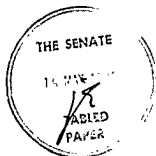




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*Mary Egan*

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**SENATE STANDING COMMITTEE ON  
REGULATIONS AND ORDINANCES**



**EIGHTY-EIGHTH REPORT**

**MAY 1991**

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**SENATE STANDING COMMITTEE ON  
REGULATIONS AND ORDINANCES**

**EIGHTY-EIGHTH REPORT**

**MAY 1991**

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**SENATE STANDING COMMITTEE ON  
REGULATIONS AND ORDINANCES**

**MEMBERS OF THE COMMITTEE**

**JULY 1989 - JUNE 1990**

Senator R. Collins (Chairman)<sup>1</sup>  
Senator M.A. Colston (Chairman)<sup>2,4</sup>  
Senator B.K. Bishop (Deputy Chairman)  
Senator J.P. Faulkner<sup>3</sup>  
Senator P.J. Giles  
Senator W. O'Chee<sup>2</sup>  
Senator K.C.L. Patterson  
Senator J.O. Stone<sup>5</sup>  
Senator A.O. Zakharov<sup>2</sup>

1. Discharged 8 May 1990
2. Appointed 11 May 1990
3. Discharged 11 May 1990
4. Elected Chairman 14 May 1990
5. Resigned 1 March 1990

## 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 1989 — JUNE 1990

#### Introduction

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

1.2 The Committee has six members, with a government Chairman and a non-government Deputy Chairman. The Committee is a technical legislative scrutiny committee, operating in a non-partisan fashion. It does not examine the policy merits of delegated legislation. In particular, it avoids party political issues. The success of the Committee in applying its legal and parliamentary principles to delegated legislation is such that in the almost six decades of its operation the Senate has never refused to support a recommendation of the Committee that an instrument should be disallowed because a Minister would not amend it.

1.3 The general requirements of personal rights and parliamentary proprieties under which the Committee operates are refined by the Standing Orders into four principles. These principles, which appear at the start of this and every other Report of the Committee, are to ensure that delegated legislation —

- (a) is in accordance with the statute;
- (b) does not trespass unduly on personal rights and liberties;
- (c) 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) does not contain matter more appropriate for parliamentary enactment.



1.4 The continuity and the adaptability of the principles under which the Committee operates are illustrated by the fact that those principles have been changed only once since 1932. This was in 1979, as a response to the establishment of the Administrative Appeals Tribunal, the first Commonwealth tribunal designed to review the merits of a comprehensive range of administrative decisions.

### **Membership Changes**

1.5 On 1 March 1990 Senator John Stone resigned from the Senate. On 8 May 1990 Senator Bob Collins, the Chairman, was discharged from the Committee after being appointed to the Ministry. On 11 May 1990 Senator John Faulkner was discharged and Senators Mal Colston, Bill O'Chee and Olive Zakharov appointed. On 14 May 1990 the Committee elected Senator Colston as Chairman.

### **Independent legal adviser**

1.6 Since 1945 the Committee has been advised by an independent legal adviser. The present legal adviser is Emeritus Professor Douglas Whalan of the Law Faculty of the Australian National University, who has held that position since 1982. The legal adviser prepares a report on each of the more than 1,000 instruments examined by the Committee each year, attends meetings when the Committee feels that his advice is required and prepares legal papers on aspects of delegated legislation.

### **Committee staff**

1.7 The Committee secretariat, like the other legislative scrutiny committee, the Standing Committee for the Scrutiny of Bills, has a smaller staff than other Senate committees engaged in continuous review of an activity of the executive branch. At present the secretariat is a Secretary, a research officer, a clerical officer and a typist.

1.8 The Committee appreciates the efforts of the above staff during the reporting period.

### **Statistics**

1.9 During the year the Committee maintained a high level of activity, even though this was the first reporting period during which responsibility for many A.C.T. ordinances, regulations and other instruments, previously scrutinised by the Committee, became the responsibility of the new A.C.T. legislature and government. The Committee met 14 times, during which it considered 41 reports from the legal adviser in respect of 1,258 separate instruments of delegated legislation. The legal adviser attended a number of meetings and gave oral advice.

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

**TABLE**

Statutory Rules	411
Public Service and Defence Determinations	373
Civil Aviation Orders	178
Education instruments	58
Primary Industries and Energy instruments	51
Health and Community Services instruments	38
Superannuation instruments	34
Territory instruments	27
Miscellaneous instruments (details of which are in Appendix 1)	88
	<hr/>
	1,258

**Ministerial Undertakings**

1.11 During the year the Committee received 47 undertakings from Ministers and others to amend legislation or to take other action to meet its concerns. Details of these undertakings are in Chapter 3.

**Other activities of the Committee**

1.12 On 31 May 1990 the Committee tabled its *Eighty-Sixth Report*, a Report on the work of the Committee on the previous reporting period, 1 July 1988 to 30 June 1989. As with other Annual Reports of the Committee, the Report summarised the activities of the Committee, its goals and role and described in detail the application of its principles to individual instruments.

1.13 At the conclusion of each sittings the Chair makes a major statement to the Senate on the work of the Committee during that Sittings. Such statements were made by Senator Bob Collins on 21 December 1989 and by Senator Mal Colston on 31 May 1990 (See Chapter 2).

1.14 Whenever the Committee gives notice of intention to move for disallowance of an instrument of delegated legislation it reports to the Senate on the concerns it has with the instrument, incorporating in Hansard a summary of its possible defects. Similarly, when the Committee completes its scrutiny of such instruments it incorporates its correspondence in Hansard.

1.15 On 24 October 1989 Senator Collins tabled the Report, Transcript of Proceedings and Conference Papers of the Second Conference of Australian Delegated Legislation Committees, hosted by the Committee in Parliament House, Canberra, from 25-28 April 1989 (see Chapter 6).

1.16 A delegation from the Committee attended the *Third Commonwealth Conference on Delegated Legislation*, held at Westminster from 20-23 November 1989 (see Chapter 7).

1.17 At the invitation of the Regulations Review Committee of the New Zealand Parliament the Committee commented on the *New Zealand Statutory Publications Bill 1989*, which included several innovative provisions (see Chapter 8).

1.18 At the invitation of the Administrative Review Council the Committee commented on the Terms of Reference of a major ARC project on Rule Making (see Chapter 9).

## CHAPTER 2

### ISSUES AND ROLES

2.1 At the end of sittings during the reporting year the Chair reported to the Senate on the work of the Committee. The following are extracts from those statements.

**Senator Collins, 21 December 1989, Senate Weekly Hansard p.4979.**

2.2 "The work of the Committee over the past sittings has been characterised by the continuing large numbers of instruments of delegated legislation which have come before the Committee for scrutiny.

2.3 "The volume and variety of these instruments illustrates the central position of delegated legislation in the administration of programs by the Executive. It is clear that these programs are able to operate *only through the capacity of the Executive to make laws to fill out details and make frequent changes, often technical in nature, to administrative requirements and procedures.* These Executive laws, of course, may be made only through the direct and express authority and permission of the Parliament expressed in a parent Act which confers such power.

2.4 "Such delegated legislation, however, is not made by the Executive without supervision or control by the Parliament. The Committee acts on behalf of the Senate to scrutinise each of these instruments to ensure compliance with its principles of personal rights and parliamentary propriety. The results of the Committee's scrutiny will be discussed in detail later in this statement, but in the meantime honourable Senators are reminded that these principles were adopted with the concurrence of the Senate. Each of the instruments scrutinised by the Committee is subject to the direct sanction of the Senate through the requirements of tabling and possible disallowance. There is thus not only a structural link between each parent or enabling Act and every instrument of delegated legislation made under its authority but a practical supervision of its making and contents. The Committee acts on behalf of the Senate not as a delegate vested with formal power, as power to disallow remains with the Senate itself, but to warn and alert the Senate to possible action that it may wish to take.

2.5 "The Committee deals with Ministers and others who make delegated legislation with the knowledge that it has received the full support of the Senate for every recommendation it has made. Ministers and administrators are also aware of this and it is therefore usually possible to resolve the concerns of the Committee without reference to the Senate itself. Nevertheless the sanction is always present to concentrate the minds of those with whom the Committee raises its concerns.

2.6 "The Committee considers each instrument of delegated legislation which comes before it in the light of the four principles which form what may conveniently be called its terms of reference. Each instrument which does not comply with these principles is discussed by the Committee and a letter is written by the Chairman to the Minister responsible for the delegated legislation with a request for an explanation of the apparent breach.

2.7 "During the present sittings the Committee detected at least prima facie defects in 77 out of the 708 instruments which came before it. These defects are now discussed under each of the four principles.

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

2.8 "This first principle directly concerns parliamentary propriety and is therefore an area where the Committee is particularly vigilant to ensure that this propriety is protected. The Committee's concerns here relate not only to whether a particular instrument of delegated legislation is within the powers granted to the executive by the provisions of the parent Act, but whether all legal, procedural and other formalities are correct. The Committee expressed concern about the following aspects of different instruments.

2.9 "Several instruments were so deficient in presentation that it was not possible to determine whether they had actually been made. The Committee asked for confirmation that this fundamental requirement had been satisfied. In another case the Committee was furnished with an unsigned instrument.

2.10 "Other instruments were deficient in citation references to parent Acts, to other Acts and to other delegated legislation. One determination had different references in its heading and its enacting words to the enabling provision of its parent Act. As the reference in the heading was incorrect and the reference in the body of the instrument itself was correct, the instrument was valid in this case. The Committee is careful to check references in delegated legislation to enabling provisions. While an incorrect reference may not be fatal to the validity of the instrument the Committee regards these as a breach of parliamentary propriety. In a similar case the Explanatory Memorandum cited both the parent Act and the principal regulations incorrectly. In another case two separate but related Statutory Rules each referred twice in their Explanatory Statement to a particular Act, once correctly and once incorrectly. The Explanatory Statement for a fresh set of regulations made to repeat the substance of previous regulations consequent upon the repeal and replacement of an Act cited those previous regulations incorrectly.

2.11 "The Committee scrutinised two determinations incorrectly numbered by reference to the number of an earlier instrument. The Committee expects care in the production of instruments and the Explanatory Statements which the Committee insists should accompany them. Anything less is a breach of parliamentary propriety. The Committee normally does not write to Ministers about minor typographical errors, unless it has other concerns with the instrument.

but it does raise more obvious errors. Thus the Committee wrote to the Minister about an Explanatory Statement which twice referred to "Torres Straight Islanders". Another Explanatory Statement referred to Parts of the parent Act by reference to arabic instead of roman numerals and omitted several Parts. This was raised by the Committee in the context of other concerns with the Explanatory Statement. The Committee did not expressly write to the Minister, however, even where the same misprint appeared 14 times in six pages.

2.12 "Incorporation in instruments of material "as amended from time to time" presents problems of validity. Under s. 49A of the *Acts Interpretation Act 1901* this drafting technique is generally only valid when regulations (defined as regulations or rules under an Act) incorporate the provisions of other regulations. There were several instances where the Committee questioned instruments which purported to effect such incorporation. The Committee is concerned not merely that an instrument should be valid under its parent Act, but also that it is valid under every other Act.

2.13 "A parent Act or other Act may require special conditions to be met before delegated legislation can be validly made. The Committee questioned several instruments in which this requirement was not merely not recited in the enacting words of the instrument itself, but was not mentioned in the Explanatory Statement. Such recital may not affect validity but its lack in appropriate cases is regarded as a breach of parliamentary propriety.

2.14 "One instrument was questioned by the Committee for possible invalidity due to uncertainty. The instrument required certain public officials to act "in accordance with policies of the Commonwealth". It is a breach of the first principle of the Committee, as well as its second principle, if the provisions of an instrument are so uncertain as to make compliance difficult.

2.15 "The Acts Interpretation Act provides that regulations, defined broadly to include most disallowable instruments, may not operate retrospectively where such operation would prejudice the rights or impose liabilities on any person other than the Commonwealth. The Committee has questioned a number of instruments on this ground, including two where possible prejudicial retrospectivity of one day was involved.

2.16 "In another case the heading of an instrument advised a purpose for an instrument which appeared unrelated to its substance. The Committee normally questions such cases of *apparent internal inconsistency*.

2.17 "One instrument purported to substitute some of its provisions "in lieu of" earlier provisions. The Committee raised the question whether this was intended to repeal the earlier provisions.

2.18 "The Committee also wrote to the Minister where loose-leaf amendment pages did not appear to follow on from each other.

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

2.19 "This is another area where the Committee is particularly vigilant. The Committee raised concerns about instruments which might offend against its second principle for the following reasons.

2.20 "The Committee questioned a provision that effectively prevented a person from challenging earlier evidence which may be used against that person in later proceedings. The Committee believes that delegated legislation should not deprive a person of the fundamental right to test evidence which may be adduced in proceedings to which they are a party.

2.21 "One instrument appeared to permit the Australian Federal Police to release details of convictions and reports of various investigations, some involving criminal offences, without any safeguards relating to the privacy of individuals concerned. The Committee considers that the right to privacy from inappropriate intrusions through executive law-making is a fundamental liberty. Similarly, another instrument seemed to allow Telecom to release personal details of its millions of subscribers without adequate safeguards.

2.22 "Another basic personal liberty is protection from entry by public officials upon private or business premises without proper authorisation. Delegated legislation may provide for entry upon premises by inspectors or other similar officials in the course of administering a program or scheme. The Committee in such cases, however, insists that the warrant or other authority is drafted so that maximum protection is given appropriate to the circumstances. Thus the Committee questioned a provision that a search warrant "may" be in a particular prescribed form, rather than "shall" be in that form. Warrants should also preferably be issued by judges or at least stipendiary magistrates, rather than by justices of the peace; and entry should be restricted to "reasonable" times between particular dates.

2.23 "A conviction for an offence is a serious matter and the Committee ensures personal rights are protected in relation to offence procedures. Thus the Committee questioned a provision under which a fine for breach of a provision could be paid by post, as an alternative to attending court where a higher fine could be imposed. The Committee was concerned that the notice sent out to offenders did not point out that payment by post would not only discharge liability but that no offence would be recorded as having been committed.

2.24 "Delegated legislation may also authorise officials to give directions to individuals or to require production of documents. In several cases the Committee was concerned that these be limited to reasonable directions or requirements.

2.25 "The Committee was concerned at two instruments which provided for strict liability offences. The Committee always questions such provisions and accepts justifications for them only in the most exceptional circumstances.

2.26 "Another area of immediate concern to the Committee is the right to practise a livelihood. A possible abrupt curtailment of existing rights to enter into certain types of contract affecting this right was questioned by the Committee.

2.27 "The Committee noted four instruments where forms which previously had been prescribed and which were thereby subject to tabling and disallowance were removed from the scrutiny of Parliament. In such cases the Committee is concerned that the new forms should as far as possible be approved by the Minister rather than by a public official, that the power to delegate approval of the forms should be limited, and that the instrument itself should set criteria for the contents of the forms. The public has a right to expect that mandatory forms are either directly subject to the scrutiny of Parliament or are made under close limits which are themselves subject to scrutiny. Similarly the public has a right to expect that as many instruments as possible are not only subject to tabling and disallowance but are subject to the full requirements of the Statutory Rules Publication Act 1903, and this matter was raised with the Minister in respect of two instruments.

2.28 "The Committee believes that the public has a right to expect standards of drafting, presentation and access in delegation legislation which are no less than such standards applicable to Acts. This will be elaborated later in this statement. In respect of these aspects, the Committee noted that 20 Explanatory Statements were sufficiently deficient to warrant comment, some in respect of more than one instrument. In addition, five separate types of instrument had no numbering or citation. Some of the deficiencies in Explanatory Statements were failure to mention that an amendment was being made to implement an undertaking given by a Minister to the Committee, confusing or no advice for the reasons the instrument was made, including no reasons for fees which were doubled and for exemptions from fees, and a correct heading whose contents related to another instrument.

2.29 "The Committee was concerned in respect of seven instruments which either directly incorporated other documents or which referred to them in such a way that it was necessary to consult them to understand the instrument. The Committee's concerns in these cases are that the public have convenient access to the documents.

- (c) Does the delegated legislation 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?

2.30 "This principle is partly a corollary of the Committee's concern with personal rights and liberties. Delegated legislation scrutinised by the Committee may grant discretions to Ministers, public officials or others to make decisions



which may have important personal or commercial effects upon individuals. The Committee examines all such cases to decide whether it is appropriate that these discretions should be subject to external review of their merits by the Administrative Appeals Tribunal.

2.31 "During the present sittings the Committee raised concerns in respect of 21 instruments which granted discretions to the executive with no apparent right of review either on the face of the document or explained in the Explanatory Statement.

2.32 "Some of these discretions were to exempt persons from the payment of fees or charges, others were to determine allowances, to deem standards to be satisfied and to remove names from a register. In some cases this discretion was vested in the Minister, in another with the Commissioner of the Australian Federal Police, with the secretary of the department, or with a statutory Council or statutory officer.

2.33 "In some cases the Committee was satisfied by advice that a power was to exempt for a brief period only, for safety reasons. In another it was satisfied that the discretion related to the allocation of finite resources, in a situation which the Administrative Review Council had accepted was not appropriate for review.

2.34 "The Committee looked closely at several instruments which not only did not provide for external review, but which apparently permitted delegation of the exercise of the discretion. Where there was no right of review of a discretion the Committee expected to see detailed criteria to limit and control its exercise. Similarly, in several cases where a parent Act provided for external review the Committee considered that review of discretions should also be provided for delegated legislation made under that Act. The Committee wrote to Ministers during the sittings confirming its long-established attitude that internal review is acceptable only in exceptional circumstances.

2.35 "Finally, the Committee wrote to Ministers in respect of Explanatory Statements which did not advise that rights of review of discretions in the instrument were available elsewhere, either through the parent Act, another Act or the principal regulations.

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

2.36 "This principle is the most subjective of the criteria in respect of which the Committee scrutinises delegated legislation. During the present sittings the Committee questioned several instruments on this ground

2.37 "The Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1989 No. 200, prolonged the existence of certain legislation which would otherwise be in breach of the Sex Discrimination Act 1984 by a further 12-month

period, to bring the total period of such exemptions, all effected by regulation, to six years. The Committee noted advice in the Explanatory Statement that the government will consider amendment of the parent Act and repeated its views, given on previous extensions of exemption by regulation, that legislation would be appropriate. The Committee suggested that an amending Bill should be introduced before the present regulations expired.

2.38 "An analysis of the instruments scrutinised by the Committee this sittings emphasises the continuing trend whereby only a minority of instruments are part of the Statutory Rules series. As with the previous sittings less than a third of instruments are made as Statutory Rules, which include all of the protections and safeguards required by the Statutory Rules Publication Act. A substantial majority of delegated legislation, therefore, is made without the discipline of these provisions and, although subject to tabling and possible disallowance in Parliament, lacks other requirements which are present in the Statutory Rules and which should be characteristic of any acceptable system of executive legislation.

2.39 "Statutory Rules mainly consist of Regulations by the Governor-General, although there are a few other categories, such as Rules of the various Commonwealth Courts, which are made by the judges of those Courts. The Statutory Rules provide a comprehensive, unified and definitive series of all such instruments made in the course of a calendar year.

2.40 "The citation of each of these is clear, with a short, precise title and a numerical sequence. The preamble or enacting words recite the authority under which each instrument is made, citing the parent Act or Acts and any other relevant provisions such as section 4 of the Acts Interpretation Act, under which regulations may be made even though the enabling provisions of the parent Act have not yet come into effect. The recital also expressly indicates that the Governor-General makes the regulations with the advice of the Federal Executive Council. If the parent Act imposes a condition on the making of regulations such as prior consultation with an industry group, then the existence of this condition is normally also recited. The Committee had written to the Attorney-General, the Hon. Lionel Bowen MP, on this aspect of the recitation. The Minister assured the committee that in all appropriate cases the Statutory Rules would expressly recite that such requirements had been satisfied. The Minister of State who sponsored the Regulations is also clearly indicated, with the date of making.

2.41 "Other procedural formalities of the Statutory Rules are also included on each instrument. The date of notification in the Commonwealth of Australia Gazette is set out, as is the complete history of the Regulations in question, from the date of first making to the most recent amendment.

2.42 "The body of each of the Statutory Rules is similarly well presented with a clear drafting style that emphasises the continuity and unity with the principal regulations of amending legislation. Printing and presentation of the Statutory Rules is of a high quality and is uniform in lay-out throughout the series. Each yearly series of Statutory Rules is bound in a permanent, hard copy volume.

2.43 "The position of the Committee with respect to the drafting, presentation and access of delegated legislation is quite clear. This is that delegated legislation should not be inferior in any of these aspects to Acts of the Parliament itself. *Delegated legislation is not legislation which is somehow lesser in status than an Act.* If Parliament has expressly provided in a parent Act for legislative instruments to be made by the executive then the executive should ensure the same high quality of these instruments as the Parliament does for Acts.

2.44 "*From the point of view of the citizen, rights and duties granted or imposed by delegated legislation are no less than those granted or imposed by an Act of Parliament.* Many instruments of delegated legislation, for example, provide for penalties of fines or imprisonment for breaches of offences created by those instruments. Other delegated legislation affects the ability of individuals to practise a livelihood or supervises important areas of economic activity. *From the point of view of the Parliament, delegated legislation is made, and can only be made, by the express authority of an Act.* The executive, when making delegated legislation, is acting as a surrogate of the Parliament. Delegated legislation which is any way inferior to Acts is a reflection upon Parliament itself.

2.45 "The Committee is pleased to report that the Statutory Rules series generally satisfies what it believes should be proper standards of drafting, presentation and access. It is unfortunate, therefore, that this series is now less than a third of the instruments of delegated legislation coming before the Committee. The position with respect to other instruments is *far less satisfactory.*

2.46 "The many defects of delegated legislation apart from the Statutory Rules may be briefly described. A noticeable characteristic here is the great variation in quality. Some instruments, such as the different territorial ordinances and regulations, are in some ways equal to the Statutory Rules. Others can only be classed as poor in all respects. Such delegated legislation may be categorised as in no way comparable in presentational aspects to an Act of Parliament.

2.47 "The worst instruments which come before the Committee have no numbering or citation at all, no heading or title apart from a lengthy and complex preamble and poor quality paper. The drafting of their provisions do not indicate whether the instrument is intended to stand alone, to amend another earlier instrument or to repeal other instruments which appear to deal with similar matters. Consolidations or reprints are not produced and ADP aspects are not addressed. Such defects would be bad enough in one series of delegated legislation.

The difficulties increase, however, when there is a multiplicity of these inferior series of delegated legislation dispersed throughout the various departments of state, government business enterprises and statutory authorities.

2.48 "The Committee is always concerned where there are particularly long delays in replies to correspondence or in the implementation of undertakings given by Ministers to the Committee to amend delegated legislation to meet its concerns. One option here, foreshadowed previously by the Committee, is to invite the *responsible officials to appear before the Committee to explain the reasons for the delay*. During this sittings the Committee invited two Ministers to nominate appropriately senior members of their departments to discuss long delays in dealing with Committee initiatives.

2.49 "In one case departmental officers had not prepared a reply for the consideration of the Minister more than six months after an inquiry from the Committee. This case raised particularly important questions of personal liberties which the Committee acknowledged would require careful consideration and possibly liaison with other departments. In its letter to the Minister inviting the *nomination of senior officials to meet with it in Parliament House, however, the Committee pointed out that correspondence from the Committee should be dealt with in departments with a priority that reflects the importance of a communication from a committee of the Parliament*.

2.50 "In the event departmental officers did not meet the Committee in this case. Following receipt of the invitation from the Committee a departmental officer contacted the Chairman, apologised for the delay and asked to be excused attendance if a reply was provided at once. The Chairman agreed to this, subject to the agreement of the other members.

2.51 "The other case involved delay in implementing undertakings given by the Minister to the Committee to amend provisions of delegated legislation seen as *defective by the Committee. There were two undertakings here, both given on 18 February 1988*. The first related to the provision of photographic identity cards for persons authorised to enter upon private premises. The second involved a right of review of the merits of a decision of the Minister that a person possessed sufficient qualifications to practise an occupation under the terms of the delegated legislation in question. After a number of reminder letters the Committee was advised on 8 June 1989 that in respect of one of the matters that the department was still giving consideration to the issues, and in respect of the other the concept had proved not to be as simple as originally thought.

2.52 "The Committee wrote to the Minister indicating that it was concerned that the department had been working on these matters for a year and a half with no apparent resolution. The Committee invited the Minister to nominate senior officials to *brief it on the work done by the department on these matters*. Four officials, two from the department and two from a portfolio statutory authority,

then met with the Committee in Parliament House. It is believed that this was the first time the Committee had invited departmental officials to explain delays in implementing Ministerial undertakings.

2.53 "It has been, of course, a continuing characteristic of the Committee over the almost 58 years of its existence that the policy merits of delegated legislation are not raised. The provisions of a particular instrument may be subject to political controversy in the community and in the Senate but the Committee restricts its consideration to issues of technical, legislative scrutiny. This has also been one of the great strengths of the Committee which, combined with its strictly bipartisan operation, has resulted in the trust and confidence which the Senate has always placed in the Committee. It is appropriate to point out here that the Senate has never failed to act on a recommendation of the Committee. There can be no higher tribute to the work of a committee.

2.54 "A corollary of the confidence of the Senate itself is the equal trust of the Committee by Ministers.

2.55 "There are, however, areas of policy where the Committee does raise concerns and requests advice and explanation from executive law makers. The policy of an instrument will always be questioned by the Committee if it infringes the Committee's principles relating to personal rights and parliamentary proprieties. The Committee does not accept that its concerns may be met by a reference to policy considerations without further elaboration. During the present Sittings, for example, one Minister wrote to the Committee in response to questions it had raised, that "high government policy" was the reason for an apparent deficiency in the instrument. This was, however, accompanied by additional details addressing the Committee's concerns. The Committee responded that it would not have been satisfied by the sole assertion of government policy. This will, of course, be a relevant factor for the Committee to take into account in its deliberations, but assertions of policy require separate and full justification. The alternative would reduce the effectiveness of the Committee.

2.56 "The legal or legislative policy of an instrument is also examined by the Committee. Delegated legislation may be made only with the express authority of an Act of Parliament and the Senate is concerned that the high standards it expects and requires of Acts are followed by executive law-makers. In this context, the Committee's concerns with the *Interpretation Ordinance 1989, Territory of Ashmore and Cartier Islands Ordinance No.3 of 1989*, related solely to the legislative policy of that instrument. The Committee wrote to the Minister expressly in relation to considerations of legislative policy, seeking an explanation of the policy which led to the form of the Ordinance. The Minister for the Arts, Tourism and Territories, the Hon. Clyde Holding MP, replied to the Committee setting out in considerable detail the policy behind the Ordinance.

2.57 "The Committee does not operate in a vacuum, unrelated to other legislative scrutiny committees or to other administrative law bodies, although for decades the Committee was the only such body operating in this area in Australia. In recent years, however, with the establishment of the Scrutiny of Bills Committee by the Senate, with legislative scrutiny Committees in the States and Territories and with specialist Commonwealth, and in some cases State, administrative law bodies, there has developed a close network of these organisations which meet together to exchange views and discuss matters of common concern.

2.58 "This network is not confined to Australia. The First Commonwealth Conference of Delegated Legislation Committees, held in Parliament House, Canberra, was an initiative of the Committee in 1980. The Committee also sent senior delegations to the Second Commonwealth Conference in Ottawa in 1983 and to the Third Commonwealth Conference in London, held in November this year. Honourable Senators will recall that on 7 December 1989 Senator Bishop, Deputy Chairman of the Committee, gave a personal report to the Senate on that Conference. Senator Bishop also indicated that the delegation will present a full report to the Senate, including a transcript of the proceedings of the Conference, when such proceedings become available.

2.59 "Another example of the international nature of the network of delegated legislation committees is a request from the Chairman of the Regulations Review Committee of the House of Representatives of New Zealand for comments on a Statutory Publications Bill. Requests for comments were also sent to the State and Territory delegated legislation committees. The Committee replied with detailed comment on the Bill, adding that the approach from New Zealand was an encouraging example of the value of the network of members, advisers and staff of the various committees.

2.60 "The Committee was also approached by Professor Cheryl Saunders, President of the Administrative Review Council, for its views on the terms of reference of a Council project on rule making. The Administrative Review Council is a peak organisation established to provide advice to government on all aspects of administrative review, and is one of the most important constituents of the Commonwealth administrative law system. Professor Saunders indicated in her letter that the Council attached great importance to consultation with the Committee during the course of its project, and that the Council would also be grateful for the opportunity to draw on the expertise of the Committee. The Committee believes that the confidence shown in the Committee by an organisation with the reputation and position of the Administrative Review Council is not merely a tribute to the Committee, but also to the Senate itself, which has always given support to the Committee's operations.

2.61 "At the conclusion of the last sittings the Committee reported how the responsibility for many of the ordinances, regulations and other instruments made in respect of the ACT has passed to the new legislature and government of the territory. It also reported that the Chairman wrote to the Speaker of the Legislative

Assembly for the ACT inviting a delegation of members from that legislature to meet with the Committee to discuss technical legislative scrutiny, and offering to assist the Legislative Assembly should it wish to establish a committee with similar functions.

2.62 "The Legislative Assembly for the ACT accepted this invitation and sent a delegation to a meeting of the Committee to observe its operation and methods. The Committee remains willing to assist the territorial legislature. Many of the *ordinances, which are now acts, which were transferred to the control of the territory, had been amended at the instigation of the Committee to safeguard personal rights or protect parliamentary propriety. Ministerial undertakings, not yet implemented when responsibility for the legislation in question passed to the territory legislature, had also been given to amend other provisions. Every mainland State and territory, with the exception of the very new ACT Legislative Assembly, has a legislative scrutiny committee which examines delegated legislation.*

2.63 "The Members of the Committee thank their colleagues in the Senate for their support of its bipartisan scrutiny of delegated legislation to protect personal liberties and parliamentary proprieties."

#### **Senator Colston, 31 May 1990, Senate Weekly Hansard p.1581.**

2.64 "The work of the Committee during these sittings has been unusual in that the number of sitting weeks has been much less due to the elections on 24 March 1990. The scrutiny which normally takes place over the whole of a normal sittings has been compressed into four weeks.

2.65 "The considerable volume of delegated legislation which came before the Committee in that short time illustrates its position in Australian public administration. Although the Parliament did not meet for more than four months, the parent Acts which authorise the Executive and others to make laws remained in operation, and delegated legislation was added to Commonwealth law at a rate scarcely less than during a normal sittings. It may be that the Executive could not function without delegated legislation, especially where flexibility and technical detail are elements of a particular scheme or a continuing program. Such law making by the Executive does not occur in a vacuum. The Regulations and Ordinances Committee acts as a surrogate of Parliament to scrutinise in minute detail every instrument of delegated legislation to ensure compliance with parliamentary propriety and personal rights.

2.66 "This scrutiny is procedurally possible because of the legislative requirement that all delegated legislation be tabled in both Houses and be liable to disallowance. In practice, however, it is only in the Senate where disallowance occurs. Such extreme action is rarely necessary, however, as a Minister will usually undertake to amend an offending instrument to meet the concerns of the Committee or will explain the provisions of the instrument to its satisfaction. The Senate has never failed to act on a recommendation of the Committee. This confidence of the Senate

*in its longest serving committee, with the exception of certain domestic committees, is due not to any procedural formalities. It is because the Committee has earned this respect due to the most notable characteristic of its operations. That is, that it operates in a non-partisan fashion, with no consideration to party loyalties or to the broad policy merits of individual instruments.*

2.67 *"This trust of the Senate is, in turn, reflected in the dealings of the Committee with Ministers. A communication from the Committee is recognised by Ministers and administrators as dealing with only technical legislative scrutiny which could not affect the efficiency of any properly conceived administrative scheme...*

2.68 *"Each instrument which comes before the Committee is scrutinised under the four principles which may be called its terms of reference. When a defect comes to its notice a letter is sent to the Minister responsible for making or administering the legislation in question, with a request to amend the offending provision or parent Act, to take administrative action or to provide further background explanation.*

2.69 *"In these sittings the Committee detected what appeared to be defects in 107 of the 550 instruments which it considered. These defects are set out below under each of the four principles. These principles are not mutually exclusive. For example, failure to provide proper review of an adverse exercise of a discretion is also a breach of personal rights.*

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

2.70 *"This principle includes the general reference of parliamentary propriety. This is not interpreted narrowly to mean only that an instrument is within the authority granted by Parliament to the Executive to make laws. Like all the principles of the Committee it is broad and evolutionary. The Committee was concerned at the following aspects of various instruments.*

2.71 *"It is a fundamental principle of parliamentary propriety that if delegated legislation authorises instruments of a legislative nature then provision should be made for parliamentary tabling and disallowance of those instruments. Such provisions may grant power to exempt from provisions or fees or to otherwise affect the operation of the principal instrument. If such power only applies to individual cases then a right of review of the merits of decisions may be appropriate. If, however, a group or class is affected then the resulting instrument may be legislative and should be subject to control by Parliament in the same way as the principal instrument. The Committee questioned a provision for Departmental by-laws with no tabling and disallowance requirements. Another case required a certificate of exemption from review procedures to be tabled but did not provide for disallowance. In another a definition of "drugs", which was an*



important element in the entire scheme effected by the delegated legislation, could be varied by a declaration in the Gazette with no tabling or disallowance. The power to exempt or vary may be a power equal to that of the original law maker.

2.72 "Parliamentary propriety is also affected if an instrument on its face is *unusual to the extent that its provisions may have been unintended*. In such cases the Explanatory Statement should fully describe the background. For example, one instrument which determined the remuneration of important office holders was followed a few days later by another, next in the series, which duplicated the same remuneration for the same office holders. In another case, one instrument made in 1990 was expressed to come into operation on the date of the coming into operation of a provision of a 1980 Act. One instrument determined allowances for every State of the United States in one part and in another omitted one State. In one instrument the Chairpersons of various Committees set up by regulation could appoint an acting member, whereas in most similar cases the Minister had this power. On a fighter note, the Committee was intrigued by a breakfast allowance for New York which was double that for lunch. This was made up for, however, by a dinner allowance which was six times that of lunch.

2.73 "The Committee always checks that particular procedural requirements for the making of delegated legislation have been met. In suitable cases this should be actually advised in a recital in the enacting words. In other cases it may be sufficient to include the advice in the Explanatory Statement. In one case the Minister was required to approve a project before determining an amount of money to be spent in respect of the project. The instrument itself, however, did not refer to an approval or even a project, but merely determined a sum of money.

2.74 "Following instructions from the Department of the Prime Minister and Cabinet and the Office of Parliamentary Counsel, Acts of Parliament now provide in effect for commencement at least within six months of Assent. This beneficial development has not been followed by all delegated legislation. The Committee questioned two instruments which provided for commencement on a date to be fixed by the Minister by notice in the Gazette, which could be any time in the future, or even not at all.

2.75 "The Committee is concerned that delegated legislation should be drafted and made to the same high standards as Acts of Parliament. The Committee questions instruments where these high standards are not met. One instrument was headed with a particular citation but referred to another citation in its body, a citation which was also used for a later instrument in the series. Some copies have been defective, with pages missing or with printing so poor that it could not be read. Others contained drafting and typographical errors serious enough to confuse users. One contained more than 100 handwritten alterations with no initials or other evidence of authentication. One instrument was described on its face as having been made on the advice of a Minister whose title was evidently transposed.

2.76 "In some cases Explanatory Statements were still not provided and in others there was no system of numbering or citation to assist the Parliament, the Committee and the public. Citation was poor or lacking completely even for instruments which in one case authorised the release of private information and in others authorised the payment of Commonwealth money. As discussed later in more detail, a number of Explanatory Statements did not explain reasons for increases in taxes and fees.

2.77 "One recent development has been a tendency to make different Statutory Rules with the same title, on the advice of the same Minister, amending the same principal Regulations made under the same parent Act, on the same day and with consecutive numbers in the series. There have been many such examples of this in the last six months. In the most extreme example of this trend, eight separate such Statutory Rules, all with the same title and other features described above, were made on the same day. The Committee has questioned the legislative policy which results in this apparent duplication of time and resources.

2.78 "Another characteristic of the sittings has been the number of Statutory Rules issued with a pink slip attached advising that the copy is to be substituted for an earlier, presumably defective, copy. Two such Statutory Rules were issued with a pink slip advising that the copies were to be substituted for two earlier, separate, defective, copies. This is a level of presentation which falls below that expected by the Committee. In almost every case the Explanatory Statement is silent on the reasons for the substitution, even where the different copies have different dates of making by the Governor-General. In other cases there is no apparent difference at all between the two, or three copies, with even typographical errors reproduced in the later versions. The Committee was particularly concerned that some of these defective copies may have been distributed to the public or other users. Again, there was no assurance on this point in the later Explanatory Statements.

2.79 "The substituted copies raise problems of invalidity. Several of the sets of Statutory Rules were expressly advised as having been made in reliance on amendments of the parent Act which received assent after the putative date of making of the first copy. There may also be invalidity questions under s.48A of the *Acts Interpretation Act 1901*, which provides that regulations are not to be remade while they are required to be tabled.

(b) Does the delegated legislation trespass unduly upon personal rights and liberties?

2.80 "The Committee is always particularly vigilant where personal rights are concerned. During the reporting period the Committee was concerned about the following matters.

2.81 "One area where the Committee always raises questions is where provision is made for the issue of search warrants without including the highest possible safeguards. The right of entry of public officials onto private premises, in many

cases by force if necessary, requires close scrutiny. One instrument provided for the Secretary of a Department to issue a warrant. This was a breach of the important safeguard that warrants should only be issued by a judicial officer. In addition, the Secretary could delegate this power to any person at all. Another instrument empowered the Minister or a delegate to issue warrants, although delegation was restricted to senior officers of the Department. Again, this was a breach of the principle and safeguard that in these matters a person should not be a judge in their own cause. Such issue was a serious matter, as the warrant in this case authorised the destruction of certain buildings and property found on the premises. The Committee questioned another case where a warrant could be issued by a magistrate, who is a judicial officer, or a Justice of the Peace, who is not, and where the prescribed form of the warrant was not mandatory. In another case the Committee was concerned at the lack of provision for a mandatory form of warrant even where issue was required by a judge.

2.82 "The Committee is always concerned at provisions creating strict liability offences, that is, where there may be no intention by a person to commit an offence, or even no knowledge that an offence exists. Such provisions have potential for breaches of personal liberties and the Committee accepts strict liability only in exceptional circumstances and after full explanation from the Minister. Strict liability provisions included a failure to provide information to a public official and a prohibition on discharging more than 20 persons from a tourist boat in certain areas, even apparently if the boat caught fire or was sinking. Another instance involved a prohibition on keeping certain hazardous objects on land or interfering with authorised public officials who entered upon that land. The Committee was especially concerned that in this latter case there was not even a provision requiring such authorised public officials to carry and produce proper photographic identity and evidence of their authority. In this context, the Committee normally insists that any public official with the power to enter private premises, whether by warrant or otherwise, carry the fullest identification.

2.83 "Another aspect of offence provisions that draws an immediate response from the Committee is any reversal of the normal onus of proof which, of course, lies with the prosecution. It is a principle of personal liberty that a person is innocent until proven guilty. The Committee will accept the reversal of this presumption only in special circumstances. This is the position even where, as in the one case considered during these sittings, there were a number of elements in the offence of which only one reversed the onus of proof.

2.84 "The Committee questions any provision which gives the executive unusual powers which affect personal rights. One instrument made extensive provision for a number of committees to advise the Minister on important policy issues. The Minister was empowered to appoint Committee members, who were required to be highly qualified and eminent. Although the maximum period of appointment was only three years the Minister could remove members for no reason and with no explanation. The usual provision in such cases restricts removal to proven misbehaviour or physical or mental incapacity.

2.85 "Wherever an instrument imposes, or provides for a change in the rate of taxes, charges or fees, the Committee requires the Explanatory Statement to set out the basis for the calculation of the rate, the change from the previous rate and the period during which the previous rate was in force. The level and calculation of taxes and charges directly affects personal liberties and any unusual or unexplained increase may breach those liberties. One instrument advised that an increase in charges from \$860 to \$2000 in little more than 12 months was "to meet costs". Other increases from 2.5 cents to 13.5 cents and an increase of 50% were not explained at all. On the other hand, a reduction of 40% in a levy was also unexplained.

2.86 "On a related issue the parent Act of one instrument provided that fees charged by the regulations must not amount to taxation. There was no such assurance in the Explanatory Statement. In addition, the Explanatory Statement stated that the fees had been set following advice from an Industry-Government Consultative Committee. The Committee asked whether such advice had actually been accepted.

2.87 "Delegated legislation may deprive people of their property in the course of provision for a scheme or program. In such cases the committee is vigilant to ensure that the compensation process is as fair as possible. In one case personal service of a notice for compensation purposes could be substituted by a notice in the Gazette and in a local newspaper. Failure by an affected person to take action then generally resulted in loss of a right to compensation. In addition, compensation was not payable where another person had been compensated in good faith in respect of the same matter. Such a provision prevented payment where the government may have acted in good faith, but negligently.

2.88 "Procedural requirements, as with the substituted service just mentioned, have the potential to affect personal rights. In one instrument, involving appeal rights, persons had to be "told" of the result of a hearing. In another, the Reserve Bank had to "tell" banks of an accounting day. It appeared that telling for these important matters could be merely oral. This contrasted with another instrument which required telling in writing.

2.89 "Expressions in delegated legislation should be precise and certain. Subjective and vague provisions could breach personal rights. Some such words and phrases questioned by the Committee include "adequately supervised", "keeps up to date", "successful business record", "distinguished talent", "has a national reputation" and "regional and global priorities of the Commonwealth". Failure to comply with such provisions could result in prosecution or the exclusion from personal and economic benefits. In such cases, of course, the Committee believes review of adverse decisions should be provided.

- (c) Does the delegated legislation 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?

2.90 "This principle complements the Committee's vigilance with respect to personal rights and liberties. Any discretion granted to a Minister or administrator to make a decision which could adversely affect an individual is scrutinised for appropriate external review of the merits of that decision.

2.91 "The Committee prefers independent external review of the merits of administrative decisions rather than internal review, even if such review is conducted by an independent specialist tribunal constituted expressly to consider such reviews. The Committee generally refuses to accept that final review should be conducted by a public official or a delegate of the Minister. In this context the Committee questioned provisions under which a specialist internal review tribunal could not make a final, binding decision but could only recommend in respect of an earlier decision, following a procedure where only the Commissioner of the Australian Federal Police was entitled to be represented. Review by the Minister personally is more acceptable as the Minister is, of course, liable to be examined in parliament on his or her actions. The Committee's preference is for review of executive discretions to be conducted by the Administrative Appeals Tribunal (AAT), which is an independent body of legal and technical experts able to place itself in the position of the original decision maker and to substitute its decision for the original decision made. The case for review is more pressing where a statutory decision maker is given authority to delegate that power.

2.92 "In some instruments external review was provided for some discretions but not for others. In these cases the Committee believes that if review is appropriate for some discretions which are part of a general scheme, then in the absence of compelling reasons to the contrary, review should be provided for all such discretions. In some situations it appears that absence of universal review rights in a particular scheme was a mere oversight, corrected as soon as the Committee drew attention to the defect. In other cases the Minister explained to the satisfaction of the Committee why external review was inappropriate. Such reasons included decisions to be made in emergencies.

2.93 "The Committee always looks carefully at discretions involving the rights of individuals to carry on a business or to practise a trade or profession. Such considerations are also part of the Committee's brief to safeguard personal liberties. Decisions affecting important commercial rights, such as the power to withdraw or cancel export entitlements, were raised, as was the failure to provide review of a decision not to waive or reduce fees, where such fees could amount to tens of thousands of dollars.

2.94 "In some cases the Minister may advise the Committee that a discretion relates to the allocation of a finite resource, where the overturn of an existing decision and its substitution by another will result in a chain of alterations to other decisions, to the detriment and confusion of those affected. The Administrative Review Council, the peak Commonwealth advisory body on all aspects of administrative review, has accepted that in such cases independent external review of the merits by a body such as the AAT with all the rights of the original decision maker, may not be appropriate. The Committee may accept such advice although where this is the case it will look with particular care to ensure safeguards exist with respect to the original decision, such as detailed and precise criteria to guide and control the decision maker.

2.95 "Such criteria should be provided wherever possible in all delegated legislation. In several cases, however, the effect of detailed criteria was diluted by the addition of an additional criterion such as "any other factors that are relevant" or "any other factors that the Commissioner considers relevant".

2.96 "The Committee is particularly concerned where discretions are provided but there is no mention of review rights either in the instrument itself or in the Explanatory Statement. Such rights may, of course, be provided by the parent Act, by the parent regulations in the case of certain Orders, by the principal regulations or by other instrument. Review rights should in such cases be set out in the Explanatory Statement.

2.97 "In one such case a statutory authority could determine payments out of a fund to holders of equity in the fund with no apparent review of any adverse decision in respect of classes of equity or even between individuals in a class. This was even though the Explanatory Statement advised that there was no automatic right of payment

2.98 "The Committee questioned a reference to "reasonable costs" with no indication of a right of review of an adverse decision, as it did with a discretion to determine whether costs were "excessive".

2.99 "Similarly, the Committee asked for further advice where, although AAT review was provided, the Minister could exclude this right by giving a certificate on public interest grounds, with provision only for tabling but not disallowance of the certificate. In this instance the Explanatory Statement advised that the right of review was included on the recommendation of the Administrative Review Council. There was no corresponding advice on whether the exclusion certificate had been recommended by the ARC

2.100 "Discretions may affect individual employees of the Commonwealth as well as commercial enterprises. The Committee asked for clarification of review rights of a discretion to reimburse interest where a public servant is transferred and subsequently takes out an unregulated mortgage in place of a regulated. Similar discretions in respect of a disability and other allowances were questioned

2.101 "In one set of regulations there were 11 separate decision makers expressly mentioned, including State and Territory Ministers and officials and, in two cases, non-government bodies.

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

2.102 "No instrument was questioned under this principle during the sittings. The Committee awaits, however, resolution of a matter which it first raised several years ago and which it has continued to press. The *Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1989 No. 200*, continued in operation for a further 12 month period, to 31 July 1990, certain legislation which would otherwise be in breach of the parent *Sex Discrimination Act 1984*. This was the sixth year in a row that these discriminatory laws had been prolonged by regulation. The Committee indicated to the Minister that amendment of the Act would be appropriate rather than further regulation.

2.103 "An analysis of the legislation which has come before the Committee this sittings emphasises a trend noticed before in these statements. This is that the Statutory Rules series, which is the best drafted and produced of all of the scores of series of delegated legislation, is a clear minority of the instruments which come before the Committee. As noted earlier during the survey on the principles of the Committee, the Statutory Rules series may have defects. It is, nevertheless, markedly superior to all other series, due largely to the safeguards imposed by the *Statutory Rules Publication Act 1903*. Much of the other delegated legislation lacks this protection and, although subject to tabling and possible disallowance, is not acceptable in quality of drafting or presentation.

2.104 "Another aspect of the legislation is encouraging. The considerable numbers of Civil Aviation Orders, Defence Determinations and Public Service Determinations all deal with matters which are particularly suited to executive law making. The Civil Aviation Orders deal with technical engineering requirements and the other Determinations largely with the minutiae of financial aspects of personnel administration. Other series of instruments, which are not equal in presentation to these series or, of course, to the Statutory Rules, sometimes address issues which are less obviously appropriate to delegated legislation.

2.105 "Despite the generally good response that the Committee receives from Ministers and departmental officials there are still areas of concern. When the Committee reconvened after a break of more than four months it found that some replies to correspondence were still outstanding. It is essential that officers address such queries with a priority that reflects the importance of the subject matter and the gravity of a communication from a Committee of the Parliament. On behalf of the Committee I have written reminders in respect of this correspondence, indicating that if necessary the Committee would repeat its initiative of last year

and invite senior departmental officials to appear before it to explain long delays. Such an option is also available to the Committee in respect of undertakings to amend legislation which remain outstanding.

2.106 "The members of the Committee are grateful to their colleagues in the Senate for their commitment to its non-partisan parliamentary ideals of protection of personal liberties and parliamentary proprieties."



## CHAPTER 3

### GUIDELINES ON THE APPLICATION OF THE PRINCIPLES OF THE COMMITTEE

#### Introduction

3.1 Standing Order 23(3) sets out the four Principles under which the Committee scrutinises every disallowable instrument of delegated legislation. These Principles are listed at the beginning of this and every other report of the Committee. With one exception, the Principles have been unchanged since the Committee was established in 1932. That exception was designed to recognise the establishment of the Administrative Appeals Tribunal, the first Commonwealth tribunal to provide merits review of administrative decisions across a substantial range of executive actions. Interpretation of the Principles is flexible and evolutionary, expanding over the last six decades to respond to greater numbers and types of delegated legislation. This Chapter illustrates where the Committee has detected possible defects in the legislation which has come before it during the year. Officers of Departments of State and statutory authorities may therefore find the Chapter useful as a check-list of matters about which the Committee has expressed its concern.

#### PRINCIPLE (A)

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

###### Failure to comply with provisions of the parent Act

3.2 This is one of the most fundamental aspects of Principle A. Such failure may render the instrument void. It is also a breach of parliamentary propriety to make an instrument the substance of which is unauthorised by the parent Act. In particular, the Committee always looks closely at delegated legislation which amends or affects the operation of Acts. The National Health Regulations (Amendment), Statutory Rules 1989 No.292, prescribed matters which materially altered the way the parent Act operated. These matters had important commercial and personal implications. The Committee carefully satisfied itself that the Regulations were in accordance with the parent Act.

3.3 The Therapeutic Goods Regulations, Statutory Rules 1990 No.88, prescribed fees for the purposes of the parent Act. That Act expressly provided that such fees must not amount to taxation. There was no advice either on the face of the

instrument, such as a recital, or in the Explanatory Statement, that the Regulations were in accordance with this provision of the parent Act. The Committee obtained this assurance from the Minister.

3.4 The Remuneration Tribunal Determination No.23 of 1988 was made on 20 December 1988 but not tabled until 17 October 1989. The parent Act required the Minister to table such Determinations within 15 sitting days of being received by the Minister from the Tribunal. The Determination is then subject to "disapproval" within 15 sitting days. Because of the length of time between making and tabling the Committee sought an assurance that the requirements of the parent Act had been met. The Minister gave this assurance, undertook to institute arrangements to ensure early tabling and accepted the suggestion of the Committee that review of the parent Act was appropriate.

#### **Failure to effect legislative intent**

3.5 Delegated legislation must not only comply with the parent Act, but also effect any intentions evident from the instrument itself or in the Explanatory Statement. The Seamen's Compensation Regulations (Amendment), Statutory Rules 1989 No.113, increased rates and amounts of compensation payable under the parent Act. The Regulations fixed the date of these increases as 13 June 1989. However, the Explanatory Statement advised in three separate places that the date of increase was intended to be 13 June 1988 and in a fourth that it was intended to be 13 December 1988. The Committee noted that if the intention was to backdate the increases then this was not effected by the legislation. The Minister advised that the dates in the Explanatory Statement were incorrect due to an oversight, but that all Executive Council documentation had been correct.

3.6 The Export Control (Fees) Orders as amended (Amendment), Export Control Orders No.6 of 1989, provided that the Order was to apply "in lieu of" earlier Orders. The Committee asked whether it was intended to repeal these earlier Orders and, if so, whether this intention was effected. The Minister advised that an intention to repeal was mentioned in Notes to an earlier amendment, which also used the expression "delete".

3.7 The Meat Inspection (General) Orders as amended (Amendment), Meat Inspection Orders No.3 of 1989, amended the principal Orders by replacing pages in a loose-leaf system. Such loose-leaf replacements assist users by providing a principal instrument which is always up to date. However, a drafting oversight in this case meant that the replacement pages did not follow on from each other. The Minister undertook to amend the Orders.

3.8 The Determination of Amount No.1989-90/8 under s.47(2)(b)(iii) of the National Health Act 1953 determined an amount for the purposes of the parent Act with effect "on and from 23 June 1989". The Committee noted that the earlier Determination of Amount No.1989-90/3 had determined in identical terms the same amount under the same provision with effect "on and from 22 June 1989".

The Minister advised that he had signed an unnumbered instrument on 30 April expressed to take effect from 22 June. However, legal advice was then obtained that the instrument could be invalid as beyond power. This instrument was not tabled and consequently under s.48(3) of the Acts Interpretation Act 1901 ceased to have effect. On 1 June the Minister then signed Determination No.1989-90/3 which was also expressed to take effect from 22 June. This instrument was tabled in both Houses within 15 sitting days but was incorrectly gazetted, the unnumbered first Determination of 30 April being gazetted in its place. It was then realised that Determination No.1989-90/3 was of no effect under s.48A of the Acts Interpretation Act, having been made less than seven days after the last day on which the 30 April instrument could have been tabled. A third instrument, Determination of Amount No.1989-90/8 was then made on 23 June with effect from that date. This was the earliest date upon which a fresh Determination could be made, given the instrument made on 1 June. This third instrument was correctly gazetted and tabled. Determination 1989-90/8 was intended to replace Determination No.1989-90/3.

3.9 The Determination No.4 of 1989 under s.10D(1)(b) of the *Aged or Disabled Persons Homes Act 1954* increased a rate of subsidy with effect from 3 May. However, an earlier Determination under the same provision had increased the same subsidy by the same amount from 2 May. The later Determination did not purport to revoke the earlier, which appeared to be valid. If it did, there would be prejudicial retrospectivity of one day. If it did not then the later instrument would be superfluous, as payments were already authorised from 2 May. The Minister advised that the earlier instrument was valid and that payments would be made from 2 May.

#### Uncertainty of expression or effect

3.10 As a corollary to the requirement that delegated legislation must effect its intended purpose, such instrument must also effect its purpose in certain and clear provisions. As well as a breach of parliamentary propriety, uncertain provisions affecting individuals are also a breach of personal rights. The Finance Regulations (Amendment), Statutory Rules 1989 No.221, provided that an officer could not approve a proposal to spend public money unless satisfied that the proposal is "in accordance with the policies of the Commonwealth". The Committee pointed out that it may not be certain what these policies are and that Commonwealth policies may change. The Minister advised the Committee that the provision was well understood both by approving officers and by members of the public affected by it. The Minister also noted that the same expression appeared in other Commonwealth legislation, such as s.6 of the *Defence Housing Authority Act 1987*. The Committee accepted this advice but replied that an Act was subject to all the procedural rigours of parliamentary passage whereas delegated legislation does not have that same publicity and prior scrutiny.

3.11 The Interpretation Ordinance 1989, Territory of Ashmore and Cartier Islands Ordinance No.3 of 1989, was drafted in such a way that it may have been difficult to ascertain the state of the law. The Ordinance incorporated provisions of three Commonwealth Acts, two A.C.T. Acts and one Northern Territory Act. These provisions were incorporated as amended from time to time in the future. The incorporated provisions, although complex, were referred to only by section numbers. Thus, section 8 of the Ordinance incorporated 19 sections of the *Commonwealth Crimes Act 1914* in this way. It also appeared that issues of the South Australian Government Gazette published before 1 January 1911 were relevant for the purposes of the Ordinance. The Committee considered that, as a matter of legislative policy, delegated legislation should be certain in its effect. The Minister advised that there were no resources to produce a discrete, stand alone, Territory specific Ordinance in a reasonable time. Although the incorporation method was complex and less easy to read it was immediately available and remained up to date.

3.12 The Lotteries Ordinance 1989, Territory of Christmas Island Ordinance No.4 of 1989, provided, among other things, for the control of such games as belankes, fan tan, pakapoo, punto banco, swy, thimble rig, two pairs and unders and overs. The Committee asked, in a light hearted fashion, whether these expressions should be defined in the Ordinance. The Minister advised that the terms were well understood in the Territory.

#### **Legislative instruments not subject to tabling and disallowance**

3.13 Delegated legislation may provide for Forms or other instruments which affect a class of persons in such a way that they themselves are legislative. In such cases the Committee first satisfies itself that this is not invalid subdelegation of the power to legislate. It then ensures that where appropriate such instruments are subject to tabling and disallowance.

3.14 The Customs Regulations (Amendment), Statutory Rules 1989 No.101, and the Excise Regulations (Amendment), Statutory Rules 1989 No.102, under the express authority of amendments of their parent Acts, removed Forms from the scrutiny of Parliament. The Forms, which were previously prescribed and therefore subject to the full procedural safeguards of the *Statutory Rules Publication Act 1903*, were now to be merely approved by the Comptroller. The Minister undertook to amend the parent Act to provide for tabling and disallowance of the Forms.

3.15 The Superannuation (Continuing Contributions for Benefits) Regulations (Amendment), Statutory Rules 1989 No.168, provided that the Minister could declare certain offices to be employment for the purposes of the parent Act. This appeared to be a legislative power which was not subject to tabling and disallowance. The Minister undertook to amend the parent Act.

3.16 The Motor Vehicle Standards Regulations, Statutory Rules 1989 No.202, provided for Forms to be approved by the Minister, although this power could be delegated to senior executive officers in the Department. There was no provision for parliamentary scrutiny of the Forms. The Minister undertook to amend the parent Act.

3.17 The Migration Regulations (Amendment), Statutory Rules 1989 No.267, provided for the Minister to exempt classes of persons from payment of fees. This power, referring to "classes", was almost certainly legislative, making a rule for a common group. There was no provision for parliamentary scrutiny. Where there is a power to exempt individuals from the payment of a fee, there should be AAT review of the exercise of this power in each individual case. Where the power is to exempt classes, then tabling and disallowance should be provided. The Minister advised that the present Regulations would shortly be replaced and that this legislative power would be removed. If this was not the case then he would have undertaken to amend the regulations.

3.18 The sole purpose of the Quarantine (Animals) Regulations (Amendment), Statutory Rules 1989 No.272, was to remove quarantine Forms from the Regulations and thus from the scrutiny of Parliament. The new Forms were not even to be approved by the Minister, but by an official. The Forms appeared to be mandatory. The case for parliamentary scrutiny of instruments such as Forms is stronger where they are mandatory or where they are not required to be approved personally by the Minister. The Committee looks closely at powers which may be delegated to a person whose actions are not personally answerable to the Parliament. The Minister advised that the information required by the Forms was set out by the parent Act. The Forms were required to comply with those provisions of the Act.

3.19 The Therapeutic Goods Regulations, Statutory Rules 1989 No.88, provided that the definition of "drugs" could be varied by the Secretary by notice in the Gazette. This power, which was legislative, was not subject to parliamentary scrutiny. The Minister advised that this provision duplicated a provision in the parent Act.

3.20 The efforts of the Committee to ensure tabling and possible disallowance in suitable cases is sometimes complemented by appropriate amendments of parent Acts at the instigation of the Standing Committee for the Scrutiny of Bills or otherwise. For example, the *Community Services and Health Legislation Amendment Act (No.2) 1989*, amended the principal *Health Insurance Act 1973* to omit the existing words in s.34, "The Minister may, by notice published in the Gazette, determine" and to substitute, "The Regulations may declare" Developments such as this are very positive. The Committee congratulates the Minister.

### **Appropriate levels of delegation**

3.21 Many instruments provide for powers to be delegated. The Committee examines these to ensure that the level of delegation is appropriate. It will be a breach of personal liberties if fundamental decisions affecting an individual may be delegated to a junior officer of the Department, or, as in some cases, to anyone at all. Also, power to delegate these powers to junior officers will indicate that AAT review should be provided. Unsuitable powers of delegation may also be a breach of parliamentary propriety. Under the **Therapeutic Goods Regulations, Statutory Rules 1990 No.88**, the Secretary was empowered to delegate all or any of his or her powers to any officer of the Department, no matter how junior. This included the power to waive unlimited amounts of Commonwealth revenue. The Minister undertook to amend the Regulations to restrict this delegation to senior executive officers. The Regulations also provided wide powers for authorised officers. The Committee recognised that given the nature of the duties of these officers that it was not appropriate for a formal amendment to restrict authorised officers to senior executive officers. However, the Committee obtained an assurance from the Minister that authorisations would be made to officers as senior as possible.

### **Validity of incorporated material**

3.22 Instruments of delegated legislation often incorporate other material so that such material itself becomes part of Commonwealth legislation. The Committee has no objection to this. For example, the **Determination of Motor Vehicle Standards Order No.1 of 1989**, incorporated 2,900 pages of **Australian Design Rules**. This was appropriate, as the Standards dealt with technical engineering matters. The Committee scrutinises all such incorporated material. Incorporation must also comply with S.49A of the **Acts Interpretation Act 1901** which provides, in effect, that only Commonwealth Acts and regulations may be incorporated as amended and in force from time to time. The **Fisheries Notices NPF 2, 3, 4 and 5** incorporated the definition of "prawns" in the Northern Prawn Fishery Management Plan "as amended and in force from time to time". The Committee sought advice on whether this incorporation was valid. The Minister advised that there was express provision in the parent Act for such incorporation. The Committee obtained a similar assurance in respect of the **Export Control (Fees) Orders as amended (Amendment), Export Control Orders No.6 of 1989**.

### **Appropriate limits on powers of officials**

3.23 Many instruments of delegated legislation provide for the approval of allowances or other similar payments. The Committee believes that such procedures should be controlled and directed by detailed, objective criteria. Naturally this is a protection for the individuals affected. Inappropriate procedures may also breach parliamentary propriety. **Overseas Defence Determination No.27 of 1989** "provided for an official at an overseas post to approve the payment of certain financial

assistance. There were neither criteria to guide the official in the exercise of this power nor an upper limit on the amount of the assistance. The Minister undertook to amend the instrument.

### **Defects in drafting**

3.24 The standard of drafting, presentation and access of delegated legislation should not be less than those of Acts of Parliament. Instruments should therefore conform to contemporary drafting practice. The A.C.T. *Self-Government (Consequential Provisions) Regulations (Amendment)*, *Statutory Rules 1989 Nos.298 and 299*, used the expressions "he" and "his" rather than "he or she" and "his or her". The Minister advised that the latter was the preferred Commonwealth drafting style.

3.25 The heading to *Determination No.4 of 1989 under s.10(1)(b) of the Aged or Disabled Persons Homes Act 1954* referred to s.10(1)(B). The *Therapeutic Goods Regulations, Statutory Rules 1990 No.88*, cited a *Northern Territory Act* by reference to a year, although the correct citation for such Acts does not include the year.

### **Provision of numbering and citation**

3.26 Every instrument of delegated legislation should be included in a convenient system of numbering and citation. Without such a system users may be confused. Numbering also recognises the importance of delegated instruments, which have a legal effect no less than that of Acts. At present there are more than 100 series of delegated legislation. The Committee believes that all instruments of delegated legislation should be subsumed within a single series, either the present *Statutory Rules* series or a new universal series. In the meantime, it is essential that each series be properly identified. Ministers agreed to provide numbering for future *Information Provision Incentive Rules under s.99AAA of the National Health Act 1953*, *Determinations of Average Annual Gross Value of Production of the Australian Fishing Industry, Approved Research Fund and Approved Moneys under ss.31(1), 32 and 33(2) of the Fishing Industry Research and Development Act 1987* and *Declarations under s.9(1) of the Wildlife Protection (Regulation of Exports and Imports) Act 1982*.

### **Inadequate explanatory material**

3.27 The Committee wrote to Ministers about numbers of defects regarding Explanatory Statements. *Declarations under s.9(1) of the Wildlife Protection (Regulation Exports and Imports) Act 1982*, *Principles 1989-90/22 and 23 made under ss.9AB(13) and s.10B(7) of the Aged or Disabled Persons Homes Act 1954*, *Principles 1989-90/24 and 25 made under ss.24(4) and 24(5) of the Aged or*

*Disabled Persons Homes Amendment Act 1989* and Remuneration Tribunal Determinations Nos.3, 4, and 5 of 1989 were not accompanied by Explanatory Statements. The Ministers undertook to provide these for future instruments.

3.28 The Determination No.4 of 1989 made under s.10D(1)(b) of the *Aged or Disabled Persons Homes Act 1954* was tabled with the wrong Explanatory Statement.

3.29 A number of Explanatory Statements were incomplete or incorrect. Explanatory Statements should be set out in the same way and provide the same information as Explanatory Memoranda for Bills. That is, an Explanatory Statement should be a stand alone document, which sets out the formal legislative authority under which an instrument was made, explains its policy background, gives reasons why it was made, describes its intended effect and summarises each of its provisions. The Explanatory Statement for Determination No.1989-90/3 under s.47(2)(b)(iii) of the *National Health Act 1953* advised that a formula for setting a contribution was a fixed percentage of another payment, when it was actually the complement of that percentage. That for the *Mutual Assistance in Criminal Matters (Republic of Vanuatu) Regulations, Statutory Rules 1989 No.215*, referred to the parts of the parent Act by arabic numbers rather than the correct roman numerals. It also advised that the Regulations applied specified Parts of the parent Act to Vanuatu, but it did not explain the purpose of those Parts. That for the *Family Law Regulations (Amendment), Statutory Rules 1989 No.235*, merely advised that the Regulations "prescribe the *Peace and Good Behaviour Act 1982* of the State of Queensland for the purposes of subsections 114AB(1) and (2) of the *Family Law Act 1975*." This assumed a detailed knowledge by users of both Acts. That for *Public Service Determination 1989/146* advised the wrong dates of effect of the Determination. The Committee does not usually raise minor drafting errors unless they affect the validity or substance of an instrument. However, the Committee wrote to the Minister about the Explanatory Statement for the *Remuneration Tribunal (Miscellaneous Provisions) Regulations (Amendment), Statutory Rules 1989 No.146*, which twice referred to "Torres Straight" Islanders. The Explanatory Statement for the *Telecom Australia Stock Regulations, Statutory Rules 1989 No.149*, advised that the previous regulations were the *Australian Telecommunications Corporation (Telecom Australia Stock) Regulations*, when they were the *Telecommunications (Telecom Australia Stock) Regulations*. In all these cases Ministers advised that future Explanatory Statements would meet the requirements of the Committee

3.30 If an instrument implements an undertaking given by a Minister to amend delegated legislation to meet the concerns of the Committee then this should be advised in the Explanatory Statement. This is usually done, but was omitted in the Explanatory Statements for the *Wool Marketing Regulations (Amendment), Statutory Rules 1989 No.110*, and the *Determination of Principles for the Approval of Premises as an Accredited Pathology Laboratory APL/6 under the Health Insurance Act 1973*. The Ministers advised that in future such cases this would be done.



3.31 Any material which should be read together with an instrument is also scrutinised by the Committee. The Explanatory Statements for Determination of Particulars under s.23DC(2) of the *Health Insurance Act 1973 of Form APP4-A* and Determination of Particulars under s.23 DF(2) of the *Health Insurance Act 1973 of Form APA4-A*, advised that separate Important Notes should be read before the Forms were completed. The Committee obtained and examined copies of the Important Notes.

## **PRINCIPLE (B)**

### **DOES DELEGATED LEGISLATION TRESPASS UNDULY ON PERSONAL RIGHTS AND LIBERTIES?**

#### **Protection of right to earn a livelihood**

3.32 The Committee is particularly vigilant where delegated legislation may restrict or affect adversely the right of a person to carry on a trade or business. In such cases the Committee examines closely such provisions to ensure that they are fair in all the circumstances.

3.33 The Information Provision Incentive Payment Rules under s.99AAA of the *National Health Act 1953* effected a scheme, in operation for a limited time, to coordinate information software to expedite payments to pharmacists. The Committee accepted advice from the Minister that any future scheme would provide for AAT review of adverse departmental decisions. However, the Committee also obtained an assurance from the Minister that no pharmacist had suffered financial loss due to the operation of the present scheme.

3.34 The Finance Regulations (Amendment), Statutory Rules 1989 No.221, provided that proposals to spend public moneys could not be approved unless they were "in accordance with the policies of the Commonwealth". The Committee considered that this provision might cause difficulties for government suppliers or for those who entered into contracts with the Commonwealth. The Minister advised that in the context of government purchases that these policies were well known and should not interfere with the business of suppliers.

3.35 The National Health Regulations (Amendment), Statutory Rules 1989 No.292, prevented the payment of benefits from insurance contracts based upon periods of hospitalisation. The Committee sought advice on whether insurance companies would be deprived of a market and whether the industry was given sufficient notice to restructure its products and offer alternative policies. The Minister advised that the industry could change from offering products based on periods of hospitalisation to those based on periods of certified disability or incapacity.

### **Right to privacy**

3.36 *The Committee looks closely at any instrument which may affect the right to privacy. The Committee insists that any possible breach be remedied or fully explained.*

3.37 *The Australian Federal Police Regulations (Amendment), Statutory Rules 1989 No.139, provided for services that may be supplied by the AFP at the request of, or by agreement with, a member of the public or body corporate. These services included reporting on convictions, fingerprints, harassment, violence or threats of violence and providing copies of road accident reports, industrial accident reports and medical reports. This appeared to be very sensitive information which could affect privacy. The regulations did not provide any apparent criteria or safeguards. The Minister explained that the Commissioner was bound by the Information Privacy Principles in the Privacy Act 1988. The regulations did not grant any new rights to information, but only related to cases where services could already be provided. Following a request for further information the Minister advised that following consultation with the Privacy Commissioner the future release of information would be the subject of an AFP Administrative Circular. The Committee also obtained an assurance that under the patient Act the Minister could ask the Commissioner for a report in respect of the administration of these provisions. In addition the Committee noted that although the regulations were made on 28 June the Administrative Circular was not ready at the end of October, by which time the popular press had commented upon them. It may have been appropriate to prepare the Circular for issue at the same time the regulations were made. The Circular was issued in November and provided that all AFP members were to familiarise themselves with the Privacy Act and to ensure that its requirements were met.*

3.38 *The Australian Telecommunications Corporation Regulations, Statutory Rules 1989 No.150, provided for circumstances where Telecom may disclose personal information. Most of these appeared reasonable, such as an emergency, or as required by law. However, in one case such information, including unlisted telephone numbers and addresses, could be released where the person was reasonably likely to be aware that information of that kind is usually disclosed in the circumstances. The Committee was concerned at the open ended nature of this discretion. The Minister advised that Telecom's policies and procedures for release of personal information were being reviewed in the light of the Privacy Act and after full consultation with the Privacy Commissioner. In the meantime the wording of the provision raised by the Committee had derived from Information Privacy Principle 11(1)(a).*

3.39 *The Therapeutic Goods Regulations, Statutory Rules 1990 No.88, provided that licence holders must give to the Secretary information about certain persons. There was no requirement that the information should be reasonably connected with the purposes of the legislation. This was a possible breach of privacy. The Minister agreed to amend the regulations.*

## **Rights of entry, search and seizure**

3.40 The Committee scrutinises provisions which grant power to public officials to enter private premises to ensure that adequate safeguards exist for the exercise of such powers.

3.41 The Wheat Industry Fund Levy Collection Regulations, Statutory Rules 1989 No.172, provided for a warrant to enter premises, which "may" be in the form of a Schedule. The Committee believes that it is usually appropriate for such warrants to be in a mandatory form. This is particularly so where, as in this case, warrants may be issued not only by Magistrates, but also by Justices of the Peace, who are not judicial officers. Warrants to enter private premises, in this case by force, have such a serious impact upon personal rights that normally their issue should be restricted to judicial officers such as Judges and Magistrates. In addition, the form of the warrant provided for entry "at any time", with no requirement that entry be restricted to reasonable hours. The Committee noted that the form of search warrant in the recent Horticultural Export Charge (Nursery Products) Regulations, Statutory Rules 1989 No.251, was mandatory. The Minister advised that Justices of the Peace could issue warrants because they may be required for remote areas where a Magistrate may not be available. However, the Minister would take the Committee's concerns into account when proposed omnibus legislation was being drafted to combine much of the levy collection legislation, including wheat, into a single omnibus act with appropriate regulations.

3.42 The *Latteries Ordinance 1989, Territory of Christmas Island Ordinance No.4 of 1989*, provided for a power of entry without a warrant and with no criteria limiting entry to reasonable hours. The Minister undertook to amend the Ordinance to provide that entry must be reasonable.

## **Strict liability offences**

3.43 The Committee requires detailed explanation of exceptional circumstances before it will accept strict liability offences. The Defence Force Regulations (Amendment), Statutory Rules 1989 No.290, provided a penalty of \$500 or three months imprisonment or both for disturbing or interfering with the operation of certain defence equipment, except with the permission of a chief of staff or an officer using the equipment. There was no requirement that the equipment must be knowingly or wilfully disturbed. The Minister undertook to amend the Regulations.

## **Rights of parents and children**

3.44 In some cases the Committee may decide that some aspects of personal rights are such that in the circumstances it is inappropriate to approach the Minister. The Human Rights and Equal Opportunity Commission Regulations, Statutory Rules 1989 No.407, provided that "sexual preference" was an additional ground of discrimination for the purposes of the parent *Human Rights and Equal*

*Opportunity Commission Act 1986.* Senator Brian Harradine put the case to the Committee of a homosexual schoolteacher who freely discusses his lifestyle and attitudes with students, being transferred against his will to an administrative position within the school.

3.45 Senator Harradine obtained advice from the Legislative Research Service that such action would not constitute discrimination in a religious school but probably would in a State school, unless it could be argued that the teacher was moved because the inherent requirements of the job made him unsuitable, given his conduct. Senator Harradine believed that whether the action of such a schoolteacher is contrary to the inherent requirements of his job is a question of public policy affecting the rights of State school children and their parents. Senator Harradine believed that the instrument and the Explanatory Statement should be amended to make clear whether the example he gave came within the provisions of the Regulations.

3.46 After detailed discussion of Senator Harradine's example the Committee decided not to write to the Minister. The Committee considered that the example raised important issues but that it was possible for individuals to differ on their attitudes to these issues. This being the case, such matters should be left to what Senator Harradine referred to as public policy. The merits of public policy issues are not raised by the Committee, which restricts its activities to technical legislative scrutiny.

### **Rights of classes of people**

3.47 The Committee does not restrict its scrutiny to the rights of individuals. It also examines cases where the rights of classes of individuals may be adversely affected. The Public Service Regulations (Amendment), Statutory Rules 1989 No.144, changed the representation upon the Joint Council established by the principal Regulations by removing the right of the Australian Council of Professional Associations to nominate a representative to the Council. There was no indication in the Explanatory Statement of the reason for the change, which on its face deprived the ACPA and its members of a substantial right. The Minister advised that following the recent affiliation of the Australian Professional Engineers Association with the Australian Council of Trade Unions membership of the organisations which are affiliated only with the ACPA now comprises less than one per cent of persons employed in the Australian Public Service. Therefore, it was considered that the ACPA no longer warranted its position on the Joint Council.

### **Right to a clear explanation of personal rights and liabilities**

3.48 Any provisions which grant rights or impose liabilities or duties should be clear in their effect. Unclear provisions are a breach of parliamentary propriety. If they affect individuals they are also a breach of personal rights. A Form prescribed by the Australian Capital Territory (Electoral) Regulations (Amendment),

**Statutory Rules 1989 No.186**, advised electors who failed to vote at a general election that they could dispose of the matter by paying \$20 to the Electoral Commissioner. The Form also advised that an elector could dispose of the matter by having the matter dealt with by the Magistrates Court, where the maximum penalty was \$50 plus court costs. However, the Form did not advise electors that the Regulations provided that should they elect to pay the \$20 then this not only discharges any liability and ensures that no further proceedings can be brought but also that the elector is not to be regarded as having been convicted of an offence. The Minister undertook to amend the Form.

3.49 Both the Determination of Particulars under s.23DC(2) of Form No.APP4-A and the Determination of Particulars under s.23DF(2) of Form No.APA4-A, under the *Health Insurance Act 1973*, referred in their Notes to separate Important Notes. The Committee examined these Important Notes to ensure that all personal rights provided in the parent Act and the instruments themselves were explained to users of the Forms.

3.50 The National Health Regulations (Amendment), **Statutory Rules 1989 No.292**, effectively prevented the payment of benefits under insurance policies based on periods of hospitalisation. The Committee was concerned with the effect of this prohibition on holders of such policies which had not yet expired. The Committee sought an assurance that these policies had not suddenly become void with policy holders unaware that they lacked this cover. The Minister advised that existing policies were not affected and would continue until expiry.

#### **Reasonableness of penalties, fees and charges**

3.51 The Committee questions any penalty, fee or charge which appears unreasonably high. It is a breach of personal rights if fees and charges are sharply increased, or exemptions are granted, without explanation in the Explanatory Statement of proper reasons for the changes. The Export Inspection (Quantity Charge) Regulations (Amendment), **Statutory Rules 1989 No.136**, more than doubled certain charges and exempted several categories of agricultural produce from charges, without any such explanation. The Minister advised that the basis for the increase was 60 per cent cost recovery. The Minister also explained the reasons for the exemptions.

#### **Reasonableness of mandatory directions**

3.52 Some instruments provide that government officials or other persons may give directions to individuals. Sometimes these directions may be merely oral, yet failure to comply may be punished by a fine or imprisonment. In other cases failure to comply may result in the loss of commercial benefits. The Committee insists that such provisions be expressly limited by a reasonableness requirement. The Lotteries Ordinance 1989, Territory of Christmas Island Ordinance No.4 of 1989, provided that certain documents must be produced on demand from auditors, who

need not be government officials, with a penalty for a natural person of \$3,000 or six months imprisonment or both and \$15,000 for a body corporate. Part of the provision included a reasonability requirement but another important part did not. Another provision empowered an authorised person to give directions, which may be oral, the contravention of which carried a penalty of \$6,000 or imprisonment for 12 months, or both. There was no requirement that the directions be reasonable. The Minister undertook to amend the Ordinance.

3.53 *The Therapeutic Goods Regulations, Statutory Rules 1990 No.88*, provided that the Secretary may fix a time within which a certain transfer was required to be made, with a penalty of \$1,000. There was no provision that the time fixed must be reasonable. The Minister undertook to amend the Regulations.

### **Protection of personal reputation**

3.54 The Committee not only ensures that individuals are protected against direct and immediate breaches of personal rights such as unfair searches, offences, fees or directions. It also protects such things as the right to privacy and the right to preserve one's personal reputation. The *Therapeutic Goods Regulations, Statutory Rules 1990 No.88*, set up a number of committees to advise the Minister on matters with important personal rights and commercial implications. Members of these committees were appointed by the Minister for terms of up to three years, which was usual. However, the Regulations expressly provided that the Minister could remove a member from a committee at any time. There was no requirement that removal should be on specified grounds or that the Minister should give reasons for a summary dismissal. The Committee noted that such a procedure would scarcely contribute to a high standard of independent advice and that the professional reputations of those thus removed could suffer. The Minister undertook to amend the Regulations to provide that the Minister may remove committee members only for proven misbehaviour or physical or mental incapacity.

### **PRINCIPLE (C)**

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

##### **Review of decisions with commercial and livelihood implications**

3.55 Many instruments of delegated legislation provide for Ministers or officials to exercise discretions which may have commercial consequences for individuals earning their living, or which may directly affect the ability to practise a trade or profession. The Committee usually insists that such discretions be subject to *independent, external review of their merits* by the AAT. The *Motor Vehicle Standards Regulations, Statutory Rules 1989 No.202*, and the *Determination of Motor Vehicle Standards, Order No.2 of 1989*, both dealt with aspects of

mandatory standards for certain motor vehicles. The former instrument empowered the Minister to exercise discretions which could be commercially valuable. Although criteria were provided and the parent Act provided for AAT review in some cases, it was not certain whether this right extended to decisions under the Regulations. Under the latter instrument the Minister could deem that a vehicle or component complied with the national standard. The Minister undertook to provide that all decisions under both instruments would be made subject to AAT review.

3.56 Under the *Lotteries Ordinance 1989, Territory of Christmas Island Ordinance No.4 of 1989*, the Minister could grant or refuse approval of lotteries and betting schemes subject to any conditions or requirements. Only broad criteria were provided in respect of the power and there was no right of review of these presumably lucrative commercial concessions. In addition, the Minister could delegate this power to any person at all. The Minister undertook to amend the instrument to provide detailed criteria and to restrict delegation to senior executive officers.

3.57 The *Agricultural and Veterinary Chemicals Regulations, Statutory Rules 1989 No.165*, provided that a statutory authority could waive fees which in some cases were as high as \$20,000. The Minister pointed out that criteria were provided and that the power was exercisable only in limited circumstances. Nevertheless, the parent Act would be reviewed to see if AAT review was suitable. Similarly, the *Therapeutic Goods Regulations, Statutory Rules 1990 No.88*, provided for the Secretary to waive fees which in one case were \$34,700 and in another \$23,000. The Minister undertook to amend the instrument to provide for AAT review.

3.58 The *Principles 1989-90/22 and 23* under s.9AB(13) and s.10B(7) of the *Aged or Disabled Persons Homes Act 1954* provided criteria for the exercise of discretions in relation to building projects. However, the criteria were imprecise and subjective, referring to work being "substantially completed", "substantial funds" being spent and work being completed "within a reasonable period". There was no right of review of discretions exercised under these broad criteria. The Minister advised that imprecision was deliberate and unavoidable because of the nature of project management processes. The instruments only relate to approval in principle. There are more detailed provisions for final approval. Flexibility is needed for projects of this nature, otherwise meritorious proposals might be excluded. With respect to review rights, the ARC had considered similar provisions and advised that AAT review was unsuitable because the discretions involved disbursement of a finite amount of money.

3.59 The *Meat Inspection (General) Orders as amended (Amendment), Meat Inspection Orders No.3 of 1989*, also provided subjective criteria for the exercise of commercially valuable discretions. Persons could be exempted from the Orders under "exceptional circumstances" or "special commercial circumstances". There was no indication of review in either the body of the instrument or in the Explanatory Statement. The Minister advised that the principal Orders provided for AAT review. In such cases, where an amending instrument provides for a discretion

which is reviewable under provisions of the parent Act or principal instrument, the Committee believes that advice of a right of review should be included in a Note in the body of the amending instrument.

3.60 The Excise Regulations (Amendment), Statutory Rules 1989 No.307, provided for the refund of excise duty where an applicant established, to the satisfaction of the Comptroller, that goods had been destroyed or otherwise rendered incapable of being resold. There were no criteria and no apparent review rights. The Minister undertook to amend the Regulations to provide for a refund if destruction was carried out under official supervision. This would remove any discretion. Applicants would be exempted from the usual supervision fee.

3.61 The National Health (Nursing Home Respite Care) Regulations, Statutory Rules 1989 No.173, provided for a number of commercially valuable discretions relating to the number of respite care patients in private nursing homes. The Minister advised that ARC advice was that some of the discretions were not suitable for AAT review, as the merits of one claim involved an assessment of the relative merits of all applicants who seek a proportion of a limited resource. However, the Minister undertook to provide criteria for the exercise of the other discretions.

3.62 The Health Insurance (Vocational Registration of GPs) Regulations, Statutory Rules 1989 No.270, provided for internal review procedures from an adverse decision to admit or remove a person from the Register. Entry on the Register had important livelihood implications. In general, the Committee prefers external, independent, merits review by the AAT rather than internal review. The Minister advised that the Senate Select Committee on Health Legislation and Health Insurance had reported that AAT review was not suitable for decisions taken by an independent professional body about the standing of medical practitioners.

### **Review of decisions involving personal rights**

3.63 The Committee is equally vigilant where a discretion does not have commercial or livelihood implications, but rather directly affects personal rights. All such discretions should provide appropriate review. The Small Claims (Amendment) Ordinance 1989, ACT Ordinance No.54 of 1989, and the Magistrate's Court (Amendment) Ordinance 1989, ACT Ordinance No.55 of 1989, both provided a discretion for the Clerk of the Court to remit fees if the Clerk is satisfied that payment would impose hardship. There were no other criteria and no indication of review. The Minister advised that the Court could review a decision of the Clerk under the first instrument. The fee in the second instrument was unrelated to any personal rights to be heard or to defend a charge. It is payable only after a matter has been fully dealt with by the Court and a decision handed down. It is not payable where a defendant has successfully defended a charge, or where a custodial or other sentence not involving a pecuniary penalty has been imposed. In any event the fee is only \$20.



3.64 *The Australian Federal Police Regulations (Amendment), Statutory Rules 1989 No.139*, provided that the Commissioner may waive the payment of prescribed fees for certain services provided by the AFP. Criteria were provided to limit the discretion of the Commissioner. The first of these criteria was appropriate, being cases where payment would cause financial hardship. The second was subjective and open-ended, being any reason which the Commissioner considers appropriate. There was no review of this discretion. The Minister advised that the AFP were not obliged to perform any of the services for which the fees were prescribed. In cases such as major sporting events or concerts of popular music the services of the AFP may not be possible unless fees are paid. Where the AFP provides such services other resources will be depleted. The regulations do not create a right for these services to be performed. The regulations also provide that where these services are provided for a charitable purpose no fees are payable. The Minister considered that it was not appropriate to provide AAT review of these additional functions of the AFP performed as a community service.

3.65 *The Fisheries Notice No.NPF 1* closed an area to boats for 48 hours to provide for a I.e Mans type resumption of fishing. An official was empowered to exempt boats from the prohibition. The Committee looks closely at powers granted to officials rather than Ministers. In such cases the instrument should provide narrow criteria and a right of external review. Here the Committee assumed that it was intended to restrict the discretion to emergencies involving life or property. The Minister advised that normally exemptions would involve emergencies, but there were other legitimate reasons to exempt a boat. Exemptions only applied to navigation, as exempted boats were still required to stow fishing gear. The short period of 48 hours was unsuitable for an external review process.

#### **PRINCIPLE (D)**

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

3.66 This is a Principle which the Committee does not raise often. Nevertheless, it is a breach of parliamentary propriety for delegated legislation to deal with matters more suited for inclusion in a Bill. These are matters which by their nature should be subject to debate and the other procedural rigors of parliamentary passage of a Bill. The areas where delegated legislation may be defective under this Principle were set out in the *Eighty-Sixth Report*, May 1990, paragraph 3.70.

3.67 *The Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1989 No.200*, prolonged for the sixth year in a row the operation of discriminatory Commonwealth, State and Territory legislation which would otherwise be in breach of the parent Act. It was due to the efforts of the Committee that these Regulations are made on a year to year basis. Originally, they were made on a permanent basis, but to meet the concerns of the Committee the Minister undertook that each set of Regulations under the parent Act would only

operate for a year. The Committee noted improvement from the previous year, with some deletions from the lists of continued discriminatory laws. The Explanatory Statement also advised that the Government would consider an amendment of the parent Act so that the Parliament could debate the entrenching of discrimination in Commonwealth legislation. The Committee considered that there should be no necessity for further Regulations after the present set expired on 31 July 1990. The Minister advised that it was intended to amend the Act, but there were still matters to be resolved in certain areas. The Committee replied that it appreciated this intention, but would look closely at any further extensions by regulation.

3.68 The National Health Regulations (Amendment), Statutory Rules 1989 No.292, effected substantial changes in the operation of policies written by private insurers in respect of medical coverage. The Committee discussed this instrument under Principle (D) and concluded that it was not as important an issue as others where the Committee had raised this Principle. Nevertheless, the Committee wrote to the Minister asking whether amendment of the parent Act had been considered. The Minister advised that the parent Act expressly authorised such changes by regulation, so this method was used.

## CHAPTER 4

### MINISTERIAL UNDERTAKINGS IMPLEMENTED

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

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

4.2 On 3 November 1988 the Minister for Community Services and Health, the Hon Neal Blewett MP, undertook to amend the Forms to clarify drafting and to amend Important Notes to the Forms to explain the expression "After due inquiry". This undertaking was implemented by Determination of Particulars under s.23DC(2) of the *Health Insurance Act 1973* of Form APP4-A and Determination of Particulars under s.23DF(2) of the *Health Insurance Act 1973* of Form APA4-A, of 31 May 1990 and 20 June 1990.

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

4.3 On 1 November 1988 the Minister for Telecommunications and Aviation Support, the Hon Gary Punch MP, undertook to amend the Regulations to require persons authorised to discharge firearms over a Federal airport to carry identification. This undertaking was implemented by the *Air Navigation Regulations (Amendment)*, Statutory Rules 1989 No.400, of 21 December 1989.

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

4.4 On 11 April 1989 the Chairman of the ANRC, Dr D G Williams, undertook to amend the By-law to remove strict liability, dual liability and conclusive proof provisions. This undertaking was implemented by *General By-law Amendment No.5*, of 11 July 1989 and *General By-law Amendment No.8*, of 6 February 1990.

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

4.5 On 23 November 1988 the Minister for the Arts and Territories, the Hon Clyde Holding MP, undertook to amend the Ordinance with respect to a number of concerns expressed by the Committee. This undertaking was implemented by the Casino Control Ordinance 1989, Territory of Christmas Island Ordinance No.8 of 1989, of 25 October 1989.

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

4.6 On 1 November 1988 the Minister for Telecommunications and Aviation Support, the Hon Gary Punch MP, undertook to amend the Regulations to provide criteria for the payment of compensation and to provide that authorised officers of the Civil Aviation Authority carry identification cards. This undertaking was implemented by the Civil Aviation (Buildings Control) Regulations (Amendment), Statutory Rules 1989 No.192, of 14 July 1989.

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

4.7 On 20 October 1988 the Minister for Science, Customs and Small Business, the Hon Barry Jones MP, undertook to amend the Regulations to provide that only the Minister may refuse the export of military ships and aircraft. This undertaking was implemented by the Customs (Prohibited Exports) Regulations (Amendment), Statutory Rules 1990 No.125, of 29 May 1990.

**Customs Regulations (Amendment)**  
**Statutory Rules 1989 No.101**  
**Excise Regulations (Amendment)**  
**Statutory Rules 1989 No.102**

4.8 On 30 August 1989 the Minister for Science, Customs and Small Business, the Hon Barry Jones MP, undertook to amend the parent Acts to provide that certain forms be disallowable instruments. This undertaking was implemented by the *Customs and Excise Legislation Amendment Act (No.4) 1989*, assented to on 17 January 1990.

**Determination of Principles No.APL/1 under section 23DN(2) of the**  
**Health Insurance Act 1973**

4.9 The Minister for Community Services and Health, the Hon Neal Blewett MP, undertook to amend instruments to provide for a review of a decision that a person's qualifications are not sufficient for the person to be regarded as equivalent

to a 'scientist' or 'senior scientist'. This undertaking was implemented by the **Determination of Principles for the Approval of Premises as an Accredited Pathology Laboratory No.APL/6 under the Health Insurance Act 1973**, of 27 September 1989.

**Excise Regulations (Amendment)  
Statutory Rules 1989 No.307**

4.10 On 24 May 1990 the Minister for Small Business and Customs, the Hon David Beddall MP, undertook to amend the Regulations to provide a right of review by the AAT of a discretion by the Comptroller relating to excise duty. This undertaking was implemented by the **Excise Regulations (Amendment), Statutory Rules 1990 No.7**, of 23 January 1990.

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

4.11 On 18 February 1988 the Minister for the Arts, Sport, the Environment, Tourism and Territories, Senator the Hon Graham Richardson, undertook 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.* This undertaking was implemented by the **Great Barrier Reef Marine Park Regulations (Amendment), Statutory Rules 1989 No.269**, of 28 September 1989.

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

4.12 On 20 April 1989 the Minister for Housing and Aged Care, the Hon Peter Staples MP, undertook to amend the parent Act to provide AAT review of decisions under the Rules. However, the scheme came to an end during the reporting period and the Committee released the Minister from his undertaking after obtaining an assurance that there were no persons refused payment under the scheme and therefore no potential applicants for review.

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

4.13 On 22 November 1988 the Minister for Resources, Senator the Hon Peter Cook, undertook to rectify the omission of a Note to section 1A of the Schedule to the Orders. This undertaking was implemented by the **Meat Inspection (Fees) Orders as amended (Amendment), Meat Inspection Orders No.2 of 1989**, of 27 September 1989.

**Meat Inspection (General) Orders as amended (Amendment)**  
**Meat Inspection Orders No.3 of 1989**

4.14 On 19 December 1989 the Minister for Resources, Senator the Hon Peter Cook, advised that a drafting oversight noted by the Committee had been corrected by Meat Inspection Orders No.4 of 1989, of 26 October 1989.

**Migration Regulations (Amendment)**  
**Statutory Rules 1989 No.267**

4.15 On 13 December 1989 the Minister for Immigration, Local Government and Ethnic Affairs, Senator the Hon Robert Ray, advised the Committee that a provision which gave the Minister a discretion to exempt classes of persons from payment of a fee was intended to be repealed. If this were not the case the Minister advised that the Regulations would have been amended to provide that the exemption be a disallowable instrument. This undertaking was implemented by Migration Regulations (Repeal), Statutory Rules 1989 No.413, of 21 December 1989.

**Navigation (Master and Seamen) Regulations (Amendment)**  
**Statutory Rules 1988 No.154**

4.16 On 10 October 1988 the Minister for Land Transport and Shipping Support, the Hon Bob Brown MP, undertook to correct a drafting oversight. This undertaking was implemented by the Navigation (Master and Seamen) Regulations (Amendment), Statutory Rules 1990 No.14, of 23 January 1990.

**Overseas Defence Determination 1989/27**

4.17 On 14 September 1989 the Minister for Industrial Relations, the Hon Peter Morris MP, undertook to amend the Determination to limit a discretion granted to a public official to reimburse certain expenses. This undertaking was implemented by Overseas Defence Determination 1990/31, of 9 March 1990.

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

4.18 On 3 May 1988 the First Assistant Secretary, Co-ordination and Conditions Division, Department of Industrial Relations, undertook to omit references to the 'public interest' and to substitute 'the interests of the service' in other areas of legislation beside the Board Determinations. This undertaking was implemented by Public Service Determination 1989/95, of 27 June 1989.

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

4.19 On 1 June 1989 the Minister for Primary Industries and Energy, the Hon John Kerin MP, undertook to remake the instrument to overcome possible invalidity due to incorrect references in a loose-leaf amendment system. This undertaking was implemented by the **Management Plans Omnibus Amendment, Plan of Management No.26, of 5 September 1989.**

## **CHAPTER 5**

### **MINISTERIAL UNDERTAKINGS NOT YET IMPLEMENTED**

5.1 Below are Ministerial and other undertakings, given to amend legislation to meet the concerns of the Committee, which had not been implemented at 30 June 1990, the end of the reporting period. Some have been implemented since that date.

#### **Agricultural and Veterinary Chemicals Regulations Statutory Rules 1989 No.165**

5.2 On 21 November 1989 the Minister for Primary Industries and Energy, the Hon John Kerin MP, undertook to amend the Regulations to correct a drafting oversight and to consider amendment to provide AAT review of certain discretions.

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

5.3 On 1 November 1988 the Minister for Telecommunications and Aviation Support, the Hon Gary Punch MP, undertook to amend the Regulations to describe methods of service of notifications and to require authorised persons to carry proof of identity.

#### **Defence Force Regulations (Amendment) Statutory Rules 1989 No.290**

5.4 On 8 January 1990 the Minister for Defence Science and Personnel, the Hon David Simmons MP, undertook to amend the Regulations to remove a strict liability offence.

#### **Determination of Australian Design Rules as National Standards Order Determination of Motor Vehicle Standards - Order No.1 of 1989**

5.5 On 15 November 1989 the Minister for Land Transport and Shipping Support, the Hon Bob Brown MP, undertook to amend the Order to provide AAT review of a discretion of the Minister.



**Export Control (Fees) Orders as amended (Amendment)  
Export Control Orders No.6 of 1989**

5.6 On 19 December 1989 the Minister for Resources, Senator the Hon Peter Cook, undertook to amend the Orders to correct a drafting oversight

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

5.7 On 17 May 1988 the Minister for the Arts, Sport, the Environment, Tourism and Territories, Senator the Hon Graham Richardson, undertook 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.

**Lotteries Ordinance 1989  
Territory of Christmas Island Ordinance No.4 of 1989**

5.8 On 15 November 1989 the Minister for the Arts, Tourism and Territories, the Hon Clyde Holding MP, undertook to amend the Ordinance to –

- (a) provide detailed criteria for the discretion of the Minister to approve lotteries
- (b) provide AAI review for the same discretion
- (c) limit the persons to whom the discretion may be delegated
- (d) limit the power of officials to demand information
- (e) limit the power of officials to enter premises, and
- (f) limit the power of officials to give directions

**Marine Orders Part 51 – Navigation Orders  
Order No.1 of 1989**

5.9 On 12 July 1989 the Minister for Land Transport and Shipping Support the Hon Bob Brown MP undertook to provide a Note in the body of Marine Orders indicating that particular decisions are reviewable by the AAI

**Motor Vehicle Standards Regulations  
Statutory Rules 1989 No.202**

5.10 On 26 October 1989 the Minister for Land Transport and Shipping Support, the Hon Bob Brown MP, undertook to amend the parent Act to provide that certain forms be disallowable instruments. The Minister also undertook to amend the Regulations to provide for AAT review of all discretions.

**National Health (Nursing Home Respite Care) Regulations  
Statutory Rules 1989 No.173**

5.11 On 10 October 1989 the Minister for Housing and Aged Care, the Hon Peter Staples MP, undertook to amend the Regulations to define the Minister's discretion to approve benefit respite care places in nursing homes.

**Remuneration Tribunal Determination No.23 of 1988**

5.12 On 20 December 1989 the Minister for Industrial Relations, the Hon Peter Morris MP, undertook to consider amending the *Remuneration Tribunal Act 1973* to require that copies of Determinations be provided to the Minister for tabling within 15 sitting days of their being made.

**Rules of the Australian Industrial Relations Commission  
Statutory Rules 1989 No.46**

5.13 On 8 June 1989 the President of the Australian Industrial Relations Commission, the Hon Mr Justice B J Madder, undertook to amend the Rules to correct a drafting oversight.

**Sex Discrimination (Operation of Legislation) Regulations  
Statutory Rules 1989 No.200**

5.14 On 4 October 1989 the Minister for Justice, Senator the Hon Michael Tate, undertook to introduce new legislation to cease exemptions to the Act by regulation.

**Superannuation (Continuing Contributions for Benefits) Regulations  
(Amendment)  
Statutory Rules 1989 No.168**

5.15 On 13 September 1989 the Minister for Finance, Senator the Hon Peter Walsh, undertook to amend the Regulations to provide that a certain declaration be a *disallowable instrument*.

**Therapeutic Goods Regulations  
Statutory Rules 1990 No.88**

5.16 On 15 May 1990 the Minister for Aged, Family and Health Services, the Hon Peter Staples MP, undertook to amend the Regulations to —

- (a) provide AAT review of the power of the Secretary to waive or reduce fees
- (b) limit the persons to whom a power to waive or reduce fees may be delegated
- (c) correct a drafting oversight
- (d) provide that certain powers be exercised reasonably
- (e) provide criteria for the removal of members of certain statutory committees, and
- (f) limit the appointment of acting members of such committees.

On 16 May 1990 the Senate disallowed the Therapeutic Goods Regulations and the associated Therapeutic Goods (Charges) Regulations, Statutory Rules 1990 No.89.

## CHAPTER 6

### THE SECOND CONFERENCE OF AUSTRALIAN DELEGATED LEGISLATION COMMITTEES

6.1 On 24 October 1989 Senator Collins tabled the Report, Transcript of Proceedings and Conference Papers of the Second Conference of Australian Delegated Legislation Committees, hosted by the Committee in Parliament House, Canberra, from 25-28 April 1989. The Conference was chaired by Senator Collins. The President of the Senate, Senator the Hon Kerry Sibraa, gave a speech of welcome to the Governor-General, His Excellency the Hon Bill Hayden, who opened the Conference. The papers presented at the Conference by persons connected with the Committee were —

1. Practical Politics and the Art Of Bipartisanship in Legislative Scrutiny, *Senator Bob Collins.*
2. Legislative Scrutiny — A last hope for Australian Parliamentarism, *Senator Austin Lewis, Deputy Leader of the Opposition in the Senate and a former Chairman and Deputy Chairman of the Committee.*
3. Seven Years in a Parliamentary Hotseat — Techniques of advising and the passing parade of issues arising in Delegated Legislation Scrutiny Committees, *Emeritus Professor Douglas Whalan, Legal Adviser to the Committee.*

(Copies of these papers are available from the Committee secretariat.)

The tabling statement by Senator Collins read as follows —

6.2 "The First Conference of Australian Delegated Legislation Committees, held in Brisbane in 1986, provided Australian parliamentarians who scrutinise delegated legislation with an opportunity to exchange ideas and opinions, and renew their support for each other in the task of bipartisan, technical, legislative scrutiny. The Senate Standing Committee on Regulations and Ordinances wished to continue this desirable practice and in December 1988 offered to host the Second Conference in Canberra in April 1989.

6.3 "The Committee invited the Senate Standing Committee for the Scrutiny of Bills and all Australian state and territory parliamentary committees involved in scrutiny of delegated legislation to participate in the Conference. The Committee also sent invitations to all Commonwealth Parliamentary Association branches to participate at the Conference as active observers. As a result of these invitations,

delegations attended from New South Wales, Victoria, Queensland, Western Australia, South Australia, and the Northern Territory. (A delegation from Tasmania was unable to attend due to the holding of a State election). Observer delegations attended from the Parliaments of Botswana, the British Virgin Islands and New Zealand. In all 10 Parliaments were represented by a total of 49 delegates. The Conference was held in the Main Committee Room of Parliament House, Canberra. By the courtesy of the President of the Senate, Senator the Hon. Kerry Sibraa, the full facilities of the Commonwealth Parliament were available for the Conference and the delegates.

6.4 "The President of the Senate, Senator the Hon. Kerry Sibraa, welcomed the delegates and introduced the Governor-General, His Excellency the Hon. Bill Hayden. The President emphasised the significance of legislative scrutiny committees given the complexity of executive government and increasing demands on parliamentary time.

6.5 "The Governor-General, His Excellency the Hon. Bill Hayden, formally opened the Conference. This was, in fact, the first official duty of the recently appointed *Governor-General in the new Parliament House since his swearing-in*. In his speech to delegates, Mr Hayden stated that, despite fears about the decline of Parliament, the parliamentary institution retained its vigour in the work of its committees. Delegated legislation was an extremely important tool of modern governmental administration and parliamentary scrutiny of it assumed great importance because it helped to ensure that the government and its administration did not exceed the powers given to them by Parliament. Mr Hayden also emphasised that, although delegated legislation did not have to pass the scrutiny of Parliament prior to it coming into force, legislative scrutiny committees remained an effective control because their avoidance of party political issues enabled them to work effectively in a spirit of cooperation and bipartisanship against any misuse of power and authority by government.

6.6 "The Conference was also addressed on particular topics related to delegated legislation by a distinguished group of parliamentarians and lawyers.

6.7 "Emeritus Professor Douglas Whalan of the Australian National University, Legal Adviser to the Senate Standing Committee on Regulations and Ordinances, spoke of his experiences as an independent legal adviser.

6.8 "Senator Bob Collins, Chairman of the Senate Standing Committee on Regulations and Ordinances, spoke about his experiences of bipartisanship in legislative scrutiny committees.

6.9 "Senator Austin Lewis, a former Chairman of the Senate Committee, spoke on legislative scrutiny as a last hope for the idea of Australian parliamentarism.

6.10 "Ken Jasper, MP, Chairman of the Subordinate Legislation Subcommittee of the Legal and Constitutional Committee of the Parliament of Victoria, spoke on the relationship between policy and principle in subordinate legislative scrutiny in Victoria.

6.11 "Professor Dennis Pearce, Commonwealth Ombudsman and former legal adviser to both the Senate Standing Committees on Regulations and Ordinances and Scrutiny of Bills, spoke on the impact of Parliamentary legislative scrutiny on the quality of public administration.

6.12 "Bob Hetherington, MLC, Chairman of the Western Australian Joint Standing Committee on Delegated Legislation, spoke on the Western Australian experience of scrutiny, which he described as "a turning back to parliamentary supremacy".

6.13 "Justice Trevor Hartigan, a Judge of the Federal Court of Australia and President of the Administrative Appeals Tribunal, spoke on the role of delegated legislation as a tool of administration.

6.14 "Questions and discussions following each of the addresses to the Conference were lively, well informed, and directed to the future development and improvement of parliamentary oversight of executive law-making.

6.15 "The Conference passed three resolutions. The first two dealt with the *holding of the Third Conference in Perth in 1991*. The third resolution was that Committees would report at the Third Conference on: "

- (a) the nature, the extent and the implications for Delegated Legislation Committees of the proliferation, within the Commonwealth, the States and the Territories, of legislative and quasi-legislative instruments which either:
  - (i) are not subject to parliamentary scrutiny and control, or
  - (ii) whether so subject or not, represent a developing trend in delegated law-making by virtue of their origins, content, presentation or otherwise;
- (b) the extent to which the Parliaments of the Commonwealth, the States and the Territories have been able to monitor and scrutinise and where necessary improve by amendment provisions in Bills which confer delegated law-making powers; and
- (c) the progress of staged repeal of delegated legislation (where this occurs) and the problems this may have produced for scrutiny committees, and their responses to it.

6.16 "Several major themes emerged during the Conference. Perhaps the most important of these was the role of parliamentarianism in legislative scrutiny. This topic also influenced discussion of other themes which developed.

6.17 "Several delegates mentioned the wide bipartisan support that existed in *Parliaments for their Regulations and Ordinances Committees*. Committees contribute to the parliamentary institution, with an effectiveness that arises from their avoidance of party political issues. The non-partisan approach of committees provides a truly parliamentary perspective and the committees are, therefore, crucial to the preservation of the parliamentary system.

6.18 "The Conference particularly affirmed the bipartisan nature of relations with ministers and the public service. This was contrasted with the executive and party political threat to parliamentarianism and all that that expression stood for. Senator Austin Lewis concluded that legislative scrutiny committees were the last hope of parliamentarianism because they were possibly the only places where it was still practised. Parliament should be constantly vigilant to protect itself against executive encroachment and executive erosion of parliamentary supremacy.

6.19 "Delegates agreed that terms of reference of delegated legislation committees which provided for scrutiny on the ground that an instrument may trespass on rights and liberties clearly asserted the authority of Parliament over the executive; Parliament was supreme and it was up to Parliament, not governments, to balance conflicting individual and collective rights.

6.20 "As the Conference resolution indicated, Australian committees were also concerned about the growth and effect of quasi-legislation. One delegate noted a move away from more formal regulatory instruments and commented on the frequently poor drafting and presentation of less formal instruments. Some kinds of ministerial orders were not subject to parliamentary control. One question raised here was the extent to which delegated legislation committees should recommend changes to *enabling Acts*. Although purely administrative instruments need not come before committees, statutes should not be undone by administrative guidelines. A decline in parliamentarianism could be illustrated by less substance in Acts, the necessary detail being supplied later in the form of binding guidelines or directions.

6.21 "The Conference expressed misgivings about the increased use of regulations for policy purposes and the use of non-reviewable, but nevertheless binding, general directions. Whereas previously an Act may have set up broad parameters for regulation, now the regulations were setting up broad parameters for administrative instructions. Provisions should be made for such instructions to come before a committee if it was suspected that the executive was using them to avoid scrutiny. The Administrative Appeals Tribunal looks at instruments which fall short of binding delegated legislative enactments, including departmental practice manuals issued for the guidance of relatively junior officers. The final contributions to the Conference noted a trend to 'hollow legislation', where real

legislative power was in the regulations and other instruments provided for by an enabling Act (for example the *Commonwealth Export Control Act 1982*). There was general agreement that effective scrutiny should be expanded over the whole range of quasi-legislation.

6.22 "The Conference devoted considerable attention to the question of scrutiny both of bills and also of Acts. This problem was often seen as related to that of quasi-legislation.

6.23 "Discussion emphasised the importance of scrutiny of bills, particularly in relation to legislative delegations that might by-pass delegated legislation committees. In this context, principle (d) of the Senate Committee (that delegated instruments should not contain matter more appropriate for parliamentary enactment) was the most subjective of that Committee's principles and, therefore, very difficult to apply ex post facto. The problem could be avoided by more effective limitations on the scope of provisions in bills providing for delegated legislative powers.

6.24 "There was a co-operative partnership between the two Senate legislative scrutiny committees, one dealing with bills and the other addressing the delegated legislation eventually arising from those bills.

6.25 "Scrutiny of bills and delegated legislative scrutiny were seen as inter-dependent and not mutually exclusive, although Senator Lewis commented that "the jury is still out" on the Senate Scrutiny of Bills Committee, largely because there was still no practice of the Chairman or other committee members moving and supporting amendments on behalf of that Committee or of the Senate supporting the Committee by always agreeing to proposals arising from the Committee's recommendations on matters of civil liberty or parliamentary propriety. It may be desirable to have a separate committee to deal with scrutiny of bills, rather than for this difficult function to be given to a delegated legislation committee.

6.26 "A deplorable aspect of the preparation and passage of bills was the developing trend towards legislation by 'press release' or 'legislation by policy statement'. Another problem recurring too frequently was provision in bills for regulations to amend their parent Acts.

6.27 "It was suggested that the regulation provision of an Act should be so drafted as to limit the scope of delegated legislative powers to stated purposes.

6.28 "It is usual to state that delegated legislation committees avoid policy issues as part of their bipartisan role, although this obligation does not prevent the Committee challenging a so-called policy that is obviously and directly an infringement of the Committee's principles. The Committee must pursue its primary responsibility to parliamentary propriety and personal rights and liberties. Scrutiny of legislative policy is, for example, central to the operations of the Senate



Standing Committee on Regulations and Ordinances. The Committee does not accept as an excluded matter of policy a ministerial policy to legislate in a way that infringes the Committee's terms of reference.

6.29 "Although it was sometimes difficult to see where policy ended and administration began, the members of the Senate Committee have always avoided party political dispute. The Committee had, however, made important contributions to legislative policy. Some delegates felt that issues of political or party policy did not arise when a Committee examined or expressed concern about the regulation-making powers of an enabling Act.

6.30 "The bipartisan success of the Senate Committee was attributed to avoiding scrutiny of the merits of the instruments before it. Ministers had accepted that the Committee was not a threat to policy. Discussion followed on the various attitudes taken by different Committees towards what may be regarded as a policy matter.

6.31 "The Regulations and Ordinances Committee endeavours to persuade all Ministers that Explanatory Statements should accompany each legislative instrument laid before Parliament. These should explain the background to, and justifications for, the legislation, summarise its provisions and give some indication of the impact of the instrument on those likely to be affected by it. Several of the States, however, have legislative requirements for highly detailed regulatory impact statements and discussion of these was an important topic at the Conference.

6.32 "The desirability of public impact statements was identified as a 'major trend' for the next decade. In particular, there was a need to scrutinise the impact of regulatory laws upon the business community. It was suggested that committees retain the services of economic advisers, as well as legal advisers.

6.33 "Statutory requirements for regulatory impact statements and associated mechanisms for public consultation led to discussion of exemption procedures for impact statements, the reaction of ministers and executive departments for impact statements, the reaction of ministers and executive departments to the new requirements and the relation of impact statements to policy.

6.34 "The closing statements included comments on the costs of producing impact statements, their content and drafting requirements.

6.35 "Sunset and sunrise provisions and staged review were of major interest throughout the Conference. As with regulatory impact statements, this was an area in which the States have been notably active and innovative.

6.36 "This general topic, including the concept of total regulatory review, was another identified as a 'major trend' for the next decade. Delegates commented on the special unit in New South Wales, separate from the legislative scrutiny

committee, which was established to review the number and volume of regulations. The similar Commonwealth Business Regulation Review Unit was also mentioned. The discussion included the reaction of executive departments to sunset provisions.

6.37 "The final statements included several references to the need for review of outdated delegated legislation.

6.38 "The role of the media also emerged as a theme at the Conference. A related topic was publicity and education about the operations of delegated legislation committees.

6.39 "It was suggested that the media were devoting less time to reporting Parliament, the public service and the relationships between them. Parliamentary committees were now a safeguard in areas where the media were formerly more active. Examples were given of the lack of interest from the media.

6.40 "Seminars to publicise the activities of Committees could be useful in this context. Another proposition was that there should be more educational activity on the role of committees; it was felt that the decline of Parliament would accelerate if the media and the public were uninformed.

6.41 "Other issues relating to technical scrutiny by delegated legislation committees arose in the speeches and in discussion. The Conference Report expressly mentions a score of additional questions which were raised by delegates.

6.42 "The Second Conference focused the attention of Australian and visiting Committees on common challenges and problems, particularly the increasing use of quasi-legislation and the need for vigilance in meeting executive encroachments on parliamentary primacy. At the same time, bipartisanship and parliamentarianism were emphasised and confirmed. This emphasis on common threats, common principles and common responses was specially productive because of the diversity of structures, powers and functions of the different committees whose members met in Canberra to participate at the Second Conference of Australian Delegated Legislation Committees."

## CHAPTER 7

### THE THIRD COMMONWEALTH CONFERENCE ON DELEGATED LEGISLATION

#### WESTMINSTER, 20-23 NOVEMBER 1989

7.1 A delegation from the Committee attended the Third Commonwealth Conference on Delegated Legislation, held in Westminster from 20-23 November 1989. The delegation was Senator Bronwyn Bishop, Deputy Chairman of the Committee, Senator Rosemary Crowley (Senate Standing Committee for the Scrutiny of Bills) Senator Patricia Giles and Senator Kay Patterson (as well as being a member of the Committee, Senator Patterson was Deputy Chairman of the Senate Standing Committee for the Scrutiny of Bills). The delegation was accompanied by Anne Lynch, Deputy Clerk of the Senate and by the Committee's legal adviser, Emeritus Professor Douglas Whalan.

7.2 The first Commonwealth Conference on Delegated Legislation, hosted by the Committee, was held in Parliament House, Canberra on 29-30 September and 1-2 October 1980. The second Conference was held in Ottawa from 11-14 April 1983.

7.3 The delegation took an active part in the Westminster Conference, presenting six papers, with Senator Crowley and Senator Patterson chairing two of the seven working sessions led by parliamentarians. Senator Bishop was selected as a member of a *panel to sum up the results of the Conference*. Senator Bishop was also selected as a member of the Continuing Co-ordinating Committee, to represent the Pacific countries of the Commonwealth.

7.4 The six papers presented by the delegation were —

1. The Principles of the Standing Committee on Regulations and Ordinances of the Australian Senate, *Senator Bishop*
2. Scrutiny of Bills in the Commonwealth of Australia, *Senator Crowley*
3. Scrutiny of federal quasi-legislation in Australia, *Senator Giles*
4. *Different models of technical legislative scrutiny, Anne Lynch*
5. Review of existing delegated legislation in the Australian States, *Senator Patterson*

6. The links in the chain of protective scrutiny of delegated legislation,  
*Emeritus Professor Whalan.*

(Copies of these papers are available from the Committee secretariat.)

7.5 On 7 December 1989 Senator Bishop, as leader of the delegation, made an interim report to the Senate on the Conference (Senate Weekly Hansard, p.4110), as follows –

7.6 "Mr Deputy President, I had the honour the week before last to lead a delegation of senators and others to the Third Commonwealth Conference on Delegated Legislation, hosted by the United Kingdom Joint Committee on Statutory Instruments and held in London from 20 to 23 November. The Australian delegation consisted of me, in my capacity of Deputy Chairman of the Regulations and Ordinances Committee, Senator Patricia Giles, a member of the Regulations and Ordinances Committee and Chair of the Committee of Privileges, Senator Kay Patterson, a member of the Regulations and Ordinances Committee and Deputy Chairman of the Scrutiny of Bills Committee, and Senator Rosemary Crowley, a member and former Chair of the Scrutiny of Bills Committee. We were accompanied by Anne Lynch, Deputy Clerk of the Senate; Emeritus Professor Douglas Whalan, Legal Adviser to the Senate Regulations and Ordinances Committee; Mr Ken Jasper, MP, Chairman of the Subordinate Legislation Subcommittee of the Victorian Legal and Constitutional Committee, and Ms Pauline Ireland, Research Officer to the Victorian Legal and Constitutional Committee. The delegation will be presenting a full report to the Senate, including a transcript of the proceedings of the Conference, when such proceedings become available. The delegation considered, however, that I should make this statement to the Senate as soon as possible.

7.7 "As with the previous conferences, held first in Australia in 1980 and second in Canada in 1983, this conference brought together representatives of a wide cross-section of Commonwealth countries. Delegates from a number of countries which had not been represented at the previous conferences attended the London conference. In particular, note was taken at that conference of the representation from Pakistan, the first Commonwealth-wide conference that country had attended since rejoining the Commonwealth. In all, 61 delegates attended from 17 countries.

7.8 "As with previous conferences, the commonality of problems confronting all delegated legislation committees was evident. The resolutions agreed to unanimously at the conference give a brief indication of the matters which were discussed during the four days of the conference. I seek leave to have this incorporated in Hansard.

7.9 "The resolutions read as follows-

#### RESOLUTIONS OF THE CONFERENCE

1. That this Conference:
  - (a) expresses its deep regret at the death, on 30th March 1986, of Senator Alan Joseph Missen, Australia, Chairman of our first Commonwealth Conference on Delegated Legislation, hosted by Australia in 1980, and inaugural Chairman of the Commonwealth Delegated Legislation Committee; and
  - (b) places on record its appreciation of the crucial contribution made by the late Senator Missen to the establishment of this Commonwealth-wide institution, and to the enhancement of parliamentary democracy by emphasising the importance of scrutiny of all legislation to good government.
2. That a continuing coordinating Committee be appointed by the Conference to:
  - (a) arrange the next conference
  - (b) bring up to date the Comparative Study prepared in Canada.
3. That the Committee shall consist of representatives for each of the following geographical groups of delegations, each group electing its own representative on a one delegation one vote basis:
  - (a) Europe (Cyprus, U.K.)
  - (b) Asia (Maldives, Pakistan)
  - (c) Africa (Botswana, Tanzania, Zambia, Zimbabwe)-two representatives
  - (d) Americas (Belize, Canada)
  - (e) Caribbean (St. Lucia, Trinidad & Tobago)
  - (f) Pacific (Australia, New Zealand)
4. That the Committee shall appoint its own Chair and determine its own procedures; that the immediate past Chair (currently Hon. Perrin Beatty P.C., M.P., Canada) shall be entitled to be coopted ex-officio; and that the hosts of the next conference, if not already represented, shall be entitled to nominate a representative to be coopted.

5. That the United Kingdom will provide a secretariat for the Committee until the hosts of the next conference are identified; and that this function will be transferred to the hosts of the next conference.
6. That the next conference will be held in a jurisdiction willing to host it, not less than 3 years and if possible not more than 5 years after the current conference.
7. That the Conference authorises the United Kingdom delegation to circulate a record of its proceedings.
8. That the following issues, common to a number of Commonwealth countries, arose from the Third Commonwealth Conference on Delegated Legislation; and that therefore it would be a profitable exercise for each member country to examine its scrutiny procedures in relation to the issues set out below, and to be prepared to report to the next conference the results of such examination and, should modification or reform be deemed necessary, any progress made to achieve change.
  - The allowing of the executive power to amend or repeal primary legislation without further reference to Parliament ("Henry VIII Clauses");
  - whether those responsible for scrutinising delegated legislation have access to the best and most independent legal and technical advice;
  - whether the language of legislation, including delegated legislation, is accessible and comprehensible to the ordinary citizen;
  - the scrutiny of delegated powers contained in bills or proposed bills;
  - the weeding out of outdated, over-amended or inaccessible regulations, whether by "sunset clauses" or other means.
9. In preparation for the next conference, a survey of the information from each country should be collated, perhaps by the host country, and presented to the Fourth Conference.
10. The Continuing Co-ordinating Committee is:
  - (a) Mr Bob Cryer, M.P. (U.K.)
  - (b) Mr Abdul Rauf Lughmani (Pakistan)
  - (c) (i) Hon. Bahiti K. Temane, M.P. (Botswana)  
(ii) Mr Philip S. Marmo, M.P. (Tanzania)

(d) Mr Tom Wappel, M.P. (Canada)

(e) vacant

(f) Senator Bronwyn Bishop (Australia)

7.10 "Significantly, the conference resolved that each member country would examine its own scrutiny procedure concerning the following issues: firstly, 'Henry VIII clauses', whereby the Executive takes power to amend or repeal primary legislation without further reference to Parliament; secondly, whether those responsible for scrutinising delegated legislation have access to the best and most independent legal and technical advice; thirdly, whether the language of legislation, including delegated legislation, is accessible and comprehensible to the ordinary citizen; fourthly, the scrutiny of delegated powers contained in Bills or proposed Bills; and, fifthly, the weeding out of outdated, overamended or inaccessible regulations, whether by 'sunset clauses' or other means.

7.11 "It is well to note that extreme use of Henry VIII clauses, which is of relative insignificance at the Federal level in Australia because of our Regulations and Ordinances Committee and Scrutiny of Bills Committee, was of great concern to a number of our colleagues, particularly in Britain. The model of our Scrutiny of Bills Committee met with great enthusiasm from Lord Rippon from the United Kingdom, where there is no such equivalent. Many features of the Australian system, both at a Federal and State level, were the subject of some envy by our Commonwealth colleagues. The most important feature at Federal level, which has also been commented upon at previous conferences, is the capacity of either House to ensure that motions of disallowance, whether on behalf of the Regulations and Ordinances Committee or by any member of either House, are in fact dealt with. Some legislatures, notably Victoria and New Zealand, are moving in this direction; others are frustrated by their lack of capacity to ensure that their reports and recommendations for disallowance are debated and determined.

7.12 "The problem of quasi-law, that is, guidelines, manuals, rulings and the like which can be given the force of law and are not subject to parliamentary scrutiny, met with considerable concern from delegates, who noted the growth of such practices. Discussion over the week ranged widely, as indicated by the subject matter of each session. The first session, on 20 November, was based on a paper commissioned by the second conference and prepared by the Parliament of Canada, entitled 'Drafting and Scrutiny of Legislation in the Commonwealth: a Comparative Study'. As the first speaker on this paper I gave an account of the current operations of the Regulations and Ordinances Committee. As mentioned above, the question of quasi-law was one of such concern to the conference that it was the subject of a full discussion on 21 November following an address given by Professor Gabriele Ganz from Southampton University. Senator Patricia Giles delivered a paper which addressed this question.

7.13 "On Wednesday, 22 November, under the general heading 'Uses and Abuses of Delegated Powers', three papers were given. The first was by Mr Andrew Bennett, MP, of the United Kingdom, who spoke in general terms on the topic; the second by Mr Doug Graham, MP, of New Zealand who spoke to a paper on fees and charges, with particular reference to the use of delegated legislation to raise taxes without full parliamentary authority. The third paper, on the overuse of Henry VIII clauses, was given by the aforesaid Hon. Lord Rippon of Hexham, a former Secretary of State for the Environment, who, as I said earlier, drew specific attention to the Senate Standing Committee for the Scrutiny of Bills as a model which might, with profit, be followed by other parliaments. It was therefore timely that the speaker at the next session on that day, Senator Rosemary Crowley, gave a paper on the scrutiny of enabling legislation, with particular reference to the operation of the Scrutiny of Bills Committee.

7.14 "The afternoon session was devoted to discussion of court supervision of delegated legislation, the subject of a paper by Mr Louis Blom-Cooper, QC, from the United Kingdom, whose paper was supported by a contribution from Professor Douglas Whalan. This was followed by a panel discussion on relationships between executive government and the Parliament, with United Kingdom representatives from the Department of Education and Science and the Home Office, Parliamentary Counsel, and the Law Advocate's Department, together with Counsel to the Chairman of Committees of the House of Lords and Counsel to Mr Speaker. Indeed, we were privileged to have the opening ceremony of this conference conducted by both the Lord Chancellor and Mr Speaker.

7.15 "On 23 November, Senator Kay Patterson delivered a paper on the review of existing regulations, which gave a succinct account of general scrutiny practices in the Australian States. Mr Ken Jasper, as a representative of the States, spoke of the practices in the Victorian legislature. The last paper delivered at the conference was by Professor St John Bates, Clerk of Tynwald, the Isle of Man. He examined different models of scrutiny, covering matters such as whether such scrutiny is best undertaken by a committee of members or by officials, and powers of committees in relation to delegated legislation. Anne Lynch made a contribution on behalf of the Australian delegation.

7.16 "The conference proceedings concluded with a panel discussion of which I was privileged to be a member, the panellists having been selected in the course of the conference from the delegations. These panellists emphasised the importance of parliamentary scrutiny of the Executive and executive accountability to the Parliament. The conference concluded with a discussion of future proceedings and with agreement to the resolutions which I have had incorporated in Hansard. It is noteworthy that the first resolution of the conference was a recognition of the contribution made by the late Senator Alan Missen to the establishment of the conference and the enhancement of parliamentary democracy.



7.17 "Mr Acting Deputy President, on behalf of the Australian delegation, I wish to thank you and the Senate for the support given to the delegation. This support was continued in London by Mr President's predecessor, His Excellency the Hon. Douglas McClelland, and Mrs McClelland, and the excellent staff at the Australian High Commission, to whom we express our appreciation. We wish also to place on record our sincere thanks to our hosts, the United Kingdom Committee on Statutory Instruments, for the splendid organisation of the conference, and the wonderful hospitality which we all enjoyed. As the brief outline of the program indicates, all delegates actively contributed, both through the presentation of papers and through their participation in the vigorous discussions that followed the presentation of the papers. There seems little doubt that the discussions were fruitful, and the Australian delegation looks forward to being represented at the next conference, which by resolution will be held within the next three to five years at a venue yet to be determined. I move: That the Senate take note of the statement."

## CHAPTER 8

### NEW ZEALAND STATUTORY PUBLICATIONS BILL 1989

8.1 On 19 July 1989 the Chairman of the Regulations Review Committee of the House of Representatives of the New Zealand Parliament wrote to the Committee asking for comments on the *New Zealand Statutory Publications Bill 1989*. Important provisions of the Bill were based on a Report of the Regulations Review Committee.

8.2 The Chairman, Senator Collins, wrote to the New Zealand Committee on 17 August 1989. The following paragraphs are extracts from the letter.

8.3 "On behalf of the Senate Standing Committee on Regulations and Ordinances I am pleased to provide comments which I hope will be of assistance. Your approach to us for comments on a New Zealand Bill that will affect the work of your Committee is an encouraging example of the value of the Commonwealth wide network of members, advisers and staff of the various delegated legislation committees. The spirit of that network was warmly evident at the recent Second Conference of Australian Delegated Legislation Committees, held in Parliament House, Canberra.

8.4 "The Statutory Publications Bill in its present form appears to have a number of innovative features which may enhance the supervisory powers of Parliament over the executive.

8.5 "The most striking of these provisions are: the power of partial disallowance; the permanent referral to the House of Representatives and any of its relevant committees, allowing disallowance by resolution or deeming at any time during the life of a regulation; and the power of amendment or substitution of regulations by Parliament. Any one of these provisions would be viewed as a major advance for many other committees. Together, however, they represent a notable attempt at realistic Parliamentary control of subordinate law-making.

8.6 "The provisions which allow for parliamentary control of quasi-legislative instruments are also very interesting. I will comment in detail on each of these under the appropriate clause

## **Clause 1 — Short title and commencement**

8.7 "Clause 1(2) provides, in effect, for various provisions of the Act to come into force on dates to be appointed by the Governor-General by Order in Council. You might be interested to know that the Senate is somewhat critical of such a commencement device because it could give rise to the virtual non-implementation, at the discretion of the Executive, of provisions passed by Parliament.

8.8 "In Australia the practice had recently been to include such commencement provisions in Acts, leading on occasions to subsequent delay, sometimes of years, before the executive acted to commence the relevant provisions. However, following a resolution of the Senate, the Department of the Prime Minister and Cabinet and the Office of Parliamentary Counsel then accepted that there should be a "sunrise" provision for each such commencement, which generally provides for automatic commencement within six months if the executive government has not commenced the provisions within that time. I attach a copy of an Order of the Senate in relation to the issue, a copy of memoranda from the Department of the Prime Minister and Cabinet and the Office of Parliamentary Counsel, a copy of Papers on Parliament, No.2, "Legislation and Dissolution by Proclamation — Some Implications", by Anne Lynch, Deputy Clerk of the Senate, and the draft of another article on this matter by the Deputy Clerk.

## **Clause 2 — Interpretation**

8.9 "The definition of "Regulations" in clause 2 includes (paragraph (e)) instruments deemed by any Act to be regulations. One of the most difficult problems recently encountered in Australian delegated legislative scrutiny is how to achieve adequate parliamentary control over so-called "quasi-legislation". This is now a major legislative issue in Australia. As I mentioned in a statement to the Senate on 15 June 1989, there is an increasing use of new legislative and administrative techniques outside the usual kinds of legislative instruments. These defy the accepted justifications for delegated legislation. Some Acts contain considerably less detail than previously, with subsequent resort to a variety of forms of quasi-legislative instrument. This detail may not be technical or minor but can be the substantive core of the scheme, expressed in such terms as "guidelines" or "directions". In Australia these may not be subject to disallowance or even tabling. When they are so subject their terminology and content is such that it is difficult to tell whether they are mandatory prescriptive instruments or administrative decisions. Increased use of these instruments at the expense of detailed provision in Acts and the more orthodox and carefully drafted instruments of delegated legislation like Statutory Rules may increase the power of the executive at the expense of the parliament.

8.10 "Paragraph (e) would be a valuable provision to facilitate parliamentary control over quasi-legislative instruments if the executive took the proper course of "deeming" all legislative or prescriptive instruments to be regulations and therefore

subject to the remaining provisions of the Bill. Paragraph (e) seems to reflect some executive recognition that there is a problem in this area and attempts to alleviate it. If a deeming provision is used, however, there will be a need for parliament to conduct a very careful scrutiny of bills that contain provisions for creating instruments, to determine if legislative instruments have been properly deemed to have the character of regulations. Any prescriptive instrument should be deemed to be a regulation and thus subject to the provisions for regulations regarding disallowance, printing, etc. Where this has not occurred the further need may arise of moving appropriate amendments on the floor of the House. It is crucial that quasi-legislation should not escape the scrutiny and control of parliament by slipping through the net of an inadequate definition. If a multitude of "guidelines" appear in Acts and are not deemed to be regulations then all the consequences of the new quasi-legislation will follow, and many of the intended safeguards in the Statutory Publications Bill will come to nothing. The only alternative to moving amendments to each future offending Bill may be to amend paragraph 2(e) to provide that as a matter of law, legislative or prescriptive instruments not otherwise described in paragraph (a) to (d) are deemed to be Regulations for the purposes of this Bill. All of our comments on the following provisions of the Bill are subject to this proviso.

8.11 "In Australia, at least, we see this as a very important issue. Unfortunately here there is no automatic deeming provision and recourse must be had to moving amendments on the floor of the Senate to ensure that quasi-legislative instruments (often identified and drawn attention to by the Scrutiny of Bills Committee) are to be dealt with as if they were Regulations (see section 46A Acts Interpretation Act 1901 (Commonwealth)).

8.12 "The problem of quasi-legislation was discussed in detail at the recent Second Conference of Australian Delegated Legislation Committees...

#### **Clause 9 — Publication of regulations**

8.13 "I am somewhat concerned that as far as reprints of Regulations are concerned, all the good intentions of clause 4 appear not to apply expressly to regulations; the mandatory provision for reprints of Acts in clause 4(1)(b) does not seem to appear in clause 9. I would regard this as a defect ... reprints of regulations being equally as important as reprints of Acts. As a general rule, we believe regulations should be printed, published and reprinted in the same way as Acts, with the same quality of presentation and binding, and the same degree of consolidation, annotation, indexing, access (including ADP applications) and distribution.

8.14 "It is noted that the Chief Parliamentary Counsel is required to arrange for the printing and publication of regulations. It is appropriate that this official arranges for similar treatment of Acts (except for reprints), in keeping with the general outlook that regulations are in no way inferior law to Acts and that they should be published, etc in a similar fashion to Acts. We are concerned, however,

that insufficient attention is directed to the publication (and reprint) of current regulations. The clause only requires publication of future regulations. It is true that the Attorney-General may order printing but there is no criteria for the exercise of this power. At the risk of repetition we believe the provisions for the publication of regulations should be not less than those for the publication of Acts...

#### **Clause 11 — Notice of making of regulations**

8.15 "Clauses 11(a) to (e) (providing for notice that regulations have been made) are wholly appropriate. Clause 11(f), however, gives no indication of the other information which should be available to users of regulations and the publication of which may be appropriate. Consideration could be given, for example, to express notification that Explanatory Statements are also available to be purchased, if this is in fact the case. There appears to be no provision for the mandatory preparation of regulatory Explanatory Statements in the Bill. You would also be aware of recent innovations in some of the Australian States, where Regulatory Impact Statements are an integral part of regulation making, as well as the scrutiny process. These Regulatory Impact Statements are by their nature necessarily provided for by statute. They are among the more significant changes which have taken place in the Australian legislative scrutiny arena. No change has yet occurred at the Federal level. However, while mandatory production of Regulatory Impact Statements may need careful evaluation, the provision of a proper Explanatory Statement to accompany regulations may be a more obvious response to the needs of users. It has long been the policy of the Committee to require Ministers to provide Explanatory Statements for all delegated legislation referred to the Committee. Such statements are tabled and thereby publicly available...

#### **Clause 19 — Disallowance of regulations**

8.16 "This provision seems to allow the Parliament to disallow any regulation at any time and not simply within, say, a certain number of sitting days. If so, this is an notable contribution to Parliamentary control of delegated legislation. Most legislatures have a set period during which disallowance action must be taken, following which Parliament has no control over instruments, even though circumstances may have changed and the Parliament may wish to take action. Parliament can amend or repeal an Act at any time. It is, however, usually limited to a short initial period to take similar measures with respect to regulations made under that Act. From the point of view of Parliamentary supremacy this outcome is unfortunate.

8.17 "I note that individual provisions of regulations may be deemed to have been disallowed and this partial disallowance is most useful. Given the notable provisions in the Bill for amendment or substitution, this approach will ensure full control by Parliament over the content of laws made by the executive.

8.18 "On the general question of disallowance the Senate recently had a difference of opinion with the Commonwealth Solicitor General and the Attorney-General's Department over the efficacy of a particular disallowance resolution. Litigation appears to have justified the position of the Senate with respect to this aspect of disallowance. A copy of decisions in the case so far is attached for your information. (The litigation was *Thomas Borthwick and Sons (Pacific) Ltd v Kerin and Others*, (1989) 87 ALR 527. See *Eighty-Sixth Report*, May 1990, Chapter 9)...

#### **Clause 23 — Power with Parliament to amend or substitute regulations**

8.19 "These provisions are very interesting indeed. They will ensure proper control by Parliament over the content of executive law making. They also recognise the proper position of a person who delegates, viz that a delegated power does not prevent the exercise of the same power by the person who delegates...

#### **Clause 25 — Power of the Executive to revoke spent regulations and other instruments**

8.20 "It appears that the power to revoke in this clause is not subject to disallowance. The power to repeal or revoke is just as much a law making power as the power to make regulations and should similarly be under the control of Parliament. The exercises of this power should similarly be published and numbered as are other instruments. The Senate Committee has taken issue with the executive on this very point and on its initiative a Commonwealth ordinance was disallowed on the grounds that the repeal of obsolete Acts by executive law making was not appropriate unless the Parliament had detailed and exact information about what was being repealed and could retain its power to prevent any particular repeal. I attach a copy of the Report of the Committee on this matter. (See *Seventy-Sixth Report*, December 1985)..."

## CHAPTER 9

### LIAISON WITH THE ADMINISTRATIVE REVIEW COUNCIL

9.1 The Administrative Review Council (ARC), established under the *Administrative Appeals Tribunal Act 1975*, is one of the most important constituents of the Commonwealth administrative law system. The functions of the ARC are generally to inquire into and review all aspects of the review of administrative decisions. Its membership is Professor Cheryl Saunders, President, the Presidents of the Law Reform Commission, the Administrative Appeals Tribunal and the Commonwealth Ombudsman as ex officio members and seven other members, predominantly permanent heads of Commonwealth Departments of State.

9.2 On 31 August 1989, in Parliament House, the ARC held a major conference on Rule Making. Members of the Committee, the Legal Adviser and the Secretary attended the conference and were invited to the conference dinner, addressed by the Hon Sir Gerard Brennan, AC KBE, a Justice of the High Court. Following this conference the President of the ARC wrote to the Chairman as follows —

“20 October 1989

Senator Bob Collins  
Chairman  
Senate Standing Committee on  
Regulations and Ordinances  
Parliament House  
CANBERRA ACT 2600

Dear Senator Collins

At its meeting on 13 October, the Administrative Review Council discussed the action that should be taken to follow up its Conference on Rule Making, held in the Parliament on 31 August.

The Council agreed to formally adopt a project on rule making and to give it a high priority. A Council committee was appointed, with Professor Dennis Pearce as its Chairman, to carry the project forward. The terms of reference are attached. The Council also agreed to edit as much of the proceedings of the Conference as possible and to publish them, partly to stimulate discussion on the issues involved in rule making and partly to inform people about the project.

The Council attaches great importance to consultation with your Committee during the course of its project. We would value your support for the project and be grateful for the opportunity to draw on your expertise from time to time. We would also be interested in your views on the terms of reference at this early stage, before the project gets underway.

I will be overseas for a month from the end of this week, but Professor Pearce would like to have a meeting with you as soon as possible to discuss the project. He will contact you himself within a week or so. I look forward to becoming involved in the project when I return.

Yours sincerely

Professor Cheryl Saunders  
President

**ADMINISTRATIVE REVIEW COUNCIL**  
*Rule Making Committee*

*Terms of Reference*

- (1) To examine the distinction between primary and other forms of legislation and what should form the prima facie division of content between them.
- (2) To review the nature and forms of legislative instruments to produce uniformity of terminology and common content in the various forms of instruments.
- (3) To review the Acts Interpretation Act and the Statutory Rules Publication Act to designate the different forms of subordinate legislation and the making and review processes appropriate to each.
- (4) To review procedures for making subordinate legislation with regard being paid to notice and consultation procedures and the impact that the Victorian Subordinate Legislation Act procedures have had.
- (5) To review the method of publication of subordinate legislation with attention being paid to the need for consolidation of instruments and their publication in accessible form, and to consider in this context, the possibility of the establishment of a Federal Register."



9.3 On 22 November 1989 the Chairman wrote to Professor Saunders as follows—

"22 November 1989

Professor Cheryl Saunders  
President  
Administrative Review Council  
GPO Box 9955  
CANBERRA ACT 2601

Dear Professor Saunders,

I refer to your letter of 20 October 1989 concerning action following upon the Administrative Review Council Conference on Rule Making, held in Parliament House on 31 August 1989.

The Committee believes the Terms of Reference of the Rule Making Committee appear to be appropriate, and we are pleased to offer comments on any aspect of the project that you believe would be helpful. The Committee secretariat has already been in touch with the staff of the Council on an informal basis and I would be pleased to talk to Professor Pearce whenever convenient. I also look forward to discussing the matter with you on your return to Australia.

In the meantime the Committee offers the following preliminary comments on the terms of reference.

- (1) Your first term of reference is, of course, related to a principle of each of the Senate legislative scrutiny committees, namely whether a particular matter should be legislated for under delegation rather than by Parliament. Both Committees have commented on individual cases in which the question has arisen and upon the general conceptual approaches. It may be appropriate for these conclusions to be studied. It may also be useful to isolate and categorise the key characteristics of the range of existing subordinate legislative instruments to determine whether any generally applicable rules can be abstracted that could in future be applied to difficult cases. For example, is all technical data automatically consigned to delegated instruments? What is "technical data"? Would it include lists of bodies to be subject to or excluded from the legislation? Should the making of administrative or machinery arrangements always be delegated? Again, how should that be defined? Should the delegation of law making power in Acts be expressly limited to technical and administrative matters to confine the otherwise wide scope of what may be prescribed?

- (2) The Committee supports changes to produce uniformity of terminology and subject matter or content of Commonwealth delegated legislation. This is somewhat related to your Term of Reference (5) which is discussed below. The Committee would support a common terminology for all Commonwealth statutory instruments, possibly bringing all such instruments within the present Statutory Rules series.
- (3) This is a most important area of concern. The basic attitude of the Committee is that all Commonwealth statutory instruments should be subject to the provisions of the *Statutory Rules Publication Act 1983*. The provisions in the *Acts Interpretation Act 1901* which require legislative instruments to be subject only to tabling and disallowance are flawed in that all of the safeguards in the *Statutory Rules Publication Act* do not apply. This question of publication and consolidation is addressed later under number (5) of your Terms of Reference. Apart from this the Committee supports the inclusion of safeguards in statutory provisions. With respect to the review processes appropriate to delegated legislation, the Committee has noted the phased repeal of instruments by reference to dates of making and the automatic "sunset" provisions of a term of years for new instruments, provided in various State Acts. Your review of such provisions could be coordinated with your examination of terminology, consolidation and publication under Terms of Reference (2) and (5). The Committee has also noted the recent New Zealand initiative where, as we understand it, instruments stand *permanently referred* to the Parliament for possible disallowance at any time, a very interesting potential safeguard, facilitating regular and effective monitoring potential.
- (4) Procedures for notice could be helpful in the Commonwealth context, as could some consultation provisions. You would be aware, however, of the strict avoidance of policy issues by the Committee. It has been argued that some of the provisions in the Victorian and New South Wales Acts may inappropriately require Committees to examine aspects of the policy and merits of subordinate laws. There are also practical considerations here. In Victoria, for example, the great bulk of the population lives in the Melbourne metropolitan area and it would not be difficult to arrange, for example, personal representations. In the Commonwealth sphere, on the other hand, neither the Parliament nor much of the senior public service are located in or near the population centres they serve. Personal representations could be expensive in time and money unless the Senate committees were asked to invite submissions and travel to take evidence.
- (5) This is one of the most important areas of reform in the whole field of delegated legislation. It is not necessary to detail the deficiencies of much delegated legislation in this area. The Committee believes that the standards of drafting, printing, publication, citation, accessibility, consolidation and ADP applications of delegated legislation should be not less than that of Acts of the Parliament. This standard is, the Committee believes, achieved by the *Statutory Rules*. It is clearly not achieved by most of the other forms of delegated

legislation, now the majority of such instruments. A Federal Register might be appropriate with suitable unified numbering and citation. Some aspects of The United States Federal Register, described at your Conference, could provide a model for Commonwealth action. Options here could include a series of *Commonwealth Statutory Instruments similar to the Statutory Rules* or, and this may be the preference of the Committee, to subsume all delegated legislation within the present Statutory Rules series. These proposals could be modified if a complete system of phased repeal of statutory instruments is introduced. The above are preliminary comments only and we look forward to *developing aspects of them following our discussions.*

Yours sincerely

**Bob Collins**  
Chairman"

## APPENDIX 1

### CLASSIFICATION OF LEGISLATIVE INSTRUMENTS UNDER THE HEADING "MISCELLANEOUS" IN PARAGRAPH 1.10

Remuneration Tribunal Determinations	25
Aged or Disabled Persons Homes Act Determinations and Principles	12
Parliamentary Presiding Officers' Determinations	10
Australian National Railways Commission By-laws	5
Wildlife Protection (Regulation of Exports and Imports) Declarations	4
Commonwealth Employees' Rehabilitation and Compensation Approvals and Declarations	3
Export Control Orders	3
Motor Vehicle Standards Orders	3
States Grants (Petroleum Products) Schemes	3
AUSTEL Determinations	2
Customs Act Notices	2
Excise Act Notices	2
Explosives Regulations Orders	2
Telecommunications Act Determinations	2
Trade Practices Declarations and Guidelines	2
Acts Interpretation Act Orders	1
Australian Centennial Roads Development Determination	1
Lands Acquisition Notices	1
Quarantine Act Determination	1

*John F. Giles*  
16-5-91

Rules of Court by High Court	1
Ships (Capital Grants) Act Guidelines	1
Social Security Act Determinations	1
Telecommunications By-laws	1

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## APPENDIX 2

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

<i>Enactments</i>	<i>Instruments</i>
Aboriginal Councils and Associations Act 1976	by-laws (s.30)
Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987	by-laws(ss.15,23)
Aboriginal Land Rights (Northern Territory) Act 1976	declarations (grants of mining interest)(s.41) proclamations (mining interests and operations)(s.42)
Aboriginal and Torres Strait Islander Commission Act 1989	determinations (Chairperson and Chief Executive Officer)(s.194) notices (constitution, election procedures, operations, terms of members of Commission)(s.116) rules (regional council and zone elections)
Aboriginal and Torres Strait Islander Heritage Act 1984	declaration by Minister of significant areas and objects (s.15)
Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-management) Act 1978	by-laws (s.10)
Acts Interpretation Act 1901	orders (administrative arrangements)(s.19BA)
Aged or Disabled Persons Homes Act 1954	Charter (hostel resident's rights and responsibilities) determinations (approved home grants)(s.9) determinations (personal and respite personal care subsidy)(s.10) general conditions (hostels)(s.10F) guidelines (hostel variable capital funding)(s.9B)
Aged or Disabled Persons Homes Amendment Act 1989	principles (s.25)

Anti-dumping Authority Act 1988	directions (interpretation of legislation) (s.12)
Ashmore and Cartier Islands Acceptance Act 1933	ordinances of territory (s.6) regulations of territory
Atomic Energy Act 1953	declarations that the Approved Defence Projects Protection Act 1947 applies (s.60)
Australian Antarctic Territory Act 1954	ordinances of territory (s.12) regulations of territory
Australian Broadcasting Corporation Act 1983	rules (Tenure Appeal Board and Disciplinary Appeal Board) (s.83)
Australian Capital Territory Supreme Court Act 1933	rules of court (s.28)
Australian Capital Territory Tax (Transfers of Marketable Securities) Act 1986	regulations (tax exemptions)(s.6)
Australian Horticultural Corporation Act 1987	orders (accounts, returns and registration of premises)(s.122)
Australian Meat and Live-stock Corporation Act 1977	orders (export licences and meat quotas)(s.1611, 16J, 16K, 16L)
Australian National Airlines Act 1945	by-laws (s.69)
Australian National Railways Commission Act 1983	by-laws (s.79)
<i>Automotive Industry Authority Act</i> 1984	suspension of number of statutory authority(s.21)
Bankruptcy Act 1966	rules (records and inspection)(s.172), (bankruptcy proceedings)(s.315)
Bass Strait Freight Adjustment Levy Act 1984	rates of levy (s.6)
Bounty (Books) Act 1986	declarations (s.4)
Bounty (Computers) Act 1984	notices (classification of machines) (s.5)
Bounty (Metal Working Machines and Robots) Act 1985	declarations (classification of machinery and components, specification, value and percentages) (ss.6, 7, 8)

Broadcasting Act 1942	orders (technical services, interference, examinations)(s.15), (Broadcasting Tribunal)(s.17), (planning, technical services)(s.125E)
Census and Statistics Act 1905	determinations (release of information)(s.13)
Christmas Island Act 1958	<i>ordinances of territory (s.10) regulations of territory (s.23)</i>
Civil Aviation Act 1988	orders (technical requirement for aircraft, engines and equipment) (s.98(5))
Cocos (Keeling) Islands Act 1955	ordinances of territory (s.13) regulations of territory (s.20)
Commonwealth Employees Rehabilitation and Compensation Act 1988	declarations (rehabilitation and compensation) (s.21) notices (declaration of body corporate)(s.73), (declaration of administering authority)(s.101)
Commonwealth Electoral Act 1918	rules of court (s.375)
Commonwealth Teaching Service Act 1972	determinations (remuneration, benefits and allowances)(ss.20, 23)
Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980	instruments applying to relevant Acts (s.4)
Coral Sea Islands Act 1969	ordinances of territory(s.7)
Crimes (Foreign Incursions and Recruitment) Act 1978	declarations (Ministerial dispensation) (s.9)
Customs Act 1901	declarations (diesel fuel rebate)(s.164) directions (interpretation of anti-dumping legislation) (s.269TA), (factory costs)(s.269S), notices (diesel fuel rebate)(s.164) instrument of approval (forms for diesel rebate)(s.4A)
Customs Tariff Act 1987	directions (substitutes and imitations)(s.25) directions (goods consisting of separate articles)(s.26) orders (application of duties)(s.36)
Dairy Industry Stabilization Act 1977	principles (determination of quotas)(s.11A)



Defence Act 1903	<i>determinations (superannuation interim arrangements)(s.52)</i> <i>determinations (remuneration, benefits and allowances)(58C)</i> <i>orders (control and administration of rifle ranges)(s.123G)</i> <i>interim determinations(conditions of employment)(s.13)</i> <i>determinations (inconsistent regulations)(s.14)</i> <i>rules (punishment)(s.36)</i>
Defence Force Discipline Act 1982	rules of procedure (s.149)
Defence (Special Undertakings) Act 1952	orders (restricted areas)(s.15)
Disability Services Act 1986	<i>determinations (training allowances) (s.24)</i> <i>principles (administrative)(s.5)</i>
Employment, Education and Training Act 1988	<i>determinations (higher education institutions)(s.4(1))</i>
Environment Protection (Impact of Proposals) Act 1974	orders (administrative procedures)(s.7)
Environment Protection (Nuclear Codes) Act 1978	<i>orders under regulations (s.15)</i> <i>orders (codes of practice,nuclear activities)(s.9)</i> <i>orders (special situations,nuclear activities)(s.14)</i>
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Explosives Act 1961	orders (handling of explosives)(s.16)
Export Control Act 1982	orders (prescribed goods, inspection, seizure, trade descriptions, fees) (s.25)
Family Law Act 1975	rules of court (s.123)
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Federal Court of Australia Act 1976	rules of court (s.59)

Fisheries Act 1952	determinations (plans of management)(s.7B) fisheries notices (s.8) plans of management ( <i>fisheries</i> )
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Great Barrier Reef Marine Park Act 1975	<i>zoning plans (marine parks)</i> (s.12)
Health Insurance Act 1973	approvals of form of undertaking (pathology authorities and practitioners)(s.23) determinations (approved pathology authorities and practitioners)(s.23) determinations (Pathology Services Advisory Committee)(s.78C) determinations (pathology services)(ss.4A, 4BA, 4BB, 23DC, 23DF, 23DN) determinations (variation of table of services)(s.4) guidelines (payment of Medicare benefits)(s.3) determinations (definition of 'basic private' and 'basic table')(s.13) determinations (acute cases)(s.27) determinations (medical services outside Australia)(s.40) determinations (Medical Participation Review Committee) (s.40) determinations (health services)(s.9) directions (registered organisations)(s.19) directions (Health Insurance Commission)(s.73) orders (eligibility of immigrants and refugees)(s.8) instruments of revocation (pathology authorities and practitioners) (s.23) principles (approval of private hospitals)(s.31)
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High Court of Australia Act 1979	directions (functions and powers of Clerk)(s.19)
Higher Education Funding Act 1988	determinations (grants for building and operating expenses) (ss.26, 31) directions (grants for expenditure and operating purposes)(ss.18(3), 20(1), 21(2), 26(2), 29(3), 31(2), 32(3), 100, 101) Horticultural Research and Development Corporation Act 1987

	orders (s.81)
Human Rights and Equal Opportunity Commission Act 1986	declarations of international instruments (s.47)
Interstate Road Transport Act 1985	orders (federal road safety standards)(s.35)
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Liquid Fuel Emergency Act 1984	guidelines (allocation of fuel)(s.41)
Liquified Petroleum Gas (Grants) Act 1980	determinations (wholesale LPG prices)(s.5)
Meat Inspection Act 1983	orders under regulations (s.36) orders (production of standards inspection, official marks, fees) (s.37)
Motor Vehicle Standards Act 1989	determinations (national standards, auditing procedures)(ss.7, 9)

National Health Act 1953	<p>agreement (residents and proprietors of nursing homes) charter (nursing homes residents' rights and responsibilities) declarations (pharmaceutical benefits)(s.85)</p> <p>declarations (nursing home care standards)(s.45F)</p> <p>determinations (basic benefits for patients in nursing homes) (s.47(2B))</p> <p><i>determinations (basic table)(s.4)</i></p> <p>determinations (benefits payable to proprietors of non-government nursing homes for disabled people) (s.47(1))</p> <p>determinations (daily allowance for occupied beds) determinations (amounts payable for hospital treatment)(s.4D)</p> <p>determinations (pharmaceutical benefits)(s.85)</p> <p>instrument of approval (forms)(s.40AA)</p> <p>instrument of revocation (guidelines for medical and hospital benefits plans)(s.73E)</p> <p>notices (benefit rate for non-government nursing homes for disabled people)(s.47)</p> <p>notices (<i>recurrent funding for nursing homes</i>)(s.12)</p> <p>principles (exempt nursing homes fees and status, methodology for determining service need classification)(ss.39, 40)</p> <p>principles (guidelines for approving an 'approved operator' of a nursing home)</p> <p>principles (terms and conditions of employment of staff) principles (scales of fees)(s.3)</p>
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Nuclear Non-Proliferation (Safeguards) Act 1987	<p>declaration (equipment, material and technology)(s.4)</p> <p>declarations (exemptions and terminations)(ss.4,11)</p> <p>orders (grants of permits)(s.73)</p>
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States Grants (Technical and Further Education Assistance) Act 1989	determinations (grants for operating expenses, building and capital expenditure)(ss.9(1), 10(4), 11(1), 12(1), 13, 14)
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### APPENDIX 3

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