time ago and on 31 August 1988 the then Minister for Arts and Territories, the Hon. Gary Punch MP, wrote to the Chairman undertaking to direct his departmental staff to do everything possible to clear outstanding undertakings. Should this not be possible before the coming of self-government the Minister undertook to recommend to the new ACT government that appropriate and urgent amendments be made. On behalf of the Committee I have written to the present Minister for the Arts and Territories, the Hon. Clyde Holding MP, reminding him of this undertaking.

7.4 "At this point I emphasise that, as honourable senators know, it is not all ACT Ordinances and related instruments which are being transferred to the new Legislative Assembly. A few ACT laws will continue to be made by the Commonwealth at least for the time being, particularly those on matters which are the responsibility of the Attorney-General. The Committee will, of course continue to examine the technical aspects of Ordinances of other Territories of the Commonwealth.

7.5 "Finally I inform the Senate that on behalf of the Committee I shall be writing to the new Speaker of the Legislative Assembly for the ACT, when he or she is appointed, offering the best wishes of the Committee for its future and inviting a delegation of members of the Assembly to attend a lunch jointly hosted by the Committee and the Scrutiny of Bills Committee. The purpose of this meeting will be to discuss the process of technical legislative scrutiny by parliamentary committees with a view to encouraging our ACT colleagues to adopt similar machinery if they consider it to be appropriate for their chamber."

7.6 The letter to the Minister for the Arts and Territories, the Hon Clyde Holding MP, referred to in the statement by Senator Collins, read as follows -

11 May 1989

The Hon. Clyde Holding, MP
Minister for the Arts and Territories
Parliament House
CANBERRA ACT 2600

Dear Minister,

I am writing on behalf of the Committee with respect to the establishment of the Legislative Assembly for the A.C.T. and the transfer of responsibility for most A.C.T. legislation to that Assembly and the Ministers appointed from among its members.

As you are aware, the Committee has scrutinised much of the legislation due for transfer, examining its provisions for compliance with its principles.

During the course of its scrutiny, issues raised by the Committee were taken up by you and your predecessors, who gave undertakings to amend A.C.T. legislation so that it would accord with those principles. Most of these undertakings have been implemented but some are still outstanding, no doubt due to demands on legislative resources in the processes leading to self-government.

In this context, your predecessor, the Hon. Gary Punch MP, wrote to the Committee on 31 August 1988 that he would direct his departmental staff to do everything possible to clear outstanding undertakings before the coming of the A.C.T. self government. In the event that

it would not be possible to implement all outstanding undertakings before the date of self-government he undertook to recommend to the new A.C.T. government that appropriate and urgent amendments be made. The Committee is most grateful for this helpful response.

Attached is a list of undertakings given to the Committee by you and your predecessors which appear not yet to have been implemented. There is also a matter where correspondence is outstanding. The Committee would be grateful if you would write to the A.C.T. government in the terms suggested by your predecessor on 31 August 1988. In respect of the outstanding correspondence it would be appreciated if you would recommend that action be taken to meet the concerns of the Committee.

The Committee takes this opportunity to congratulate you on the understanding and constructive manner in which you have dealt with the Committee regarding those laws which are to become the responsibility of the Legislative Assembly for the A.C.T. The Committee intends to write to the Legislative Assembly offering its best wishes and inviting a delegation to meet it and the Scrutiny of Bills Committee to discuss how the Committees might assist the Assembly to establish a legislative scrutiny committee, if it wishes to adopt such a course. I also intend making a short statement to the Senate on the establishment of self-government from the point of the Committee.

Yours sincerely,

Bob Collins
Chairman

- 7.7 The attachment referred to in the letter read as follows -

**SENATE STANDING COMMITTEE ON REGULATIONS
AND ORDINANCES**

**A.C.T. LEGISLATION
OUTSTANDING MINISTERIAL UNDERTAKINGS AND CORRESPONDENCE
AT 11 MAY 1989**

OUTSTANDING UNDERTAKINGS

- 7.8 *Optometrists (Amendment) Ordinance 1986*
ACT Ordinance No 51 of 1986

The then Minister undertook on 11 November 1986 to amend the Ordinance to provide for certain Administrative Appeal Tribunal review rights.

- 7.9 *Commercial Arbitration Ordinance*
ACT Ordinance No 84 of 1986

The then Minister undertook on 19 March 1987 to amend the ordinance to meet the concerns of the Committee on service of documents.

- 7.10 *New South Wales Acts Ordinance 1986*
ACT Ordinance No 91 of 1986

The then Minister undertook on 28 April 1987 to amend the Ordinance progressively to remove outdated provisions.

**7.11 Blood Donation (Acquired Immune Deficiency Syndrome)
Amendment Ordinance (No 2) 1986
ACT Ordinance No 90 of 1986**

The then Minister undertook on 8 May 1987 to place a "sunset clause" in the Ordinance to ensure it is remade and consequently re-examined in the Parliament.

On 24 May 1988 the Chairman wrote to the Minister for the Arts and Territories, the Hon Gary Punch MP, advising that the Committee had agreed to release the Minister from an undertaking to include a "sunset clause" in the Ordinance. The Chairman also advised the Minister, however, that a related undertaking should be honoured; the periodic (i.e. at least every 12 months) tabling of information of legal compensation and medical developments regarding AIDS.

**7.12 Gaming Machine Ordinance 1987
ACT Ordinance No 34 of 1987**

The then Minister undertook on 19 November 1987 to amend the Ordinance to meet the concerns of the Committee on a knowledge element in an offence provision, a defence of reasonable excuse in other offence provisions, use of photographic identity cards by inspectors and rights of review.

**7.13 Children's Services (Amendment) Ordinance (No 2) 1987
ACT Ordinance No 53 of 1987**

The Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon John Brown MP, wrote to the Chairman on 9 December 1987 undertaking to amend the Ordinance to correct an oversight.

7.14 **Games, Wagers and Betting-Houses (Amendment) Ordinance 1987**

ACT Ordinance No 59 of 1987

The Minister for the Arts and Territories, the Hon Gary Punch MP, wrote to the Chairman on 19 April 1988 undertaking to amend the legislation to correct a discrepancy.

7.15 **A.C.T. Institute of Technical and Further Education Ordinance 1987**

ACT Ordinance No 71 of 1987

The Minister for the Arts and Territories, the Hon Gary Punch MP, wrote to the Chairman on 27 April 1988 undertaking to amend the Ordinance to provide that certain powers be only exercised in writing, that certain opinions of the Minister be reviewed annually, that details of some Ministerial decisions be included in the annual report of the Institute, that specific provision be made for the termination of the Director's appointment, and to clarify offence provisions.

7.16 These undertakings were largely implemented by the A.C.T. Institute of Technical and Further Education (Amendment) Ordinance 1988, ACT Ordinance No 82 of 1988, of 7 December 1988, although amendment of the Audit Regulations (Commonwealth) was still required with respect to the annual report provision.

7.17 **Long Service Leave (Building and Construction Industry) (Amendment) Ordinance (No 2) 1987**

ACT Ordinance No 74 of 1987

The Minister for the Arts and Territories, the Hon Gary Punch MP, wrote to the Chairman on 18 May 1988

undertaking to amend the Interpretation Ordinance to make it clear in the context of the examination by the Committee of the above Ordinance, that a separate offence arises for each day on which a person continues to fail to comply with a requirement.

**7.18 Schools Authority (Amendment) Ordinance 1988
ACT Ordinance No 2 of 1988**

The Minister for the Arts and Territories, the Hon Gary Punch MP, wrote to the Chairman on 24 May 1988 undertaking to amend the Ordinance to provide criteria for an administrative decision and for Administrative Appeals Tribunal review of decisions made under these criteria.

7.19 Programs made under section 12 of the Housing Assistance Ordinance 1987

The Minister for the Arts and Territories, the Hon Gary Punch MP, wrote to the Chairman on 26 May 1988 undertaking to amend the various programs to provide various appeal rights, to provide criteria for the exercise of discretions, and to clarify certain provisions.

**7.20 Casino Control Ordinance 1988
ACT Ordinance No 72 of 1988**

The Minister for the Arts and Territories, the Hon Clyde Holding MP, wrote to the Chairman on 3 November 1988 undertaking to amend the Ordinance with respect to a number of concerns expressed by the Committee.

7.21 Noise Control Ordinance 1988
ACT Ordinance No 71 of 1988

The Minister for the Arts and Territories, the Hon Clyde Holding MP, wrote to the Chairman on 23 November 1988 undertaking to amend the Ordinance to require certain matters to be included in the Noise Control Manual and to require Annual Reports to be tabled.

7.22 Nurses Ordinance 1988
ACT Ordinance No 61 of 1988

The Minister for the Arts and Territories, the Hon Clyde Holding MP, wrote to the Chairman on 30 November 1988 undertaking to amend the Ordinance to clarify drafting, to provide a defence of reasonable excuse in an offence provision and to provide for certificates to be sent to a residential address.

7.23 Building (Amendment) Ordinance 1988
ACT Ordinance No 73 of 1988

The Minister for the Arts and Territories, the Hon Clyde Holding, MP wrote to the Chairman on 16 December 1988 undertaking to amend the Ordinance to clarify drafting.

7.24 Motor Omnibus Services Ordinance 1955
ACT Determination of Fees No 33 of 1988

The Minister for the Arts and Territories, the Hon Clyde Holding, MP wrote to the Chairman on 16 December 1988 undertaking to amend the Determination to clarify drafting.

OUTSTANDING CORRESPONDENCE

- 7.25 Drugs of Dependence Ordinance 1989
 ACT Ordinance No 11 of 1989

On 24 April 1989 the Chairman wrote to the Minister for the Arts and Territories, the Hon. Clyde Holding MP, concerning no date of commencement being specified; the severity of some penalties; strict liability offences; review of decisions and drafting matters.

A reply had not been received by 11 May 1989.

- 7.26 The letter to the Speaker of the Legislative Assembly of the ACT, referred to in the statement by Senator Collins, read as follows-

11 May 1989

Mr David Prowse
Presiding Officer
Legislative Assembly for the A.C.T.
CANBERRA ACT 2600

Dear Mr Prowse,

On behalf of the members of the Senate Standing Committee on Regulations and Ordinances may I congratulate you on your election as Presiding Officer of the Legislative Assembly for the Australian Capital Territory.

The Committee has had a long and, I believe, important connection with A.C.T. legislation. You would be aware of the contribution of the Committee to the present high quality of safeguards in A.C.T. Ordinances, Regulations and other instruments with respect to personal liberties and parliamentary proprieties.

Many of these safeguards were included in individual pieces of legislation as a result of concerns expressed by the Committee. Those concerns prompted undertakings by the responsible Minister to amend A.C.T. legislation or to initiate or modify administrative practices. In addition, safeguards introduced to particular pieces of legislation have become precedents which are now incorporated as standard forms in similar situations.

Scrutiny by the Committee has resulted in undertakings covering a wide variety of concerns. Recent undertakings in respect of personal rights include amendments to provide for Administrative Appeals Tribunal review; to provide criteria for discretionary decisions; to establish safeguards in respect of entry and seizure provisions; to provide that certain powers be exercised only in writing; to remove unnecessary strict liability offences and to ensure that officials with power of entry to private premises carry proper identification. In respect of parliamentary proprieties undertakings have been received to ensure that important subordinate legislation and administrative instruments are subject to tabling in Parliament, and where appropriate also subject to disallowance.

These undertakings illustrate some of the concerns of the Committee and reflect the breadth and diversity of the matters it raises. Fuller accounts of the work of the Committee may be found in its various Reports, in statements to the Senate on its operations and in the regular tabling and incorporation of its correspondence.

I would also draw to your attention the helpful and appropriate responses the Committee has received from the Commonwealth Ministers who have been responsible for making and administering A.C.T. legislation. The work

of the Committee has been assisted by the non-partisan nature of Ministerial involvement and by Ministers' co-operation with the Committee in the application of its principles.

The Committee has been assisted in its work by its independent legal adviser, Emeritus Professor Douglas Whalan of the ANU, whose independent opinions and advice have underlined the technical nature of scrutiny by the Committee.

At the time of transfer of responsibility there were ministerial undertakings outstanding in respect of some A.C.T. legislation, aspects of which had been criticised by the Committee. There was also a matter in respect of which the Committee had not completed its scrutiny. It is understood that the Minister for the Arts and Territories, the Hon. Clyde Holding MP, will be recommending that the new A.C.T. government implement these undertakings as a priority.

The Committee appreciates that these early days of the Legislative Assembly will be taken up by many important procedural matters. It may be that some early consideration may also be given by the Assembly to the appointment of a technical legislative scrutiny committee for A.C.T. laws and delegated legislation. The existence of such a specialist Committee could go far in ensuring the continuation of effective protection of personal rights and parliamentary proprieties in A.C.T. legislation.

The Committee would be pleased to give the Assembly any advice or assistance it requests regarding the practices and operations of scrutiny committees. With a view to extending the parliamentary network of Australian legislative scrutiny the Senate Committees would be pleased to host a lunch for a delegation of members of

the Legislative Assembly to discuss the question of technical scrutiny if the Assembly thought that this would be helpful.

Once again may the Committee offer best wishes to the Legislative Assembly for the A.C.T.

Yours sincerely,

Bob Collins
Chairman

CHAPTER 8

STATEMENT BY SENATOR COLLINS ON CONSIDERATION BY THE COMMITTEE OF THE A.C.T. IMPERIAL ACTS (REPEAL) ORDINANCE 1988

- 8.1 On 11 May 1989 the Chairman made a statement in the Senate on the scrutiny by the Committee of the Imperial Acts (Repeal) Ordinance 1988, ACT Ordinance No 94 of 1988. The statement is reproduced below -
- 8.2 "Senator COLLINS - Recently the Standing Committee on Regulations and Ordinances considered the ACT Imperial Acts (Repeal) Ordinance 1988. This was the third Ordinance in a package intended to reform the law with respect to imperial legislation in the Australian Capital Territory (ACT). This Ordinance repealed various old Acts such as the Evidence of Barbarous and Uncivilised People Destitute of the Knowledge of God Act. It also repealed Acts which obviously were never actually observed in the Australian Capital Territory even though they may have been in force, such as the Wine to be Sold at Reasonable Price Act 1330.
- 8.3 "On a more serious note, the Committee looked long and hard at this Ordinance, which repealed many Acts, none of which were expressly listed, by a law made by the Executive. At the end of 1985, at the instigation of the Committee, the Senate actually disallowed a similar ordinance made in respect of obsolete New South Wales Acts; another example of the Senate asserting the primacy of the Parliament. Subsequently, the Committee held a hearing with senior officials of the Attorney-General's Department to try to avoid a similar fate for the proposed Imperial Acts (Repeal) Ordinance.

The Attorney-General, the Hon. Lionel Bowen, MP, then undertook to meet the concerns of the Committee by providing in the Explanatory Statement to re-enact any repealed Imperial Act which either House resolved should be re-enacted.

8.4 "The Committee accepted this undertaking as the result would be that the Senate could, in effect, recall a repealed Act. The Committee wrote to the Minister that when the ordinance was made it would report to the Senate that its form was acceptable because of this undertaking.

8.5 "The eventual Ordinance was not tabled in the Senate until this year, when it was again closely examined by the Committee. There was a strong feeling in the Committee that the subject matter of the ordinance might be better dealt with by the new ACT Legislation Assembly. Legal advice was obtained, however, which indicated some of the Acts concerned were outside the jurisdiction of the Legislative Assembly. Had this not been the case, it is possible the Committee may have recommended that the matter be dealt with by the new legislature. Mr President, I seek leave to incorporate a short summary of the Committee's scrutiny of this Ordinance."

8.6 The summary is reproduced below -

IMPERIAL ACTS (REPEAL) ORDINANCE 1988

8.7 "The New South Wales Acts Application Ordinance 1985, ACT Ordinance No.25 of 1985, repealed over 100 New South Wales Acts in their application to the ACT, without listing the actual Acts. The result was that a Senator wishing to object to the repeal of a particular Act was obliged to move to disallow the repeal of all the Acts, including those in which the Senator had no interest.

- 8.8 "The Committee moved for disallowance of the Ordinance on 11 October 1985 and when the Senate rose on 28 November 1985 the Ordinance was deemed to have been disallowed. The disallowance was reported on in the Seventy-Sixth Report of the Committee, December 1985.
- 8.9 "The Imperial Acts (Substituted Provisions) Ordinance 1986, ACT Ordinance No.19 of 1986, was intended as the first of three stages in the reform of Imperial Acts which applied in the ACT. That Ordinance terminated the operations of 26 Imperial Acts in the ACT and substituted new provisions in their place.
- 8.10 "The Imperial Acts Application Ordinance 1986, ACT Ordinance No.93 of 1986, was the second stage of the reforms. It expressly preserved certain Imperial Acts, such as Magna Carta, the Petition of Right and the Bill of Rights.
- 8.11 "The Third stage would be the eventual Imperial Acts (Repeal) Ordinance, intended to repeal unnecessary and obsolete Imperial Acts in their application to the ACT.
- 8.12 "The Attorney-General, the Hon. Lionel Bowen MP, then advised the Committee that he had concluded it would not be possible to include a list of Acts to be repealed in the repealing legislation, as recommended by the Committee in its Seventy-Sixth Report. This was because a complete and accurate list could not be provided and because an incomplete list would be inconvenient and uncertain. Nevertheless, the Attorney-General emphasised that he wished to ensure that specific Acts could be taken out of the repeal process if either House wished. Accordingly, the Attorney-General suggested a meeting between the Committee and senior officials of his department. The Committee held an in camera hearing with these officials on 20 November 1986.

- 8.13 "Following the hearing the Chairman wrote to the Attorney-General on 26 November 1986, confirming that the concern of the Committee was that the Senate should have the same control over the executive unmaking of laws as it had over the executive making of laws. The Chairman then advised that following the hearing the Committee accepted the proposal that rather than list Acts in a repealing Schedule, the Attorney-General would undertake to re-enact any repealed Imperial Act which either House resolved should be preserved. The Chairman added that when the Ordinance was eventually tabled the Committee would report to the Senate that its form was acceptable because of this undertaking.
- 8.14 "The Imperial Acts (Repeal) Ordinance 1988, ACT Ordinance No.94 of 1988, was made on 15 December 1988 and tabled in the Senate on 28 February 1989. It repealed all Imperial Acts in force in the ACT except those expressly preserved by the 2 earlier related ordinances. No Act was expressly mentioned in the Ordinance, although an extensive list of such Acts was included in the Explanatory Statement. A passage in the Explanatory Statement also asserted that if either House resolved that an Imperial Act repealed by the Ordinance should be preserved, that Act would by Ordinance be restored to be in force as it was before the Ordinance. (This Ordinance differed from the disallowed New South Wales Acts Application Ordinance 1985 in that with the former the Imperial Acts affected were not known with certainty, while with the latter there was a limited and definitive number of Acts each of which was certain and known).
- 8.15 "The Committee examined the Ordinance at its Meetings of 2 March, 9 March and 6 April 1989. Because of the length of time involved in the making of the Ordinance and the subsequent passage of Acts with respect to an

ACT Legislative Assembly the Committee felt it may be more appropriate for the matter to be dealt with by that legislature. The Committee received advice, however, that the ACT Legislative Assembly did not have power to make laws with respect to some of the matters dealt with by the repealed Acts. After full discussion over a number of meetings of different alternatives, such as additional Commonwealth legislation or complementary Commonwealth and ACT legislation, the Committee resolved to accept the Ordinance and to report to the Senate that its form was acceptable due to the undertaking of the Attorney-General."

CHAPTER 9

CONFIRMATION OF THE POWER OF EITHER HOUSE OF PARLIAMENT IN RESPECT OF THE DISALLOWANCE OF DELEGATED LEGISLATION

9

9.1 During the reporting period a judgment of the Federal Court of Australia considered an important aspect of the power of either House of Parliament in respect of the disallowance of an instrument of delegated legislation.

9.2 Thomas Borthwick and Sons (Pacific) Ltd v Kerin and Others, (1989) 87 ALR 527

On 1 May 1986 the Senate disallowed Orders 100C, 100D and 111A of the Prescribed Goods (General) Orders, as contained in Prescribed Goods (General) Orders as amended (Amendment), being Export Control Orders No.7 of 1986 and made under the Export Control Act 1982.

9.3 These Orders were in the form of two paragraphs, Order 1 (which repealed Orders 100A and 111A) and Order 2 (which, among other things, inserted new Orders 100C, 100D and 111A). The form of Order 2 was the replacement of certain numbered existing pages in the loose-leaf principal Orders with other new pages. The new pages reproduced not only those provisions changed by amendment, but also provisions printed on the replaced pages to which no amendment was made.

9.4 The respondents claimed that the disallowance was invalid. It was clear that subsection 48(4) of the Acts Interpretation Act 1901 permits a House of the

Parliament to disallow the whole of any set of regulations or a single particular regulation which is part of a set of regulations. Subsection 48(4) does not, however, permit disallowance of only part of a single regulation. The word "regulation" (or, in this case, the word "orders") is used in s.48 to describe each of a serially numbered collocation of words into which subordinate legislation is divided by the legislature. Thus, as Export Control Orders No.7 consisted of only two Orders, subsection 48(4) only enabled a House to disallow either or both of those two Orders, not part or parts of either. Only the whole of Export Control Orders No.7 of 1986, or alternatively the whole of Order 2 of Export Control Orders No.7 of 1986, which actually inserted new Orders 100C, 100D, and 111A in the principal Orders, could be disallowed. The actions of the Senate, therefore, purported invalidly to disallow a part of an Order.

- 9.5 The judgment of the Federal Court was handed down by Jenkinson J. on 13 June 1989.
- 9.6 The Judge stated that the question was whether Export Control Orders No.7 of 1986 consisted, and consisted only, of two Orders, those numbered 1 and 2 in that instrument. If so, then subsection 48(4) enabled either House of Parliament to disallow either or both of those two Orders, not a part or parts of either or a part or parts of the legislative provisions made by either.
- 9.7 The Judge stated that nothing turned on the method of amendment by substitution of pages. The decision would be the same if Order 2 had in a series of paragraphs inserted the new Orders 100C, 100D and 111A.
- 9.8 "I am inclined to think, and I shall assume without deciding, that in s.48 the word "regulations" means one of the serially numbered collocations of words into

which subordinate legislation of the Governor-General is divided by that legislator, and that the word "regulations" means a plurality of those collocations. If that be so, then "order" and "orders" have corresponding meanings in the application of s.48 to orders made in the exercise of the power conferred by reg 3 of the Export Control (Orders) Regulations, and so each of Order 1 and Order 2 of the Export Control Orders No.7 of 1986 was susceptible of disallowance. The two orders, Order 1 and Order 2, were susceptible also of disallowance by a single resolution, there being disclosed no contrary intention to understanding the phrase "any of those regulations" as comprehending several regulations. It does not, however, follow that only Order 1 and Order 2 of the Export Control Orders No.7 of 1986 laid before the Senate were susceptible of disallowance. When the Minister made the Export Control Orders No.7 of 1986, in my opinion he "made", in the sense which that word naturally bears in s.48(1), each of the serially numbered collocations of words which Order 2 inserted into the Prescribed Goods (General) Orders as amended, namely Orders 100A, 100B, 100C, 100D and 111A. The language in which the Minister's power is expressed in reg 3 of the Export Control (Orders) Regulations, like the language in which the exercise of the power is expressed - "I, the Minister of State for Primary Industry, hereby make the following Orders..." - is apt to describe the bringing into existence of Orders 100A, 100B, 100C, 100D and 111A as it is apt to describe the bringing into existence of Orders 1 and 2. This was pointed out by Woodward J in his reasons for making interlocutory orders in the proceeding on 23 December 1988. I respectfully agree. So also, in my opinion, were the inserted orders as well as Orders 1 and 2 "laid before" the Senate when the Export Control Orders No.7 of 1986 were laid before that House. Each, or all or some, of those inserted orders were accordingly susceptible of disallowance, in my opinion.

9.9 "To that conclusion, which is as applicable to regulations as it is to the orders here in question, the objection was raised that such a construction of s.48(4) facilitates a dissective "remodelling" of legislation by one House, contrary to the legislative intention said to be discernible in s.48. But in my opinion the questions of policy, as to what the manner and degree ought to be of control by unicameral resolution of subordinate legislative activity, can be clearly resolved only by provisions which give direction for the mode of expression both of the subordinate legislation and the disallowing resolution. No direction is given as to the mode in which regulations shall be expressed. In particular no direction is given as to what may be done by way of amendment or of repeal or of addition in a single serially numbered collocation of words to which the word "regulations" is applied in common legal usage. That being so, it is not in my opinion possible to discern any legislative intention to confine the power of disallowance any more straitly than the noun "regulation", and participles "made" and "laid" in s.48(1), in their natural meanings require ...

9.10 "But I express no concluded opinion as to whether s.48(4) may on its proper construction authorise a resolution disallowing an exercise of a power to make regulations which exercise finds expression in a collocation of words not constituting the whole of a serially numbered collocation of words. When it is borne in mind that a power, conferred by an Act, to make regulations is commonly construed as including a power "to repeal, rescind, revoke, amend or vary" any regulation made (Acts Interpretation Act 1901, s.33(3)), there seems to me at least room for argument that in s.48(4) the word "regulation" means a grammatically complete expression of a single legislative provision by the Governor-General in exercise of the power conferred by an Act "to make regulations"."

9.11 The validity of the action of the Senate in disallowing a number of discrete, individual orders contained within a single, numbered paragraph of an instrument was thereby confirmed.

APPENDIX 1

CLASSIFICATION OF LEGISLATIVE INSTRUMENTS
UNDER THE HEADING 'MISCELLANEOUS' IN PARAGRAPH 1.9

Remuneration Tribunal Determinations	18
Determinations under <u>States Grants (Technical and Further Education Assistance) Act 1989</u>	12
Directions under <u>Higher Education Funding Act 1988</u>	7
Directions under <u>States Grants (Tertiary Education Assistance) Act 1984</u>	7
Determinations under <u>Aged or Disabled Persons Homes Act 1954</u>	6
Orders under <u>Navigation Act 1912</u>	5
Horticultural Orders	4
States Grants Petroleum Products Scheme Notices	3
Commonwealth Teaching Service Determinations	2
Determinations under <u>Social Security Act 1947</u>	2
Declarations under <u>Telecommunications (Interception) Act 1979</u>	2
Notices under <u>Customs Act 1901</u>	1
Determinations under <u>Liquified Petroleum Gas (Grants) Act 1980</u>	1

Determinations of Fees under <u>Quarantine Act 1908</u>	1
Proclamations under <u>Quarantine Act 1908</u>	1
Rifle Club (Firearms) Orders	1
Declarations under <u>Wildlife Protection</u> <u>(Regulation of Exports and Imports) Act 1982</u>	1

APPENDIX 2

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

<u>Instruments</u>	<u>Enactments</u>
regulations (statutory rules)	Various Acts, subject to Acts Interpretation Act 1901 SS.48,49
ordinances of territories	Ashmore and Cartier Islands Act 1933 S.6 Australian Antarctic Territory Act 1954 S.12 Christmas Island Act 1958 s.10 Cocos (Keeling) Islands Act 1955 S.13 Coral Sea Islands Act 1969 S.7 Heard Island and McDonald Islands Act 1953 S.11 Norfolk Island Act 1979 S.28A Seat of Government (Administration) Act 1910 S.12
regulations of territories	various Ordinances, subject to Acts of Territories as above various Ordinances, subject to Seat of Government (Administration) Act 1910
regulations (tax exemptions)	Australian Capital Territory Tax (Transfers of Marketable Securities) Act 1986 S.6
rules of court	Australian Capital Territory Supreme Court Act 1933 S.28 Family Law Act 1975 S.123 Federal Court of Australia Act 1976 S.59 Judiciary Act 1903 S.86 Commonwealth Electoral Act 1918 S.375
rules (bankruptcy proceedings)	Bankruptcy Act 1966 S.315
rules (records and inspection)	Bankruptcy Amendment Act 1980 S.172
rules (Tenure Appeal Board and Disciplinary Appeal Board)	Australian Broadcasting Corporation Act 1983 S.83

rules of procedure	Defence Force Discipline Act 1982 S.149
rules (punishments)	Defence Legislation Amendment Act 1984 S.36
rules (proceedings of the Compensation Board)	Overseas Telecommunications Act 1946 S.73
by-laws	Aboriginal Councils and Associations Act 1976 S.30 Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 SS.15,23 Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978 S.10 Australian National Airlines Act 1945 S.69 Australian National Railways Commission Act 1983 S.79 Australian Shipping Commission Amendment Act 1983 S.21 Defence Acts Amendment Act 1981 S.9 Federal Airports Corporation Act 1986 S.72 Postal Services Act 1975 S.115 Postal and Telecommunications Amendment Act (No.2) 1983 SS.27,28,29 Telecommunications Act 1975 S.111
orders under regulations	Environment Protection (Nuclear Codes) Act 1978 S.15 Meat Inspection Act 1983 S.36 Protection of the Sea (Discharge of Oil from Ships) Act 1981 S.22 Protection of the Sea (Powers of Intervention) Act 1981 S.24
orders (administrative arrangements)	Acts Interpretation Act 1901 S.19BA
orders (accounts, returns and and registration of premises)	Australian Horticultural Corporation Act 1987 S.122
orders (export licences and meat quotas)	Australian Meat and Live-stock Corporation Amendment Act 1982 S.16M(1)

orders (Broadcasting Tribunal)	Broadcasting Act 1942 S.17
orders (planning, technical services)	Broadcasting Act 1942 S.125E
orders (technical services, interference, examinations)	Broadcasting and Television Act (No.2) 1976 S.15
orders (technical requirement for aircraft, engines and equipment)	Civil Aviation Act 1988 S.98(5)
orders (application of duties)	Customs Tariff Act 1966 S.36
orders (control and administration of rifle ranges)	Defence Act 1903 S.123G
orders (Minister for Defence, restricted areas)	Defence (Special Undertakings) Act 1952 S.15
orders (administrative procedures)	Environment Protection (Impact of Proposals) Act 1974 S.7
orders (codes of practice, nuclear activities)	Environment Protection (Nuclear Codes) Act 1978 S.9
orders (special situations, (nuclear activities)	Environment Protection (Nuclear Codes) Act 1978 S.14
orders (handling of explosives)	Explosives Act 1961 S.16
orders (prescribed goods, inspection, seizure, trade descriptions, fees)	Export Control Act 1982 S.25
orders (instruments of the Attorney-General)	Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 S.5
orders (instruments of the the Attorney-General)	Foreign Proceedings (Excess of Jurisdiction) Act 1984 SS.15,17
orders (eligibility of immigrants and refugees)	Health Legislation Amendment Act 1983 S.8
orders (nomination and appointment of members)	Horticultural Research and Development Corporation Act 1987 S.81
orders (federal road safety standards)	Interstate Road Transport Act 1985 S.35
orders (production of standards inspection, official marks, fees)	Meat Inspection Act 1983 S.37

orders (ships and shipping, shipping law codes and tonnage)	Navigation Act 1912 SS.405PA,427
orders (navigation, stowage safety)	Navigation Amendment Act 1979 S.19
orders (grant of permits)	Nuclear Non-Proliferation (Safeguards) Act 1987 s.73
orders (under regulations and articles of international convention)	Protection of the Sea (Prevention of Pollution from Ships) Act 1983 S.34
orders (emergency prohibitions or restrictions on transmitters)	Radiocommunications Act 1983 S.41
emergency orders	Australian Capital Territory Electricity Supply Amendment Act 1982 S.6 Radiocommunications Act 1983 S.42
declarations (grants of mining interest)	Aboriginal Land Rights (Northern Territory) Act 1976 S.41
declarations by Minister of significant areas and objects	Aboriginal and Torres Strait Islanders Heritage (Interim Protection) Act 1984 S.15
declarations that the Approved Defence Projects Protection Act 1947 applies	Atomic Energy Act 1953 S.60
declarations (classification of machinery and components, specification, value and percentages)	Bounty (Metal Working Machines and Robots) Act 1985 SS.6,7,8
declarations (recognised education institutions)	Bounty and Subsidy Legislation 1987 S.10
declarations (rehabilitation and compensation)	Commonwealth Employees' Rehabilitation and Compensation Act 1988 S.121
declarations (Ministerial dispensation)	Crimes (Foreign Incursions and Recruitment) Act 1978 S.9
declarations (rebate of diesel fuel duty)	Customs and Excise Legislation Amendment Act (No.2) 1985 SS.9,19
declarations (rebate of oil duty)	Excise Act 1901 S.78B

declarations of international instruments	Human Rights Commission Act 1981 S.31
declarations of international instruments	Human Rights and Equal Opportunity Commission Act 1986 S.47
declarations (pharmaceutical benefits)	National Health Act 1953 S.85
declarations (nursing home care standards)	National Health Act 1953 S.45D
declarations (equipment, material and technology)	Nuclear Non-Proliferation (Safeguards) Act 1987 S.4
declarations (exemptions and terminations)	Nuclear Non-Proliferation (Safeguards) Act 1987 SS.4,11
declarations (State law enforcement authorities as agencies)	Telecommunications (Interception) (Amendment) Act 1987 S.21
declarations (operation of Act and acquisition outside Australia)	Trade Practices Act 1974 SS.50A(1),163A
declarations (imports and exports of wildlife)	Wildlife Protection (Regulation of Exports and Imports) Act 1982 S.9
determinations (approved home grants)	Aged or Disabled Persons Homes Act 1954 S.9
determinations (release of information)	Census and Statistics Amendment Act (No.2) 1981 S.10
determinations (terms and conditions of employment)	Commonwealth Teaching Service Act 1972 SS.20,23
determinations (remuneration, benefits and allowances)	Defence Act 1903 S.58C
interim determinations (conditions of employment)	Defence Amendment Act 1979 S.13
determinations (inconsistent regulations)	Defence Amendment Act 1979 S.14
determinations (training allowances)	Disability Services Act 1986 S.24
determinations (import parity pricing Bass Strait oil)	Excise Act 1901 S.6A

determinations (plans of management)	Fisheries Act 1952 S.7B
determinations (variation of table of services)	Health Insurance Amendment Act 1977 S.4
determinations (health services)	Health Legislation Amendment Act 1984 S.9
determinations (definition of "basic private" and "basic table")	Health Legislation Amendment Act 1985 S.13
determinations (acute cases)	Health Legislation Amendment Act (No.2) 1985 S.27
determinations (medical services outside Australia)	Health Legislation Amendment Act (No.2) 1985 S.40
determinations (Medical Participation Review Committee)	Health Legislation Amendment Act (No.2) 1985 S.40
determinations (Pathology Services)	Health Insurance Act 1973 SS.4A, 4BA, 4BB, 23DC, 23DF, 23DN
determinations (Pathology Services Advisory Committee)	Health Insurance Act 1973 S.78C
determinations (wholesale LPG prices)	Liquified Petroleum Gas (Grants) Amendment Act 1984 S.5
determinations (national standards)	Motor Vehicle Standards Act 1989 S.7
determinations (basic benefits for patients in nursing homes)	National Health Act 1953 S.47(2B)
determinations (basic table)	National Health Act 1953 S.4
determinations (pharmaceutical benefits)	National Health Act 1953 S.85
determinations (fees)	Quarantine Amendment Act 1984 SS.25, 86E
determinations (terms and conditions of employment)	Public Service Act 1922 S.82D
determinations (salaries and allowances)	Remuneration Tribunals Act 1973 SS.7,12DD

determinations (fees)	Seat of Government (Administration) Act 1910 S.12(9A)
determinations (claims for benefits, allowances, pensions)	Social Security Act 1947 S.168(4)
determinations (grants for operating expenses)	States Grants (Technical and Further Education Assistance) Act 1989 SS.9(1),10(4),11(1),12(1)
determinations (employees eligible for scheme)	Superannuation Act 1976 S.153AC
determinations (salaries)	Trade Representatives Act 1933 S.11A
directions (substitutes and limitations)	Customs Tariff Act 1982 S.25
directions (goods consisting of separate articles)	Customs Tariff Act 1982 S.26
directions (cost of goods value of labour and materials)	Customs Amendment Act 1983 S.5
directions (registered organisations)	Health Legislation Amendment Act (No.2) 1982 S.19
directions (Health Insurance Commission)	Health Legislation Amendment Act 1983 S.73
directions (functions and powers of Clerk)	High Court of Australia Act 1979 S.19
directions (grants for expenditure and operating purposes)	Higher Education Funding Act Act 1988 SS.18(3),20(1), 21(2),26(2),29(3),31(2), 32(3),100,101
directions of Minister	Parliament House Construction Authority Act 1979 S.9
directions (variations in recurrent expenditure)	States Grants (Tertiary Education Assistance) Act 1984 S.31
directions (variations in State entitlements, additional conditions)	States Grants (Tertiary Education Assistance) Act 1984 SS.36,42,46
notices (classification of machines)	Bounty (Computers) Act 1984 S.5

notices (diesel fuel rebate)	Customs Act 1901 S.164(1) Excise Act 1901 S.78A(SA) as amended by Customs and Excise Legislation Amendment Act (No.2) 1985
notices (application of Act to other countries)	Extradition (Commonwealth Countries) Act 1985 S.4
fisheries notices	Fisheries Act 1952 S.8
notices (acquisition of lands)	Lands Acquisition Act 1955 S.12
notices (Minister's determination of rates)	Nursing Homes Assistance Act 1974 S.36
zoning plans (marine parks)	Great Barrier Reef Marine Park Act 1975 S.33
plans of management	National Parks and Wildlife Conservation Act 1975 S.12
plans (spectrum plans)	Radiocommunications Act 1983 S.18
plans (frequency bands)	Radiocommunications Act 1983 S.19
principles (determination of quotas)	Dairy Industry Stabilization Act 1977 S.11A Dairy Industry Stabilization Amendment Act 1978 S.5
principles (administrative)	Disability Services Act 1986 S.5
principles (approval of private hospitals)	Health Legislation Amendment Act 1983 S.31
principles (approval of nursing homes)	Nursing Homes Assistance Act 1974 S.31A
principles (scale of fees)	National Health Amendment Act 1983 S.3
guide to assessment of rates of pension	Veterans' Entitlements Act 1986 S.29
guidelines (payment of Medicare benefits)	Health Insurance Amendment Act 1984 S.3
guidelines (allocation of fuel)	Liquid Fuel Emergency Act 1984 S.41
guidelines (transmitter licences)	Radiocommunications Act 1983 S.25

guidelines (claims for payment for ships, converting of ships, structural or equipment changes to ships)	Ships (Capital Grants) Act 1987 S.18(8)
standards (performance and compliance of devices)	Radiocommunications Act 1983 S.9
suspension of member of Commission	Aboriginal Development Commission Act 1980 S.17
suspension of member of statutory authority	Automotive Industry Authority Act 1984 S.21
suspension of member of statutory authority	Steel Industry Authority Act 1983 S.18
suspension of Commissioner or Second Commissioner	Taxation Laws Amendment Act 1984 S.295
amendments of schemes (grants to states, petroleum prices)	States Grants (Petroleum Products) Act 1965 S.7A
modifications or variations of Canberra Planning	Seat of Government (Administration) Act 1910 S.12A
instruments of revocation (guidelines for medical and hospital benefits plans)	National Health Act 1953 S.73E
instruments applying to relevant Acts	Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 S.4
proclamations (mining interests and operations)	Aboriginal Land Rights (Northern Territory) Act 1976 S.42
proclamations (property listing)	World Heritage Property Conservation Act 1983 S.15
rates of levy	Bass Strait Freight Adjustment Levy Amendment Act 1985 S.5

APPENDIX 3

ALPHABETICAL INDEX OF LEGISLATION AND
DELEGATED LEGISLATION WITH PARAGRAPH REFERENCES
1988-1989

A

A.C.T. Agents (Amendment) Ordinance 1989 (A.C.T. Ordinance No.4 of 1989)	3.4-3.5; 4.3; 5.4
A.C.T. Casino Control Ordinance 1988	4.14
A.C.T. Imperial Acts (Repeal) Ordinance 1988	8.2
A.C.T. Institute of Technical and Further Education (Amendment) Ordinance 1987 (A.C.T. Ordinance No.71 of 1987)	5.2; 7.15
A.C.T. Institute of Technical and Further Education (Amendment) Ordinance 1988 (A.C.T. Ordinance No.82 of 1988)	5.2; 7.16
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Administration and Probate (Amendment) Ordinance 1989 (A.C.T. Ordinance No.17 of 1989)	4.19
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Administrative Decisions (Judicial Review) Act 1977	2.30
Administrative Proposals Order under section 6 of the <u>Environment Protection (Impact of Proposals) Act 1974</u>	6.2
Agents (Amendment) Ordinance (No.2) 1988 (A.C.T. Ordinance No.47 of 1988)	4.2-4.3; 5.3
Air Force Regulations (Amendment) Statutory Rules 1988 No.129)	3.46; 5.5

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Air Navigation Regulations (Amendment) (Statutory Rules 1988 No.159)	4.6-4.7; 6.4
Air Navigation Regulations (Amendment) (Statutory Rules 1986 No.141)	5.7
Air Navigation (Charges) Regulations (Statutory Rules 1986 No.169)	5.9
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Regulations (Amendment)
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Canberra Sewerage and Water Supply
Regulations (Amendment)
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