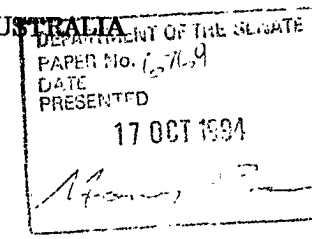
THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA



SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

LEGISLATIVE INSTRUMENTS BILL 1994

NINETY-NINTH REPORT

OCTOBER 1994

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SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

MEMBERS OF THE COMMITTEE

Senator Mal Colston (Chairman)
Senator Bill O'Chee (Deputy Chairman)
Senator Eric Abetz
Senator Stephen Loosley
Senator Nick Minchin
Senator Olive Zakharov

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.

LEGISLATIVE INSTRUMENTS BILL 1994

Introduction

On 25 August 1994 the Selection of Bills Committee recommended that the Legislative Instruments Bill 1994 be referred to the Committee for inquiry and report. The Senate agreed to this recommendation on the same day. The Committee was required to report by 10 October 1994, later varied to 17 October 1994.

Following the reference of the bill, the Committee advertised in the national press on 31 August 1994, advising of the reference, inviting written submissions and advising of a public hearing on 4 October 1994. The Committee also wrote individually to 50 people and organisations about its inquiry.

The Committee held a public hearing in Senate committee room 2S1 between 11.30 am and 3.00 pm on 4 October 1994. The Clerk of the Senate and representatives of the Attorney-General's Department, including the Office of Legislative Drafting, were called as witnesses and attended. The Administrative Review Council was also called as a witness but was unable to send a representative.

The Committee was assisted by its legal adviser, Emeritus Professor Douglas Whalan AM.

The Committee engaged Mr Geoff Harders as drafting counsel to draft amendments to the bill which reflect its recommendations. The amendments are in Appendix B.

Background

The bill was introduced into the Senate on 30 June 1994. The bill makes important changes to the existing law about the making, registration and parliamentary scrutiny of legislative instruments.

The second reading speech advised that the bill implements the Government's response to Report No 35 of the Administrative Review Council, Rule Making by Commonwealth Agencies, tabled in the Senate on 7 May 1992.

The speech advised that the bill was intended to provide easy access to delegated legislation through an electronic register of all new and existing delegated legislation. Members of the public may scan the register and print out a copy of any legislation. A new legislative instrument will not be able to be enforced unless it is registered. Existing delegated legislation will not be able to be enforced unless registered within a specific time. Everyone should have inexpensive and easy access to delegated legislation through the electronic register.

There will be a mandatory consultation process for delegated legislation affecting business. This process includes the provision of a legislative instrument proposal which analyses the need for the instrument, its costs and benefits and alternative means of achieving its objectives. This should ensure that any defects in the proposal are exposed and can be corrected before the instrument is made.

The speech advised that Parliament will have a greater role in the scrutiny of delegated legislation. All registrable legislative instruments will be subject to parliamentary scrutiny, which is not the case at present. Existing provisions of the *Acts Interpretation Act 1901* dealing with the construction and disallowance of instruments will be repealed and re-enacted in the bill. In addition, Parliament will be given a new power to defer consideration of a motion of disallowance of a legislative instrument for up to six months. This will allow the rule-maker to remake or amend the instrument to achieve an objective specified by resolution of a House.

The speech advised that while primary legislation is relatively accessible, delegated legislation is another matter. While some existing legislative instruments are readily available, a substantial amount is not easily accessible to the public. In this context, the community is entitled to know what laws exist and apply to them.

The speech advised that the bill would involve Australians and the Parliament in the process of making delegated legislation and ensuring that it is understandable, effective and up to date.

Committee findings on the bill

The Committee endorses the objectives of the bill as set out in the second reading speech and generally supports its main principles. There are, however, questions concerning the detail of the scheme about which the Committee has concerns, or would wish to comment. These are set out below.

Conclusive and unreviewable power of the Attorney-General

The Committee noted that the second reading speech advised that the Government did not accept four recommendations made by the ARC.

The speech advised that, in particular, the Government did not accept the recommendation that the legislation implementing its Report should not include a

definition of a legislative instrument. The Government considered that this would create uncertainty and result in litigation to test the scope of the legislation.

The Committee has no objection to the definition of legislative instrument in clause 4 of the bill. The Committee is, however, concerned about the conclusive and unreviewable power of the Attorney-General in clause 7 to declare whether or not an instrument is legislative.

Clause 7 provides that where a rule-maker is uncertain whether an existing or prospective instrument is legislative in character, application may be made to the Attorney-General to determine the matter. The Attorney-General must then issue a certificate which is conclusive as to whether an instrument is legislative. Clause 39 requires such certificates to be registered in Part C of the Register. A Note to the clause advises that such decisions by the Attorney-General are not reviewable under the *Administrative Decisions (Judicial Review) Act 1977.* The bill later provides expressly for amendments of that Act to achieve this purpose.

The clause therefore imposes a conclusive and unreviewable duty on the Attorney-General to interpret the law, which may be a judicial power exercised contrary to Chapter III of the Constitution. As pointed out by the Standing Committee for the Scrutiny of Bills in Alert Digest 12/94, pages 43-45, without clause 7 the question of whether an instrument is legislative could be settled only by a court. Even if the power is not judicial, but administrative, not only is the review jurisdiction of the Federal Court removed, but also the action is not subject to review by the Administrative Appeals Tribunal. The Committee considers this to be a case where the rights and duties of citizens may be unduly dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

In the absence of clause 7, the Attorney-General, or another Minister advised on the legal issues by the Attorney-General, would be a defendant in litigation to decide whether an instrument was legislative. The Scrutiny of Bills Committee observed, "It is unacceptable that the power conclusively to decide an issue should be given to a person who would otherwise be one of the parties to litigation to decide that very issue." Whether or not the clause is technically valid, laws should be interpreted by an impartial court and not by a Minister of the government of the day.

Clause 7 was discussed in some detail at the public hearing, where officers of the Attorney-General's Department advised that it was expected that the power would be used in very few cases. The Committee suggests that this may be as much a reason for removing the power from the bill as for retaining it.

In any event, most Acts raise issues which may be doubtful. It could be an undesirable precedent if questions of interpretation were to be settled by a conclusive certificate from the Attorney-General.

Finally, the issue of a certificate will mean in some cases that an instrument which would otherwise be disallowable will not be disallowable, even if Parliament assumed that such instruments were legislative when the enabling Act was passed. This may have the further effect of the Senate expressly providing in bills, as a safeguard, that instruments are legislative.

For the above reasons the Committee has considerable reservations about this power. Nevertheless, it noted the advice from the Attorney-General, the Hon Michael Lavarch MP, in a letter to the Committee of 4 October 1994 (see Appendix A) and does not oppose the clause.

The Committee considers, however, that certificates issued in respect of subclause 7(2) which determine that an instrument is not legislative, should be expressly deemed to be disallowable instruments. Subclause 7(2) provides for the Attorney-General to determine whether an instrument of a kind made on or after commencing day, 1 January 1995, will be a legislative instrument. If such certificates are subject to disallowance Parliament will be able to scrutinise the exercise of the power without adversely affecting the operation of the legislative scheme as presently provided in the bill. The Committee also considers that if a subclause 7(2) certificate determining that an instrument is not legislative is disallowed, such instruments should be deemed to be legislative. The Committee did not consider that certificates issued in respect of subclause 7(1), which applies to individual instruments made before commencement day, should be disallowable.

As pointed out above, officers of the Attorney-General's Department advised the Committee that it was expected that there would be very few certificates issued under clause 7. Accordingly, these recommendations by the Committee should have little effect on the operation of the bill. The Committee therefore recommends that the bill be so amended.

Backcapturing rather than sunsetting

The second reading speech also advised that what it called another significant departure from the ARC Report related to sunsetting, which the Report recommended should apply in stages to all legislative instruments. The Government considered that it would be premature to provide for sunsetting until an evaluation of possible benefits had been undertaken, particularly as sunsetting was a resource intensive practice.

The Committee does not oppose the Government's position on this. The Committee would expect, however, that the Government give every assistance to enable the ARC to play a central part in the proposed evaluation of the backcapturing program.

Consultation limited to certain legislative instruments affecting business

Third, while the ARC Report recommended that the consultation process be undertaken in all cases, the Government considered that what the speech called the burden of consultation should apply in the first instance only to legislative

instruments made under specified legislation affecting business. Whether consultation should be extended outside the business context would be considered by the ARC as part of its evaluation of the whole regime provided for in the Bill after it has operated for three years.

The Committee does not oppose the proposed provisions limiting consultation to delegated legislation affecting business. The Committee supports the ARC review of this aspect of the legislation after three years operation. In this context the consultation procedures commence on 1 January 1996 rather than 1 January 1995 like the rest of the bill, so the review would examine two years of consultation.

Rules of court are not legislative instruments

Fourth, the speech advised that although the ARC recommended that the regime provided by the bill apply to rules of court made by Federal courts, any supervision of these rules by the executive risks interference with the independence of the judiciary and offending the doctrine of the separation of powers. The courts, however, accept that the principles of the legislation should apply to them. Accordingly, the bill amends the various Acts establishing the courts to provide a court specific regime based on the principles of the bill.

The Committee does not oppose a specific regime for rules of court, but notes that, as presently drafted, it is possible for the regulations to remove the rules from parliamentary scrutiny. Such regulations themselves would be subject to scrutiny and possible disallowance, but rules could be made under those regulations which would operate at least until disallowance and which would not be subject to control by Parliament. Accordingly, the Committee recommends that the bill be amended to provide that the regulations may not modify Part 5 of the bill - Parliamentary Scrutiny of Legislative Instruments, in its application to rules of court.

Other concerns of the Committee

The Committee has other concerns with the bill apart from those recommendations of the ARC which were not accepted by the Government. These include the following matters.

Decisions of the Minister not required to be tabled

Clause 17 provides that, in relation to consultation procedures, the responsible Minister must decide in writing whether particular organisations represent persons affected by proposed legislative instruments. Subclause 19(1) provides that the Attorney-General may certify in writing that the public interest requires that consultation is not required for a legislative instrument. Subclause 19(2) provides that a rule-maker must record in writing, with reasons, a decision that consultation is not required. Under present provisions, it appears that tabling these decisions as part of the explanatory statement may be only discretionary. The Committee recommends that the bill provide that the decisions must be contained in the explanatory statement.

Disallowance of legislative instruments

Clause 48 re-enacts certain existing provisions of the Acts Interpretation Act providing for disallowance of legislative instruments and includes a new provision for deferral of consideration of motions of disallowance.

At present, the bill provides for only an entire legislative instrument to be disallowed. The Committee considers that this is unacceptable, being a serious diminution of the existing rights of Parliament to control delegated legislation. In this context the Committee has this year scrutinised the Migration Regulations, Statutory Rules 1994 No 268, which are 657 pages long, and other lengthy instruments. The bill as it stands would require a House to disallow the whole 657 pages of those Regulations even though it only objected to one provision of a few lines. The provision is, therefore, practically, as well as conceptually, defective.

The Government has, however, advised the Committee that it intends to move amendments to clause 48 to preserve the existing right to disallow a single provision of an instrument. The Committee supports this essential proposed amendment.

Subclause 48(4) provides for a new provision, which has no counterpart in the Acts Interpretation Act, under which a House may defer consideration of a motion of disallowance for up to six months. While not opposing this provision, the Committee notes that, while appearing to strengthen parliamentary control of delegated legislation, in practice it may favour the executive. A Minister may use the existence of the provision to urge deferral of a motion in order to allow time to amend the unacceptable provision. If the Senate agreed to such deferral, the provision may then remain in force for up to six months, at the end of which the Minister may claim that amendment is not possible or is now undesirable, and contend that the provision should remain because of the time during which it has been in force. On the other hand, the existing provisions ensure relatively swift action. It will be necessary for the Senate to ensure that the new provision is not misused by the executive. In any event, it is an option for the Senate to disallow a legislative instrument but to indicate that it would consider rescission of the motion if certain conditions were met.

No annual report

The bill does not provide for an annual report to Parliament on the operation of the scheme which it proposes. The Committee understands, however, that such a report will be included in the annual report of the Attorney-General's Department. The Committee supports this.

Application of the bill to the Australian National University

At present the bill applies to statutes, rules and orders made under the *Australian National University Act 1991* by the Council, an authority or an officer of the university. The Vice-Chancellor of the ANU (See Appendix A) has suggested that it is inappropriate for the bill to apply to university legislation which affects the

content of academic courses. The Committee accepts that such legislation should be excluded from the general terms of the bill and so recommends.

In this context the Committee noted that the university statutes must be approved by the Governor-General, gazetted and tabled in Parliament. The rules and orders are also easily accessible.

Powers of Committee when Senate is not sitting

Section 9 of the *Subordinate Legislation Committee Act 1969* (Tasmania) provides that if, during a parliamentary recess or adjournment, the Committee considers that a regulation should be amended or rescinded, the Committee may so advise the rule-maker, who must amend or rescind the regulations as indicated by the Committee, or suspend its operation until the regulation is dealt with by both Houses.

This matter was not recommended by the ARC or included in the bill. Nevertheless, the Committee sees considerable merit in such a provision, the use of which would enable the Senate, through the Committee, to exercise effective control over legislative instruments when the Senate is not sitting. The Committee suggests that the possible inclusion of a similar power could be part of the proposed review after three years of the operation of the present provisions.

Unforeseen or unintended consequences of the bill

A submission from Mr John McKenzie pointed out what appeared to be unforeseen consequences of the bill. These were as follows:

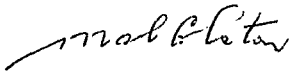
1. As presently drafted, clause 27, dealing with the status of the Register and judicial notice of legislative instruments, may operate only in respect of documents extracted from the Register and printed by the Government Printer. The Committee recommends that the bill be amended to extend this provision to include documents printed with the authority of the Principal Legislative Counsel.

2. As presently drafted, clause 28, dealing with rectification of the Register, may not permit rectification of a registered copy of a document. The Committee recommends that the bill be amended to avoid this.

3. As presently drafted, clause 41, which requires a rule-maker to inform the Principal Legislative Counsel if an instrument was not validly made, would operate so narrowly as to have little meaning. The Committee recommends that the bill be amended to avoid this.

4. As presently drafted, proposed section 46B of the Acts Interpretation Act, dealing with disallowable non-legislative instruments, provided for in Schedule 4, would require complex and repetitive provisions to ensure full parliamentary scrutiny of such instruments. The Committee recommends that the bill be amended to avoid this consequence.

A submission from Ms Rosa Ferranda of the Senate Table Office pointed out numbers of drafting inconsistencies. The Committee understands that these are being addressed by Government amendments.



Mal Colston
Chairman

October 1994

APPENDIX A

Submissions received

1. Mr Richard Griffiths, Capital Monitor
2. Mr John McKenzie
3. Mr Richard Griffiths, Capital Monitor (second submission)
4. Mr Peter Ilyk, Manager, Legislation and Legal Services, Civil Aviation Authority
5. Mr Harry Evans, Clerk of the Senate
6. Mr Robert Hadler, Director - International, National Farmers' Federation
7. Ms Betty Hounslow, Director, Australian Council of Social Service
8. Mrs Wendy Brazil
9. Mr Victor Perton MP, Chairman, Scrutiny of Acts and Regulations Committee, Parliament of Victoria
10. Ms Rosa Ferranda, Senior Parliamentary Officer (Legislation and Documents) Senate Table Office
11. Mr Martin Soutter, Assistant Director, Business Council of Australia
12. Ms Jane Goddard, Immigration Advice and Rights Centre
13. Mr Adrian Cruickshank MP, Chairman, Regulation Review Committee, Parliament of New South Wales
14. Dr Susan Kenny, President, Administrative Review Council
15. The Hon Michael Lavarch MP, Attorney-General
16. Professor RD Terrell, Vice-Chancellor, Australian National University
17. Mr Denis O'Brien, Chairman, Administrative Law Committee, Law Council of Australia
18. Mr Mark Duckworth, Director, Centre for Plain Legal Language, University of Sydney Law School

Most of the above submissions are attached.

LEGISLATIVE INSTRUMENTS BILL 1994

SUBMISSION TO SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES BY JOHN McKENZIE

I should say at the outset of this submission that, whatever shortcomings the Legislative Instruments Bill may have, it is in my opinion a valuable and very necessary measure. It should help to ensure that members of the public are able to find relatively easily the legal requirements that affect them. It should also help to ensure that bureaucratic instructions and directions are soundly based on law and are not the results of subjective assessments of what is necessary in the interest of flexible administration. The Bill is therefore most welcome.

Legislative instruments: definition

1. Clause 4 of the Bill defines legislative instruments in 2 ways. Subclause 4 (1) contains a descriptive definition that relies largely on the legal effects of instruments. Subclause 4 (2), on the other hand, declares certain instruments to be legislative instruments, regardless of any effect they might have. Two classes of the instruments covered by subclause 4 (2) appear to me to give rise to possible problems.

Disallowable instruments

2. Paragraph 4 (2) (d) of the Bill provides that an instrument is a legislative instrument if it is:
   (a) made under a power delegated before the commencing day (1 January 1995); and
   (b) declared to be a disallowable instrument for the purposes of section 46A of the Acts Interpretation Act.

3. Any such instrument made before 1 January 1995 will have to be registered after that day in Part B of the Register in accordance with clause 37. Any such instrument made on or after 1 January 1995 will have to be registered in Part A of the Register before it can have any effect.

4. If, however, such an instrument were a legislative instrument solely because of paragraph 4 (2)(d), it would be possible to repeal and remake the delegated power after 1 January 1995. Any instruments made under the remade power would not fall within the scope of the definition.

5. Given the public consultation and other requirements that attach to legislative instruments, there may be some inducement to avoid those requirements by adopting the course mentioned above. But in any event, the repeal and re-enactment, or remaking, of legislation in the course of law reform or review

activities may well involve the result that instruments that were legislative instruments under the old legislation will cease to be so under corresponding new provisions .

6. Changes of this kind could prove confusing in practice, both to administrators and the public. In particular, members of the public who get used to finding particular kinds of instruments on the Register may well assume, incorrectly, that no such instruments have been made under a remade or re-enacted law if they fail to find anything registered. Without some guidance, it may not occur to them to look elsewhere.

Proclamations

7. Paragraph 4 (2) (e) of the Bill makes Proclamations legislative instruments. The effect of this provision (in conjunction with the disallowance provisions) on Proclamations that proclaim the commencement of Acts is not clear.

8. Presumably, a Proclamation that proclaimed a commencing day for an Act could be disallowed before the commencing day occurred. It could be argued, in such a case, that the effect of disallowance would be to revoke the Proclamation and that a new Proclamation would be necessary before the Act could come into operation. An Opposition could, in this way, temporarily frustrate the legislative intentions of the Government without risk of providing the trigger for a double dissolution.

9. The question remains whether a commencing day Proclamation could be disallowed after the commencing day has occurred and, if so, what effect would such a disallowance have. On one view, the Proclamation would have served the only purpose it can serve, and its continued existence would be unnecessary. In other words, a disallowance in these cases would have no effect. On the other hand, the courts may well conclude that Parliament could hardly have intended to give itself a power that had no effect when exercised. If the courts were to take that view, and I think it highly likely that they would, the most likely effect of disallowance would be that the Act, having commenced, would stop operating on disallowance.

10. A result of this kind would, of course, have implications for the usual "Macklin Clause" commencing provision, under which an Act automatically comes into operation (or is repealed) at a specified time after Royal Assent if it has not commenced by Proclamation before then. Such a provision, at least as currently worded, would not operate in cases of the kind I have mentioned, because the Act would, in fact, have commenced by Proclamation.

11. A failure to register a commencing day Proclamation made before 1 January 1995 appears to have no effect. Under subclause 43(3), the only instruments that are to be treated as repealed are those that cease to be enforceable, a term that does not appear capable of applying to a Proclamation of this kind.

12. I think the commencement of Acts and their continued operation is a serious matter and should not be left open to question, and that the proposed provisions leave precisely such an opening. I think the legislation should make clear the intended result of a disallowance of a commencing day Proclamation.

When do instruments take effect?

13. Under clause 8 of the Bill, a legislative instrument takes effect, in the absence of any day or time specified or identified in it, at midnight in the ACT next following the time when it is registered.

14. The commencement of disallowable instruments that are not legislative instruments is, however, governed by the proposed new subsection 46B (2) of the Acts Interpretation Act. Under proposed paragraph 46B (2) (d) of that Act, such instruments will commence on "the day of notification" in the Gazette.

15. It is not clear why a legislative instrument commences at midnight following its registration in these cases, but a non-legislative instrument takes effect on the day (i.e. at the first moment of the day) of its gazettal. The difference is likely to cause confusion.

16. Take, for example, a delegated power to grant general and specific exemptions. A generally applicable exemption is likely to be a legislative instrument under subclause 4 (1) of the Bill, but an exemption of a specified person from a specified provision may not be covered by that subclause. If a specific exemption is not a legislative instrument but is, nevertheless, a disallowable instrument under the proposed new section 46B of the Acts Interpretation Act, it will commence at the beginning of the day when notice of its making is gazetted. The general exemption, however, will commence at midnight following its registration, i.e. at the very last second of the day when it is required. The differences appear to be not only confusing (particularly where both instruments are made under the same power) but incapable of rational explanation.

17. I note, in addition, that the new provisions will mean that, in most cases, it will not be appropriate to use expressions such as "on or after the commencing day" in legislation referring to legislative instruments, although such expressions will continue to be appropriate for other disallowable instruments.

18. I recommend that the commencement provisions for legislative and non-legislative instruments that do not specify their own commencing days or times, should be consistent, at least to the extent that they should result in the commencement of both kinds of instruments at the beginning or the end of a particular day. To remain with the present provisions would be the least disruptive: to change to the proposed system would be the most confusing.

Retrospectivity

19. Subclause 8 (2) of the Bill would permit a certain degree of disadvantageous retrospectivity. An instrument to which paragraph 8 (1) (d) of the Bill applies could have a retrospective effect that started on the day of registration, so long at it did not start before the time of registration. The retrospectivity could, however, cover several hours before the instrument itself came into operation. Thus, retrospectivity is to be tested, not by reference to commencement in these cases, but by reference to the time of registration, which could be some hours earlier.

20. This situation does not arise under the present provisions of section 48 of the Acts Interpretation Act, and will not arise under the proposed section 46B, which will replace section 48 for non-legislative instruments. Because, under those provisions, instruments that do not provide their own specified commencing days or times commence at the beginning of the day of gazettal, retrospectivity is, in effect, tested against commencement in those cases.

21. This difference between the retrospectivity provisions that apply to legislative and non-legislative instruments is also likely to cause confusion, particularly in cases like the example mentioned in paragraph 16 above.

The Register

22. The Bill contains no provisions saying how the registration of an instrument is to be effected. Subclause 24 (3) provides that Parts A, B and C of the Register consist of scanned images of documents entered on the Register. Clause 40 requires certain particulars in relation to each such instrument to be entered in the Index, which forms part of the Register. Those particulars are to include the time and date of registration.

23. There is, however, nothing to indicate when registration takes place. It is not clear, for example, whether registration of an instrument is complete when the scanned image of it is entered under Part A, B or C, or only when the required particulars relating to it are entered in the Index, which presumably happens after the entry of the scanned images. As there may be some delay between the entry of an image and the entry of the related particulars in the Index, I recommend that the legislation should clearly identify when registration is to be regarded as having taken place.

Status of the Register

24. Subclauses 27 (2), (4) and (5) do not seem to me to be clear. Subclause 27 (2) speaks of a legislative instrument that is extracted from the Register and that is printed by the Government Printer. A legislative instrument cannot be extracted from the Register, although a copy of it can be. A copy, on the other hand, that is printed not by the Government Printer but by some form of printing equipment

operated in conjunction with the Register, will not be covered by the provision. It seems to me, therefore, that subclause 27 (2) may well describe a document that does not exist and that even if it is altered to refer to copies of documents it will only cover those printed by the Government Printer. Unless it is intended that all such copies should be printed by the Government Printer, this provision is likely to create a confusing distinction between copies.

25. Similarly, subclause 27 (4) speaks of a document that "purports to be an extract from ... the Register" and that purports "to have been printed by the Government Printer". Again, this provision will only apply to extracts printed by the Government Printer. Unless it is intended that the Government Printer is going to make all such extracts, it will create a confusing distinction between Government Printer extracts and extracts printed by using equipment that has no connection with the Government Printer.

26. Subclause 27 (5) speaks of a document to which subclause 27 (4) applies that purports to be "a copy of a document registered in Part A, B or C of the Register on a particular day and at a particular time". Registration dates and times do not form part of scanned images entered in Part A, B or C of the Register, but in the Index, which is a separate part of it. It is therefore not easy to see how a document that purports to be an extract from Part A, B or C of the Register could also purport to contain material contained in the Index.

27. I recommend that all of these provisions be clarified.

Rectification of the Register

28. Under subclause 28 (1) of the Bill, the Principal Legislative Counsel can only rectify an error in Part A, B or C of the Register if "the error lies in the document as it appears in the Register and not in the original document in the form in which it was lodged for registration".

29. It is not clear how this provision is intended to operate where the document that is registered is a copy and the original, when lodged under clause 33, subsequently turns out to contain differences. If, for example, a person produces a copy of a document and the copy is registered under clause 31 of the Bill, it could be argued that the copy produced for registration is to be regarded, for the purposes of subparagraph 28 (1) (b) (ii) of the Bill, as the form of the original produced for registration. If what is registered under clause 31 in such a case turns out to be an exact copy of the produced copy, the provision would not, if that argument is accepted, appear to permit rectification. If, on the other hand, the copy produced for registration under clause 31 cannot be regarded as covered by subparagraph 28(1)(b)(ii), rectification is still not possible because the original, when lodged under clause 33, is not "lodged for registration".

30. The provision should, in my opinion, clearly cover this situation.

Invalid material

31. The intended operation of clause 41 is not clear. In fact, it seems to have little scope to operate at all. It will apply only if a rule-maker, or the Principal Legislative Counsel, becomes aware that a registered instrument "was not validly made". As validity is a matter that only the courts can finally determine, it could be argued that subclause 41 (1) does little more than require rule-makers to notify the Principal Legislative Counsel of court decisions that particular instruments have not been validly made, if and when they happen to become aware of the decisions. It is not clear why reasons for the invalidity would have to be given if that is the only application the provision is intended to have.

32. The provision is not apparently intended to apply to invalid provisions but only where an entire instrument is invalidly made. This appears to further reduce its application.

Remaking of instruments in certain cases

33. While clause 50 would prevent the making of a legislative instrument "the same in substance" as a registered instrument during the latter's tabling period, the provision could be easily avoided by remaking each of the provisions in the registered instrument as a separate legislative instrument. None of the separate instruments would, by itself, be the same in substance as the registered instrument, but their combined effect would have the same result.

Acts Interpretation Act: proposed new section 46B

34. Proposed new section 46B of the Acts Interpretation Act differs in 2 important ways from the equivalent present provisions of the Act.

35. Under the present section 46A of the Act, the "enabling provision" conferring the power to make an instrument, and the provision making any such instrument a disallowable instrument, can be separate. That allows, for example, an Act that contains several separate enabling provisions to contain a single additional provision declaring instruments made under each of the enabling provisions to be disallowable instruments. The new provision only operates where the enabling provision itself provides that instruments made under it are disallowable. Thus, in the example I have given, each enabling provision would have to contain its own declaration. There seems no reason for this change, which could produce unnecessarily complex and repetitive provisions in some cases.

36. Under the present section 46A of the Act, where an instrument is made a disallowable instrument, certain other provisions of the Act apply to it "except so far as the law otherwise provides". Those provisions govern, among other things, the commencement, retrospectivity, tabling and disallowance of instruments. The present provision allows, for example, a regulation to be made

making an instrument made under it a disallowable instrument and to modify the application of the commencement provisions of the Acts Interpretation Act in relation to that instrument. The proposed new section 46B of the Act contains no such power to modify the provisions that will apply to disallowable instruments.

Partial disallowance

37. In its present form, the Bill would not allow the disallowance of provisions of a legislative instrument but only disallowance of an entire instrument. I understand, however, that it is proposed to introduce amendments to permit the disallowance of provisions of an instrument. I shall not, therefore, comment any further on this aspect of the Bill except to mention that if the proposed amendments used the word "provision", it may be that the new disallowance provisions would enable, for the first time, a subregulation to be disallowed. The present section 48 of the Acts Interpretation Act, while it provides for the disallowance of a regulation, does not appear to permit disallowance of a part of a regulation.

John McKenzie

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5 September 1995

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14 September 1994

Mr David Creed
Secretary
Senate Standing Committee on
Regulations and Ordinances
Parliament House SG49
CANBERRA ACT 2600

Dear David,

I refer to the advertisement in the Canberra Times on 31 August 1994 seeking submissions on the Legislative Instruments Bill 1994.

For the reasons set out in the Second Reading Speech when the Bill was introduced into the Senate on 30 June 1994, the Civil Aviation Authority supports the introduction of legislation along the lines proposed by the Bill. However, the Bill does have a number of serious implications for a regulatory body such as the CAA which is required to regulate air navigation safety in Australia.

Under the legislative scheme for the safety of air navigation in Australia, the Civil Aviation Authority is empowered under regulation 37A of the Civil Aviation Regulations to issue airworthiness directives to aircraft operators requiring them to take immediate action to remedy an unsafe condition in an aircraft or an aircraft component. These directives are legislative in character and can apply to a specific aircraft/component or to all aircraft/components of a specified type or category. Such action is taken by the Authority on a regular basis when defects (such as cracks) are discovered in aircraft or when the Authority is advised by its overseas counterparts of safety problems in a particular aircraft or type of aircraft. During the past 12 months approximately 500 airworthiness directives were issued by the Authority. On average, one or two airworthiness directives are issued every day.

These situations require immediate action and it would be totally impractical for the Authority to go through a consultation process as envisaged by clause 19 of the Bill or seek the Attorney-General's certificate under clause 19(1)(b) in such situations. As the expert body responsible for aviation safety the Authority must be able to take unilateral action to prevent possible aviation disasters. The proposed consultation/certificate process could affect the lives of Australia's travelling public and could also affect Australia's safety reputation in the international aviation community.

It is important to note that the regulation of air navigation in Australia stems, in part, from Australia's obligations under the Chicago Convention. This is expressly recognised by section 11 of the Civil Aviation Act 1988 which provides that the Authority must perform its functions in a manner consistent with the obligations of Australia under the Chicago Convention and any other agreement between Australia and any other country or countries relating to the safety of air navigation. The Annexes to the Convention require Contracting States to take necessary action to ensure the safety of air navigation. There are instances when Contracting States need to take immediate action to prevent air accidents. Airworthiness directives are used universally for this purpose. If the Authority were bound to comply with the consultation requirements it could adversely affect Australia's international reputation as a safety regulator and would mean that Australia could not respond quickly to information provided by other countries in relation to defects detected abroad. Such an exchange of information between countries in the international aviation community is an essential component in maintaining the safety of aviation throughout the world.

In these circumstances the Authority believes that the public consultation requirements in the Bill should not apply in relation to airworthiness directives. The Authority notes that aviation security instruments under the Air Navigation Regulations are totally exempted from the Bill.

Because airworthiness directives may need to be issued to rectify urgent safety problems they often need to commence from the date of notification in the gazette. However, under the proposal in the Bill they could not commence until midnight following the time of registration. This unnecessary delay in commencement could have serious consequences on air safety. The Authority believes that the existing provisions in the Acts Interpretation Act relating to commencement are preferable.

The other difficulty with the Bill is that it is impossible to know which matters are caught by the general definition of "legislative instrument" in subclause 4(1) of the Bill.

As you will be aware, the Authority is empowered under the Civil Aviation Act and Regulations to issue many different types of directions, instructions, approvals, specifications, designations, etc. Many of these are not declared to be disallowable instruments but may be caught by the general definition of "legislative instrument".

The difficulty, of course, is that from 1 January 1995 if many of these instruments are legislative instruments within the meaning of the Bill then they will be unenforceable unless they comply with the Bill's procedural requirements. However, it is not

possible to determine definitely beforehand whether particular instruments are required to comply with the Bill or not. From a safety regulatory perspective this uncertainty is not acceptable as the Authority needs to be able to enforce its safety requirements. The only safe course for the Authority to adopt would seem to be to process all instruments in accordance with the Bill's requirements. However, this would cause unnecessary administrative problems for the Authority and could jeopardise safety unnecessarily.

There is an urgent need to clarify the exact scope of the definition of legislative instrument. It may be that the Bill should have a special commencement provision for subclause 4(1) of the Bill to delay its commencement for 6 months after 1 January 1995. As clause 7 would come into operation on 1 January 1995 agencies would have 6 months to obtain definitive certificates from the Attorney-General in relation to those instruments about which there is some uncertainty. Subclause 4(2) could still commence on 1 January 1995 as it is possible to determine objectively whether an instrument falls within one of the paragraphs of that subclause.

Such a delayed commencement for subclause 4(1) would seem to provide an adequate opportunity for agencies such as the Authority to obtain the necessary certificates in relation to instruments about which there is genuine uncertainty. This procedure would have the least impact upon safety and at the same time would allow the Bill to take effect from 1 January 1995 as planned.

Yours sincerely,

Peter Ilyk
Manager
Legislation & Legal Services Branch

AUSTRALIAN SENATE

OFFICE OF THE CLERK OF THE SENATE

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hm/l/10072

19 September 1994

Senator M Colston
Chairman
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Mr Chairman

LEGISLATIVE INSTRUMENTS BILL 1994

The Committee has drawn to my attention the advertisement in which the Committee invites submissions on this bill, which was referred to the Committee by the Senate on 25 August 1994.

In responding to this invitation, I have considered proposed government amendments to the bill, which the Committee has also made available.

I hope that the following observations will assist the Committee.

Clause 7: Attorney-General's conclusive certificate

The power of the Attorney-General under this clause to conclusively determine whether an instrument is a legislative instrument, without any possibility of judicial review, is highly objectionable. The clause confers a judicial power on a minister. There is no reason for the question of whether an instrument is a legislative instrument not being determined in accordance with the terms of the bill and subject to judicial adjudication if required, as with all other such questions arising under legislation. I strongly recommend that this clause be omitted.

Clauses 17 and 19: Attorney-General's certificates as to consultation

A written decision by the Attorney-General under clause 17, a certificate by the Attorney-General under subclause 19(1) and a written decision by a rule-maker under subclause 19(2) should be tabled in each House of the Parliament.

Clause 47: Incorporated document

I see no reason why an incorporated document should not be tabled in each House of the Parliament; if a document is voluminous it could be tabled in electronic form.

Clause 48: Disallowance of instruments

As the bill is drafted it would allow a House to disallow only the whole of a legislative instrument. This would be a serious diminution of the power of disallowance, and in most circumstances would be fatal to that power and prevent its exercise. The amendments submitted by the government appear to overcome this problem by providing that a provision of an instrument would be disallowable. This would preserve the situation which exists under the current legislation. It would probably also preserve the law as expounded by the Federal Court in *Borthwick v Kerrin* 1989 87 ALR 527. One must have a suspicion that the bill as drafted was intended to take revenge on the Senate and the Federal Court for the Court's rejection of the opinions of the Solicitor-General and the Attorney-General's Department in the *Borthwick* case.

Subclauses 48(2) and (3): Seconding of motions

These subclauses refer to the seconding of a motion for disallowance, notwithstanding the abolition of seconding by the Senate in 1981. The references to a motion being seconded add nothing to the provisions and should be omitted.

Subclause 48(4): Deferral of disallowance motion

The provisions for deferral of a disallowance motion may seem to be favourable to parliamentary scrutiny and control of legislative instruments, but in practice are likely to favour the executive. Threatened with a disallowance motion, a minister may urge the deferral of the motion to allow the government time to amend the affected provision. The provision may then remain in force for up to six months, and at the end of that period the minister may announce that amendment of the provision has proved too difficult or impossible, and contend that the provision must remain because of the time during which it has been in force. In other words, the deferral provisions may be used to avert disallowance. The current provisions, whereby a minister must either negotiate amendment within 15 sitting days or lose the affected provision, are salutary in concentrating minds and ensuring relatively swift action. The Senate will have to be extraordinarily resolute to prevent the proposed deferral provisions being misused in the way suggested.

Schedule 4: Rules of court

It appears to be the effect of the schedule that rules of court under section 48 of the High Court Act are to be subject to disallowance, but rules of court under section 86 of the Judiciary Act are not. There would appear to be no basis for such a distinction.

These observations have been confined to principal points. It is presumed that the Committee will be undertaking a close scrutiny of the bill and the amendments to see that there are no drafting or typographical errors or oversights, or unforeseen or undisclosed consequences. I would be pleased to provide assistance in this task if the Committee so requires.

I would also be pleased to elaborate or add to these observations should the Committee so require.

Yours sincerely

(Harry Evans)

Legislative Instruments Bill 1994

Submission by the National Farmers' Federation to the Senate Standing Committee on Regulations and Ordinances

NFF General Support for the Bill

The National Farmers' Federation (NFF) supports the Legislative Instruments Bill to establish a comprehensive regime for making, scrutinising and publishing Commonwealth delegated legislation. We welcome improved consultative processes where changes to delegated legislation affect business.

We note that many of the Commonwealth Acts listed in Schedule 2 to the Bill, as affecting business and requiring Legislative Impact Proposals (LIPs) when relevant delegated legislation is being amended, affect agriculture. However, NFF is concerned that the anomalies listed below, and in particular the proposed treaties exception in clause 19, will reduce the scope for effective consultation.

Limitations and Anomalies in the Bill

Several qualifications in the Bill may, in practice, make it less useful than otherwise expected:

- It only applies to *delegated* legislation, and not to amendments to Acts. Despite the debate of Bills in Parliament and the occasional public release of exposure draft Bills, consultation with industry over *statutory* amendments is haphazard and often inadequate in terms of timing and depth. Bills (Acts) are usually more important to industry than regulations, given their establishment of principles, entitlements and obligations which control the scope of detailed regulation.

- There are several potentially important exceptions where consultation, including LIPs, is not required:

  - where the regulation in question is required by an international treaty;

  - where it is urgently required - *who decides the urgency?;*

  - where the instrument relates to policy that has already been the subject of significant public consultation;

  - where it was announced in the Budget;

  - where the instrument is unlikely to directly affect business - *unrealistic, ill-informed or even disingenuous judgements are likely when the exception is so open-ended*; and

- where the Attorney-General certifies that a particular instrument be excluded if required in the public interest.

Several of these are difficult to justify, or can be subject to abuse. The 1992 Administrative Review Council Report, *Rule Making*, recommended there be ***no*** exceptions (or, at least, did not recommend any). Furthermore, there is no requirement in the Bill to report publicly when exceptions are invoked and therefore no public accountability.

Also, there are some inconsistencies as regards the listing of several Acts in Schedule 2. While the *Hazardous Wastes Act* is listed, the *Endangered Species* legislation is not. Yet both stem from treaties.

The Treaty Exception

The treaty exception is especially disappointing because it runs contrary to widespread industry support for greater accountability and public debate in treaty-making and in the domestic implementation of treaties. A copy of the NFF position (shared with ten other national industry associations) is annexed for the Committee's information.

The Government gives no justification for this exception, or for any other, in its Explanatory Memorandum. The assumption, commonly made by officials, that the Parliament (and through it the community) has adequate opportunity to debate treaties when an implementing Bill is being enacted, is flawed: many treaties to which Australia is party are *not* legislated, yet can impact significantly on industry (eg, the Framework Convention on Climate Change).

Conclusions and Recommendations

- NFF welcomes the general thrust of the legislation and the LIP process;
- We are critical of some of the exceptions, notably the treaty exception, and urge the Committee and the Government to review them before enacting the Bill;
- The treaty exception should be dropped unless the Government can adequately explain and justify it to the Committee;
- Whenever an exception is invoked pursuant to the Act, there needs to be some opportunity to expose that decision to public accountability. As a minimum requirement, there ought to be reporting of that decision to the Parliament (including your own Committee); and
- There should be a review of why the *Endangered Species* legislation is not listed in the Schedule.

National Farmers' Federation
23 September 1994

Submission to the Senate Standing Committee on Regulations and Ordinances

by the Australian Council of Social Service

concerning the Legislative Instruments Bill 1994

1. General Comments

ACOSS is pleased to see the Government initiating reforms to the system of rule making at the Commonwealth level. The present system is greatly in need of reform. We agree generally with the Administrative Review Council's ('ARC') Report no. 35 of 1992 as to the current problems and the desirable solutions to these.

This being so, we are disappointed and concerned to see that the Legislative Instruments Bill ('the Bill') departs from the ARC's recommendations in significant respects. The Bill should be amended prior to enactment to bring it into line with the ARC's recommendations, as supported by other bodies.

This submission focuses on two specific concerns that we have with the Bill, as opposed to highlighting what we regard as some positive aspects of the Bill. It repeats, in part, submissions we made to the Commonwealth Attorney-General's Department in August 1994 in response to the Access to Justice report.

2. Consultation in the making of delegated legislation

2.1 The Bill

This Bill aims to introduce a consultation process in relation to the making of delegated legislation affecting business. It was the government's expressed intent that consultation should be limited to this business context (Second Reading Speech, Hansard at p. 2383). The Bill arrives at this limitation in two ways: first, in the exclusion or selective inclusion of statutes in Schedule 2; second, through clause 19(1)(a)(vii) which provides that a rule-maker is not required to consult where satisfied that "the instrument is one which is not likely to directly affect business".

2.2 ACOSS comment

Consultation in the process of delegated legislating is and has for a long time been an integral part of the process of making such legislation. Until now, the consultation has not been mandatory at the Commonwealth level. The Bill would turn one aspect of this, in relation to a limited group, into a mandatory requirement. We applaud this but are bitterly critical that the move from discretionary to mandatory consultation has not gone far enough.

It is inconceivable in terms of political, democratic and quality of outcome considerations for there to be no consultation on major pieces of delegated legislation. In fact, all major business interest groups in any area affecting business

are routinely consulted. What is puzzling about the Bill is that it does not take this any further. For example, if there was to be a major reworking of delegated legislation made under the Dairy Industry Stabilization Act 1977, it is inconceivable that the Dairy Industry Association and National Farmers' Federation would not be consulted. It is hard to see that the Bill would make any difference in this regard.

What would make a difference to the current position would be a mandatory consultation requirement that applied to the making of delegated legislation generally, and that required consultation with people and organisations other than those in the business sector.

We wish to make clear that we have no objection to business being consulted. Rather, our objection is to others being excluded. The implication in the proposed limitation on the consultation requirement is that business interests are more important than all others. We do not accept this and find it offensive. Further, we do not accept that effect on business is a rational criterion for distinguishing legislation requiring consultation from that which does not. Consultation leads to improvements in the quality of outcome and other benefits noted below. This happens whether or not the delegated legislation affects business and those consulted are in business. The effect of the distinction is to omit matters where consultation is particularly important. For example, in the making of delegated legislation in the migration area consultation is especially important given the crucial outcomes of the decision making process and the impenetrable nature of the legislation. However the Bill excludes most of such delegated legislation from the consultation requirement.

There are strong justifications for a general consultation requirement, as opposed to the limited one contained in the Bill. These are:

* consultation improves the quality of the final product. It provides a platform and an occasion for better information flows to departments and government agencies.

  It is clear that one of the major changes in the way that government administers has been a shift from broad base discretions to finely tuned rules. This must be accompanied by mechanisms that acknowledge the need for increased information flows and legitimacy that arise because of the shift.

  Benefits of consultation are borne out by past experience. For example, the (then) Joint Select Committee on Migration Regulations consulted peak advocacy bodies in relation to the 1989 Migration Regulations. This consultation contributed enormously to the quality of the regulations, leading to re-writes of essential textual material that would otherwise have required immediate amendment, as well as to policy changes.

  The problems with a legislative proposal may well be readily identifiable by people and organisations who are actually working with the delegated legislation. Consultation thus imports expertise that is, or may otherwise be, lacking in the government. It leads to legislation which has a better chance of being workable. It reduces the likelihood that amendments will be required, which are costly in terms of government time, printing costs and complexity of the legislation. It also gives

other branches of government, state and local, the opportunity to have a say about legislative proposals, which is particularly important when they have an implementation role.

* Consultation legitimises the delegated legislation. There is an increasing distance between those who make rules and the Ministers notionally responsible to Parliament. This raises legitimacy concerns. The process of law making must include an acknowledgment that vast amounts of delegated legislation will be made without receiving real Parliamentary scrutiny or debate. A mandatory consultation procedure would provide a surrogate method for ensuring legitimacy whilst leaving to Parliament its ultimate powers of scrutiny and disallowance.

* Consultation gives those affected by delegated legislation a voice, and does so much more efficiently and fairly than would be the case in an adjudicative context. Consultation is cheaper, does not have the restrictive standing rules of courts, allows more participants and allows the decision maker to consider the merits as opposed merely to legality. It makes much more sense for 'test cases' to be fought in the rule-making arena than in court.

* A general consultation requirement would reduce the incidence of 'regulatory capture'. We noted above that government routinely consults business when making major delegated legislation. If consultation goes no further than this, there is a real risk that the government identifies too closely with the interests of those it is regulating. 'Cosy' regulatory structures develop. It is necessary to widen consultation requirements to avoid this.

We accept that there may need to be exceptions to a general consultation requirement. Such exceptions, however, should go no further than those limited exceptions recommended by the Administrative Review Council (ARC).

The issue of a general consultation requirement has been considered by the ARC, the Senate Standing Committee on Legal and Constitutional Affairs (Costs of Justice), the House of Representatives Standing Committee on Legal and Constitutional Affairs ("Clearer Commonwealth Law") and the Access to Justice Advisory Committee (AJAC). All were agreed on the benefits of consultation in the making of delegated legislation, particularly in promoting the public interest. They regarded consultation as beneficial in ensuring that competing interests are taken into account, that government is made accountable for its proposals and that the ensuing legislation is of a better quality than it would otherwise be. AJAC highlighted the access to justice features of a consultation requirement (Report p. 467). All considered that the benefits that will flow from a general consultation requirement will outweigh the costs of the process.

The reason given by Government for limiting the consultation requirement to legislation affecting business was 'the burden in undertaking consultation' (Second Reading Speech). Given the content of the consultation requirement (generally an advertisement with a duty to consider and take into account submissions made in response) it is difficult to regard it as a real burden. It is more likely that the real concern is that of control - the fear that increased participation lessens control. In

our view, this is not a valid reason to restrict the consultation requirement in the manner of the Bill.

The Bill should be amended prior to enactment to impose a general consultation requirement in the making of delegated legislation.

3. Sunsetting

The Bill is deficient in failing to include a requirement for the 'sunsetting' of delegated legislation. The advantages of a scheme for the sunsetting of delegated legislation have been recognised by the ARC, the House of Representatives Standing Committee on Legal and Constitutional Affairs and the Access to Justice Advisory Committee. It is significant that four States have introduced this requirement for delegated legislation.

In addition to the persuasive arguments of the ARC, the link between consultation and a sunsetting scheme should be considered. Sunsetting would ensure that all existing delegated legislation is gradually put through a consultation regime (in the event that a general consultation requirement is introduced, as recommended above). Unless there is some scheme for the sunsetting of existing delegated legislation, the advantages flowing from consultation requirements will not be fully realised in relation to the very large amount of delegated legislation that currently exists.

The Government's reason for not including a sunsetting requirement is that an evaluation of other sunsetting schemes has not yet been undertaken, and given the resources required for it, it would be premature to enact the practice (Second Reading Speech, Senate, Hansard, 30 June 1994, p. 2382). This is unconvincing. Sunsetting legislation has been operating in other jurisdictions for some time now without any disasters or calls for abolition. .

The Bill should be amended prior to enactment to introduce a scheme for the sunsetting of all delegated legislation on a ten-year rotating basis, as recommended by the ARC and the AJAC.

Submission from the Scrutiny of Acts and Regulations Committee upon the Legislative Instruments Bill 1994

RECEIVED
26 SEP 1994
Joint Standing Cttee on Regulations & Ordinances

The Scrutiny of Acts and Regulations Committee (SARC) thanks the Standing Committee on Regulations and Ordinances for its invitation to lodge written submissions on the Legislative Instruments Bill. The SARC has several comments on the Bill and the changes envisaged. It sets these out below.

The SARC itself embarked upon a review of its legislation, the Subordinate Legislation Act 1962. Its Report on the Act was tabled in the Victorian Parliament in November, 1993. A Government Response to this Report was prepared. Copies of both documents are enclosed for your interest. It is expected that legislation will be passed this session and come into force on 1 January 1995.

By way of submission, these remarks briefly address Recommendations 2, 3 and 1 of the SARC's 'Report upon an Inquiry into the Operation of the *Subordinate Legislation Act 1962*'.

Recommendation 2 (p35)*

This recommendation specifies new tabling requirements for incorporated documents.

Currently, where subordinate legislation incorporates by reference material contained in other documents, there is a requirement under section 32 of the Interpretation of Legislation Act 1984 to table that material before both Houses of the Parliament.[1]

The SARC has recommended a significant change to this procedure, as outlined on pages 28 -36 of the Report.

The Committee notes that the provisions in the Legislative Instruments Bill do not require tabling of all incorporated documents. The arrangement under the Bill is for the documents incorporated in a legislative instrument which is subject to disallowance to be made available for inspection by the Parliament.

This certainly relieves the Parliament of the burden of storage, but the SARC is not confident that the common law would accept the validity of Subordinate Legislation incorporating material by reference.

Prior to the enactment of section 32 of the Interpretation of Legislation Act there was doubt at common law of the validity of subordinate legislation incorporating material by reference. Because all the material was not set out in the subordinate instrument itself there could be held to be insufficient publication; because a person was not able to obtain all the information from the subordinate instrument lack of certainty could be argued. The enactment of section 32 was seen as "a welcome clarification of this area of the law. [2] *(p.28)*

Questions of availability and access to the law also arise.

The present Attorney-General expressed concern at the time of the 1991 amendment bill about the availability and cost of, and hence access to, the law -

.....I was concerned about the difficulties that people in country areas would encounter when faced with documents containing thousands of pages. I asked the officer of the department whether any provision would be made to have such documents available in major country centres as a matter of practice. I was told that the documents would not be available because of the cost involved. It was said that some of the incorporated documents from the United States of America could cost up to $40,000 so that, at most, only two copies of the document would be available - the one tabled in Parliament and the one available at the relevant Minister's office. So if people in Mildura want to find out about the status of a particular regulation they will have to come down to Melbourne to find out. I wonder whether it is appropriate to incorporate documents of that type or whether we should look at other ways of making statutory rules. (pp. 31, 32)

Amendment of incorporated documents by bodies beyond Parliamentary scrutiny may also create concerns in relation to sub-delegation. Professor Dennis Pearce has stated:

..... the inclusion in delegated legislation of requirements stipulated by another organisation means that the other organisation is, in effect, stating the law on the topic. This may not be so if the incorporation is of a document as in force at a particular time. But if the incorporation is of the document as in force from time to time, this enables the organisation writing the document to determine the content of the delegated legislation. Is this not a sub-delegation of the lawmaking power? (p. 32)

Recommendation 3

The Committee recommends that the Subordinate Legislation Act 1962 be repealed and re-enacted.

This submission addresses two aspects which are central to the treatment of Subordinate Legislation in Victoria.

1. The first is the preparation of regulatory impact statements.

Clause 8 of the Draft Bill (contained in Appendix 1 to the Report) reads:

8. Circumstances in which regulatory impact statements are to be prepared

Unless an exception under section 9 or an exemption under section 10 or 11 applies, the responsible Minister must ensure that a regulatory impact statement is prepared if a proposed statutory rule would impose an appreciable economic or social burden on a sector of the public. (p. 54)

Part 3 of the draft Legislative Instruments Act focuses on a similar process. The process is limited to Legislative Instruments which "directly affect business" and which are made under those Acts specified in Schedule 2.

The SARC argues that the draft Legislative Instrument Act would be of greater use if the consultation process was required in broader circumstances than currently projected.

The rationale underlying the introduction of regulatory impact procedures is that decision-making will be enhanced if all possible information is available to the decision-maker. Decision makers are faced with competing interests, and tradeoffs are invariably necessary. More information and the existence of procedures whereby various interest groups and community representatives are enabled to put their views, will mean that competing economic, social and moral claims are more adequately revealed. Without such a procedure, those whose claims are more obvious or who are able to gain access to the decision making process will more often "win"; this means, in the context of regulation-making that regulations will not necessarily be made which benefit the community to the optimum degree possible, but will very likely benefit sectional interests to the detriment of the whole. (p.11)

The SARC acknowledges criticisms of the Victorian process:

The present format of the regulatory impact statement is seen as repetitive, dull and essentially designed for regulations with easily determined financial costs or benefits. There is too much emphasis on cost/benefit analysis measured in dollar terms. Where environmental and social costs and benefits are involved certain rulemakers experience difficulties in satisfying the Department of Small Business and Employment's Office of Regulation Reform. It is the Director of Small Business in the Department who normally advises the rulemaker whether the impact statement adequately assesses the likely impact of the proposed rule.

".... a cost benefit analysis is often, in the case of environmental and resource management issues, not the appropriate tool by which to assess the need for regulations...."
(Department of Conservation and Natural Resources, p2.)(p.14)

and of the threshold test:

.....in practice there has been strong criticism from within regulating agencies of the fact that the interpretation of what constitutes an "appreciable burden" has historically been an extremely wide one.

Many Departments accept the necessity and desirability of the RIS process in relation to major regulatory issues, but believe that considerable Departmental resources are wasted in meeting RIS requirements in respect of minor regulation. In this context wider support for the RIS process as a whole is potentially endangered.

It may be that a widespread acceptance of the RIS process will prove critical to the results which it is able to deliver in practice and even to its durability. If this acceptance is to be secured, elimination of burdens which may be seen as unduly onerous may need to be considered. Moreover, it is intuitively apparent that there may not be benefits associated with review of minor regulation sufficient to outweigh the costs involved. (p.19)

Vagueness in the test has prompted the recommendation expressed in the SARC's Draft Bill that the SARC itself may "exempt a proposed statutory rule from the RIS requirement where the Committee certifies in writing that in the opinion of the Committee a proposed statutory rule would not impose an appreciable economic or social burden on a sector of the public." (pp 20,21)

The SARC notes with interest the approach taken in the Legislative Instruments Act with respect to the consultation process prior to the making of legislative instruments. Part 3 of the Legislative Instruments Act that spells out in greater detail than that found in the Subordinate Legislation Act of Victoria the "which, who and what" of the planned consultations.

The expression "appreciable burden" (found in the Victorian guidelines) is replaced in the Legislative Instruments Act by the more generous expression "persons likely to be affected".

Interestingly, this might overcome the interpretative struggle which the Victorian Committee has recently had in a situation where regulations have provided for voluntary declarations as to health status of beasts.[3] Should or should not these regulations be accompanied by a Regulatory Impact Statement because of the 'appreciable burden' which attaches to the regulations?

On one side of the argument, the regulations provide for voluntary declarations which are required by the principal legislation. Thus, the Parliament has set its seal on the scheme which the regulations merely implement. There is no alternative to the statutory rule. A RIS is not necessary.

On the other hand, while the Parliament has legislated for voluntary declarations to be prescribed by regulation, it has not declared that voluntary declarations do not impose an appreciable burden on any sector of the public'. A RIS is therefore required to assess whether or not this is so.

In this case, the so-called 'voluntary' declaration, by virtue of market pressures, is becoming obligatory - which has aided the Committee in its final decision to require that the regulations comply with the regulatory impact statement process.

Under the proposed Commonwealth Legislation, such argument would not arise because the standard of the threshold test ("likely to be affected") is both less specific and more broad.

The SARC notes that section 19 of the proposed Legislative Instruments Act enumerates circumstances in which public consultation is not required. Section 19 (1) (b) authorises the Attorney-General to certify in writing that the public interest requires that an instrument be not subject of consultation. The SARC suggests that such a certificate might more properly emanate from the Standing Committee on Regulations and Ordinances, maintaining Parliamentary supervision of actions of the executive; or, alternatively, that such a claim by the Attorney-General be subject to disallowance by either House; or, alternatively, be subject to limitations.

The Attorney-General's certificate may be seen as parallel to the Premier's Certificate which has a similar role in Victoria. The Draft Victorian Bill proposes limitations on the issuance a Premier's certificate as outlined in draft clause 11:

11. Exemption by the Premier

(1) Section 8 does not apply if the Premier certifies in writing that it is in the public interest to make the statutory rule without preparing a regulatory impact statement.

(2) The Premier must not issue a certificate unless the proposed statutory rule is to expire on or before the day which is 12 months after the first day on which any provision of it is to come into operation.

(3) The Premier must specify in the certificate the reasons why it is in the public interest to make the statutory rule without preparing a regulatory impact statement.

(4) A copy of the certificate must be laid before each House of the Parliament at the same time as the statutory rule is so laid under section 19. (p.55)

2. The second matter in which the SARC has comments is the area of Parliamentary scrutiny of Legislative instruments (Part 5 of the Bill) and disallowance procedures.

The SARC is interested in the 'deferral period' provided for in subclause 48 (4) of the Bill. It sees advantages in providing for a fixed period to enable a Legislative instrument to be remade or amended to achieve a specified objective.

Recommendation 1 (p28)

The Committee recommends that a Subordinate Legislation Handbook be prepared and printed.

Parliamentary Counsel's office made this suggestion to the Inquiry. Its purpose would be to present advice and other material pertinent to the preparation of Subordinate Legislation in one document.

Possibly, a similar project is already envisaged by Principal Legislative Counsel.

The SARC would encourage the preparation of such a document for the information of government agencies.

In conclusion, the SARC warmly thanks the Senate Standing Committee for an opportunity to contribute to its consideration of an important legislative development. Our Committee well remembers its meetings with the Senate Standing Committee in the past. Should the Committee wish to hear oral evidence from SARC on the Bill, we would be pleased to assist. In particular, we would be pleased to give evidence about the practical operation of our Act.

Victor Perton, MP
Chairman

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1 Section 32, Interpretation of Legislation Act 1984 (pp 2 - 8) Act No. 6 1991.

2 Legal and Constitutional Committee - A Review of the Operation of Section 32 of the Interpretation of Legislation Act 1984 p. 2.

3 SR 66/1994 - Stock (Hormonal Growth States Declarations) Regulations, made under the Stock (Seller Liability and Declarations) Act 1993.

* Page references refer to SARC's Report throughout.

BUSINESS COUNCIL OF AUSTRALIA

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26 September, 1994

The Secretary
Senate Standing Committee on Regulations
and Ordinances
Parliament House SG 49
CANBERRA ACT 2600

Dear Sir/Madam,

Legislative Instruments Bill 1994

I refer to the Legislative Instruments Bill 1994 which has been referred to the Standing Committee on Regulations and Ordinances for inquiry and report by 10 October 1994.

Over the last 10 years the Business Council has been a strident advocate for regulatory reform in Australia to assist this nation compete successfully in world markets and attract increasingly scarce overseas capital. In the push for micro-economic reform the extent and burden of business regulation has been largely overlooked. Business regulation has significantly increased in recent years without adequate analysis about its impact on industry and its net benefits to the community.

ARC Report

The Legislative Instruments Bill 1994 has its origins in the report by the Administrative Review Council to the Attorney General dated March 1992. The ARC's report contained the following findings:

- a vast growth in the volume and diversity of delegated legislative instruments;
- different and often inconsistent practices for drafting, consultation, scrutiny and publication applied;
- significant problems exist in relation to procedures associated with the making of statutory rules; and
- the framework of principles and procedures for the making of delegated legislation is patchy, dated and obscure.

In addition to these problems the ARC states that the Commonwealth has failed to keep pace with developments in procedures for the making of and scrutiny of delegated legislation that have occurred in other jurisdictions around Australia. The ARC states:

> *"In particular, in New South Wales, Queensland, South Australia and Victoria have introduced general arrangements for 'sunsetting' of existing and new delegated legislation. Another important development at state level, again in New South Wales and Victoria, is the requirement for public consultation for the making of significant delegated legislative instruments. In a general review of procedures for delegated legislation, it is appropriate to examine the developments at state level as well."*

Liberating Enterprise

In September 1992 the Business Council and a large number of business and professional organisations published a paper entitled "Liberating Enterprise to Improve Competitiveness". The paper found that despite the introduction of a number of useful initiatives by Commonwealth and State Governments in the late 1980s designed to reduce the cost of regulation on business, the process at the federal level has fallen in disrepute. By way of contrast the paper found that some states, particularly New South Wales and Victoria continued to implement regulatory management strategies and have in place procedures for review of existing legislation and assessment of new regulatory proposals. It was a specific recommendation of the paper that the Commonwealth introduce a Legislative Act as proposed by the Administrative Review Council to prescribe procedures for the making, publication and supervision of delegated legislative instruments.

Legislative Instruments Bill 1994

The Legislative Instruments Bill has been introduced into Federal Parliament as the Government's response to the recommendations by the ARC on rule making by Commonwealth agencies. The Bill provides for:

- mandatory and formal public consultation;
- preparation and tabling of "legislative instruments proposals";
- back-capturing of legislative instruments made prior to the commencement date; and
- establishment of a computer based and widely accessible Federal Registrar of Legislative Instruments.

While the Business Council is generally supportive of the broad thrust of the Legislative Instruments Bill, it is extremely disappointed to note that the proposed legislation is considerably weaker than similar state legislation. In this regard the

Commonwealth is failing to meet higher standards set in New South Wales, Victoria, Queensland and South Australia which have all introduced legislation for general sunsetting of delegated legislation.

The Business Council also has concerns about the nature and scope of the consultation procedures contained in Part 3 of the Bill. The Council supports the recommendation contained in the ARC that public hearings should be held for controversial or sensitive legislative proposals. In this regard, Clause 16 should be amended to provide for such public hearings.

The Business Council is strongly opposed to Clause 20 which states that a failure to comply with the consultative procedures does not affect the validity or enforceability of a proposed legislative instrument. The Council believes that this clause removes effective teeth that the legislation has in relation to consultation and as such should be deleted.

The Council is also concerned that Clause 19 of the Bill provides too great a scope for a rule maker or the Attorney General to exclude the consultation procedures from operating. The Council has the following specific objections to Clause 19:

- if exemptions are to be included in the legislation they should be not a matter for a rule maker but rather a matter for the Attorney General;

- Clause 19 should require the Attorney General to provide reasons why the public interest requires that a new delegated instruments be excluded from public consultation; and

- instruments made pursuant to an international agreement should be subject to public consultation. In these circumstance the Business Council recommends the deletion of Clause 19(1)(a)(i).

As a final comment, the Business Council recommends that the Senate Standing Committee on Regulations and Ordinances amends its principles so that it can scrutinise delegated legislation to ensure that delegated legislation complies with the consultative procedures contained in the Legislative Instruments Bill. As previously advised, the Council looks forward to discussing these matters with the Committee at 11.00 am on 4 October 1994.

Yours sincerely,

Martin Soutter
Assistant Director

Legislative Instruments Bill 1994

Submission to the Senate Standing Committee on Regulations and Ordinances

September 1994

By the Immigration Advice and Rights Centre
5th Floor 345-349 Riley Street, Surry Hills, NSW 2010

For more information contact Jane Goddard ph 2811609 or fax 2811638

Introduction

The Immigration Advice and Rights Centre (IARC) is a specialist provider of immigration advice and advocacy, training, information and publications. Since 1988 IARC has used the expertise gained from performing these functions to make valuable contributions to legal and policy discussion and reform concerning migration issues. As part of the nationwide network of community legal centres IARC has contributed to debate concerning access to justice issues.

IARC welcomes the opportunity to comment on the Legislative Instruments Bill 1994. The following submission reflects our broad interest in the adoption of mechanisms to facilitate a more open style of rule making and to encourage participatory democracy. We are using the Centre's area of expertise to illustrate the potential benefits of these mechanisms.

Our submission has therefore been framed in terms of a blanket recommendation relating to the Bill. Should this recommendation not be accepted we would ask that the committee consider the "fall back" recommendation 2. This recommendation is specific to migration law.

Recommendation 1

That the mandatory consultation clauses contained in *Part 3 Consultation Before Making Legislative Instruments* of the Bill be amended so that the clauses cover all delegated legislation made under Commonwealth Acts.

Justification
The limitation contained in the Bill, namely that consultation be restricted to legislative instruments affecting business, is at odds with a number of reports which have examined the issue of community consultation in great detail. The Administrative Review Council in 1992 (Rule Making in Commonwealth Agencies), the Senate Standing Committee on Legal and Constitutional Affairs in 1993 (Costs of Justice Second Report), the House of Representatives on Legal and Constitutional Affairs in 1993 (Clearer Commonwealth Law) and the Access to Justice Advisory Committee in 1994 (Access to Justice an Action Plan) have all made recommendations in the strongest possible terms that there be a process of community consultation prior to the introduction of almost all legislative instruments.

The current proposal to limit the consultation provisions to areas affecting business is contrary to the Government's stated commitment to making justice within Australia more accessible. It also implies that business interests are in some way more important than other interests. Although we recognise that business interests are different, we do not accept the implication that they are more important.

The reasoning behind the recommendations contained in the above reports is that it is in the public interest for the community to be aware of, and be able to comment on draft legislative instruments. IARC is strongly in support of this proposition and therefore views the Bill currently before the Committee as supporting sectional interests only.

The current situation regarding migration law and policy gives a good example of why the introduction of a mandatory consultation process would be beneficial to the interests of the Australian community.

As you are aware, entry to, and presence in, Australia of non-citizens is controlled by the Migration Act 1958, the Migration Regulations and certain policy materials issued by the Department of Immigration and Ethnic Affairs. The Act provides the overall framework to the migration scheme but, with few exceptions, gives no guidance on the various categories of entry. The criteria which apply to particular visa classes and subclasses of visas are contained in Schedules to the Regulations. Although the legislative framework is exceedingly important to the Australian public, undoubtedly it is the Regulations and the Schedules to the Regulations which are of major significance.

In September 1994 a new set of Regulations came into force. These new Regulations were necessary as a result of amendments to Migration Act 1958 introduced by the Migration Reform Act of 1992. Compared with other legislative instruments we believe that the Migration Regulations stand alone in terms of the significance that they have to the Australian community.

Categories of entry are contained in Schedules to the Regulations so for any amendment to occur the entire Schedule would have to be disallowed as it is not possible for Parliament to disallow a portion of the Schedule (see Administrative Review Council p. 53 *Rule Making By Commonwealth Agencies*). This means that unless Parliament is willing to move disallowance for a whole piece of delegated (migration) legislation then there is little if any potential for meaningful scrutiny by the community's elected representatives.

Given the increasing complexity of the Migration Act and Regulations it is essential for the proper administration of the migration programme that the community be given prior warning of, and input to the proposed changes. Currently there is no mechanism for this and all too frequently significant changes to the programme are buried within a particular statutory rule without any other indication that the change has been made or the reasoning behind the change.

The introduction of a compulsory consultation mechanism would result in rule makers being less likely to make ad hoc and frequent amendments to existing statutory rules. The Migration (1993) Regulations ran to over 600 pages and were amended no less than 20 times in their 18 month

lifespan. This makes it almost impossible to tell what the law is at any given time and difficult to advise people about the law's effect.

Although the primary function of compulsory consultation is clearly to give interested individuals and groups a forum within which to raise objections to policy changes which are contained in a particular legislative instrument, there is the additional function of giving the community the opportunity to highlight unintended consequences of the instrument which have not been identified by Government.

Recommendation 2

If recommendation 1 is not accepted then it is proposed that Schedule 2 of the Bill be amended

A) so as to include those legislative instruments under the Migration Act in so far as they relate to eligibility criteria of classes of business-related temporary and permanent visas, and consequently

B) those legislative instruments which relate to generic rules contained in the Migration Regulations.

Justification

The eligibility criteria for the business skills visa, the temporary business visa and those classes of visas where an Australian business sponsors an employee directly affects the conduct of business in Australia.

The Regulations themselves contain generic rules which are applicable to most visas including those classes of visas mentioned above These rules include what makes a valid application for a visa, when an application for one sort of visa can be considered an application for another and time limits for decision making. On this basis it can be argued that these generic provisions are inseparable from the eligibility criteria for each class of visa. There is no excuse for their exclusion from Schedule 2 of the Legislative Instruments Bill.

IARC believes that if the only public consultation prescribed, concerning the Department of Immigration and Ethnic Affairs, involves the Migration Agents Registration Scheme it is likely to result in lower public confidence in the legislation emanating from this Department, a continuation of the frustration experienced by those affected by/interested in migration legislation (because of their exclusion from the decision making arena) and a heightened perception that migration legislation is the exclusive province of Government and commercial interests.

Summary

The Immigration Advice and Rights Centre makes the following recommendations in relation to the Legislative Instruments Bill 1994.

Recommendation 1

That the mandatory consultation clauses contained in *Part 3 Consultation Before Making Legislative Instruments* of the Bill be amended so that the clauses cover all delegated legislation made under Commonwealth Acts.

Recommendation 2

If recommendation 1 is not accepted then it is proposed that Schedule 2 of the Bill be amended

A) so as to include those legislative instruments under the Migration Act in so far as they relate to eligibility criteria of classes of business-related temporary and permanent visas, and consequently

B) those legislative instruments which relate to generic rules contained in the Migration Regulations.

Regulation Review Committee
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RECEIVED
29 SEP 1994
Senate Standing C'tte on
Regulations & Ordinances

29 September, 1994

The Secretary
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Sir,

RE: LEGISLATIVE INSTRUMENTS BILL 1994

I refer to your letter of 1 September, 1994 inviting comment on the above Bill. My Committee was due to formally consider the Bill at its last meeting on 22 September, 1994, but unfortunately the matter was not reached. I note that your report date is 10 October, 1994. As my Committee is not due to meet again before that date I would for the purpose of assisting your Committee wish to outline my preliminary views on the Bill.

Comparison with NSW Law

The Bill covers a number of areas that in NSW are dealt with in separate Acts.

Part 1 'The Definitions of Instruments', Part 4 'Federal Register' and Part 5 'Parliamentary Scrutiny' are generally covered by the NSW Interpretation Act 1987.

Part 3 'Consultation Before Making Legislative Instruments' and Part 2 'Responsibilities of the Principal legislative Council' are generally covered by the Subordinate Legislation Act 1989 and administrative practice.

Comparison with Subordinate Legislation Act of NSW

The main difference between the Bill and the Subordinate Legislation Act 1989 of NSW is that there is no staged repeal programme for existing rules in the Bill. This was the central feature of the NSW Subordinate Legislation Act.

Furthermore there are no guidelines for conducting the Cost Benefit Analysis in the Bill, unlike Sections 4 & 5 and Schedules 1 & 2 of the Subordinate Legislation Act which lay down comprehensive guidelines for impact assessment of the statutory rules and preparation of Regulatory Impact Statements for Principal Statutory Rules.

Under Clause 18 of the Bill only a *"Broad indication of the relative costs and benefits to the Government and the public"* is required. There is no requirement for the costs and benefits to be quantified.

The Financial Impact Statement on the Bill itself only deals with costs to government, not the costs to the community. These costs would have to be estimated to determine whether the bill was cost effective.

Under the Bill the Minister can limit public consultation on a regulatory proposal to only those persons he considers sufficiently represent persons likely to be affected.

Under the Subordinate Legislation Act consultation with such interest groups is required but it does not override the requirement for public advertisement of the proposal in a statewide newspaper and the Gazette.

Definition

The definition of "Legislative Instrument" itself creates problems as it is defined as

> *"an instrument in writing:*
> *(a) that is or was made in the exercise of a power delegated by the Parliament; and*
> *(b) that determines the law or alters the content of the law, rather than stating how the law applies in a particular case; and*
> *(c) that has the direct or indirect effect of imposing an obligation, creating a right, or varying or removing an obligation or right; and*
> *(d) that is binding in its application."*

To satisfy item (c) above with respect to the direct or indirect imposition or variance of an obligation or right, it will be necessary to conduct a form of cost benefit analysis of the regulation in all but the most clear cut cases.

In NSW this takes place in any event for all Statutory Rules under Schedule 1 of the Subordinate Legislation Act event though no formal Regulatory Impact Statement is required.

Exemption

The circumstances in which public submissions are not required are extremely broad. Clause 19.(1) states that section 16 does not require the rule-maker to invite submissions concerning a legislative instrument proposed to be made under that enabling legislation if:

(a) the rule-maker is satisfied that:
(i) it is an obligation of the Commonwealth, under an international agreement, to make an instrument having the content and consequences proposed; or
(ii) the instrument gives effect to a decision announced in the Budget; or
(iii) the instrument is required for reasons of urgency including, but without limiting the generality of the foregoing, reasons

related to the prudential supervision of insurance, banking or superannuation or the regulation of financial markets; or

(iv) the instrument will implement a Government policy whose details have already been the subject of significant public consultation; or

(v) notice of the content of the instrument would enable individuals to gain an advantage over other persons without that notice; or

(vi) the instrument is made after compliance with comparable consultation requirements set out in or under the enabling legislation, or in an agreement between the Commonwealth and a State or States, or an international agreement pursuant to which the enabling legislation is enacted; or

(vii) the instrument is one which is not likely to directly affect business; or

(viii) the instrument is of a minor or machinery nature and does not substantially alter existing arrangements; or

(b) the Attorney-General has certified, in writing, that public interest requires that the instrument be excluded from the operation of section 16.

While items (i), (vi) and (viii) are similar to the exemptions in schedule 3 to the Subordinate Legislation Act, items (ii), (iv), (v) and (vii) are unprecedented and so general and imprecise in definition that arguably all rules could be exempt.

It should also be noted that in NSW where a regulation is made that is exempt from an RIS on urgency or public interest grounds as in (iii) and (b) above, an RIS must nevertheless be prepared 4 months after the regulation is made.

These are the major differences between the Bill and the NSW Subordinate Legislation Act.

I must emphasise that these are my preliminary views and the Committee might itself wish to make a formal submission in due course.

Yours faithfully,

Adrian Cruickshank, MP
Chairman
Regulation Review Committee

ADMINISTRATIVE REVIEW COUNCIL

DR SUSAN KENNY
PRESIDENT

Our Reference: 92/10

Your Reference:

4 October 1994

The Secretary
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Legislative Instruments Bill 1994

Introduction

Thank you for providing the Council with the opportunity to comment on the Legislative Instruments Bill 1994 (the Bill).

2. As you may be aware, in 1992 the Council published its report to the Attorney-General, *Report No 35 – Rule Making by Government Agencies* (Report No 35). The Council is pleased that the Bill provides for the substantial implementation of the recommendations contained in Report No 35. The Council is particularly pleased that key recommendations, such as the establishment of a Federal Register of Legislative Instruments , improvements in the standard of the quality of legislative instruments and improved community consultation and parliamentary scrutiny of delegated legislation are addressed in the Bill. The Council is confident that the Bill, if enacted, will significantly improve community access to the law.

3. However, the Council notes that the Bill does not fully implement four recommendations of Report No 35. Each of these is discussed below. The Council also discusses an issue relating to the disallowance procedures.

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Definition of 'legislative instrument'

4. In Report No 35 the Council recommended that the Legislative Instruments Act should apply to all delegated instruments that are legislative in character unless specifically excluded, and that the term 'legislative instrument' should not be defined in the Act. The Council noted, at paragraph 3.18, that the major advantage of this approach was that it would give the Legislative Instruments Act comprehensive coverage. At paragraphs 3.20-3.22 the Council acknowledged that because the distinction between legislative and administrative instruments was not always easy to draw, some uncertainty may arise in relation to some instruments. However, the Council noted that it did not expect this to cause significant practical difficulties because in cases of doubt it was likely that agencies would seek to clarify the status of instruments by exempting them from the Act. As a further safeguard, agencies would be required to justify the exemption before the Scrutiny of Bills committee.

5. The Bill provides for the term 'legislative instrument' to be defined. In the second reading speech for the Bill, the Government stated that in its view the uncertainty that would have been created from not defining the term 'legislative instrument' would have resulted in significant legal proceedings to determine the ambit of the legislation, and that the approach taken in the Bill will relieve the community of that cost burden.

Sunsetting

6. In Report No 35, the Council also recommended that all existing principal instruments of a legislative character, and all instruments subject to the Legislative Instruments Act, should be sunsetted (ie should cease to have effect on a specified day or after a designated period of time). At paragraph 7.18 of Report No 35, the Council said:

> "7.18 The Council believes that it is sound administrative practice to have some mechanism to ensure instruments are reviewed. In general, all instruments should have a maximum life of ten years. They can then be reviewed to determine whether they are still required and, if so, whether they meet current drafting standards..."

7. The Council also notes that in the report of the Access to Justice Advisory Committee, *Access to Justice – An Action Plan*, the committee recommended:

> "**Action 21.3** The Commonwealth should, in accordance with the recommendations made by the Administrative Review Council, introduce a scheme for the sunsetting of all delegated legislation on a ten-year rotating basis to ensure that delegated legislation is of a high quality, and up to date if it is required at all. If the cost of this proposal is too high, at the very least, the Commonwealth should adopt a similar policy for the updating of delegated legislation as proposed earlier for primary legislation."

8. In the second reading speech for the Bill, the Government noted that the practice of sunsetting has been used but that an evaluation of the benefits of the practice has not been undertaken. The Government decided that until such an

evaluation had been undertaken it would be premature to enact as resource intensive a practice as sunsetting.

9. The Council acknowledges that the sunsetting of legislative instruments will be likely to have significant resource implications. The Council will monitor the Government's proposed evaluation of sunsetting with interest.

Consultation

10. In Report No 35, the Council noted that consulting with members of the community about proposed new laws would improve those laws. The Council also noted that such consultation would be consistent with principles of procedural fairness, as it would enable individuals and groups with a particular interest to put their views.

11. In the second reading speech for the Bill, the Government said that because of the burden in undertaking consultation, it had decided that consultation should apply in the first instance only to legislative instruments made under specific legislation affecting business. The Government noted that whether the provisions for consultation should be extended outside the business context should be considered in light of the experience gained. The Government also stated that it would expect the Administrative Review Council to examine that aspect of the Bill after the whole regime contained in the Bill has been in operation for a period of three years.

12. The Council acknowledges that undertaking consultation on legislative instruments may add to the cost of enacting the instruments. However, the Council considers that rules made following consultation are likely to benefit significantly from having been exposed to the community before being made. They are less likely to require amendment. Therefore, the cost of undertaking consultation must be considered in light of the potential longer-term savings. The Council is pleased that the Government has broadly accepted the principle of consultation, and will monitor with interest the impact of the consultation provisions of the Bill, with a view to considering whether those provisions should be extended outside the business context.

Rules of court

13. In Report No 35 the Council also discussed whether rules of court should be covered by the comprehensive regime for making, publication and review of delegated legislation (including consultation) and recommended that they should be (Recommendation 30). The Council noted concerns that to subject rules of court to that regime might affect the independence of the courts and the judiciary from the executive, but concluded that its proposals for consultation and sunsetting would not interfere with judicial independence because the consultation would be the responsibility of the sponsoring body itself (that is, the relevant court) and not the executive. The Council also recommended that consultation on court rules should not be required to be undertaken in a particular case for rules of court if the court determined that the public interest so

required; however, in such a case the court would be required to explain its reasons and the grounds of public interest relied upon in its annual report.

14. Clause 6 of the Bill provides that rules of court for the High Court, the Federal Court of Australia, the Family Court and the Industrial Relations Court are not legislative instruments for the purposes of the Act. This excludes rules of court from the ambit of the Bill. In the second reading speech for the Bill, the Government justified this exclusion of rules of court by noting its view that any supervision of the rule-making process by the executive or its officers would risk interference with the independence of the judiciary and, accordingly, would risk offending the doctrine of the separation of powers..

13. However, the Government noted that the courts accept that the principles of the legislation should apply to them. In fact, the Bill provides for the amendment of the *Family Law Act 1975*, the *Federal Court of Australia Act 1976*, the *High Court of Australia Act 1979* and the *Industrial Relations Act 1988*. In each case the amendment is to the effect that the *Legislative Instruments Act 1994* applies in relation to rules made by the relevant court, except that the following sections do not apply:

- section 4 (definition of legislative instrument);
- section 7 (Attorney-General's power to certify whether an instrument is legislative for the purposes of the Act);
- section 13 (a) (responsibility of the Principal Legislative Counsel for ensuring that all legislative instruments are of a high standard); and
- section 14 (power of the Principal Legislative Counsel to take measures to ensure that legislative instruments are of a high standard).

14. In each case the exemption also provides for the Governor-General to make regulations modifying or adapting the provisions of the Legislative Instruments Bill 1994 in their application to the particular court.

15. The Council does not consider this approach to rules of court to be unreasonable. It substantially meets the objectives of the Council's recommendations, while accommodating the Government's concern not to interfere with the independence of the judiciary.

Partial disallowance of legislative instruments

16. The Bill provides that legislative instruments may be disallowed in certain circumstances, but does not provide for disallowance of some provisions only of a legislative instrument. However, the Council notes that the Government has proposed amendments to the Bill which would have the effect of preserving the power of Parliament to disallow a single provision of a legislative instrument, such as a sub rule, which is discrete and self contained.

17. I trust that these comments are of assistance. I would be happy to meet with you at a mutually convenient time to further discuss the Council's views.

Yours sincerely

Dr Susan Kenny
President

RECEIVED
- 4 OCT 1994
Senate Standing Cttee on
Regulations & Ordinances

Attorney-General

The Hon. Michael Lavarch M.P.
Parliament House
Canberra ACT 2600

92059430

4 OCT 1994

Senator M Colston
Chairman
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA

Dear Senator Colston

LEGISLATIVE INSTRUMENTS BILL 1994

I refer to the Committee's consideration of the abovementioned Bill.

As you are aware, the Senate Standing Committee for the Scrutiny of Bills, in its Alert Digest 12/94 of 24 August 1994 commented upon the Bill. I enclose, for the information of members of the Senate Standing Committee on Regulations and Ordinances, a copy of my response to those comments.

Yours sincerely

MICHAEL LAVARCH

Attorney-General

The Hon. Michael Lavarch M.P.
Parliament House
Canberra ACT 2600

92059430

Senator M Colston
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Colston

I am writing in response to the Committee's requests for advice in Alert Digest 12/94 of 24 August 1994 on aspects of the Legislative Instruments Bill 1994.

Before providing the advice sought I should mention that the Government is proposing a number of amendments to the Bill. In addition to a large number of amendments effecting minor technical and drafting changes, two significant changes are proposed. One change is in relation to legislative instruments made by the Governor-General. Clause 34 of the Bill provides that the original instrument be retained by the Principal Legislative Counsel. Under the proposed amendment of that clause, the originals of instruments made by the Governor-General will not be retained, after registration, by the Principal Legislative Counsel. This will allow for the originals to be retained in the series of the records of Federal Executive Council. Similarly, when regulations are made in respect of Rules of Court, provision will be made for the original of the Rules to be returned to the Court after registration and a copy retained by the Principal Legislative Counsel.

Clause 48

The other significant change is the preservation, in Part 5 - Parliamentary Scrutiny of Legislative Instruments, of the power to disallow a discrete regulation or single provision of an instrument. I attach a copy of the amendments the Government proposes to introduce together with the Supplementary Explanatory Memorandum. I believe these amendments address the Committee's comments regarding clause 48.

I observe that the provisions dealing with Parliamentary scrutiny and disallowance are an advance on the present law. The power conferred in subclause 48(4) to defer consideration of a motion of disallowance for a specified period to enable a rule, or a provision of a rule, to be remade to achieve an objective specified in the resolution is additional to the existing power of disallowance. Under the present law the method of dealing with issues of concern is the acceptance by the Parliament of an

undertaking by the relevant Minister that a further instrument will be made in the future to address the concern. I further observe that there have been occasions when delays in implementing the undertaking have been drawn to attention. Subclause 48(4) will provide a mechanism to ensure that an offending provision is remade, where its immediate disallowance would cause practical difficulties or leave an unacceptable gap in a legislative scheme.

Clause 7

The Committee has sought my advice whether the power in clause 7 of the Bill, to certify whether an instrument, or an instrument of a particular kind, is or will be a legislative instrument, may be judicial in nature or, if it is administrative or legislative, whether its exercise is sufficiently reviewable.

I do not consider that the power conferred by clause 7 is judicial in nature. At the heart of the judicial function is the power of the sovereign to decide controversies between its subjects, or between itself and its subjects. In the case of certificates under clause 7, however, there are no competing parties involved. Rather, an officer of the executive, the rule-maker, seeks from another officer of the executive, the Attorney-General, a decision regarding the status of an instrument. The terms of the Act will then operate of their own force.

The determination does not affect the rights or obligations of anyone other than the rule maker. The making of a determination is not the result of any controversy regarding the operation of an instrument. In relation to an instrument made before the commencing day of the Act the clause confers power to make a determination only before the last day on which registration would be required if the instrument is a legislative instrument. In relation to instruments proposed to be made after commencing day, there is power to make a determination only before an instrument is made. There can therefore be no question of a certificate being issued which would validate an instrument which would otherwise be unenforceable because of a failure to register it. Nor is the certificate a mechanism which may be used to exempt instruments from the operation of the Act.

Rather, the certificate is a mechanism to provide certainty, to both the executive and those potentially affected by an instrument, as to whether it is covered by the terms of the Act, in those instances where this is not entirely clear. It is unlikely that there will be a large number of applications for certificates under the clause. In the case of most instruments made before commencing day, or proposed to be made after commencing day, no application will be made, because the person having authority to make the instrument will not be uncertain about the nature of the instrument.

The Committee has raised a concern that there may not be sufficient provision for review of the exercise of power under this clause. Exclusion from review under the *Administrative Decisions (Judicial Review) Act 1977* is something which I do not advocate lightly. However, in this case I feel it is vital that the making or operation of administrative instruments not be unduly hampered or delayed by challenges to the issue of a certificate. The issue of a certificate that an instrument is not a legislative instrument would, of course, imply that it is administrative, and the usual channels for administrative review would then be available in relation to the instrument itself. Although the certificate is stated to be "conclusive", this would of course not prevent review of the exercise of this power by the High Court, in its

original jurisdiction under s75(v) of the Constitution in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

Decision-making powers - clauses 17 and 19

The Committee noted that clauses 17 and 19 provide for the making of decisions in relation to the consultation process which are excluded from review under the *Administrative Decisions (Judicial Review) Act 1977*. The Committee has also noted that paragraphs 17(b) and subclause 19(2) require these decisions to be recorded in writing. In the case of a rule-maker's decision under subclause 19(1), subclause 19(2) also requires that the rule-maker set out the reasons for his or her satisfaction that the requirements of the relevant exemption from the consultation procedures are met. Paragraph 19(1)(b) requires that a certification by the Attorney-General also be recorded in writing.

The Committee has asked whether these decisions and reasons will be published, and has suggested that the appropriate forum to review those decisions may be the Parliament, when the legislative instruments are tabled and subject to disallowance. The short answer is that there will be indirect publication of the decisions and that review will occur through surveillance by the Senate Standing Committee on Regulations and Ordinances.

Clause 32 of the Bill requires a rule-maker to lodge with the Principal Legislative Counsel, at the time of lodging a legislative instrument for registration or soon thereafter, an explanatory statement explaining the operation of the instrument. If consultation was required under Part 3, subclause 32(2) requires the explanatory statement to include, inter alia, a statement of the decision made under clause 17 (subparagraph 32(2)(a)(ii)), and of any decision made under paragraph 19(1)(a) or certificate issued under paragraph 19(1)(b) (subparagraphs 32(2)(vi) and (vii)). Paragraph 32(2)(b) requires the explanatory statement to be accompanied by a copy of the relevant record of decision or certificate.

Subclause 46(1) requires a copy of the explanatory statement and of any accompanying documents, to be delivered by the Principal Legislative Counsel to the Parliament to be laid before each House with the relevant legislative instrument. Subclause 46(2) requires that, where a rule-maker has failed to lodge an explanatory statement with the Principal Legislative Counsel before he or she has delivered the relevant instrument to the Parliament for tabling, the rule-maker must deliver the explanatory statement to the Parliament, together with a written explanation of the delay in it being lodged for tabling.

The Parliament will therefore have before it an explanatory statement to which is attached a copy of the decision under clause 17, and any decision or certificate under clause 19 when legislative instruments are tabled and subject to disallowance, and these decisions will be able to be reviewed by the Parliament at that time.

Schedule 4 - Amendment of various Acts with respect to Rules of Court

The provisions of the Bill, with some exceptions, are applied to the rules of court of the four federal Courts as if those rules were legislative instruments. The application of these provisions is subject to modification or adaptation by regulations made under each Court's enabling legislation. Each Court's enabling legislation requires

that regulations must provide for a procedure for consultation before a rule directly affecting business is made, to ensure that there is consultation with organisations or bodies representing the interests of those likely to be affected by the proposed rule.

The Committee comments that it would be possible to exclude the rules of court from having to be registered and to exclude them from parliamentary scrutiny, and has sought my advice as to whether some further limitation on the width of this regulation making power could be included in the Bill.

As the Committee is aware, rules of court are made by the Judges of each Court and deal primarily with practice and procedure in the Courts. As such, considerations of the independence of the judiciary arise in relation to the prescription of processes to be followed by the Judges.

In order to be able to react quickly to any unforeseen difficulties which might arise in the application of the provisions of the Bill to these rules, a power has been provided to modify this application by regulation. Any such regulations would be fully subject to the provisions of the Bill. In particular, such regulations would be registered, tabled in Parliament, and subject to disallowance. No diminution of the power of Parliament to disallow rules of court is provided envisaged. In the unlikely event that such a change were proposed to be effected by regulation, Parliament would have full power to disallow such a regulation.

The Bill has, as you are aware, been referred to the Senate Standing Committee on Regulations and Ordinances for consideration and report, by 10 October 1994. I have therefore sent a copy of this letter to that Committee for its information.

Please let me know if you require any further explanations of the Bill.

Yours sincerely

MICHAEL LAVARCH

THE AUSTRALIAN NATIONAL UNIVERSITY

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10 October 1994

Mr David Creed
Secretary
Senate Standing Committee on
Regulations and Ordinances
Parliament House
Canberra ACT 2600

Dear Mr Creed

Legislative Instruments Bill 1994

I wish to respond to the public invitation for comment on the Legislative Instruments Bill 1994. I understand that comments were sought by 23 September 1994, but for the reason indicated below it has not been possible to submit a considered response by that deadline. The matter is however, one of great significance for the University and I therefore hope very much that it may be possible to have the concerns expressed in this letter taken into account by the Senate Standing Committee on Regulations and Ordinances.

The Bill, if enacted in its current form, would have the effect of intruding upon the authority of the Council of the University given to it by section 9 of the Australian National University Act 1991 to control and manage the University. The timing of meetings of the Council is such that the next opportunity for the expression of its views on the matter would be the meeting scheduled for Friday 14 October 1994. While I will certainly be bringing the matter to the attention of Council at that time, I would not want the absence of a comment by the Council itself in the meantime to be misunderstood as any lack of concern on the University's part.

The Statutes of the University are made by the Council of the University under Sections 50 and 51 of the Australian National University Act 1991. A statute, when made by the Council, must be transmitted to the Governor-General for approval; when so approved it must be notified in the *Gazette*; and it has the force of law from the day on which it is so notified.

The Statutes of the University are made by the Council under Sections 50 and 51 of the Act. These sections are essentially different: Section 51 deals with statutes which relate to traffic and affect the community generally. I accept that these Statutes and any Rules or Orders made under them come within the spirit of the Bill.

The statute making power in Section 50 is a different matter. Section 50 relates to a range of matters of relevance to the University community but which do not affect the wider community, except in one particular sense to which I refer later.

The University is a self-governing community of people who choose to submit to its jurisdiction either by being students or staff. Indeed, I believe there is a long-standing tradition that the Government allows universities to manage their own affairs. This is reflected in public statements by the Minister for Employment, Education and Training in recent times. The statute-making power provides a structure for this self-governing nature of the University.

The statutes may empower any authority (including the Council) or officer of the University to make rules and orders, not inconsistent with the Act or any Statute, for giving effect to Statutes. I note that rules and orders which may be made pursuant to the Statutes which come under Section 50 also will be required to be laid before both Houses of Parliament. At present there is no requirement for this.

The capacity to make, amend or repeal rules and orders on a variety of matters in a timely way is essential to the effective governance of the academic work and management of the University. The University rules and orders deal with matters of considerable detail which affect only the University community. For example they include rules relating to the content of courses, academic dress, internal administration of Halls of Residence and the basis on which prizes are given. While these matters are important to the University, they have little, if any, effect on the community at large.

As I indicated earlier, I have a particular concern which will be shared by the academic community and ought I believe to be shared by the community as a whole. This is that the Bill in its present form if enacted will, by virtue of the provision for disallowance by the Parliament of Statutes, Rules and Orders made by the Council, leave the way open for the possibility of political intrusion into the academic content of courses. I suggest that this is quite improper in a liberal democracy.

As a consequence of the above, I ask that the Standing Committee on Regulations and Ordinances give serious consideration to having all Statutes, Rules and Orders made under Section 50 of the Act (or any section replacing that section from time to time) included in Schedule 1 of the Bill. No exemption is sought for Statutes, Rules and Orders made under Section 51.

I am anxious that the significance of this matter for the University should be properly recognised and so will be very willing to make myself available for discussion should that be necessary.

Yours sincerely

R D Terrell
Vice-Chancellor

MINTER ELLISON MORRIS FLETCHER

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10 October 1994

The Secretary
Senate Standing Committee on Regulations
and Ordinances
Parliament House
CANBERRA ACT 2600

BY FACSIMILE: 277 5838

Dear Sir

Legislative Instruments Bill 1994

The Administrative Law Committee of the Law Council of Australia supports the thrust of the Bill and notes that it largely gives effect to the report of the Administrative Review Council, *Rule Making by Commonwealth Agencies*.

The only matter on which the Administrative Law Committee wishes to comment is the exclusion of particular decisions from review under the *Administrative Decisions (Judicial Review) Act* 1977 (see Schedule 4 to the Bill). The Committee does not support this exclusion.

In general terms the scope of judicial review under the ADJR Act should mirror the scope of judicial review under the prerogative writs. Schedule 1 to the ADJR Act should, in the Committee's view, be repealed or substantially reduced. It should not be added to by further exclusions such as those proposed in Schedule 4 to the Legislative Instruments Bill.

The question whether or not a particular instrument is legislative or administrative in character is one with which the Federal Court is accustomed to deal. There is a significant amount of case law on the matter. The matter should not be determined by the giving of a non reviewable certification by the Attorney-General.

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Similarly, exclusion from review of decisions under Part 3 of the Bill is not appropriate. It can safely be left to the discretion of the Federal Court whether or not to entertain an application for review of a decision under Part 3 relating to public consultation on legislative instruments.

Yours sincerely

D O'Brien
Chairman

Administrative Law Committee
Law Council of Australia

Centre for Plain Legal Language

13 October 1994

Mr David Creed
Secretary
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Fax: (06) 277 5838

Dear Mr Creed

Submission on the Legislative Instruments Bill 1994

Thank you for the opportunity to make a submission on the Legislative Instruments Bill 1994.

I limit my comments to Parts 2 and 3 of the Bill and the clauses concerning measures to ensure high standards and consultation.

I support the measures included in clause 14. The Office of Legislative Drafting has a policy of drafting legislation in clear language. I understand that the recommendations of the Clearer Commonwealth Law Report are being implemented in that Office. I hope that the Parliament and its officers support the Office in this and do not see effective communication simply as an option. It is now an essential part of the modern law-making process.

Regulations often have an easily identifiable audience. It is therefore possible to write Regulations that have a particular audience in mind. It is of course vital that the wording complies with all the forms needed to make the Regulation legally effective. But this can be consistent with clarity. A law that is legally effective but cannot be understood by its intended users falls short of the aims of good government.

Last year I studied how the *Victorian Cleanliness (Food Drugs and Substances) Regulations* were used. In this study asked a number of users about how they used the Regulations. The fact is that every workplace that handles food must have a copy

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available for staff to consult. But the Regulations were never consulted. The problem is that they are written to suit lawyers, but they do not suit the way cooks or butchers actually work. (I have included a copy of this paper with this letter.)

This is extremely inefficient, because it means that after the Regulations are published, another booklet must be written explaining what they mean in terms familiar to the user.

This is where the procedure set out in Part 3 of the Bill is important. The process of consultation should not just be on the policy and the content but also on whether the Regulations can be understood by the anticipated users. This could involve testing on some anticipated users to see how they interpret the Regulations. In this way the Regulations can be both legally effective and effectively communicate at the same time. To make sure this happens, perhaps clause 15 could be amended to state:

> ...to make submissions concerning the instrument's policy, content, clarity and intelligibility to anticipated users.

To reinforce this, clause 14 could include an additional paragraph along these lines:

> (g) conducting programs to test the clarity and intelligibility of legislative instruments on anticipated users.

In recent years State and Commonwealth Parliamentary and Legislative Drafters have modernised the format of legislation. Nowadays Acts and Regulations often include charts, examples and other aids. This trend should be encouraged. Indeed the format could be altered even more so that the Regulations become users' handbooks as much as general rules of conduct.

Effective communication is not limited to improving access to the law. It is also concerned with the costs of government regulation. In Australia today many people are calling for microeconomic reform. Using plain language is an aspect of this. One of the aims of microeconomic reform is to reduce the incidental costs of business. Obscure legal language adds to those costs, which are often passed on to consumers.

I hope that in your Report to the Senate, you can refer to some of these issues and that the way in which Regulations communicate is made a priority.

Yours sincerely

Mark Duckworth
Director

APPENDIX B

LEGISLATIVE INSTRUMENTS BILL 1994

Draft amendments reflecting recommendations of the Committee

(1) Clause 7, page 6, at the end of the clause add the following subclauses:
"(6) A certificate given on an application under subsection (2) to the effect that an instrument of a particular kind will not be a legislative instrument is a disallowable instrument for the purposes of section 46B of the *Acts Interpretation Act 1901.*
"(7) If a House of the Parliament disallows a certificate mentioned in subsection (6) in relation to an instrument of a particular kind, instruments of that kind made on or after the day of disallowance are taken to be legislative instruments.".

(2) Clause 27, page 14, line 13, after "Government Printer", insert "or with the authority of the Principal Legislative Counsel".

(3) Clause 27, page 14, line 19, after "Government Printer", insert "or with the authority of the Principal Legislative Counsel".

(4) Clause 28, page 14, line 34, after "document", insert ", or the copy of the original document,".

(5) Clause 32, page 16, line 15, omit "should", substitute "must".

(6) Clause 32, page 16, line 40, omit "should", substitute "must".

(7) Clause 41, page 20, line 26, omit "aware", substitute "of the opinion".

(8) Clause 41, page 20, line 29, omit "so aware and of the reason for the invalidity", substitute "of that opinion and of the reason for the opinion".

(9) Schedule 1, page 29, after item 2, insert the following item:
"2A. Instruments under section 50 of the *Australian National University Act 1991* relating to the content of academic courses".

(10) Schedule 4, page 41, omit proposed paragraph 46B(1)(b), substitute:
"(b) that are made under a provision of an Act or legislative instrument (the '**enabling provision**') that confers power to make instruments of that kind; and
(c) that are expressly declared by the enabling provision or by another provision of the Act or instrument to be disallowable instruments for the purposes of this section.".

(11) Schedule 4, page 43, in proposed paragraph 125(1)(bb) of the *Family Law Act 1975,* insert "(other than provisions of Part 5 of that Act)" after "1994".

(12) Schedule 4, page 44, in proposed subsection 59A(1) of the *Federal Court of Australia Act 1976,* insert "(other than provisions of Part 5 of that Act)" after "1994".

(13) Schedule 4, page 45, in proposed subsection 49(1) of the *High Court of Australia Act 1979,* insert "(other than provisions of Part 5 of that Act)" after "1994".

(14) Schedule 4, page 46, in proposed subsection 486A(1) of the *Industrial Relations Act 1988,* insert "(other than provisions of Part 5 of that Act)" after "1994".

EXPLANATORY STATEMENT

The preceding amendments implement changes to the bill recommended by the Committee:

Amendment 1
Provides that a certificate issued by the Attorney-General determining that an instrument of a particular kind will not be legislative, is a disallowable instrument. If a House disallows such a certificate, instruments of that kind are taken to be legislative.

Amendments 2 and 3
Extends judicial notice of legislative instruments to documents printed with the authority of the Principal Legislative Counsel as well as to those printed by the Government Printer.

Amendment 4
Permits rectification of registered copies of documents as well as of original documents.

Amendments 5 and 6
Requires rather than permits decisions relating to public consultation to be included in the explanatory statement.

Amendment 7
Remedies the apparent unintentional narrow operation of a requirement to inform the Principal Legislative Counsel if an instrument was not validly made.

Amendment 8
Remedies the apparent unintentional narrow operation of a requirement to annotate the Register if an instrument was not validly made.

Amendment 9
Exempts instruments made under the *Australian National University Act 1991* relating to the contents of academic courses, from the operation of the bill.

Amendment 10
Avoids the necessity for complex and repetitive provisions to ensure full parliamentary scrutiny of disallowable non-legislative instruments.

Amendments 11, 12, 13 and 14
Limit the power under which the regulations may modify or adapt the provisions of the bill applying to rules of court so as to ensure full parliamentary scrutiny of such rules.

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

LEGISLATIVE INSTRUMENTS BILL 1994

ADDITIONAL SUBMISSIONS NOT APPENDED TO REPORT

CAPITAL MONITOR

29 August 1994

The Secretary
Senate Standing Committee for Regulations and Ordinances
Parliament House
Canberra ACT 2600

Dear Mr Creed,

I notice that the Committee is inquiring into the **Legislative Instruments Bill 1994.**

As you may be aware, I have recently submitted an article on the Bill to the Australian Law Librarians Group, for publication in the August edition of their magazine. I enclose a copy of the final version of that article, which raises some issues in which the Committee may be interested.

You may care to note that the Attorney-General's Department could suggest only some minor, detailed changes to the article, which I was proposing to outline in my next article on this legislation.

Disallowance of a Repealing Instrument

In addition to the more general concerns addressed in the enclosed article, I should draw your attention to a possible drafting error in **s49(2)** of the Bill, dealing with the disallowance of an instrument which repeals an earlier instrument.

It appears, from **s49(2)(b)**, that the disallowance of a repealing instrument has the effect of reviving the earlier, repealed, instrument from the date and time of the making of the second, repealing, instrument. However **s49(1)** has the effect of making the second, disallowed, instrument effective from the time of its making until its disallowance. Presumably, the second instrument could contain, in addition to its repeal provisions, new administrative requirements to replace those in the earlier instrument. Thus, it appears that, for the period from the making of the second instrument until its disallowance, both instruments will be effective, with two sets of administrative requirements operable.

The Committee may care to seek advice on this matter.

Yours sincerely

Richard Griffiths

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As delivered
pm 15 Aug

Canberra Rules

With a Register of Legislative Instruments

Richard Griffiths
Capital Monitor

You know all those notices which appear in the Commonwealth Government Notices Gazette? The ones announcing the making of statutory rules, or food standards, or therapeutic goods approvals, or land acquisitions, or by-laws, or ordinances, etc, etc? Well, prepare to bid almost all of them farewell by 1 January 1995, if the Attorney-General's Department has its way.

With them should also go the present frustrations associated with obtaining copies of some of them from the originating agencies.

The Government has introduced into the Senate its Legislative Instruments Bill 1994. The Bill represents the Government's response to the major recommendations of the Administrative Review Council's Report No 35, "Rule Making by Commonwealth Agencies". It sets out a new regime governing drafting standards and the procedures for the making, publication and parliamentary scrutiny of **all** delegated legislation.

Let's look at how the system is supposed to work, before addressing some more general potential problems. Note that this article is not addressing what is supposed to happen within the Government. That will have to wait for another article. What is described here is what you, outside Government, should see from 1 January 1995.

Legislative Instruments - The New System

What is a Legislative Instrument?

Does your work involve "legislative instruments"? Well, as might be expected, the term "legislative instrument" is carefully defined in the Bill and you should check there for the details. In broad terms, however, it includes: statutory rules, ordinances, proclamations, rules, by-laws, or other instruments made in the exercise of a power delegated by the Parliament, ie normally delegated in the parent Act.

In short, there are probably not too many law librarians whose work does not involve "legislative instruments".

Non-Legislative Instruments There are a number of kinds of "non-legislative instruments" which are also defined

in detail in this Bill. Examples are: some security, defence or police instruments, or ministerial directions issued to government business enterprises. They may still not need to be published and, where they are published, they will continue to be published in the Gazette.

Of course, just to make things really confusing, some of those non-legislative instruments are disallowable by the Parliament. Obviously, they will become public in the act of tabling and, furthermore, Schedule 4 of the new Bill says that they must be published in the Gazette or, at least, notice must be given of their making and where copies can be obtained.

Consultation Before Publication of Legislative Instruments

The Bill contains a schedule which lists all Acts considered to affect business. From 1 January 1996, any legislative instrument made under those Acts will need to be preceded by a Legislative Instrument Proposal, to permit "public" consultation, although there are exceptions, listed in the Bill. In the past, prior consultation was entirely at the discretion of the issuing authority.

The Bill, however, gives organisations which are preparing legislative instruments considerable "flexibility" with regards to consultation. They can seek a determination from their Minister that they need consult with only certain organisations, eg peak industry groups, and that will suffice. The present system of "magic circles" will, therefore, unfortunately, continue, much to the frustration of those law librarians whose partners are not in some particular magic circle. Why the Bill does not require public notices for **all** legislative instruments which require public consultation is not clear. Perhaps that would reduce bureaucrats' and insiders' power unacceptably?

The rule-maker must include, in the explanatory statement which will accompany the instrument when tabled, details of consultation required and, if not undertaken, why. There are no legislative penalties or disadvantages for drafters who fail to consult at all. Failure to consult will not invalidate an instrument. For cynical public servants, making a simple error and not consulting, at all, may seem the best course of action, sometimes.

Recalling how some public service organisations responded (or did not respond) to the passage of the Freedom of Information Act 1982, one suspects that consultation will be more honoured in the breach than in the observance, at least for the first few years. Nevertheless, it must be agreed that what is proposed on consultation is better than what has been happening.

Clearly, law librarians are going to be involved in the consultation process. They will have to be able to explain not only the processes required in the Bill, but also why some irate, badly-miffed partner has not had an opportunity take part in the consultation processes for a legislative instrument to which they are sure they could have brought immense expertise.

Publication of Legislative Instruments

All legislative instruments will be published on an electronic database, called the Federal Register of Legislative Instruments. Until an instrument is available on the Register, it cannot come into force.

This will impose new constraints on Ministers and senior public servants. Previously, some instruments did not need to be gazetted, coming into force when signed (and, just sometimes, then being kept in the bottom drawer of the bureaucrat's desk until needed).

Because the Register will record the date and time of the publishing of every instrument, there should be less scope for arguing, for example about whether some commercial deal was concluded before the Government sought to prohibit it with a legislative instrument. (Obviously, it may be necessary for those commercial legal arrangements or agreements to include the time, as well as date, of their signing. Presumably, some form of certification will be required.)

There will be a separate Index, published in both electronic and paper form. It is not clear how frequently, or how expeditiously, the paper Index will appear. Noting the variations in some indices, only optimistic or lucky librarians would rely on the Index.

The full text of each instrument will be on the Register, albeit in one of three sections, depending on when the instrument came into force.

Note that electronic publication of instruments will bear little relation to their consolidation. All you will see on the Register will be the various amendments to, say, the Migration Regulations. You can either download, then try your hand at an unofficial consolidation, or you can wait for the official consolidation. Noting that the Migration (1993) Regulations were originally gazetted in November 1992, came into force on 1 February 1993, were amended twelve times and eventually overtaken by the Migration Regulations 1994 on 1 September 1994, without ever being consolidated officially, law librarians may find it advantageous to be able to do their own unofficial consolidations of key legislative instruments.

Paper copies of all legislative instruments will be available for purchase from the AGPS bookshops, using demand printing. Obviously, these will be just the actual instruments, unconsolidated until the Attorney-General's Department has done the official consolidation. (Note the requirements for evidentiary material, discussed below.)

Obviously, until all lawyers are computer literate and capable of conducting their own searches of the Register, law librarians will need to be expert in searching the Register of Legislative Instruments.

Parliamentary Scrutiny

Just as delegated legislation is presently subject to parliamentary scrutiny and, possibly, disallowance, under the Acts Interpretation Act 1901, so too will legislative instruments be (and some esoteric documents like disallowable non-legislative instruments, too).

The main differences will be:

> The power to disallow legislative instruments will be contained in the Legislative Instruments Act (when passed), not the Acts Interpretation Act 1901.
>
> Whereas at present fifteen sitting days are available before delegated legislation must be tabled, under this Bill the Principal Legislative Counsel will have only six sitting days to table legislative instruments made on or after the commencing day. The normal fifteen days periods to move disallowance, etc, then apply.
>
> The Parliament will not be able to disallow individual provisions of legislative instruments. The entire instrument will have to be disallowed. Careful packaging of nice and nasty provisions by a Government could make it politically awkward to disallow some instruments.

Another difference, which could produce changes for those of us with an interest in the workings of Parliament, is that the Principal Legislative Counsel will be responsible for arranging the tabling of all legislative instruments. Previously, except for Statutory Rules, the Ministers or their Departments were generally responsible. Timeliness was not always a strong point, especially when there was something to hide.

Transitional Provisions

You know what the current system is, how instruments are made and published, don't you? (Just say "Yes", and promise yourself that you will get a better handle on the

new system.) Well, there obviously has to be a way to get from the present system to the new system.

For the period of transition from the present system to the brave new world of this Bill, there are further definitions, based on when the legislative instrument is made and when it comes into effect, to catch those instruments which will have already been made when the new system starts.

Another section of the Bill also tells us how long Departments will have to review all their old legislative instruments and either ditch them or re-validate them and get them up on the new system. All instruments:

> since 1 January 1990 must be on the new system by 1 September 1995;
>
> since 1 January 1980 must be on the new system by 1 March 1996; and
>
> before 1980 must be on the new system by 1 March 1997.

In other words, after 1 March 1997, any legislative instrument which is not on the electronic register will have no current validity.

However, even the "stable" situation, after the new system has settled down, is so complex and strange that I think we should ignore the transitional stage for the rest of this article.

The Gazette

As already indicated, it is intended to do away with much of the current contents of the Government Notices Gazette series. There will still be some sorts of instruments, however, which will need to be gazetted, like disallowable, non-legislative instruments, or Governor-General's proclamations. It appears that a slimmed-down Government Notices Gazette series will be used for these.

Other Gazette series, like the Public Service Gazette, or the Business Notices Gazette, which insolvency practitioners rely on, will continue. Doubtless, however, the Australian Securities Commission will push hard, again, to do away with its monthly ASC Gazette, preferring to rely on its own electronic databases, too.

Some librarians may feel that it will be a retrograde step, going from a single repository for publication, ie the Gazette, to a split system, involving both the paper-based Gazette and the electronic Register of legislative Instruments.

Other Acts Affected

The new Bill will amend, among others, such Acts as the:

Acts Interpretation Act 1901

Administrative Decisions (Judicial Review) Act 1977

Family Law Act 1975

Federal Court of Australia Act 1976

High Court of Australia Act 1979 and

Industrial Relations Act 1988.

Those Acts are not entirely without consequence for much of the legal profession. For that reason, alone, one might assume that there has been considerable public consultation about this new Bill.

Consultation about the Bill

"Well", I hear you mutter, "How come no one has told **me** yet, and when will they tell me?"

The short answer to the first question is that you are supposed to have read the Bill, which was introduced into Parliament on 30 June 1994. As for the second question, although there is some funding identified to explain the new system to the Government departments and agencies, who have to prepare the legislative instruments, **there is no money to tell anyone else**, presumably because it is assumed that we, the governed, will just find out for ourselves. (And to some extent, this, and other, media articles will overcome part of that problem.)

"But doesn't this electronic register thing", I hear you scream, in a strangled sort of way, "mean that every law and accounting firm in the country will need to be able to search it? Possibly on a daily basis? Doesn't that mean immense changes in the way we do business and train our people? Won't everyone need modems and, possibly, additional information technology equipment by 31 December 1994? Won't that affect my 1994-95 budget?" Of course it will, but that does not appear, to the Attorney-General and his Department, to be any of their concern.

So, on the assumption that librarians in Government departments and agencies will be told all they need to know about drafting and releasing legislative instruments, let's focus the rest of this article on aspects which the rest of us will need to consider.

How Else Will the Bill Affect Me?

Inspecting the Register

The Register will be maintained in electronic form within the Attorney-General's Department. It is envisaged that access for the public will be either free, via terminals set up in the AGPS bookshops, or charged, via database providers. Several problems are immediately apparent:

The AGPS bookshops will be crowded with lawyers or legal staff, waiting to access the Register for free searches, rather than pay to subscribe to various database providers. (Anyone spot an opportunity for refreshment kiosks and waiting lounge concessions?)

Noting the difficulty ordinary folk often experience with computer searches, AGPS may need to be careful that any assistance provided by their bookshop staff is not construed to be "advice". One can imagine claims for compensation if a search fails to find something which is, in fact, on the Register.

On the other hand, of course, unless the public is provided with extensive assistance, it could be argued that their access to this form of law has been severely curtailed, especially when compared with the present system of availability in Gazettes in all public libraries, where all the public needs is time and the ability to read.

That part of the population which does not have ready access to AGPS bookshops will be disadvantaged. That includes Wollongong, Newcastle, Geelong and all other, even more bucolic, pollution- and information-free country areas.

Whereas a subscription to the admittedly not-well-indexed Government Notices Gazette costs $290 pa, providing unlimited access once they are on the library shelf, the cost of access to the electronic register will probably be at least $4 or $5 every time it is searched. How often does your library need to check on the Gazette, and how much does that cost, in terms of your time? Note that you will probably still need to subscribe to the (slimmer) Government Notices Gazette, if only to follow the making of non-legislative instruments.

Electronic searching may be just the thing for some sorts of searches, eg any instruments made under a specific section of a particular Act. However, browsing through, say, all the notices made under the Telecommunications Act 1991, to see how some legislatively-gifted bureaucrat authorised a telecommunications carrier to do something which the Government wanted to remain hidden, may range from

very difficult to very expensive to do on a database.

Agreement has yet to be arrived at with any database provider to make electronic access possible, noting the 1 January 1995 target date. Unless this occurs, it will be **all** law firms which will have to queue at the AGPS bookshop. (In that event, don't go to work for a provincial law firm, unless you like travel.)

In short, it is extremely doubtful that this proposed system will comply with the Attorney-General's stated policy objective of "Equal Access to the Law".

Maintaining the Register of Legislative Instruments

When an instrument has been made, it will be the originating authority's responsibility to ensure that it is passed to the proposed new position of Principal Legislative Counsel, in the Attorney-General's Department. The Principal Legislative Counsel will be responsible for ensuring that all Statutory Rules go on the Register, but other instruments, which can be made without any reference to that Office, will have to be formally transmitted to the Principal Legislative Counsel for inclusion. Remember: until an instrument is on the Register, it will have no force.

When an instrument is added to the Register, the time and date of its coming into force will be recorded electronically. Noting the importance of timing for many instruments, particularly those intended by the Government to head-off commercial developments, like foreign investment proposals, it will be most important to be able to guarantee the integrity of the register. In other words, who will ensure that it is not tampered with?

The Principal Legislative Counsel The temptation to tamper with the Register could occur on behalf of either or both Government and commercial interests. The simplest form of tampering would probably be to falsify the date and time the instrument came into effect. Furthermore, the tampering could take not only the obvious form of computer hacking, but also political pressure.

The Bill makes no mention of "maintaining the integrity of the Register" in the responsibilities of its guardian, the Principal Legislative Counsel. It merely makes the Counsel responsible for "maintaining the Register".

The Bill gives the Principal Legislative Counsel quite awesome powers. Section 14(1) says that he or she "may take any steps he or she considers likely to promote their [the legislative instruments'] legal effectiveness,

their clarity and their intelligibility to anticipated users." Section 28(2) says "The Principal Legislative Counsel may alter the Index at any time for any purpose whatsoever, ...". (Note that the latter applies to the Index, not to the actual instruments. Nevertheless, as the Index is the only part of the system which will be published in hard copy, this is a sweeping power.)

It could be argued that to place a public servant in this position is most unfair, unless they have statutory independence and are required to report any political or executive pressure, or any exercise of these powers, to the Parliament, immediately.

Evidentiary Material

Copies of instruments and information contained in the Register must be available for purchase from the AGPS bookshops. That will probably achieved by demand printing by the bookshop staff.

The Bill states that extracts from the Register, ie legislative instruments, which are printed by the Government Printer (presumably AGPS bookshop outlets are assumed to be the "Government Printer"), do not require proof [ie further proof] "about the provisions and coming into operation (in whole or in part) of a legislative instrument."

Don't forget: the Gazette will no longer tell you when legislative instruments have been made. Further, the new system leaves unclear how expeditiously the AGPS must publish, say, Statutory Rules in their paper-based form. Thus, even if you continue to subscribe to the paper-based Statutory Rules, you will not be sure, without searching the Register, that nothing new has been "registered" since you received your latest subscription mailing. (I suppose that "registered" is the term which will replace "gazetted", at least for legislative instruments.)

This constraint on evidence also means that, although you will be able to search the Register electronically from your library, and look at the instruments printed from your own computer search, when it comes time to go to court it may be also time to go to the AGPS and join the queues to get your evidentiary copies of instruments.

There is a let-out provision under s27(3) of the Bill that "A Court or Tribunal may inform itself about those matters in any way that it thinks fit." but that, presumably, will require the rules of each court or tribunal to address the issue. This provision seems aimed more at permitting judges to decide if they want to see a computer screen in their court.

Conclusions

The concept of having a single, publicly accessible repository for all legislative instruments is attractive, but may not have been achieved in this Bill.

The development of the electronic Register of Legislative Instruments means that we will have to be able to-search both the Register and the Gazette, if we are to cover both legislative and non-legislative instruments, instead of the present situation, where whatever is public is published in the one Gazette.

Assuming that the Legislative Instruments Bill 1994 is passed without amendments there will need to be significant changes in the way we all do business.

On balance, public access to the law, particularly away from the major cities, will be reduced or inhibited by systems currently proposed for publication.

The role and responsibilities of the Principal Legislative Counsel may require further consideration.

There does not appear to be enough time to sort out all the implications and bugs before the new system is presently planned to commence on 1 January 1995

Further Developments

There appears to be considerable Parliamentary "interest" in the Legislative Instruments Bill 1994. That suggests that it may be amended quite substantially before it becomes an Act. I will try to keep you informed.

There is also much that you will need to know about the structure of the Register, but that can wait. For now, get a copy of the Legislative Instruments Bill 1994 and start to consider its implications for your library.

CAPITAL MONITOR

RECEIVED

13 SEP 1994

Senate Standing Cttee on Regulations & Ordinances

12 September 1994

The Secretary
Senate Standing Committee for Regulations and Ordinances
Parliament House
Canberra ACT 2600

Dear Mr Creed,

Further to my submission of 29 August to the Committee's inquiry into the **Legislative Instruments Bill 1994**, an additional matter has arisen which may be relevant.

As the Committee will be aware, on Friday 2 September, Statutory Rules No 302 of 1994, **Corporations Regulations (Amendment)**, was made and notified in Special Gazette S 320, of that date. Like all the other Statutory Rules made on that day, No 302 carries the following note on its front page:

> "[NOTE: These regulations commence on gazettal: see **Acts Interpretation Act 1901, s 48**]".

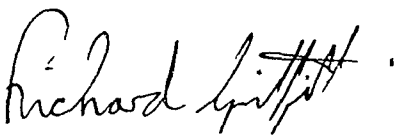
Because Statutory Rules No 302 relied on sections of the **Corporations Act 1989** which did not come into force until 5 September, there has been some controversy as to whether these Statutory Rules are not, in fact, void under the **Acts Interpretation Act 1901.** The Office of Legislative Drafting has, however, informed me that they are of the view that the Note is a mere typographic error, and the Statutory Rules are valid under the special provisions of **s. 109** of the **Corporations Act 1989**, notwithstanding that the Executive Council appears to have approved the Regulations as printed, including the Note with its reference to the **Acts Interpretation Act 1901.**

The courts may yet have to rule on that interpretation by the Office of Legislative Drafting. However, the matter appears to throw some light on current interpretation, within the Attorney-General's Department, of the powers of the Principal Legislative Counsel. Presumably, the Principal Legislative Counsel would hold that the error in Statutory Rules No 302 is a typographic error, and correct it, relying on powers under the **Legislative Instruments Bill 1994 s. 28.**

In this case, therefore, under the **Legislative Instruments Bill**, the public would never know exactly what the Executive Council approved when it made Statutory Rules No 302. This would be not just an abuse of executive power, but an abuse of bureaucratic power.

I submit that the Committee should investigate this apparently too-wide discretion of the Principal Legislative Counsel under the new Bill.

Yours sincerely



Richard Griffiths

61 Somerville Street,
SPENCE, A.C.T. 2615

23 September 1994

Mr David Creed,
Secretary,
Senate Standing Committee on
Regulations and Ordinances,
Parliament House,
CANBERRA, A.C.T. 2600

Dear Mr Creed,

Please find enclosed a submission to the Inquiry into the Legislative Instruments Bill 1994.

My submission is in two parts. The first part is based on two Higher Education funding Bills which abrogated the right of Parliament to allocate funding to Higher Education institutions through primary legislation by empowering the Minister to allocate the funding by Determination The submission outlines potential problems and problems which have actually arisen.

The second part is based on the recent publication of former Senator David Hamer entitled Can Responsible Government Survive in Australia?. In this publication, Captain Hamer set out in Chapter Nine a set of legislative requirements for an ideal legislature to control delegated legislation. This part of the submission lists 21 items which should be included in ideal legislation, and then identifies whether these items are accounted for in the Legislative Instruments Bill 1994.

A final summary lists some of my concerns with the proposed legislation as it stands at present.

I hope that this submission will be of use to the Committee and I would be willing to provide further information to the Committee if required,

Yours sincerely,

Wendy M H Brazil

Wendy M. H. Brazil, M.A., M.Ed.
Visiting Fellow, Australian National University,
Tutor, University of Canberra,
Teacher of Latin and Greek, St Clare's College, Narrabundah and Canberra Grammar School.

SUBMISSION RELATING TO THE *LEGISLATIVE INSTRUMENTS BILL 1994*

Since the *Legislative Instruments Bill 1994* is a Bill for a new Act relating to delegated legislation, I wish to bring to the attention of the Senate Standing Committee on Regulations and Ordinances problems which are associated with delegated legislation. Former Senator David Hamer has also published a monograph in which he outlines, among other aspects of responsible government, the means by which an ideal legislature would be able to control delegated legislation.

The problem in essence

Delegated legislation is very difficult to monitor. Its very existence is not easy to detect unless one is a consistent reader of Hansards and Journal of the Senate or Votes and Proceedings of the House of Representatives, or the Commonwealth Gazette. No formal notice is given to indicate that a particular item of delegated legislation is about to be tabled. There is no regularly published list of delegated legislation before or during the tabling process which is readily available to people inside or outside Parliament, except for those Senators who are members of the Senate Standing Committee on Regulations and Ordinances. *.

Once delegated legislation does exist in the form of a document tabled by the Clerk of either House, there is one chance to learn about it: by reading the Hansard record and the Journal of the Senate or Votes and Proceedings of the House of Representatives for the day of tabling. Then the time for disallowance (and therefore debate) is limited to fifteen sitting days. If no motion for disallowance is raised in either House, then the delegated legislation becomes enacted and members of the public may never know about it unless they are, in some way, affected.

Bills, on the other hand, are much more visible and accessible even to those outside Parliament. Notice of Bills appear in Notice Papers and are recorded in Hansard records and the Journals of the Senate and the Votes and Proceedings of the House of Representative. The Senate issues a Bills List which provides details of all current Bills before the Parliament. The three reading stages are fully recorded in all the documents listed above and the final outcome of its passage through both Houses is again fully publicised before the Bill is enacted. In some cases, the public is invited to provide input into a Bill at a certain stage of its progression through either House, but particularly the Senate.

The difference between legislation and delegated legislation is really the difference between the Bill which is the subject of this inquiry, a particularly visible instrument, especially since the public have been invited to provide submissions on matters contained within it, and the subject of the Bill, delegated legislation, which is almost an invisible instrument, rarely known to the public and even more rarely a matter for public discussion or input.

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* The *Delegated Legislation Monitor* has only very recently come to my attention.

Example 1 of the problem: the Higher Education Funding Amendment Bill (No. 2) 1992.

The problems which arise out of delegated legislation came forcibly to my notice in connection with the *Higher Education Funding Amendment Bill (No. 2) 1992* which changed the procedures for funding individual higher education institutions. Hitherto, the amounts for each institution were included as part of the Act and therefore were the outcome of Parliamentary legislation, with all the visibility and possibility for debate and amendment accorded to all Bills. The 1992 Bill repealed all sections of the Act which allowed for individual payments to institutions and replaced these sections with new sections which provided for the Minister to determine the individual amounts for each Higher Education institution in Australia.

The details of the changes in funding arrangements for Higher Education institutions are set out in the paper appended: *The Minister Takes Control: The Higher Education Funding Amendment Bill (No. 2): Does it Make a Difference?* The problem in this Bill was exacerbated by the interdependence of a disallowable instrument and an instrument that was not disallowable. In the amending Bill, Section 14 provided for the Minister to determine the guidelines for an Education Profile for each Higher Education institution; since this was not a disallowable instrument, it had to be published in the *Commonwealth Gazette*, but it was never tabled in Parliament and there was no possibility for Parliamentary or public action. Sections 15 and 16 of the same Bill gave the Minister the power to determine the allocations for each Higher Education institution **"having regard to the Education Profile"** of each institution. These determinations were disallowable instruments under Section 110 of the amending Bill and therefore had to be tabled in the Parliament. **The result of these provisions was to put absolute power into the hands of one person, the Minister, to determine the guidelines for the funding of each Higher Education institution (a non-disallowable instrument) and to allocate the funding (a disallowable instrument) according to the Minister's own guidelines.**

University authorities were slow to appreciate the true nature of the changed arrangements in funding. They claimed that it made no difference whether they were funded through an appropriation by a Parliament or whether they were funded by a Ministerial Determination. They failed to appreciate the changes instituted in the amending Bill which provided for the first time that the funding allocation to each institution was to be determined "having regard to the Educational Profile of each institution"; they failed to appreciate that they could only spend their grants strictly in accordance with the Educational Profile. There was a tendency for University authorities to regard the Education Profile as a simple funding model based on student numbers, staff numbers, course numbers, courses, research, and so on. This was probably understandable since the exact nature of an Educational Profile was not immediately apparent. According to Section 14 of the amending Bill it was described as a profile "in an approved form describing activities of the institution" which had to be provided to the Minister; "the approved form of an Educational Profile to be submitted by an institution shall be *determined* by the Minister after consultation with the institution". There was no further information in the Bill on the nature of the "approved form". However, some detail was to be found in the Department of Employment, Education and Training (DEET) report, *Higher Education Funding for the 1992-94 Triennium*: the approved form of the Educational Profile had four distinct parts: (i) a set of Teaching Profile tables, (ii) an

equity plan, (iii) an Aboriginal education strategy, and (iv) a research management plan. These last three items were integral parts, then, of an Education Profile and universities could have their funding adjusted according to their willingness to comply with the guidelines *determined* by the Minister. The Report reinforced this: "it is expected that institutions will continue to develop and refine their equity plan, Aboriginal education strategies and research management plans during 1992". (p.9)

The import of this change was noted in *The Canberra Times* (12 February 1993) by Crispin Hull: "The new legislation ...put[s] unnecessary power in the Minister's hands. It has the potential to be an insensitive, centralized and dangerous power. The universities in Australia are too important to be put under the ministerial thumb."

In January 1993 I attempted to locate the Determination, which should have been signed by the Minister or his delegate in December 1992, and which under the new Act, as it was by then, allocated the funding for each Higher Education institution from 1 January 1993. In fact, it was not until April that this Determination could be located. In the meantime the Determination had not been lodged in either of the two Table Offices of the Parliament; the Secretary of the Senate Standing Committee on Regulations and Ordinances had neither received it nor had any information on its whereabouts; it had not been published in the *Commonwealth Gazette*. The Parliamentary Liaison Officer of DEET refused to provide any information on the matter. A journalist who was also anxious to locate the Determination was told by the same Officer that it was not available because there was a Federal election in March and no documents could be given out. When the Determination was finally located, it was shown to have been signed in December 1992, but failure to publish the Determination in the *Commonwealth Gazette* before April meant, in effect, that Higher Education institutions had been receiving operating grants for three months without a legal basis, which is certainly not in the interests of good government. Later in the year, the Minister of the time, Mr Beazley, apologised to the House of Representatives for the late appearance of that Determination and others which were also overdue for tabling in Parliament. An item in the next DEET Annual Report also referred to this anomaly and indicated that steps would be taken to prevent a re-occurrence. (The offending Determination is appended.)

Example 2 of the problem: the Higher Education Funding Amendment Bill 1993.

In a paper entitled, *Whiteboard funding for Universities?* (also appended), I have outlined another instance of the revocation of Parliamentary responsibility. Before December 1993, Parliament had been responsible for appropriating certain amounts to be available to Higher Education institutions for five sets of "extras": enhancement of quality, projects of national priority, equality of opportunity, special research assistance and advanced engineering centres. As a result of the Parliamentary appropriations, institutional authorities knew that, in 1993, there were roughly $80 million available for quality enhancement, roughly $40 million for projects of National Priority, roughly $4 million for equality of opportunity, something between $250 and $300 million for special research assistance and $1.5 million for advanced engineering centres. In December 1993 the separate amounts appropriated by Parliament for each of the five categories were repealed and a conglomerate amount of $430,248,000 was prescribed in a new Section 23C which allowed the Minister to allocate any part of this amount to any institution for any of the five "extras". Since December 1993 the Minister alone determines which institution is to receive an allocation, if any, and under which of the five categories this money is to be allocated. This particular delegated instrument virtually puts a private bank of $430.3 million into the hands of a Minister, which creates the *possibility* for the marginality of an electorate, relevance, pragmatism, political correctness, managerialism, collaboration, vocational benefit and compliance with political demands to be repaid by a Minister rather than standards of excellence and the pursuit of knowledge and all that a University has stood for in the past. But most of all it further diminished the rights of Parliament to appropriate and allocate funding in Higher Education.

Former Senator David Hamer on delegated legislation.

Captain David Hamer, a former Liberal Senator for Victoria and Deputy President for seven years, recently published a book, *Can responsible government survive in Australia?*, which will probably by now be well known to the Committee. I would like to draw the attention of the Committee to Chapter 9, *Parliamentary control of delegated legislation*, which expresses certain concerns about delegated legislation and indicates that very precise legislation is required to control the proliferation of delegated legislation and the possible abuse of delegated power.

The Hamer recipe for ideal legislation to control delegated legislation includes the following provisions as essential:

1. All delegated legislation is to be made under the authority of an act of parliament;

2. Delegated legislation must be laid before the Parliament either before or within a brief period after being enacted.

3. Any delegated legislation not laid before the Parliament either before or within the prescribed period will be of no effect.

4. All delegated legislation must be either approved by an affirmative resolution of the Parliament or be subject to disallowance within a prescribed number of sitting days (fifteen is suggested) after being laid before the legislature.

5. The Executive must not be able to prevent an adverse decision by not bringing on the debate for disallowance of delegated legislation.

6. If disallowed, the delegated law must not be remade in the same form for a prescribed period (six months is suggested) without a permissive resolution.

7. In a bicameral Parliament, each House separately must have the power of disallowance.

8. Delegated powers to amend acts of parliament (or any law-making power) must be stringently limited as necessary and no wider than essential; such powers must be subject to close scrutiny by the Parliament; such powers must not be excluded from parliamentary control, unless they are purely administrative.

9. The power to delegate must be clearly defined.

10. The power of sub-delegation should either be precluded or strictly limited.

11. All delegated legislation should be examined to ensure that it is within the power granted by the enabling Act.

12. All delegated legislation should be examined to ensure that it is clearly worded.

13. Delegated legislation must not be retrospective.

14. Delegated legislation must not unnecessarily diminish personal rights and liberties.

15. Delegated legislation must not give bureaucrats unreviewable power over the public.

16. Delegated legislation which contains policy matters should be stringently limited; all delegated legislation containing policy matters must be subject to close scrutiny by Parliament to ensure that the policy matters are not of such importance that they should be included in legislation rather than delegated legislation.

17. All delegated legislation must be examined as it is produced by a specifically designated parliamentary committee which is to report to the legislature on any defective delegated legislation; this committee must have the power to move disallowance motions, which in turn must be dealt with by the legislature; this committee must be directed to act in a non-partisan way and must have access to independent legal advice; this committee must also have the power to negotiate with the relevant Minister to request an amendment to remove a defect in the delegated legislation without compromising the committee's power to mover for disallowance if the Minister will not comply with the request.

18. All delegated legislation must be readily available to those affected by them.

19. All delegated legislation must be accompanied by an explanatory memorandum, setting out the purpose of the delegated law and its mode of operation.

20. Certain delegated legislation must be accompanied by a formal impact statement; if the impact is significant, the designated parliamentary committee must refer the delegated legislation back to the legislature for its consideration.

21. All delegated legislation must be reviewed regularly and repealed if not longer appropriate; or all delegated legislation may have a designated time limit, after which it is automatically repealed.

(See Hamer, *op.cit.* pp. 149-150)

Many of the items above are included in the *Legislative Instruments Bill 1994* (which is henceforth referred to as "this Bill"); some are not.

Item 1. is covered by Section 4.(1) *Definition - a legislative instrument.*

Item 2. is covered by Section 45.(1) *Tabling of legislative instruments,* which sets the time limit for tabling at 6 sitting days after registration. The time limit for registration is covered in Section 23.(2).

Item 3. is covered by Section 45.(3) which provides for a legislative instrument to cease to have effect if a copy is not laid before each House of the Parliament within the set time limit..

Item 4. There is no provision for affirmative resolution of the Parliament for delegated legislation. This Bill provides for approval of delegated legislation by Parliament by default, and for disapproval by means of a motion for disallowance. Section 48 *Disallowance of legislative instruments* provides for disallowance of legislative instruments.

There has been some consideration of the use of affirmative resolution in relation to legislative instruments and of the right of each House to disallow part of a regulation or instrument rather than the entire regulation or instruments, as at present. (*A.S.P.* p.711) *

Item 5. is covered, in effect, by Section 48.(2)(b) which provides that delegated legislation is taken to be disallowed if a disallowance motion has not been withdrawn, finally dealt with or its consideration deferred. The Senate Standing Orders also provide for a disallowance motion to be placed on the Notice Paper as "Business of the Senate", which therefore takes precedence over Government and General Business (*A.S.P.* p.698). Standing Order 66A defines "Business of the Senate" to include: "A motion to disallow, disapprove, or declare void and of no effect any instrument made under the authority of any Act which provides for the instrument to be subject to disallowance or disapproval by either House of the Parliament, or subject to a resolution of either House of Parliament declaring the instrument to be void and of no effect".

Item 6. is covered by Sections 51 *Legislative instruments not to be remade while subject to disallowance* and 52 *Disallowed legislative instruments not to be remade unless disallowance resolution rescinded or House approves.*

Item 7. is covered by Section 48 *Disallowance of legislative instruments* which provides for the consequences of a motion to disallow a legislative instrument by "a House of Parliament". This fact would be clearer if the Section referred to "either House of the Parliament" rather than "a House of the Parliament".

Item 8. is covered to some extent by Section 4 *Definition - a legislative instrument* which provides that a legislative instrument must be "made in the exercise of a power

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* J. R. Odgers: *Australian Senate Practice.* 6th edition. Canberra, 1991:.

delegated by the Parliament". Section 9 accounts for the *Construction of legislative instruments*, but does not appear to include any specific provision to preclude a delegated power to amend acts of Parliament.

Item 9. The power to delegate is not adequately defined. In fact it is only mentioned on one Section, i.e. Section 5 *Definition -- power delegated by the Parliament.*

Item 10. is not adequately covered in the legislation. On the contrary, Section 5 *Definition - power delegated by the Parliament* appears to allow for almost unlimited sub-delegation, albeit with Parliamentary approval: "A reference in this Act to a power delegated by the Parliament includes a reference to a power delegated by the Parliament to a rule-maker and then, under the authority of the Parliament, further delegated by the rule-maker to another rule-maker" [*ad infinitum*].

> "The ideal legislature would ... be very wary of any power of sub-delegation given in the bill, for these powers are very difficult for a legislature to scrutinise. An extreme instance was given in the 1989 Commonwealth Conference on Delegated Legislation: ...'The Secretary was empowered to delegate to a senior executive service officer who could delegate the power to delegate to a delegate, and that delegate could delegate the power to make a decision'." Hamer, *op.cit.* p.149

Item 11 does not appear to be covered in this Bill. One would expect it to be included in Part 5 *Parliamentary scrutiny of legislative instruments.* Contrary to the Hamer prescription, Section 9 appears to give the "rule-maker" some scope for extending the rule-making power in the making of delegated legislation. The explanatory note to Section 9 appears to be somewhat contradictory: "Subsection 9(2) provides that where the making of an instrument exceeds the power of the rule-maker then to the extent that the instrument is within power it is valid." This appears to mean that a rule-maker may make an instrument exceeding the power of delegation, and if part of that instrument is within the power, then that part is valid, but the Section does not state that the part exceeding the power is invalid.

However, it is one of the responsibilities of the Senate Standing Committee on Regulations and Ordinances under Standing Order 23(3) to scrutinise each legislative instrument to ensure that it is in accordance with the Statute.

Item 12 is covered in Section 14.(1) *Measures to ensure high standards achieved,* which empowers an officer of the Senior Executive Service designated to be the Principal Legislative Counsel to take steps to ensure that legislative instruments are of a high standard and to take steps to promote their clarity and intelligibility to anticipated users.

Item 13 appears to be covered by Section 8.(2) *When do provisions of legislative instruments take effect?* . Retrospectivity had been a matter of concern for many years (see *A.S.P*, p. 706). Retrospectivity is considered to be due to inefficiency on the part of the responsible departments.

Item 14 is not covered in this Bill, but the Senate Standing Committee on Regulations and Ordinances is empowered to ensure that legislative instruments do not "trespass unduly on personal rights and liberties" (SO 23(3))

Item 15 is not covered in this Bill, but the above Committee is also empowered to ensure that legislative instruments do 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" (SO 23(3))

Item 16 is not covered in this Bill, but again the above Committee is also empowered to ensure that legislative instruments do not "contain matter more appropriate for parliamentary enactment". (SO 23(3))

Item 17. Parliamentary scrutiny is facilitated under the provisions in Part 5 *Parliamentary scrutiny of legislative instruments*. However, there is no provision in this Bill which also requires scrutiny by a Parliamentary Committee. It is possible that it is not necessary since the Senate Standing Committee on Regulations and Ordinances Committee is empowered under a Standing Order of the Senate, which also provides that "all regulations, ordinances and other instruments, made under the authority of Acts of Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the Committee for consideration and, if necessary, report thereon" (Standing Order 36A).

Item 18 Under the provisions of Division 2 of this Bill, *The Register*, there is to be a Federal Register of Legislative Instruments kept in each Department under the control of the Principal Legislative Counsel. Section 26, *Inspection of the Register*, provides for the Register to be inspected by the public and ensures that the public has reasonable access to computer terminals to inspect the Register and to copies of instruments and information in the Register. It is unclear what is meant by "reasonable access"; Will there be a charge to the public for the use of computer terminals and for copies of particular determinations? Will there be a limit on the hours other than normal business hours for public access to the register? How will access be made available in Departmental buildings where access is limited to security pass holders?

It should be noted that, since 1989, the Procedure Office of the Senate has published the *Delegated Legislation Monitor*, which continues to list disallowable instruments tabled in the Senate. This document does assist the public in keeping track of legislative instruments once they are tabled.

Item 19 is covered under Section 32.(1) *Explanatory statement to be lodged with Principal Legislative Counsel.*

Item 20. There is no provision in this Bill for a formal impact statement to accompany any delegated legislation. However, I note that in Part 3 *Consultation before making legislative instruments* those legislative instruments which require consultation must be accompanied by certain documents in writing. (Section 18.(1) *Procedures for seeking and dealing with submissions.*

Item 21 is not covered in this Bill. The Second Reading Speech to this Bill indicates that the Government decided not to include this item in the Bill because the practice of sunsetting is resource intensive and it is awaiting of an evaluation of the benefits of the practice.

Conclusion.

To conclude, I include a summary of matters which I find inadequately dealt with by this legislation or are still of some concern.

1. *Definitions.*

Although "legislative instrument" is defined in Section 4, I find the definition inadequate. For instance, Section 4.(2)(d)(i) includes a definition which refers to Section 46(A) of the *Acts Interpretation Act 1901*, but it is not clear whether the reference is to the Section 46(A) as it stands at present in the Act or as it is amended in Schedule 4 of this Bill. Section 4.(2)(d)(ii) includes a definition which refers to Part XII of the *Acts Interpretation Act 1901* which is actually repealed in Schedule 4 of this Bill.

"Delegated power" is defined in Section 5, but there is no reference to a definition of "delegated power" in Section 3 *Definitions.*

"Instruments that are not legislative instruments" are listed in Schedule 1, except for "Rules of Court" which are the subject of Section 6. Even if the Government is making a point that "Rules of Court" are to be excluded despite a recommendation of the Administrative Review Council as outlined in the Second Reading Speech, it is confusing to have to look in more than area of the Bill to find a complete list of exclusions.

2. *Access to the public.*

Despite the introduction of the Register, members of the public still have to go to a Department and examine the Register to find out if a particular legislative instrument exists before obtaining a copy. This will still require fairly assiduous monitoring of Hansards and other documents to ascertain the existence of the legislative instrument in the first place.

I note the existence of the *Delegated Legislation Monitor*, which is valuable. However, this document and the Hansards list legislative instruments after they are tabled. There still does not seem to be any way for the public to obtain notice of a legislative instrument in the way that notice is given of a Bill.

Part 3 of this Bill, *Consultation before making legislative instruments*, will assist those directly affected by a legislative instrument to be consulted before the making of that instrument, but other members of the public who may also be directly or indirectly affected will still be unaware of pending instruments. For instance, Universities authorities may be consulted before the making of legislative instruments which affect a particular University, but other members of staff and students who may also be affected will remain unaware of the instrument until it is a *fait accompli.*

I am also disturbed by the fact that it was impossible to obtain in February or March 1933 a copy of the determination which is attached as Appendix D because of the pending election, although this Document is shown to have been

signed in December 1992. It appears that some of the provisions in this Bill which refer to the timing of registration and tabling and the threat of "ceases to have effect" might prevent a future occurrence.

3. *Abrogation of the rights of Parliament.*

My most serious concern, which was also the subject of *Parliamentary Scrutiny of Quasi-Legislation* by Stephen Argument, is the transference of much of the legislative power of the Parliament to the power of determination by members of the Executive. Whenever legislation is amended to transfer a legislative power thitherto wielded by Parliament to the power of determination to be wielded by a Minister, that amendment should be referred to a relevant Committee and be made the subject of debate by each House of Parliament. In the interests of the public, Parliament should not give up any of its legislative rights without a full debate on the matter.

Wendy M. H. Brazil,
Research Officer to former Senator David Hamer, 1980-1990
Research Officer to Senator John Tierney, 1991-2
Visiting Fellow, Australian National University 1993 -

Appendix A.

INSTITUTE OF PUBLIC AFFAIRS LIMITED*
Education Policy Unit

The Minister Takes Control

The Higher Education Funding Amendment Bill (No. 2) Does it Make a Difference?

Wendy Brazil

Study Paper No. 27
March 1993

"A Classic is something that everybody wants to have read and nobody wants to read" (Mark Twain). A Bill for an Act is something that nobody wants to read, but somebody ought to.

At the end of every Parliamentary year, a vast number of new Bills suddenly appears on the agenda. In the frantic rush to get these Bills through before Christmas last year, one Bill virtually went unnoticed: the *Higher Education Funding Amendment Bill (No.2)*. This Bill changed the funding arrangements for every university in Australia. The university Vice-Chancellors are either silent or they say that it does not make any difference. But does it?

It is the 11th month of the year, late November, in the Federal Parliament. It is 11 o'clock at night and Members and Senators and their staff are faced with an all-night sitting or a series of after-midnight sessions in order to get the urgent Bills through the Parliament before Christmas. The Appropriation Bills are still being debated in the Senate and the annual chaos of new Bills suddenly introduced at the end of the year is in full swing. Parliamentary staffers, surrounded by endless piles of Bills and Reports, are constantly sifting those on which their Member or Senator will speak. The Government has applied the guillotine because of the accumulation of legislation yet to be completed, so that the opportunity and the time to speak on any of these Bills or papers is rapidly evaporating.

With red eyes the staffers begin to take short cuts and read the Bills Digests, if they exist, prepared by the Parliamentary Library, or the Explanatory Memorandum prepared by whichever Minister introduces a Bill or the Minister's Second Reading speech. Nobody has time to read a whole Bill right through. Even the Senate Standing Committee for the Scrutiny of Bills, which scrutinizes all legislation before it is dealt with in the Senate, has only time to check each Bill cursorily in November because of the huge number of Bills and the deadlines which have to be met. By about midnight the piles on the desk have spread onto the floor and the staffers begin to panic about the speeches which have to be ready before tomorrow morning, immediately, or five minutes ago.

Therefore it is not in the least surprising that one particular Bill in November last year was not read closely by a weary and overloaded Parliament. The *Higher Education Funding Amendment Bill (No. 2) 1992*, with 29 pages, 70 clauses and a schedule containing a further 11 amendments, was not entirely unnoticed, but its real significance was ignored. It was introduced into the House of Representatives on 4 November and was rushed through both Houses by 3 December. It received Royal Assent on 11 December and most of its provisions came into force immediately or from 1 January 1993. Nobody had time, of course, to read the Bill entirely, there was no Bills Digest prepared by the Library because of the vast quantity of Bills to summarize, and there was little in the Explanatory Memorandum or the Second Reading speech to guide the reader to the fact that **this Bill put all the universities in Australia under the direct control of the Minister for Higher Education.**

The Loss of State Control

How had this happened? After all, the State universities are constitutionally the responsibility of the States, and the Australian National University and the University of Canberra are the responsibility of the Federal Parliament. Up to 1987 there had been reasonable co-operation between the Commonwealth and the States on policy formulation for universities. States were able to bargain on behalf of their universities, but since the Federal Government held the purse strings, their bargaining power was always subordinate. Since 1987 even these shreds of subordinate power had been virtually eroded so that by 1991 the States formally agreed to hand over to the Federal Minister the power to fund each university in Australia directly and for the universities to report directly to the Commonwealth and not at all to the States. The 'how', the 'why' and the 'consequences' of Commonwealth dominance in higher education are set out in considerable detail in a discussion paper, *Intergovernmental Managerialism: Appropriating the Universities*, by Dr Neil Marshall, Senior Lecturer at the University of New England.

It is mystifying that there was almost no protest from the States. As Dr Marshall says: "While most State authorities are unhappy with their peripheral status in the intergovernmental arena they seem to have been willing to tolerate the situation. There has been very little in the way of protest at the Commonwealth's dominance."[1] It is equally mystifying that there has been almost no response by the universities. "It makes no difference," according to the universities, whether there is a funding arrangement made on their behalf by the State with the Commonwealth or whether they are directly funded by the Minister for Higher Education. "It makes no difference" whether the Australian National University and the University of Canberra are funded through an appropriation by the Parliament or whether they are funded by a Ministerial Determination. In either case the Educational Profiles are processed by the Department of Employment, Education and Training and a recommendation for the annual funding for each university in Australia, including the ANU and the University of Canberra, is forwarded to the Minister. Therefore, what difference does it make if the funding is by means of an Act or a Ministerial Determination, when the decisions are, in either case, made by officers in DEET?

So the universities argue, but does it really make no difference that from 1 January 1993 all 39 universities and Commonwealth-controlled colleges will contend for their share of one global maximum amount set out in the amended Act and that this share will be determined from now on by the Minister alone?

Section 4 of the Act has been altered by omitting the list of universities by State and by substituting two tables: Table A lists 35 universities and Table B comprises four Commonwealth-controlled colleges. Section 17 sets the global amount of funding for the 39 institutions for 1993, 1994 and 1995 as $2.9 billion, $3.2 billion, and $3.3 billion respectively. Chapter 7 of the Act which used to include Schedules showing the individual annual amounts for each university and college has been repealed. These amounts will no longer be included in any part of the Act. Section 42 of the *Australian National University Act*, whereby the Parliament allocated a sum of money to the ANU, has been repealed, as has a similar Section in the *University of Canberra Act*. These two universities are now included for the first time in the *Higher Education Funding Act* in Table A.

An Act of Parliament and a Ministerial Determination: The Real Difference

"But there is no difference between funding by Act of Parliament and funding by Ministerial Determination. It is a political decision in either case," claims one university authority who has spoken publicly on this issue. On the contrary, there is a vast difference. It is the difference between the whole Parliament being privy to a decision with reasonable opportunity to comment, to debate, to amend, to request an amendment and even to negate and a decision by one person which is difficult to find in the first place and when it is found difficult to act upon in the Parliament. It is the difference between a clearly visible instrument in the form of a Bill and an almost invisible instrument in the form of a Determination.

A Bill, before it becomes an Act or amends another Act, is in normal circumstances a clearly visible instrument in the Parliament. It appears on the Notice Paper of each House as a Notice of Motion to introduce a Bill for an Act to give Members and Senators warning of its existence. It is then read three times in each House with extensive debate, usually at the Second Reading stage. In addition, there is an opportunity for the Bill to be examined minutely, clause by clause, in the Committee of the Whole for acceptance, amendment or negation of individual clauses or the whole Bill. Therefore, Bills are accessible for debate and examination in both Houses of Parliament and their passage through each stage is decided by a vote. Committees of the Senate, especially the Senate Committee on the Scrutiny of Bills, usually have reasonable opportunity to examine all Bills, and the Senate Estimates Committees, in particular, have the opportunity to question Ministers and the relevant Departments on financial matters arising out of Bills twice a year. Acts and Bills are very easy to obtain. Members and Senators obtain them instantly from the Table Offices in Parliament and the public can obtain them through a Member or Senator or from any Australian Government book shop.

On the other hand, a Ministerial Determination is far less accessible. Determinations belong to that grey area of Parliamentary output which is variously called Delegated Legislation, Subordinate Legislation, Secondary Legislation or 'Quasi-Legislation'. A Determination is not listed on any Notice Paper in advance, but is tabled by the Clerk of each House as a list of Papers. No details of the papers are read out in the Chamber. A Senator or Member then relies on the Votes and Proceedings of the House of Representatives or the Journals of the Senate or the Hansard records to find out details of the items included in the Clerk's list. Determinations may or may not be disallowable instruments. If they are disallowable, then they must be tabled, and 15 sitting days are allowed for a disallowance motion to be debated. Since October 1989, the Senate has produced a *Delegated Legislation Monitor* to provide quicker access for Senators to disallowable items of delegated legislation. If they are not disallowable, then they are simply pieces of paper drafted and signed by the Minister. They may appear in the *Commonwealth Gazette*, but will never be referred to the Parliament and will not be readily available to the public, to whom the Parliament is responsible.

The Secretary of the Senate Standing Committee on the Scrutiny of Bills, Stephen Argument, has outlined the problems of 'Quasi-Legislation' in a report, *Parliamentary Scrutiny of Quasi-Legislation*: "Quasi-legislation involves serious difficulties of both a

practical and a conceptual nature. The fact that it is generally badly drafted, hard to understand and almost impossible to locate makes it an undesirable and potentially dangerous addition to the legislative framework" (p. 30).

In the amended Act, Section 14 gives the Minister the power to determine the guidelines for the Educational Profile for each university and since this is not a disallowable instrument, it will be published in the *Commonwealth Gazette*, but it will not be tabled in Parliament and there will be no possibility for Parliamentary or public action. Sections 15 and 16 give the Minister the power to determine the allocations for each university and Commonwealth college "having regard to the Educational Profile" of each university. His Determination is a disallowable instrument under Section 110 of the amended Act and has to be tabled for 15 days in each House. However, a Determination cannot be disallowed in part, it can only be disallowed as a whole, and it would be a brave Member or Senator who dared to disallow the Minister's Determination and deprive all the universities in Australia of their funding or have the funding allocations reverted to a former allocation previously passed by the Parliament.

As an interesting exercise I have been attempting to locate the Determination which should by now have been signed by the Minister or his delegate to allocate funding for each university from 1 January 1993. No such Determination has been lodged in either Table Office of the Parliament. The Parliamentary Liaison Officer of DEET refused to provide any information on the matter. A cursory glance at the *Commonwealth Gazettes* failed to locate it. Finally, the Secretary to the Senate Standing Committee on Regulations and Ordinances informed me that there has been no Determination to allocate funding to individual universities since December 1991, which was for the year 1992. One has then to ask the question: since all previous funding allocations to universities were repealed in December last year and there has been no Ministerial Determination lodged since December 1991, are universities receiving any funds at all at present, and, if they are, on what legal basis?

The Amended Act

Does it really make no difference that every reference to 'the States' is now omitted from the new Act: words such as "there is payable to a State..." or "the State will ensure that..."? All references to "the State" have been omitted for the conditions of grants set out in Section 18 of the amended Act. This is significant because the States had had some degree of control over the conditions for funding: "We want the money, of course, but we don't agree with your conditions," and at least there was the opportunity to argue a case, which has now been withdrawn. Despite the claim in the Second Reading Speech of the Minister that the new arrangements for direct funding of higher education institutions would be "accompanied by improved consultative processes so that consideration of State needs and strategies become an integral part of the triennial planning cycle," there is nothing in the amended Act which provides for any additional consultation between the Commonwealth and the States. There are two bodies, the Commonwealth State Consultative Committee and the Joint Planning Committees, which are the only avenues for consultation with DEET by the States; the former was virtually defunct by 1991 and the latter tends only to provide occasions for the States to endorse Commonwealth policy decisions which are already firmly fixed. Does it really

make no difference that the States can no longer have any input into policy formulation and implementation for their universities? University authorities argue that universities were "doubly threatened" by the State and the Commonwealth. Could it be that they were, in fact, "doubly protected" by the State and the Federal Parliament, since both had the right, at the very least, to debate issues which affected universities? The elimination of all control by the States in the amended Act makes the power of the Minister absolute in determining the guidelines for the funding of universities and for the allocation of funding according to his own guidelines.

Does it really make no difference that from now on the Minister alone shall determine the funding for each university, "having regard to the Educational Profile of each institution", words which have been added into the amended Act? And does it really make no difference that universities can only spend their grants strictly in accordance with the Educational Profile? Much has been written and said about 'Educational Profiles', but there is a tendency for university authorities to see them only as a funding model based on student numbers, staff numbers, course numbers, courses, research, and so on. The amended Act is not particularly enlightening on the exact nature of an Educational Profile. According to Section 14, it is a profile "in an approved form describing activities of the institution" which must be provided to the Minister. "The approved form of an Educational Profile to be submitted by an institution shall be *determined* by the Minister after consultation with the institution." More detail on "the approved form" is to be found in DEET's Report on *Higher Education Funding for the 1992-94 Triennium*. The approved form of the Educational Profile has four distinct parts: (i) a set of Teaching Profile tables, (ii) an equity plan, (iii) an Aboriginal education strategy, and (iv) a research management plan. The last three items are integral parts, at present, of an Educational Profile and universities will have their funding adjusted according to their willingness to comply with the guidelines *determined* by the Minister. the Report indicates that "it is expected that institutions will continue to develop and refine their equity plan. Aboriginal education strategies and research management plans during 1992" (p.9).

In his Second Reading speech, the Minister claimed that the amended Act would have "the effect of increasing the autonomy and flexibility of higher education institutions." The claim refers to a proposal, effective from 1 January 1994, to merge capital grants and recurrent grants to universities into one Operating Grant. There is a deal of sense in this proposal since it will obviate the necessity for universities to apply separately for funding for individual capital projects. The State intention is that "the roll-in of capital funds will provide flexibility, financial stability and continuity for universities in their capital planning.". This has to be put in the context, however, of the potential loss of autonomy of universities through the Educational Profiles and the right to control their own independent destiny.

The amending Bill did not go entirely unnoticed in either House, because it contained a new Section 25A to "provide grants to support student organizations in certain circumstances.". This part of the Bill was opposed in both Houses by the Opposition, but no significant reference was made in either House about the new funding arrangements for universities.

Public Criticism

By February this year, some members of the Australian National University Council became aware of the new arrangements and decided that the issue should be flagged with more vigour by the ANU authorities. A set of questions on the new arrangements has been tabled for discussion at the next Council meeting in March.

The new arrangements were reported in the *Canberra Times* (12 February 1993) by Crispin Hull: the new funding arrangements "will have a huge impact on the independence of universities and ultimately academic freedom, which is one of the important legs of our democracy." The new legislation is "divisive, can wreck universities' autonomy, will eliminate the states' role and put unnecessary power in the Minister's hands. It has the potential to be an insensitive, centralized and dangerous power. The universities in Australia are too important to be put under the ministerial thumb." Two days later, the Editorial in the *Canberra Times*, headed 'Insidious change threatens University freedoms', reported that

> "in the dying moments of the last parliamentary session last year," the *Higher Education Funding Amendment Bill (No. 2)* "stripped away funding through the States to each university, a system that allowed each university to pursue its own teaching and research priorities...This is a most insidious turn of events. It undermines academic freedom, which is one of the fundamental elements of a liberal democracy. It undermines the ability of a university to pursue what it sees as the demands of students in its catchment. And it undermines the fundamental function of a university: to educate. The university's view is supplanted by the Minister's view."

A fairly swift response appeared in the *Canberra Times* from both the Shadow Minister for Education, Dr David Kemp, and the Minister for Higher Education and Employment Services, Mr Peter Baldwin. According to Dr Kemp the Opposition will "give universities their autonomy back" by repealing the Government's university funding model passed late last year. "This model makes universities subservient to ministerial will."[2] In a letter to the *Canberra Times* on 18 February, Mr Baldwin attacked the paper's "offensively wrong editorial and article by Crispin Hull on university autonomy." "Only a paranoia akin to the League of Rights could see anything sinister in recent changes to the *Higher Education Funding Act*. Direct funding of institutions was 'strongly supported' by the Australian Vice Chancellors' Committee and agreed by the States."

A letter to the *Canberra Times* (20 February 1993) and to *The Australian* (24 February 1993), signed by seven Professors of the ANU, including Professor Sir Mark Oliphant, presumably all suffering from "paranoia", showed deep concern over the changes as a threat to universities:

> "The current drive for equity and greater participation based on the grounds of utility underpins the changes enshrined in the modified Act. It presents extraordinary dangers to our system...The insidious provisions buried in the Act and its amendments go directly and specifically to the substitution of a plural and democratic system of higher education by a highly directed system based on the immediate and singular views of the Government of the day."

This theme has been repeated in a nation-wide advertisement authorized by Professor Barry Rolfe of the ANU on behalf of "all academics who have supported the Higher Education Fighting Fund":

> "The funding for each university in Australia is now totally under the control of the Federal Minister and his bureaucracy. Future allocations to each university will be made by the Minister alone on the basis of an institution's Educational Profile, which is double-speak for the social agenda of the Minister."

The last word in the *Canberra Times* at the time of writing is from Professor Peter Karmel, also of the ANU, who attacked the changes made under the former Minister for Education, John Dawkins, which culminated late last year in the passing of the *Higher Education Funding Amendment Bill (No. 2)*:

> "Before the Dawkins era the language of higher education used the term 'sector'. Now it uses the word 'system'. It is more than a change of words. 'Sector' means a collection of independent institutions with common characteristics. 'System' means a centrally-organized and controlled system. Enforced mergers, profile negotiations, money for programs with centrally-set controls, rules for the way institutions govern themselves and a stream of policy papers from the Commonwealth are signs of the centralized system.
>
> "National priorities in a democracy change. Politicians have short- or medium-term horizons affected by party considerations, which are unsuited to setting specific determined priorities. Universities will achieve their purposes better by setting their own priorities within broad parameters. These are preserving, transmitting and extending knowledge, training highly-skilled people and critically evaluating society. A university can hardly be the conscience and critic of society if it is expected to behave as an arm of government policy."[3]

Warning bells were sounded four years ago by Professor Colin Howard of Melbourne University in an article in *The Age* (27 June 1989) that the Commonwealth had the potential for attaching conditions to the universities' funds, that funds for higher education would be distributed "as the Minister determined," without any requirement that Parliament or the public see the details of his determinations. The funds would have to be used in strict compliance with Educational Profiles prepared by the universities under the guidelines specified by the Minister. The initial guidelines were public; future guidelines need not be. Thus the Minister would have comprehensive power to direct the universities what to teach and what to research.

Now that Professor Howard's warning has become present reality, all Vice Chancellors in Australia should realize that the new funding arrangements *do* make a difference. ♦

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1. Marshall, Dr Neil, *Intergovernmental Managerialism: Appropriating the Universities*, University of New England, p. 11.
2. *Canberra Times*, 17 February 1993.
3. *Ibid*, 21 February 1993.

Appendix D

Institute of Public Affairs

EDUCATION POLICY UNIT

EMBARGOED TO MIDNIGHT, TUESDAY, 9 MARCH 1993

MEDIA RELEASE

Minister Usurps Parliament's Role in University Funding

A Bill which went through Parliament virtually unnoticed before Christmas has changed the funding arrangements of every university in Australia. The *Higher Education Funding Amendment Bill (No.2)* has taken the control of university funding from Parliament and given it to the Minister for Higher Education, an Occasional Paper written by Wendy Brazil and released by the Education Policy Unit of the IPA points out.

This change in funding arrangements is very disturbing. What the States have relinquished is not, as the Minister for Higher Education Mr Baldwin claims in a letter written to *The Australian* (3 March), "a mere post-box role" equivalent to "paper shuffling." It is far more significant than that.

Wendy Brazil's paper makes it clear that a financial arrangement made on a university's behalf by the State with the Commonwealth, through an Act of Parliament (an arrangement guaranteed by former legislation), is fundamentally different from a Determination made by the Minister for Higher Education (which is required by the new Bill). The differences are:

- both Houses of Parliament are privy to funding decisions, and have an opportunity to debate, request an amendment, amend, and even negate those decisions;
- twice a year the Senate Estimates Committee can question Ministers and the relevant Departments on financial matters arising out of Bills;

Under funding by a Ministerial Determination

- there is unlikely to be any occasion for Parliamentary debate in either House on funding decisions.

A further danger of the newly-amended higher education funding procedure is that the 'approved form' of the Education Profiles produced by each university for funding purposes is also determined by the Minister after 'consultation' with the institution. Each 'approved form' describes the 'equity' plans and the broad teaching and research functions of each university, and it is on the basis of these "Education Profiles" that the Minister now makes his Determination for funding.

Since the Minister has the final say about what is in the 'approved form' of the "Education Profiles", what is to prevent universities from becoming what Peter Karmel has referred to as "an arm of government policy"?

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Appendix C

Whiteboard Funding

Wendy Brazil

Remember December 1992 when the States lost control over funding for their own universities? Under the *Higher Education Funding Bill 1992*, the Minister responsible for Higher Education won the sole responsibility for funding 39 higher education institutions "having regard to the educational profile of each institution", which he also has the power to define and alter. Thus, the States lost their funding responsibilities for their own universities; and university authorities were initially unaware of the change, or complacent about their ability to deal directly to their advantage with the Minister.

At the same time the Federal Parliament also lost its responsibility or jurisdiction over allocations for individual universities. It had previously been directly responsible for the appropriations to the Australian National University and the University of Canberra and, through the States, for allocating individual amounts to other universities. These individual allocations had been included as a Schedule to the Act, and could be debated and amended in the House of Representatives and fully debated with request for amendment in the Senate. Since the beginning of 1993 the Federal Parliament is left only with the responsibility for appropriating and debating the total amount of recurrent funding available to all higher education institutions in Australia.

Wendy Brazil is a teacher of languages who worked for 15 years in Parliament as a Research Officer. She is currently a Visiting Fellow at the Australian National University.

Another amending Higher Education Bill was passed in December last year, amidst the agglomeration of legislation which has to be dealt with in haste and late into the night if Parliamentarians are to get home for Christmas. This Bill awarded the Minister a further funding responsibility for five sets of 'extras': enhancement of quality, projects of national priority, equality of opportunity, special research assistance and advanced engineering centres. Before December last year, the Minister had been responsible for allocating money within each category to universities, but it was the Parliament which appropriated the amount available for each of these items. As a result, universities knew that, in 1993 for instance, there was roughly $80 million available for quality enhancement, roughly $40 million for projects of National Priority, roughly $4 million for equality of opportunity, something between $250 million and $300 million for special research assistance and $1.5 million for advanced engineering centres.

The present situation

Since December last year, separate amounts for these items no longer exist. Amounts appropriated by Parliament for each of the five categories were repealed, and a conglomerate amount of $430,248,000 was prescribed in a new Section 23C, which sets the maximum consolidated amount at the Minister's disposal for all five categories. Take quality enhancement, for instance. Section 18A reads: "Subject to 23C, the Minister *may* determine an amount [of an unspecified total] of financial assistance for an institution ... *if the Minister is satisfied that the assistance will be used to maintain or enhance the quality of higher education provided by the institution.*" Henceforth the Minister alone can determine which university gets an allocation, if any, for quality enhance-

ment, and the same is true for the other four sets of grants.

Consider the category, "Grants to maintain or enhance quality of Higher Education" (Section 18A of the *Higher Education Funding Act* 1988). Before December 1993 an amount of $75.08 million had been appropriated by Parliament and the same amount for 1995. Since these amounts have been repealed, there is now no guarantee of the amount of money, if any, which will be available for grants under Section 18A. A committee for Quality Assurance in Higher Education was established in 1993 'to conduct reviews of institutions' quality assurance practices and outcomes and to advise the Government on the allocation of quality assurance program funds" (DEET: *Higher Education Funding for the 1994-96 Triennium*, p. 11). This Committee has just published its first report advising the Government on the allocation of quality assurance funding to universities in six groups: universities in Groups 1 to 5 to receive funding based on a percentage of the operating grant (3 per cent for Group 1 decreasing by 0.5 per cent to 1 per cent for Group 5); universities in Group 6 to receive a flat grant. The total amount to be allocated to universities under the Committee's recommendations is $76,748,000.

The *Report on 1993 Quality Reviews* published by the Committee for Quality Assurance in Higher Education affirms (repeatedly) the Minister's total power to allocate funding and its own role purely as an advisory body.

As a result of the amending Bill last December, one has to wonder about the future of this program. Appendix 4 of the Report states that "Funding for the Quality Assurance Program is made by special appropriation under s18A of the Act on a calendar year basis. The Act is amended from time to time, and the funds available are adjusted, reflecting movement in the higher education cost price index." However, that Appendix was written in July 1993 and the Act has been changed since then, so that there is no longer a "special appropriation under s18A of the Act". In the actual Report there is no indication of any amount available for this program in the years to come.

The States – having been by-passed in the funding process for universities, various advisory Committees and the Department of Employment, Education and Training – can proffer advice, but it is the Minister alone who determines allocation of funds to individual universities. The latest change has further eroded the powers and rights of Parliament to appropriate funds for a number of individual sections of the *Higher Education Funding Act*, and is a further step towards government by ministerial discretion. It has the potential for 'whiteboard' funding.

Ministerial Determination

It is not widely appreciated that funding by Ministerial Determination effectively denies the rights of Parliament to debate and amend legislation. Determinations are elusive documents, even if they are required under the Act to be gazetted and tabled in Parliament. For instance, it was not until April 1993 that the determination which allocated funding to universities for the calendar year of 1993 could be located. Although it was signed in December 1992, failure to publish the Determination in the Gazette before April 1993 meant, in effect, that universities were receiving funding for three months in 1993 without a legal basis, which is not in the interests of good government. Later in the year the Minister at that time, Kim Beazley, apologized to the House of Representatives for the late appearance of that Determination and others which were also overdue for tabling in Parliament.

It cannot be stressed too often and too strongly that Determinations are very different instruments from Bills: Bills can be fully debated and are often amended, particularly in the Senate. That chamber also has a number of Committees, for example, the Senate Standing Committee on the Scrutiny of Bills, which carefully scrutinizes Bills and alerts Senators to anomalies. Determinations are not as clearly publicized as Bills; they are not called on for debate individually; they do not appear in the Notice Paper, but are included as a group in a list tabled, but not read out, by the Clerk; they subsequently appear in the Hansard Record and the Journals or Votes and Proceedings.

A Member or Senator has to be vigilant (and diligent) to locate specific Determinations. Once a Determination has been tabled, it may be disallowed within fifteen sitting days of the tabling, but it can only be disallowed *in toto*; it cannot be amended or disallowed *in partibus*. Determinations are instruments whereby a Minister may resort to the recently exposed procedure for funding by whiteboard, a practice which did not find favour with the Auditor-General and which one hopes has been relinquished with the recent resignation of Mrs Kelly. However, such a provision as the one which has given the Minister for Education total control over $430 million has the potential to allow this practice to continue, albeit with greater care in recording decisions.

The end result

It has been argued, and it is undoubtedly true, that there could be advantages in the new consolidation of the five sets of grants. It does allow for greater flexibility for adjustment of funding for the separate categories. For instance, in a given year more money could be made available for special research assistance and less for projects of national priority. There is also the possibility for universities to lobby for funding for whichever of the five categories might best suit their requirements and needs.

However, the disadvantages are disturbing. It may become difficult to know how to apply for grants in these categories without knowing the amounts involved. Information about funding for the grants could be made available to certain universities and withheld from others. There will undoubtedly be great uncertainly about the amounts available for each set of grants. Universities will simply not know what money is available and for what purpose.

The new Section 23C puts a private bank of $430 million in the hands of a Minister. The result is the possibility (and it is, of course, only a possibility) for marginality of an electorate, relevance, pragmatism, political correctness, managerialism, collaboration, vocational benefit and compliance with political demands to replace standards of excellence and the pursuit of knowledge and all that a university has stood for in the past. In addition, the rights of Parliament to appropriate *and* allocate funding are further diminished. ■

Appendix V.

HIGHER EDUCATION FUNDING ACT

Changes to the Act.

In December 1992 far-reaching amendments to this Act drastically altered the basis for funding for Universities. Under this act Higher Education institutions were divided into two classes:

A. consisting of 35 established Universities and converted/amalgamated CAEs;

B. consisting of four colleges funded by the Federal Government: Avondale, Marcus Oldham, Australian Maritime and Batchelor.

From this point on the State Governments lost all responsibility for the funding of higher education institutions in their State. Thenceforth the Minister alone was responsible for funding each institution "having regard to the educational profile of each institution".

At the same time the Federal Parliament lost its responsibility or jurisdiction over allocations for individual Universities - the individual amounts had previously been included as a schedule to the Act, and therefore could be debated, amended or an amendment could be requested. Federal Parliament was left only with the responsibility for debating the total amount available to all Universities and Colleges in Tables A and B combined.

Many Universities were unaware of the changes at the time and others were complacent in the anticipation of being able to deal with the Minister to their advantage.

The important change was the abrogation of the rights of Parliament in the new funding arrangements. The Minister now allocates funding to individual Universities by determination. Determinations are elusive documents, despite the requirement for gazettal and tabling. It was not until April 1993 that the determination which allocated funding to Universities for 1993 could be located. When it was located it was signed December 1992, but it was not gazetted until April, which, in effect, meant that Universities were receiving funding for three months in 1993 without a legal basis. Later in the year Mr Beazley was to apologise to the House for the late appearance of that Determination and others which were also overdue.

Parliament has the power to disallow a Determination within fifteen sitting days of the tabling, but it must disallow the whole Determination and not a part of it. There is often little opportunity for debate on Determinations, although there is a Senate Committee which scrutinizes Regulations and Ordinances, which includes Determinations.

Determinations are very different from Bills, and there is a concern which is being examined by the Senate that Parliamentary powers and responsibilities are being eroded by the shift from measures within an Act to Ministerial Determination. (One has only to consider the present concerns over the allocation of funding by the Minister for Sport, Environment and Tourism).

The latest changes.

In December 1993 the Act was changed again. Five sets of grants for "extras" used to have an amount appropriated for each in the Act, i.e. appropriated by the Parliament. The grants were for i. quality, ii. projects of national priority, iii. equality of opportunity, iv. special research assistance and v. advanced engineering centres. The amounts accorded to each of the five categories were repealed in December and a conglomerate amount of $430,248,000 was prescribed in a new Section 23C which allows the Minister to allocate any amount of funds from this total to individual institutions for one of the five purposes itemized above.

This change creates a high degree of uncertainty for Universities. Whereas before December last year, Universities were aware that there was roughly $80 million for quality enhancement, roughly $40 million for projects of National Priority, roughly $4 million for equality of opportunity, something between $250 million and $300 million for special research assistance and $1.5 million for advanced engineering centres, now these separate amounts no longer exist and there can be no real knowledge of how much is available for each category.

There are possible advantages and disadvantages resulting from this particular change:

Advantages:

Flexibility for funding among the separate categories might mean that more money could be made available for special research assistance, for instance.

Universities might have the opportunity to lobby successfully for funding for whichever of these categories might best suit their requirements and needs.

Disadvantages:

It will be difficult to know how to apply for grants in these categories without knowing the amounts involved.

Information about of funding for these "extras" could be made available to certain Universities and withheld from others. This, I think, is the most serious disadvantage: Universities will simply not know what money is available and for what purpose.

This change could have far-reaching implications for part of the funding arrangements for Universities, in that the new Section 23C gives the Minister total discretion over $430.3 million of higher education funding without reference to Parliament except through the gazettal and tabling of any Determinations under this section.

Post script.

To date (9th February, 1994) the Determination under Sections 15 and 16 whereby the Minister allocates recurrent funding to individual Universities and Colleges for the year 1994 has not yet been tabled in Parliament.

Wendy Brazil

9 February 1994

Appendix E.
The missing Determination.

DEPARTMENT OF EMPLOYMENT, EDUCATION AND TRAINING

T3-93
15-1

HIGHER EDUCATION FUNDING ACT 1988

Determination Under Section 15 in Relation to
Grants for Expenditure for Operating Purposes
(Base Operating Grant)

I, MICHAEL AUSTIN GALLAGHER, delegate of the Minister of State for Higher Education and Employment Services, pursuant to section 15 of the Higher Education Funding Act 1988, hereby determine the amounts specified in column 4 to be amounts of financial assistance for operating purposes for each of the institutions listed in column 1, in respect of 1993, with effect from the date of this Determination.

Column 1 State/Territory Institution	Column 2 Amounts of financial assistance	Column 3 Variation	Column 4 Revised amounts of financial assistance
	$	$	$
NEW SOUTH WALES			
Australian Catholic University	0	24,348,000	24,348,000
Charles Sturt University	0	46,296,000	46,296,000
The Macquarie University + 5.3% + 3,167,000	0	63,161,000	63,161,000
The University of New England	0	82,120,000	82,120,000
The University of New South Wales	0	164,439,000	164,439,000
The University of Newcastle	0	76,925,000	76,925,000
University of Sydney	0	203,257,000	203,257,000
University of Technology, Sydney	0	73,044,000	73,044,000
University of Western Sydney	0	81,153,000	81,153,000
The University of Wollongong	0	52,700,000	52,700,000
TOTAL New South Wales	0	867,443,000	867,443,000
VICTORIA			
Ballarat University College	0	17,370,000	17,370,000
Deakin University 1.31% + 1,002,000	0	77,518,000	77,518,000
La Trobe University	0	99,365,000	99,365,000
Monash University	0	176,085,000	176,085,000
Royal Melbourne Institute of Technology Ltd	0	96,026,000	96,026,000
Swinburne University of Technology	0	35,023,000	35,023,000
University of Melbourne	0	194,634,000	194,634,000
Victoria University of Technology	0	51,964,000	51,964,000
TOTAL Victoria	0	747,985,000	747,985,000
QUEENSLAND			
Griffith University	0	73,991,000	73,991,000
James Cook University of North Queensland	0	43,516,000	43,516,000
Queensland University of Technology	0	98,474,000	98,474,000
University of Central Queensland	0	27,044,000	27,044,000
University of Queensland	0	161,221,000	161,221,000
University of Southern Queensland	0	31,695,000	31,695,000
TOTAL Queensland	0	435,941,000	435,941,000

Column 1 State/Territory Institution	Column 2 Amounts of financial assistance	Column 3 Variation	Column 4 Revised amounts of financial assistance
	$	$	$
WESTERN AUSTRALIA			
Curtin University of Technology	0	77,690,000	77,690,000
Edith Cowan University	0	50,779,000	50,779,000
Murdoch University	0	36,534,000	36,534,000
The University of Western Australia	0	85,198,000	85,198,000
TOTAL Western Australia	0	250,201,000	250,201,000
SOUTH AUSTRALIA			
The Flinders University of South Australia	0	56,272,000	56,272,000
The University of Adelaide	0	96,756,000	96,756,000
University of South Australia	0	83,229,000	83,229,000
TOTAL South Australia	0	236,257,000	236,257,000
TASMANIA			
University of Tasmania	0	67,327,000	67,327,000
TOTAL Tasmania	0	67,327,000	67,327,000
NORTHERN TERRITORY			
Northern Territory University	0	19,294,000	19,294,000
TOTAL Northern Territory	0	19,294,000	19,294,000
AUSTRALIAN CAPITAL TERRITORY			
Australian National University +0·744 +1,280	0	173,278,000	172,278,000
University of Canberra	0	30,310,000	30,310,000
TOTAL Australian Capital Territory	0	203,588,000	203,588,000
TOTAL - AUSTRALIA	0	2,828,036,000	2,828,036,000

Total grants available under Sections 15 and 16	2,889,951,000
Total advanced from 1994 for Section 15	0
Total advanced from 1994 for Section 16	0
Total of previous Determinations under Section 15	0
Total of previous Determinations under Section 16	13,372,000
Total of this Section 15 Determination	2,828,036,000
Total remaining under Sections 15 and 16	48,443,000

Dated this 23rd day of December 1992

Michael Austin Gallagher

THE SENATE
CANBERRA, A.C.T.

93/635

Mr David Creed
Secretary
Regulations and Ordinances Standing Committee
S.G.49
Parliament House
Canberra ACT 2600

Dear Mr Creed

COMMITTEE INQUIRY -- LEGISLATIVE INSTRUMENTS BILL 1994

I understand that the committee is considering the above bill and will report to the Senate on 10 October 1994.

In the course of my duties, I examine legislation first introduced in the Senate for technical and legislative consistency and consider any other drafting problems that may become apparent. In the course of my examination of the above bill, a number of inconsistencies have come to light. I enclose a copy of my hand corrections and comments for your information.

Yours sincerely

Rosa Ferranda
SPO (Legislation and Documents)
Senate Table Office

cc. Mr Peter Folbigg, Office of Parliamentary Counsel

Paragraph 4(3)(a)
~~Section 4~~

SCHEDULE 1

INSTRUMENTS THAT ARE NOT LEGISLATIVE INSTRUMENTS

1. Instruments relating to aviation security under Part XVIA of the Air Navigation Regulations under the *Air Navigation Act 1920*

2. Orders and instructions under section 14 of the *Australian Federal Police Act 1979*

3. Guidelines under section 8A of the *Australian Security Intelligence Organization Act 1979*

z/

4. By-laws under section 271 of the *Customs Act 1901* referring to goods owned by a named manufacturer or for use in a named project

5. Instructions under section 9A of the *Defence Act 1903*

6. Awards and agreements under the *Industrial Relations Act 1988*

7. Private rulings within the meaning of section 14ZAA of the *Taxation Administration Act 1953*

8. Public rulings within the meaning of section 14ZAAA of the *Taxation Administration Act 1953*

9. Laws of a self-governing Territory

10. Laws of a State or self-governing Territory that apply in a non self-governing Territory and instruments made under those laws

11. Ordinances of the former Colony of Singapore that apply in a non self-governing Territory and instruments made under those Ordinances

12. Instruments made by a tribunal to give effect to a decision of the tribunal following a hearing process

13. Ministerial directions issued to government business enterprises

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I also think each of the above should have
(1) appropriate ~~under~~ equal tab indents
(2) full stops at end of each.

Paragraph 16 (1)(b)

SCHEDULE 2

~~Section 16~~

ENABLING LEGISLATION PROVIDING FOR LEGISLATIVE INSTRUMENTS DIRECTLY AFFECTING BUSINESS

Aboriginal and Torres Strait Islander Heritage Protection Act 1984
Advance Australia Logo Protection Act 1984
Affirmative Action (Equal Employment Opportunity for Women) Act 1986
Aged or Disabled Persons Care Act 1954
Agricultural and Veterinary Chemicals Act 1988
Agricultural and Veterinary Chemicals (Administration) Act 1992
Air Navigation Act 1920
Airports (Business Concessions) Act 1959
Airports (Surface Traffic) Act 1960
Antarctic Marine Living Resources Conservation Act 1981
Antarctic Treaty (Environment Protection) Act 1980
Anti-dumping Authority Act 1988
Ashmore and Cartier Islands Acceptance Act 1933
Australian Antarctic Territory Act 1954
Australian Capital Territory (Planning and Land Management) Act 1988
— *The whole Act other than section 27*
Australia Council Act 1975
Australian Broadcasting Corporation Act 1983
Australian Film Commission Act 1975
Australian Industry Development Corporation Act 1970
Australian Institute of Marine Science Act 1972
Australian Maritime Safety Act 1990 — Authority
Australian Meat and Live-Stock Corporation Act 1977
Australian National Maritime Museum Act 1990
Australian National Railways Commission Act 1983
Australian Nuclear Science and Technology Organisation Act 1987
— *The whole Act other than Part VIIA*
Australian Nuclear Science and Technology Organisation (Transitional Provisions) Act 1987
Australian Securities Commission Act 1989
Australian Wool Research and Promotion Act 1993 — Organisation
Automotive Industry Authority Act 1984 — Act repealed by Act No 10 of 1994 . . should be omitted.
Aviation Fuel Revenues (Special Appropriation) Act 1988
Banking Act 1959
Bankruptcy Act 1966

SCHEDULE 2—continued

Banks (Shareholding) Act 1972
Beer Excise Repeal Act 1968
Biological Control Act 1984
Bounty and Capitalisation Grants (Textile Yarns) Act 1981
Bounty (Bed Sheeting) Act 1977
Bounty (Books) Act 1986
Bounty (Citric Acid) Act 1991
Bounty (Computers) Act 1984
Bounty (Machine Tools and Robots) Act 1985
Bounty (Photographic Film) Act 1989
Bounty (Printed Fabrics) Act 1981
Bounty (Ship Repair) Act 1986
Bounty (Ships) Act 1989
Broadcasting Services Act 1992
Building Industry Act 1985
Canned Fruit Excise Act Repeal Act 1968
Census and Statistics Act 1905
— *Section 27*
Cheques and Payment Orders Act 1986
Child Care Act 1972
Child Support (Registration and Collection) Act 1988
— *Subsection 4(1) (definition of "protected earnings rate")*
Christmas Island Act 1958
Civil Aviation Act 1988
Civil Aviation (Carriers' Liability) Act 1959
Civil Aviation (Damage by Aircraft) Act 1958
Coal Excise Act 1949
Coal Industry Act 1946
— *Part V*
Coal Mining Industry (Long Service Leave Funding) Act 1992
Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992
Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992
Cocos (Keeling) Islands Act 1955
Commerce (Trade Descriptions) Act 1905
Commonwealth and State Housing Agreement Act
Construction Industry Reform and Development Act 1992

SCHEDULE 2—continued

Copyright Act 1968 8/
— *Parts VA and VB*
— *Section 249*
Coral Sea Islands Act 1969
Corporations Act 1989
Currency Act 1965
Customs Act 1901
Customs Administration Act 1985
Customs Administration (Transitional Provisions and Consequential Amendments) Act 1985
Customs Securities (Penalties) Act 1981
Customs Tariff Act 1987
Customs Tariff (Anti-Dumping) Act 1975
Customs Tariff (Rate Alteration) Act 1988
Customs Tariff (Uranium Concentrate Export Duty) Act 1980
Customs Tariff Validation Acts 1981 ← Customs Tariff Validation Act (No. 2) 1980
Customs Undertakings (Penalties) Act 1981 ← Customs Tariff Validation Act 1987
Dairy Adjustment Act 1974
Dairy Industry Stabilization Act 1977
Dairy Industry Stabilization Levy Act 1977
Departure Tax Collection Act 1978
Designs Act 1906
Development Allowance Authority Act 1992
Diesel Fuel Tax Acts (No. 1) 1957 ← Diesel Fuel Tax Act (No. 2) 1957
Diesel Fuel Taxation (Administration) Act 1957
Distillation Act 1901
Education Services for Overseas Students (Registration of Providers and Financial Regulations) Act 1991
Environment Protection (Impact of Proposals) Act 1974
Environment Protection (Sea Dumping) Act 1981
Excise Act 1901
Excise Tariff Act 1921
Excise Tariff Validation Acts 1980 ← Excise Tariff Validation Act 1987
Exotic Animal Disease Control Act 1989
Explosives Act 1961
Export Control Act 1982
Federal Airports Corporation Act 1986

SCHEDULE 2—continued

Financial Corporations Act 1974
Financial Transaction Reports Act 1988
Fisheries Act 1952
Fisheries Management Act 1991
Foreign Corporations (Application of Laws) Act 1989
Fringe Benefits Tax Assessment Act 1986
General Insurance Supervisory Levy Act 1989
Great Barrier Reef Marine Park Act 1975
~~Great Barrier Reef Marine Park Authority Act 1975~~ (no such Act exist.)
Hazardous Waste (Regulations and Exports and Imports) Act 1989
Health Insurance Act 1973
— *the whole Act other than sections 3A and 3C except in so far as the Act provides for instruments to be made in respect of section 19A or to amend the General Medical Services Table, the Pathology Services Table or the Diagnostic Imaging Services Table*
Health Insurance (Pathology) (Fees) Act 1991
Health Insurance (Pathology) (Licence Fee) Act 1991
Heard Island and McDonald Islands Act 1953
Historic Shipwrecks Act 1976
Imported Food Control Act 1992
Income Tax Assessment Act 1936
— *the whole Act other than subsection 6(1) (definition of "Commonwealth country"), subsection 16(6), paragraph 23(t), section 23AB, subsection 23AC(2A), subsections 23AD(2) and (6), subsection 24(2), subsection 27D(3), subsection 27H(4), subsection 37(2), subsection 51AGA(1), subsection 78(21), subsection 82KZB(2), section 160AAA, subsection 218(7), subsection 220(5), subsection 221R(2), section 221S, paragraph 222AGF(7)(c), paragraph 222AHE(5)(c), paragraph 222AIH(4)(c), subsection 251O(2) and section 251W*
Income Tax (International Agreements) Act 1953
Industrial Chemicals (Notification and Assessment) Act 1989
Industrial Relations Act 1988
— *the whole Act other than Division 1 of Part XII and section 348 in relation to powers under Division 1 of Part XII*
Industrial Relations (Consequential Provisions) Act 1988
Industrial Research and Development Act 1986
Industry Commission Act 1989

SCHEDULE 2—continued

Insurance Act 1973
Insurance and Superannuation Commissioner Act 1987
Insurance Acquisitions and Takeovers Act 1991
Insurance (Agents and Brokers) Act 1984
Insurance Contracts Act 1984
Insurance Supervisory Levies Act 1989
International Air Services Commission Act 1992
International Labour Organisation (Compliance with Conventions) Act 1992
International Sugar Agreement Act 1978
Interstate Road Transport Act 1985
Jervis Bay Territory Acceptance Act 1915
Life Insurance Act 1945
Life Insurance Policy Holders Protection Act 1991
Life Insurance Policy Holders Protection Levies Collection Act 1991
Life Insurance Supervisory Levy Act 1989
Liquefied Petroleum Gas (Grants) Act 1980
Liquid Fuel Emergency Act 1984
Livestock Diseases Act 1978
Management and Investment Companies Act 1998
Marine Insurance Act 1909
Marine Navigation Levy Act 1989
Marine Navigation Levy Collection Act 1989
Marine Navigation (Regulatory Functions) Levy Act 1991
Marine Navigation (Regulatory Functions) Levy Collection Act 1991
Meat Inspection Act 1983
Meteorology Act 1955
Migration Act 1958
— *The whole Act in so far as it provides for instruments that relate to Part 2A of the Act*
Motor Vehicle Standards Act 1989
Mutual Recognition Act 1992
Narcotic Drugs Act 1967
— *Sections 9, 10, 11, 12, 13, 19, 22 and 23*
— *Subsections 24(1) and (2)*
— *So much of the remaining provisions of the Act as relate to powers and functions under those sections*

SCHEDULE 2—continued

National Food Authority Act 1991
National Gallery Act 1975
National Health Act 1953
— *The whole Act other than subsections 85(2), (2AA), (3) and (6) and 85A(1), paragraphs 85A(2)(a), (b) and (c), subsections 85B(1), 88(1A) and 93(1) and (2)* and paragraph 98(1)(b)
National Measurement Act 1960
National Museum of Australia Act 1980
National Occupational Health and Safety Commission Act 1985
National Parks and Wildlife Conservation Act 1975
Navigation Act 1912
Norfolk Island Act 1979
— *Sections 27 and 67*
Nuclear Non-Proliferation (Safeguards) Act 1987
Occupational Health and Safety (Maritime Industry) Act 1993
Occupational Superannuation Standards Act 1987
Offshore Minerals Act 1994
Olympic Insignia Protection Act 1987
Ozone Protection Act 1989
Ozone Protection (Licence Fees—Imports) Act 1989
Ozone Protection (Licence Fees—Manufacture) Act 1989
Patents Act 1990
Patents, Trade Marks, Designs and Copyright Act 1939
Petroleum Excise (Prices) Act 1987
Petroleum Resource Rent Tax Assessment Act 1987
Petroleum Retail Marketing Franchise Act 1980
Petroleum Retail Marketing Sites Act 1980
Petroleum (Submerged Lands) Act 1967
Petroleum (Submerged Lands) (Exploration Permit Fees) Act 1967
Petroleum (Submerged Lands) (Pipeline Licence Fees) Act 1967
Petroleum (Submerged Lands) (Production Licence Fees) Act 1967
Petroleum (Submerged Lands) (Retention Lease Fees) Act 1985
Pipeline Authority Act 1973
Plant Variety Rights Act 1987
Pooled Development Funds Act 1992
Prices Surveillance Act 1983
Protection of Movable Cultural Heritage Act 1986

SCHEDULE 2—continued

Protection of the Sea (Civil Liability) Act 1981
Protection of the Sea (Contributions to Oil Pollution Compensation Fund—Customs) Act 1993
Protection of the Sea (Contributions to Oil Pollution Compensation Fund—Excise) Act 1993
Protection of the Sea (Contributions to Oil Pollution Compensation Fund—General) Act 1993
Protection of the Sea (Oil Pollution Compensation Fund) Act 1993
Protection of the Sea (Powers of Intervention) Act 1981
Protection of the Sea (Prevention of Pollution from Ships) Act 1983
Protection of the Sea (Shipping Levy) Act 1981
Protection of the Sea (Shipping Levy Collection) Act 1981
~~Protection of the Sea (Discharge of Oil from Ships) Act 1981~~
Psychotropic Substances Act 1976
Public Lending Right Act 1985
Quarantine Act 1908
Radiocommunications Act 1992
— *The whole Act other than sections 60 106 and subsection 294(1)*
Radiocommunications (Receiver Licence Tax) Act ~~1992~~
— *The whole Act other than section 7*
Radiocommunications (Permit Tax) Act ~~1992~~
— *The whole Act other than section 7*
Radiocommunications (Taxes Collection) Act 1983
Radiocommunications (Transmitter Licence Tax) Act ~~1992~~
— *Except section 7*
Radio Licence Fees Act 1964
Safety, Rehabilitation and Compensation Act 1988
Sales Tax (Amendment/Transitional) Act 1992
Sales Tax Assessment Act 1992
Sales Tax (Exemptions and Classifications) Act 1992
Science and Industry Endowment Act 1926
Science and Industry Research Act 1949
Scout Association Act 1924
Seafarers Rehabilitation and Compensation Act 1992
Sea Installations Act 1987
Sea Installations Levy Act 1987

SCHEDULE 2—continued

Ships (Capital Grants) Act 1987
Snowy Mountains Engineering Corporation Act 1970
Snowy Mountains Engineering Corporation (Conversion into Public Company) Act 1989
Snowy Mountains Engineering Corporation Limited Sale Act 1993
Special Broadcasting Service Act 1991
Spirits Act 1906
States Grants (Petroleum Products) Act 1965
Statute Law (Miscellaneous Amendments) (No. 1) Act 1982
— *Sections 191 and 192*
~~Steel Industry Authority Act 1983~~ Expired.
~~Stevedoring Industry Acts (Termination) Act 1977~~ Repealed.
Stevedoring Industry Charge (Termination) Act 1977
Stevedoring Industry Finance Committee Act 1977
Stevedoring Industry Levy Act 1977
Stevedoring Industry Levy Collection Act 1977
Structural Adjustments (Loan Guarantees) Act 1974
Subsidy (Cultivation Machines and Equipment) Act 1986
Subsidy (Grain Harvesters and Equipment) Act 1985 Set.
Superannuation (Financial Assistance Funding) Levy Act 1993
Superannuation Guarantee (Administration) Act 1992
Superannuation Industry (Supervision) Act 1993
Superannuation Supervisory Levy Act 1991
Superannuation (Resolution of Complaints) Act 1993
Superannuation (~~Roll-over~~ Benefits) Levy Act 1993 Rolled-Over
Taxation Administration Act 1953
— *The whole Act other than section 5A*
Taxation (Interest on Overpayments) Act 1983
Taxation (Unpaid Company Tax) Assessment Act 1982
Telecommunications Act 1991
Telecommunications (Application Fees) Act 1991
Telecommunications (Carrier Licence Fees) Act 1991
Telecommunications (Numbering Fees) Act 1991
Telecommunications (Public Mobile Licence Charge) Act 1992
Telecommunications (Universal Service Levy) Act 1991
Television Licence Fees Act 1964
Textile, Clothing and Footwear Development Authority Act 1988

SCHEDULE 2—continued

Therapeutic Goods Act 1989
Therapeutic Goods (Charges) Act 1989
Tobacco Advertising Prohibition Act 1992
Tobacco Charge Act (No. 1) 1955
Tobacco Charges Assessment Act 1955
Tobacco Marketing Act 1965
Torres Strait Fisheries Act 1984
Trade Marks Act 1955
Trade Practices Act 1974
Tradesmen's Rights Regulation Act 1946
Training Guarantee (Administration) Act 1990
Trust Recoupment Tax Assessment Act 1985
Whale Protection Act 1980
Wheat Marketing Act 1989
Wildlife Protection (Regulation of Exports and Imports) Act 1982
World Heritage Properties Conservation Act 1983
Wool International Act 1993
Wool Tax Act (No. 1) 1964
Wool Tax Act (No. 2) 1964
Wool Tax Act (No. 3) 1964
Wool Tax Act (No. 4) 1964
Wool Tax Act (No. 5) 1964
Wool Tax (Administration) Act 1964

Subsection 3(1)
~~Section 3~~

SCHEDULE 3

BODIES THAT ARE GOVERNMENT BUSINESS ENTERPRISES

ANL Limited
Australian Maritime Safety Authority
Australian National Railways Commission
Australian Postal Corporation
Civil Aviation Authority
Federal Airports Corporation
National Railway Corporation Limited
Qantas Airways Limited
Telstra Corporation

SCHEDULE 4

Section 53

AMENDMENTS OF OTHER LEGISLATION

Acts Interpretation Act 1901

Heading to Part XI:

Omit the heading, substitute:

"PART XI—NON-LEGISLATIVE INSTRUMENTS AND RESOLUTIONS".

Sections 46 and 46A:

Repeal the sections, substitute the following sections and Notes:

Construction of instruments

"46.(1) If a provision confers on an authority the power to make an instrument that is not a legislative instrument within the meaning of the *Legislative Instruments Act 1994* or a rule of court then, unless the contrary intention appears:

(a) this Act applies to any instrument so made as if it were an Act and as if each provision of the instrument or a rule of court were a section of an Act; and

(b) expressions used in any instrument so made have the same meaning as in the enabling provision; and

(c) any instrument so made is to be read and construed subject to the enabling provision, and so as not to exceed the power of the authority.

"(2) If any instrument so made would, but for subsection (1), be construed as being in excess of the authority's power, it is to be taken to be a valid instrument to the extent to which it is not in excess of that power.

"(3) If a provision confers on an authority the power to make an instrument (that is not a legislative instrument or a rule of court):

(a) specifying, declaring or prescribing a matter or thing; or

(b) doing anything in relation to a matter or thing;

then, in exercising the power, the authority may identify the matter or thing by reference to a class or classes of matters or things.

Note: This provision has a parallel, in relation to legislative instruments, in section 9 of the *Legislative Instruments Act 1994.*

Prescribing matters by reference to other instruments

"46A.~~(1)~~ If legislation authorises or requires provision to be made in relation to any matter in an instrument that is not a legislative instrument within the meaning of the *Legislative Instruments Act 1994* or a rule of court,

redundant — there is no subsection (2)

SCHEDULE 4—continued

"(4) An instrument to which this section applies must be notified in the *Gazette* and, if the instrument is not so notified by being published in full in the *Gazette*, a notice in the *Gazette* of the instrument having been made, and of the place or places where copies of it can be purchased, is sufficient compliance with that requirement.

"(5) If a notice of the making of an instrument is published in accordance with subsection (4), copies of the instrument must, at the time of publication of the notice or as soon as practicable thereafter, be made available for purchase at the place, or at each of the places, specified in the notice.

"(6) If, on the day of publication of a notice referred to in subsection (4), there are no copies of the instrument to which the notice relates available for purchase at the place, or at one or more of the places, specified in the notice, the Minister administering the enabling provision must cause to be laid before each House of the Parliament, within 15 sitting days of that House after that day, a statement that copies of the instrument were not so available and the reason why they were not so available.

"(7) Failure to comply with a requirement of subsection (5) or (6) in relation to any instrument does not constitute a failure to comply with subsection (4).

"(8) A copy of an instrument to which this section applies must be laid before each House of the Parliament not later than 6 sitting days of that House after the instrument is made and, for that purpose, must be delivered to the House by the person or body authorised to make the instrument.

"(9) If a copy of an instrument is not laid before each House of the Parliament in accordance with subsection (8), it thereupon ceases to have effect.

"(10) Part 5 of the *Legislative Instruments Act 1994*, other than sections 45 and 46, applies in relation to an instrument to which this section applies as if:

(a) references to legislative instruments or to a legislative instrument were references to an instrument to which this section applies; and

(b) references to enabling legislation were references to the enabling provision; and

(c) references to repeal were references to revocation; and

(d) references in subsection 49(2) of the *Legislative Instruments Act 1994* to another legislative instrument included references to a provision of a non-legislative instrument made under the enabling provision.".

SCHEDULE 4—continued

Part XII:

Repeal the Part.

Administrative Decisions (Judicial Review) Act 1977

Schedule 1:

After paragraph (a), insert:

"(aa) decisions by the Attorney-General under section 7 of the *Legislative Instruments Act 1994* certifying that a particular instrument is, or is not, or that a kind of instrument will be, or will not be, a legislative instrument;

(ab) decisions under Part 3 of the *Legislative Instruments Act 1994*;".

Family Law Act 1975

Subsection 123(2):

Omit the subsection, substitute:

"(2) The *Legislative Instruments Act 1994*, other than sections 4 and 7, paragraph 13(a) and section 14, applies in relation to Rules of Court made under this section:

(a) as if a reference to a legislative instrument were a reference to a Rule of Court; and

(b) as if a reference to a rule-maker were a reference to the Chief Justice acting on behalf of the Judges; and

(c) subject to such further modifications or adaptations as are provided for in regulations made under paragraph 125(1)(bb).

"(3) Despite the fact that paragraph 13(a) and section 14 of the *Legislative Instruments Act 1994* do not apply in relation to Rules of Court, the Principal Legislative Counsel may provide assistance in the drafting of any of those Rules if the Chief Justice so desires.".

After paragraph 125(1)(ba):

Insert:

"(bb) modifying or adapting the provisions of the *Legislative Instruments Act 1994* in their application to the Family Court and any other court exercising jurisdiction under this Act;".

After subsection 125(1):

Insert:

"(1A) Without limiting the generality of subsection (1) in relation to regulations made under paragraph (1)(bb), regulations made under that paragraph must provide, in substitution for Part 3 of the *Legislative*

SCHEDULE 4—continued

(c) subject to such further modifications or adaptations as are provided for in regulations made under section 486A.

"(5) Despite the fact that paragraph 13(a) and section 14 of the *Legislative Instruments Act 1994* do not apply in relation to Rules of Court, the Principal Legislative Counsel may provide assistance in the drafting of any of those Rules if the Chief Justice so desires.".

After section 486:

Insert:

Regulations modifying or adapting the Legislative Instruments Act

"486A.(1) The Governor-General may make regulations for the purpose of section 486 modifying or adapting the provisions of the *Legislative Instruments Act 1994* in their application to the Court.

"(2) Without limiting the generality of subsection (1), regulations made under that subsection must provide, in substitution for Part 3 of the *Legislative Instruments Act 1994*, for a procedure to be followed by the Judges of the Court if they propose to make a Rule of Court on or after 1 January 1996 directly affecting business to ensure that, before the proposed Rule is made, there is consultation with organisations or bodies representing the interests of those likely to be affected by the proposed Rule.".

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Attorney-General

The Hon. Michael Lavarch M.P.
Parliament House
Canberra ACT 2600

92059430

Senator M Colston
Chairman
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Colston

I am writing in response to your letter of 10 October, and to the Committee's report on the Legislative Instruments Bill 1994, tabled in the Senate on 17 October. I would like to thank the Committee for its detailed consideration of the Bill, and for its helpful suggestions for amendment.

I note that the Committee engaged the services of drafting counsel, and has attached to its report draft amendments which reflect its recommendations. The drafting of amendments to be moved by the Government is, of course, a matter for the Office of Parliamentary Counsel, which has been provided with a copy of the Report.

> Recommendation: "The Committee considers, however, that certificates issued in respect of subclause 7(2) which determine that an instrument is not legisative should be expressly deemed to be disallowable instruments. ... The Committee also considers that if a subclause 7(2) certificate determining that an instrument is not legislative is disallowed, such instruments should be deemed to be legislative. The Committee did not consider that certificates issued in respect of subclause 7(1), which applies to individual instruments made before commencement day, should be disallowable." (page 4)

The Government accepts this recommendation, and Government amendments to the bill will be moved to give it effect. I note that the draft amendment in relation to this recommendation does not address the position of any instruments which may have been made in the period between the issue of a certificate, and its disallowance. In keeping with the Committee's recommendation, any such instruments should also be deemed to be legislative instruments, and Government amendments to the bill will provide for a short time limit in which they must be registered.

In view of the Committee's concern about the issue of these certificates, a Government amendment will also be moved to ensure that the function of issuing certificates is performed by the Attorney-General personally, and cannot be delegated.

> Recommendation: "The Committee would expect ... that the Government give every assistance to enable the ARC to play a central part in the proposed evaluation of the backcapturing program." (page 4) "The Committee supports the ARC review of [the consultation] aspect of the legislation after three years of operation." (page 5)

The Government will be requesting the ARC to evaluate the operation of the legislation after it has been in operation for 3 years. In particular, it is expected that the ARC will evaluate the backcapturing program which will then have been completed, and will undertake an evaluation of the benefits of sunsetting regimes in practice. The consultation requirements and procedures are an important aspect of the bill's contribution to increasing access to justice, and it is expected that the ARC will give detailed consideration to the effectiveness of consultation, and whether the requirement should be extended.

> Recommendation: "[T]he Committee recommends that the bill be amended to provide that the regulations may not modify Part 5 of the bill - Parliamentary Scrutiny of Legislative Instruments, in its application to rules of court." (page 5)

The Government accepts this recommendation and will be moving amendments to the bill to this effect.

> Recommendation: "The Committee recommends that the bill provide that the decisions [provided for in clause 17, and subclauses 19(1) and 19(2)] must be contained in the explanatory statement.

The Government accepts this recommendation and will be moving amendments to the bill to this effect. I note that a failure to comply with the requirement will not have an automatic effect upon the validity of the relevant instrument, but will be a matter for the Parliament to consider in its scrutiny of the instrument.

> Recommendation: "The bill does not provide for an annual report to Parliament on the operation of the scheme which it proposes. The Committee understands, however, that such a report will be included in the annual report of the Attorney-General's Department. The Committee supports this." (page 6)

The Government accepts the importance of reporting to Parliament upon the operation of the legislation.

Recommendation: "The Committee accepts that [university legislation which affects the content of academic courses] should be excluded from the general terms of the bill and so recommends." (page 6-7)

The Government does not accept this recommendation. The Government considers that university legislation, which affects the rights and interests of many thousands of students and staff of the universities, should, if it is within the definition of a legislative instrument contained in the bill, be covered by the bill.

The draft amendment attached to the Committee's report to reflect this recommendation removes "instruments under section 50 *Australian National University Act. 1991* relating to the content of academic courses" entirely from the operation of the bill. Section 50 specifies a range of matters which may be contained in delegated legislation made by the Australian National University. The "content of academic courses" is not specifically referred to, nor is it clear from the Committee's report precisely what is envisaged by the term.

I would have great concern that were such an amendment to be made, there would be uncertainty regarding a range of instruments made by the University, which relate in some way to academic courses, as to the requirements for publication and parliamentary scrutiny. Such a level of uncertainty would be disadvantageous to the operation of the University, as it would require an individual decision to be made in the case of every instrument made under section 50, as to whether it would or would not be covered by the exemption, which would delay the process and could leave many instruments vulnerable to challenge, if they are not lodged for registration in the Federal Register of Legislative Instruments.

The Government does not consider that coverage of university legislation by the bill will in any way challenge academic independence. In particular, I note that in most cases matters of the actual content of academic courses would appear to be dealt with by means other than university statutes or rules. I also note that whilst an amendment is proposed by the Committee in relation to legislation of the ANU, the Committee does not recommend a similar exemption for university legislation under the *University of Canberra Act 1989*, which provides in a similar fashion for statutes, rules and orders to be made by the Council and officers of the University of Canberra, and to which the same considerations would apply.

Recommendation: "The Committee recommends tbat the bill be amended to extend [clause 27, dealing with the status of the Register and judicial notice of legislative instruments] to include documents printed with the authority of the Principal Legislative Counsel." (page 7)

The Government does not accept this recomendation at this time. I support the widest possible access to the Register, and my Department is currently investigating a number of possible avenues to provide further access to the Register, in addition to the Australian Government Publishing Service Bookshops, and on-line electronic access from personal computers.

The issue of the provision of authoritative prints of legislative instruments is, however, a different issue to that of access to the Register itself. Clause 27 is an evidentiary provision, which allows for judicial notice to be taken of the content and coming into operation of a legislative instrument that is printed by the Government

Printer. Such prints are necessary for use only in proceedings, and even then, there are many occasions where courts are happy to take notice of legislation on the basis of unauthorised versions, such as those provided to practitioners in loose-leaf form by legal publishers. Should a court so require, however, it is vital that there be a definitive printed copy of an instrument.

The AGPS has in place a printing and distribution system for the provision of prints of primary and delegated legislation. It has a network of bookshops, and various subscription series already in operation, and officers of my Department are discussing with the AGPS the modifications to these subscriptions which the bill will require. Many instruments are currently not published at all, or if so, are available only through the relevant Department. Access to the authoritative prints of any registered legislative instrument through the Government Printer, which has a Charter from the Government to publish legislation, will therefore be a vast improvement on the current situation. It is expected that future review of the AGPS Charter will include consideration of how access to printed material such as legislation could be further improved.

> Recommendation: "As presently drafted, clause 28, dealing with rectification of the Register, may not permit rectification of a registered copy of a document. The Committee recommends that the bill be amended to avoid this." (page 7)

The Government accepts this recommendation, and will move Government amendments to provide that a discrepancy between an entry on the Register, and the copy of an instrument lodged for registration may be rectified.

> Recommendation: "As presently drafted, clause 41, which requires a rule-maker to inform the Principal Legislative Counsel if an instrument was not validly made, would operate so narrowly as to have little meaning. The Committee recommends that the bill be amended to avoid this." (page 7)

The Government accepts that the clause is too narrow in effect. It proposes to move an amendment so that a rule maker will be obliged to inform the Principal Legislative Counsel on becoming aware that an instrument or a provision of an instrument was not validly made. The clause will then operate so that where an instrument or provision of an instrument has been held to be invalid, and the Principal Legislative Counsel is advised of this, whether by the rule maker or otherwise, the Register will be annotated to that effect.

I note that the draft amendment attached to the Committee's report would extend the operation of the provision so that it was triggered by the rule maker's opinion that an instrument was not validly made. This opinion, however, cannot and should not invalidate an instrument, which is a matter for the courts. In my view, it would not be appropriate for the Register to be annotated on the basis of an opinion formed by a rule maker, which has no legal effect. If a rule maker considers that there is a defect in a registered instrument, which has not been held invalid, then the appropriate method of curing the defect is not for an administrative entry on the Register, but rather for the rule maker to revoke and remake the instrument, as is currently the case.

Recommendation: "As presently drafted, proposed section 46B of the Acts Interpretation Act, dealing with disallowable non-legislative instruments, provided for in Schedule 4, would require complex and repetitive provisions to ensure full parliamentary scrutiny of such instruments. The Committee recomends that the bill be amended to avoid this consequence." (page 7)

The Government accepts this recommendation, and will move Government amendments to give effect to it, so that a single provision of enabling legislation may provide that instruments made under various provisions are disallowable under the section.

There are two further matters that I should mention. The first is that the Government will also be moving amendments which exempt Proclamations which commence an Act or provisions of an Act from the disallowance provisions of Part 5 of the bill. The Committee was informed of this in evidence from Mr Morgan of my Department.

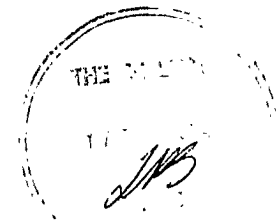
Secondly, the subject matter and nature of this bill are such that it should have the fullest possible Parliamentary consideration. I will therefore be seeking to have the bill referred to a House of Representatives committee for consideration after its introduction into that place. In order to allow for such consideration, the Government will be moving amendments in the Senate to defer the commencement date for the bill until 1 July 1995. Each of the cut-off dates in clause 37 of the bill for registration of existing instruments will also be deferred by 6 months.

Yours sincerely

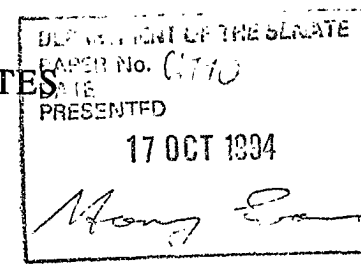
MICHAEL LAVARCH

MICHAEL LAVARCH

[PROOF COPY]



COMMONWEALTH OF AUSTRALIA



PARLIAMENTARY DEBATES

SENATE

Hansard

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Reference: Legislative Instruments Bill 1994

TUESDAY, 4 OCTOBER 1994

CORRECTIONS TO PROOF ISSUE

This is a **PROOF ISSUE.** Corrections that honourable senators suggest for the Bound Volumes should be lodged with the Assistant Chief Reporter (Senate), Department of the Parliamentary Reporting Staff (Facsimile (06) 277 2977), **as soon as possible but not later than Tuesday, 11 October 1994.**

BY AUTHORITY OF THE SENATE
CANBERRA 1994

[PROOF COPY]

THIRTY-SEVENTH PARLIAMENT

FIRST SESSION—FIFTH PERIOD

Governor-General

His Excellency the Hon. William George Hayden, Companion of the Order of Australia, Governor-General of the Commonwealth of Australia

Senate Officeholders

President—Senator the Hon. Michael Beahan

Deputy President and Chairman of Committees—Senator Noel Ashley Crichton-Browne

Temporary Chairmen of Committees—Senators Paul Henry Calvert, Hedley Grant Pearson Chapman, Bruce Kenneth Childs, Malcolm Arthur Colston, John Herron, Julian John James McGauran, James Philip McKiernan, Baden Chapman Teague, Suzanne Margaret West and Alice Olive Zakharov

Leader of the Government in the Senate—Senator the Hon. Gareth John Evans QC

Deputy Leader of the Government in the Senate—Senator the Hon. Robert Francis Ray

Leader of the Opposition—Senator Robert Murray Hill

Deputy Leader of the Opposition—Senator Richard Kenneth Robert Alston

Manager of Government Business in the Senate—Senator the Hon. John Philip Faulkner

Senate Party Leaders

Leader of the Australian Labor Party—Senator the Hon. Gareth John Evans QC

Deputy Leader of the Australian Labor Party—Senator the Hon. Robert Francis Ray

Leader of the Liberal Party of Australia—Senator Robert Murray Hill

Deputy Leader of the Liberal Party of Australia—Senator Richard Kenneth Robert Alston

Leader of the National Party of Australia—Senator Ronald Leslie Doyle Boswell

Deputy Leader of the National Party of Australia—Senator David Gordon Cadell Brownhill

Leader of the Australian Democrats—Senator Cheryl Kernot

Deputy Leader of the Australian Democrats—Senator Meg Heather Lees

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SENATE LEGISLATIVE AND GENERAL PURPOSE STANDING COMMITTEES

On 5 December 1989 the Senate resolved:

(1) That a standing committee, to be known as the Selection of Bills Committee, be appointed to consider all bills introduced into the Senate or received from the House of Representatives, except bills which contain no provisions other than provisions appropriating revenue or moneys, and to report—

  (a) in respect of each such bill, whether the bill should be referred to a Legislative and General Purpose Standing Committee; and

  (b) in respect of each bill recommended for referral to a standing committee:

    (i) the standing committee to which the bill should be referred,

    (ii) the stage in the consideration of the bill at which it should be referred to the standing committee, and

    (iii) the day which should be fixed for the standing committee to report on the bill.

(2) That the following provisions apply to the Committee—

  (a) the Committee consist of the Government Whip and 2 other Senators nominated by the Leader of the Government, the Opposition Whip and 2 other Senators nominated by the Leader of the Opposition, and the Whips of any minority groups;

  (b) the quorum of the Committee be 4 members;

  (c) the Chairman of the Committee be the Government Whip, and the Chairman appoint from time to time a Deputy-Chairman to act as Chairman when the Chairman is not present at a meeting; and

  (d) in the event of votes on a question before the Committee being equally divided, the Chairman, or the Deputy-Chairman when acting as Chairman, have a casting vote.

(3) That, where the Committee reports on any sitting day, the report be presented after the presentation of documents by Ministers.

(4) That, following the presentation of a report by the Committee, the Chairman of the Committee, or a member of the Committee on behalf of the Chairman, may move without notice a motion for the adoption of the report.

(5) That amendments may be moved to a motion under paragraph (4), including amendments to refer to a standing committee any bill of the kind referred to in paragraph (1) which is not the subject of a motion moved pursuant to paragraph (4).

(6) That an amendment of the kind referred to in paragraph (5) shall specify—

  (a) the standing committee to which the bill is to be referred;

  (b) the stage in the consideration of the bill at which it is to be referred to the committee; and

  (c) the day on which the committee is to report.

(7) That, upon a motion moved pursuant to paragraph (4) or (5), a Senator shall not speak for more than 5 minutes, and at the expiration of 30 minutes, if the debate be not sooner concluded, the President shall put the question on the motion and any amendments before the Chair, but if a Senator wishes to move a further amendment at that time, that amendment may be moved and shall be determined without debate.

(8) That, where a motion moved pursuant to paragraph (4) is agreed to with or without amendment, at the conclusion of the stage of the consideration of a bill referred to in the report adopted by that motion or in an amendment, the bill shall stand referred to the standing committee specified, and the further consideration of the bill shall be an order of the day for the day fixed for the presentation of the report of the standing committee.

(9) That, in considering a bill referred to it pursuant to this order, a standing committee shall have no power to make amendments to the bill or requests for amendments, but may recommend amendments or requests for amendments which would be in order if proposed in a committee of the whole.

(10) That a report from a standing committee relating to a bill referred to it under this order shall be received by the Senate without debate, and consideration of the report deferred until the order of the day relating to the bill is called on.

(11) That, when the order of the day relating to a bill which is the subject of a standing committee report pursuant to this order is called on, the following procedures shall apply—

(a) a motion may be moved without notice that the report of the standing committee be adopted (if the standing committee has recommended amendments to the bill, this motion shall have the effect of amending the bill accordingly, but may not be moved if other proposed amendments to the bill have been circulated in the Senate by a Senator);

(b) if a motion under subparagraph (a) is moved, following the disposal of that motion, a motion may be moved by a Minister, or, in respect of a bill introduced into either House of the Parliament other than by a Minister, by the Senator in charge of the bill, that consideration of the bill be an an order of the day for a future day, or that the bill not be further proceeded with;

(c) if no motion under subparagraph (a) or (b) is agreed to, a motion may be moved without notice that the bill again be referred to the standing committee for reconsideration, provided that such motion:

(i) indicates the matters which the standing committee is to reconsider, and

(ii) fixes the day for the further report of the standing committee,

and if such motion is agreed to, the bill shall stand referred to the standing committee, and the further consideration of the bill shall be an order of the day for the day fixed for the further report of the standing committee; and

(d) if no motion under subparagraph (b) or (c) is agreed to, consideration of the bill shall be resumed at the stage at which it was referred to the standing committee, provided that, if the consideration of the bill in committee of the whole has been concluded and the standing committee has recommended amendments to the bill or requests for amendments, the bill shall again be considered in committee of the whole.

(12) Where:

(a) the Selection of Bills Committee recommends that a bill be referred to a select committee; or

(b) a Senator indicates that the Senator intends to move to establish a select committee to consider a bill or to refer a bill to an existing select committee,

this order shall have effect as if each reference to a standing committee included reference to a select committee.

(13) That the foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders, but without limiting the operation of standing orders 25 and 115.

Members

Community Affairs: Senators Denman, Forshaw, Herron, Lees, Sandy Macdonald, Troeth, West and Zakharov.

Employment, Education and Training: Senators Bell, Carr, Crane, Forshaw, Tierney and Zakharov.

Environment, Recreation and the Arts: Senators Abetz, Bell, Devereux, Loosley, MacGauran and West.

Finance and Public Administration: Senators Campbell, Carr, Coates, Denman, Kemp and Watson.

Foreign Affairs, Defence and Trade: Senators Burns, Ellison, Jones, Teague, West and Woodley.

Industry, Science and Technology, Transport, Communications and Infrastructure: Senators Burns, Chapman, Childs, Coulter, Devereux, Ferguson, Murphy and Panizza.

Legal and Constitutional Affairs: Senators Cooney, Ellison, Christopher Evans, McKiernan, O'Chee, Reynolds, Spindler and Vanstone.

Rural and Regional Affairs: Senators Brownhill, Burns, Calvert, Crane, McKiernan, Murphy, West and Woodley.

Members of the Senate

Senator	State or Territory	Term expires	Party
Abetz, Eric[4]	Tas.	30.6.99	LP
Alston, Richard Kenneth Robert	Vic.	30.6.96	LP
Baume, Michael Ehrenfried	NSW	30.6.99	LP
Beahan, Michael Eamon	WA	30.6.96	ALP
Bell, Robert John	Tas.	30.6.96	AD
Bolkus, Hon. Nick	SA	30.6.99	ALP
Boswell, Ronald Leslie Doyle	Qld	30.6.96	NP
Bourne, Victoria Worrall	NSW	30.6.96	AD
Brownhill, David Gordon Cadell	NSW	30.6.96	NP
Burns, Bryant Robert	Qld	30.6.96	ALP
Calvert, Paul Henry	Tas.	30.6.96	LP
Campbell, Ian Gordon	WA	30.6.99	LP
Carr, Kim John	Vic.	30.6.99	ALP
Chamarette, Christabel Marguerite Alain[2]	WA	30.6.96	G(WA)
Chapman, Hedley Grant Pearson	SA	30.6.96	LP
Childs, Bruce Kenneth	NSW	30.6.96	ALP
Coates, John	Tas.	30.6.99	ALP
Collins, Hon. Robert Lindsay[1]	NT		ALP
Colston, Malcolm Arthur	Qld	30.6.99	ALP
Cook, Hon. Peter Francis Salmon	WA	30.6.99	ALP
Cooney, Bernard Cornelius	Vic.	30.6.96	ALP
Coulter, John Richard	SA	30.6.96	AD
Crane, Winston	WA	30.6.96	LP
Crichton-Browne, Noel Ashley	WA	30.6.96	LP
Crowley, Hon. Rosemary Anne	SA	30.6.96	ALP
Denman, Kay Janet[3]	Tas.	30.6.99	ALP
Devereux, John Robert	Tas.	30.6.96	ALP
Ellison, Christopher Martin	WA	30.6.99	LP
Evans, Christopher Vaughan	WA	30.6.99	ALP
Evans, Hon. Gareth John, QC	Vic.	30.6.99	ALP
Faulkner, Hon. John Philip	NSW	30.6.99	ALP
Ferguson, Alan Baird	SA	30.6.99	LP
Foreman, Dominic John	SA	30.6.99	ALP
Forshaw, Michael George[7]	NSW	30.6.99	ALP
Gibson, Brian Francis	Tas.	30.6.99	LP
Harradine, Brian	Tas	30.6.99	Ind.
Herron, John	Qld	30.6.96	LP
Hill, Robert Murray	SA	30.6.96	LP
Jones, Gerry Norman	Qld	30.6.96	ALP
Kemp, Charles Roderick	Vic.	30.6.96	LP
Kernot, Cheryl	Qld	30.6.96	AD
Knowles, Susan Christine	WA	30.6.99	LP
Lees, Meg Heather	SA	30.6.99	AD
Loosley, Stephen	NSW	30.6.96	ALP
Macdonald, Ian Douglas	Qld	30.6.99	LP
Macdonald, John Alexander Lindsay (Sandy)	NSW	30.6.99	NP
McGauran, Julian John James	Vic.	30.6.99	NP
MacGibbon, David John	Qld	30.6.99	LP
McKiernan, James Philip	WA	30.6.96	ALP

Members of the Senate—*continued*

Senator	State or Territory	Term expires	Party
McMullan, Hon. Robert Francis[1]	ACT		ALP
Margetts, Diane Elizabeth (Dee)	WA	30.6.99	G(WA)
Minchin, Nicholas Hugh	SA	30.6.99	LP
Murphy, Shayne Michael	Tas.	30.6.99	ALP
Neal, Belinda Jane[6]	NSW	30.6.99	ALP
Newman, Jocelyn Margaret	Tas.	30.6.96	LP
O'Chee, William George	Qld	30.6.99	NP
Panizza, John Horace	WA	30.6.96	LP
Parer, Warwick Raymond	Qld	30.6.99	LP
Patterson, Kay Christine Lesley	Vic.	30.6.96	LP
Ray, Hon. Robert Francis	Vic.	30.6.96	ALP
Reid, Margaret Elizabeth[1]	ACT		LP
Reynolds, Hon. Margaret	Qld	30.6.99	ALP
Schacht, Hon. Christopher Cleland	SA	30.6.96	ALP
Sherry, Hon. Nicholas John	Tas.	30.6.96	ALP
Short, James Robert	Vic.	30.6.99	LP
Spindler, Siegfried Emil	Vic.	30.6.96	AD
Tambling, Grant Ernest John[1]	NT		NP
Teague, Baden Chapman	SA	30.6.96	LP
Tierney, John William	NSW	30.6.99	LP
Troeth, Judith Mary	Vic.	30.6.99	LP
Vanstone, Amanda Eloise	SA	30.6.99	LP
Watson, John Odin Wentworth	Tas.	30.6.96	LP
West, Suzanne Margaret	NSW	30.6.96	ALP
Woodley, John	Qld	30.6.99	AD
Woods, Robert Leslie[5]	NSW	30.6.96	LP
Zakharov, Alice Olive	Vic.	30.6.99	ALP

(1) Term expires at close of day next preceding the polling day for the general election of members of the House of Representatives.
(2) Chosen by the Parliament of Western Australia vice Josephine Vallentine, resigned.
(3) Chosen by the Parliament of Tasmania vice Hon. Michael Carter Tate, resigned.
(4) Chosen by the Parliament of Tasmania vice Brian Roper Archer, resigned.
(5) Chosen by the Parliament of New South Wales vice Bronwyn Kathleen Bishop, resigned.
(6) Chosen by the Parliament of New South Wales vice Hon. Kerry Walter Sibraa, resigned.
(7) Chosen by the Parliament of New South Wales vice Hon. Graham Frederick Richardson, resigned.

PARTY ABBREVIATIONS

AD—Australian Democrats; ALP—Australian Labor Party; G(WA)—Greens (WA); Ind.—Independent; LP—Liberal Party of Australia; NP—National Party of Australia

Heads of Parliamentary Departments

Clerk of the Senate—H. Evans
Clerk of the House of Representatives—L. M. Barlin
Parliamentary Librarian—
Principal Parliamentary Reporter—J. W. Templeton
Secretary, Joint House Department—M. W. Bolton

SECOND KEATING MINISTRY

Prime Minister	The Hon. Paul John Keating
Deputy Prime Minister and Minister for Housing and Regional Development	The Hon. Brian Leslie Howe
Leader of the Government in the Senate and Minister for Foreign Affairs	Senator the Hon. Gareth John Evans QC
Deputy Leader of the Government in the Senate and Minister for Defence	Senator the Hon. Robert Francis Ray
Treasurer	The Hon. Ralph Willis
Minister for Finance and Leader of the House	The Hon. Kim Christian Beazley
Minister for Industry, Science and Technology and Minister Assisting the Prime Minister for Science	Senator the Hon. Peter Francis Salmon Cook
Minister for Immigration and Ethnic Affairs and Minister Assisting the Prime Minister for Multicultural Affairs	Senator the Hon. Nick Bolkus
Minister for Employment, Education and Training	The Hon. Simon Findlay Crean
Minister for Primary Industries and Energy	Senator the Hon. Robert Lindsay Collins
Minister for Social Security	The Hon. Peter Jeremy Baldwin
Minister for Trade	Senator the Hon. Robert Francis McMullan
Minister for Industrial Relations and Minister for Transport	The Hon. Laurence John Brereton
Attorney-General	The Hon. Michael Hugh Lavarch
Minister for Communications and the Arts and Minister for Tourism	The Hon. Michael John Lee
Minister for the Environment, Sport and Territories and Manager of Government Business in the Senate	Senator the Hon. John Philip Faulkner
Minister for Human Services and Health and Minister Assisting the Prime Minister for the Status of Women	The Hon. Carmen Mary Lawrence

(The above ministers constitute the cabinet)

Second Keating Ministry—*continued*

Minister for Resources	The Hon. David Peter Beddall
Minister for Development Cooperation and Pacific Island Affairs	The Hon. Gordon Neil Bilney
Minister for Aboriginal and Torres Strait Islander Affairs	The Hon. Robert Edward Tickner
Minister for Schools, Vocational Education and Training	The Hon. Ross Vincent Free
Minister for Consumer Affairs	The Hon. Jeannette McHugh
Minister for Family Services	Senator the Hon. Rosemary Anne Crowley
Assistant Treasurer	The Hon. George Gear
Minister for Justice	The Hon. Duncan James Colquhoun Kerr
Minister for Small Business, Customs and Construction	Senator the Hon. Christopher Cleland Schacht
Minister for Administrative Services	The Hon. Francis John Walker QC
Special Minister of State, Vice-President of the Executive Council, Assistant Minister for Industrial Relations and Minister Assisting the Prime Minister for Public Service Matters	The Hon. Gary Thomas Johns
Minister for Veterans' Affairs	The Hon. Concetto Antonio Sciacca
Minister for Defence Science and Personnel	The Hon. Gary Francis Punch
Parliamentary Secretary to the Attorney-General	The Hon. Peter Duncan
Parliamentary Secretary to the Minister for Employment, Education and Training and Parliamentary Secretary to the Minister for the Environment, Sport and Territories	The Hon. Warren Edward Snowdon
Parliamentary Secretary to the Minister for Social Security	The Hon. Janice Ann Crosio MBE
Parliamentary Secretary to the Minister for Industry, Science and Technology	The Hon. Eamon John Lindsay RFD
Parliamentary Secretary to the Minister for Transport	The Hon. Neil Patrick O'Keefe
Parliamentary Secretary to the Minister for Primary Industries and Energy	Senator the Hon. Nicholas John Sherry
Parliamentary Secretary to the Prime Minister and Parliamentary Secretary to the Minister for Human Services and Health	The Hon. Andrew Charles Theophanous
Parliamentary Secretary to the Treasurer	The Hon. Robert Paul Elliott
Parliamentary Secretary to the Minister for Housing and Regional Development	The Hon. Mary Catherine Crawford
Parliamentary Secretary to the Minister for Defence	The Hon. Archibald Ronald Bevis

SENATE

Tuesday, 4 October 1994

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Members

Senator Colston (Chairman)

Senator Abetz	Senator O'Chee
Senator Loosley	Senator Zakharov
Senator Minchin	

The committee met at 11.58 a.m.

Matter referred by the Senate:

Legislative Instruments Bill 1994

Mr Lavarch, Attorney-General, minister in charge of the bill.

Advisers:

Mr G. Harders, Legislative Counsel to the Regulations and Ordinances Committee, Department of the Senate, Parliament House, Canberra, Australian Capital Territory, and

Prof. D.J. Whalan, Standing Legal Counsel to the Regulations and Ordinances Committee, Department of the Senate, Parliament House, Canberra, Australian Capital Territory.

CHAIRMAN—This is a public hearing being conducted by the Senate Standing Committee on Regulations and Ordinances into the Legislative Instruments Bill 1994. I regret our late start but I had to meet the New Zealand Governor-General and her plane was late. In addition to the members of the committee, Mr Geoff Harders, who is assisting the committee, will also be present along with Professor Whalan, who is our legal adviser.

Evans, Mr Harry, Clerk of the Senate, Department of the Senate, Parliament House, Canberra, Australian Capital Territory.

CHAIRMAN—I am sure the members of the committee have some questions to ask you in relation to your submission, and perhaps in relation to any of the other submissions you have read. Before they do that, do you wish to make an opening statement?

Mr Evans—I have just a few comments, Mr Chairman. The submission which I lodged with the committee drew attention to a few points, which I thought were major points, arising in relation to the parliamentary scrutiny of instruments. With submissions like this, there is always the tendency to concentrate on what is wrong with the bill rather than what is right with it. Those points raise what I think may be problems with the bill. I believe that the bill is certainly an advance on the current system of controlling delegated legislation and, while not perfect, I do not think perfection can be obtained in this area.

I turn now to the question of access. In dealing with the bill, the committee needs to recall—I do not think it would have any difficulty in recalling—that access is very difficult; there are great problems with access to delegated legislation at the moment. As I see it, this bill will improve access. It will not make it perfect, but it is bound to be better than the existing system.

Consultation becomes very much a question of balancing the desirability of consultation with the advantages of delegated legislation. It would be possible to have too rigorous a regime of consultation, such that you would lose the advantages of delegated legislation. In dealing with suggestions that the consultative provisions are defective, I think that balance has to be borne in mind. A number of the submissions raised some very technical points which would need to be looked at. In looking at them, I was not sure that they were all correct or that they were all of any or some consequence. But they all should certainly be looked at.

Senator ZAKHAROV—When referring to subclause 48(4), deferral of a disallowance motion, you were apprehensive about how this might operate, but you did not suggest that the power should be deleted. What would be different from the present situation—the

regulations and ordinances committee can defer disallowance to some extent—where a minister says, 'I am going to make these changes, but I can't do it straightaway?'

Mr Evans—In that situation the committee accepts an undertaking to amend and withdraws the disallowance motion on the basis of the undertaking. It is then open to the committee and the Senate to deal with any breach of the undertaking. It seems to me that this system for deferral—I do not suggest that it is not a desirable provision; it has obvious advantages—has the possible drawback that I have referred to.

I have said at the end of that paragraph that it is all a matter of the Senate being resolute, and that is the solution to the problem. But I can see a situation where a minister may say, 'Let us defer this disallowance motion because there are great difficulties with this piece of legislation,' and then, having deferred it for six months, coming back and saying, 'We found it is just too difficult to amend, so we are not going to amend it.'

As I said, the Senate will have to be resolute in that sort of situation. The minister may well say, 'It has now been in force for six months. You can't disallow it because that will create too many difficulties after all this time.' The Senate will just to have to be resolute in that sort of situation.

Senator O'CHEE—The effect of subclause 48(4) would be to prevent a disallowance motion from taking place. Is that correct?

Mr Evans—Are you referring to the deferral provision?

Senator O'CHEE—Yes.

Mr Evans—The house concerned has to make a decision to agree to the deferral in the first place. So the first question would be: does the Senate agree to a deferral? The Senate may well say, 'No. The problem with this piece of legislation is very clear. We don't agree to defer it.'

Senator O'CHEE—I assume the reason this provision was put in is that, when a regulation is disallowed by the Senate or the House of Representatives, it cannot be remade within a six-month period. This is an attempt to get around that problem, is it not?

Mr Evans—The disallowed regulation can be remade with the permission of the disallowing house. If you get another resolution, in effect, giving permission for it to be remade, it can be remade. My understanding is that this provision provides for a further period within which amendments can be negotiated and drawn up and, if the amendments go ahead, the problem with a provision of an instrument can be rectified. It gives you that further period for negotiating amendments, drafting them and so on, which is an advantage.

Senator O'CHEE—Another way to do it would be to create a mechanism by which your regulation could be disallowed but remade within the six-month period, the disallowance motion notwithstanding.

Mr Evans—Without a resolution of the disallowing house?

Senator O'CHEE—Yes.

Mr Evans—Yes, that would be an alternative solution. I am just trying to think of the circumstances in which it would be able to be remade.

Senator O'CHEE—Obviously, if a house disallowed an item of subordinate legislation but also, at the time of disallowance, provided for it to be remade within the six-month period without a further resolution, that might be a more elegant solution to the problem, might it not?

Mr Evans—That would be an alternative solution, subject to conditions specified in the resolution. There would be a problem of whether the remade instrument conformed with the conditions specified in the resolution of the disallowing house. There may be some room for doubt as to whether it conforms with that resolution. I take it that you are thinking particularly of when the houses are adjourned for a reasonable period. There could be problems of a remade instrument purporting to fix the problem in accordance with the house's specification but not, in fact, doing so. You could then have some difficulties between the time of that instrument being made and when the house resumes.

Senator O'CHEE—On a number of occasions in the past, the committee has privately

considered—you may not be aware of this—the virtue of the committee being able to disallow regulations when neither chamber is sitting. Provisions of a similar nature do exist at least in Tasmania, and there seems to be a great deal of worth in that.

Mr Evans—Yes. Those kinds of provisions certainly have the great advantage of enabling something to be, in effect, disallowed in a period when the house is not sitting—or suspended. I think the Tasmanian provision provides for them to be suspended; that is a provision of considerable value.

Senator O'CHEE—You see value in that sort of provision being introduced in the Senate?

Mr Evans—Yes. If it were to be inserted in this bill, I certainly would not object; it is a valuable provision.

Senator ABETZ—Clause 48(4)(b) refers to the deferral period not exceeding six months. To your way of thinking, is there any magic in that figure of six months—any reason why it ought be six months as opposed to three months or nine months? Would it help to concentrate the minds of departments and others if that deferral period were to be a shorter period of time?

Mr Evans—I certainly do not think it should be any longer. You could take a view that six months is a bit long because of the danger I have mentioned. The first thing that has to happen is that a minister, in effect, has to persuade a house to agree to a deferral, and to agree to a period of deferral of up to six months. As I said, the Senate might be sufficiently resolute to say, 'No. The problem with this instrument is clear; we are not going to agree to a deferral.' But, having agreed to a deferral of up to six months and then having the thing in force for up to six months, there would be a temptation for a minister to come back and say, 'Well, look, now that it has been in force for six months and no problems have arisen, it would be very inconvenient to disallow it now; I do not think you can disallow it now.' Unless the Senate is very resolute and says 'Well, that's your bad luck; we're disallowing it anyway because you haven't fixed up the problem,' six months is an awfully long time for that to occur. The provision has an obvious advantage, but it has a very large potential drawback too.

Senator ABETZ—Weighing up the advantages and disadvantages, which way would you tend to go?

Mr Evans—As I said, the solution to the problem, as I see it, is for the Senate to be sufficiently resolute, which the Senate has to be anyway. I would hesitate to say that senators are not capable of the degree of resolution required to properly use this provision. My recommendation would be to leave it in but to be aware of the danger of it and to make sure that the sort of misuse of it that I have postulated does not occur.

CHAIRMAN—From my experience on the Standing Committee on Regulations and Ordinances, the six-month period is probably a provision that we would use rarely or would think of recommending to the Senate that it use rarely.

Mr Evans—Yes, I would think so.

CHAIRMAN—But I suppose only time will tell. In your submission to us the first matter that you mentioned was the Attorney-General's conclusive certificate, which relates to clause 7 of the bill. You ended your comment by saying that it was your strong recommendation that this clause be omitted. If we had such a conclusive certificate, would that not result in greater administrative certainty?

Mr Evans—Yes, it certainly would. You can look at all sorts of acts of parliament and say that there would be greater administrative certainty if the Attorney-General could conclusively certify something to be the case. In fact, with practically every act of parliament, where there may be some doubt as to whether a provision applies or not, you can say, 'Let the Attorney-General certify conclusively whether the provision applies or not.' As I say, all you are doing is transferring the function of the courts to the Attorney-General, which I do not think is very wise.

I can see the reason for this being put in: if you have something that is not put on the register and it turns out that it should have been put on the register, it can have all sorts of dire consequences. To allow the Attorney-General to issue a conclusive certificate, in

effect interpreting an act of parliament, I think is a very bad precedent. As I say, one can encounter all sorts of potential problems in statutes which could be solved by this means, but it is not a means that I think you should encourage and resort to.

Senator O'CHEE—It is an extraordinary provision in the strict sense of the word, is it not? It is encountered in only a very select number of areas. I think the official secrets act is one, is it not? Is it in this country or the UK that there are conclusive certificates exempting documents from release under the—

Mr Evans—Under the Freedom of Information Act there are conclusive certificates, certainly. But this one is unusual in that it is, in effect, the Attorney-General making a conclusive ruling as to how an act of parliament applies and how it is to be interpreted in relation to a particular case. That is a bit different, I think, from allowing a minister to conclusively certify that the publication of a document would be damaging to Australia's international relations, for example, or damaging to the security of the Commonwealth. That is quite different from making a conclusive ruling as to how an act of parliament applies to a particular circumstance.

Senator O'CHEE—Under the Freedom of Information Act, conclusive certificates limit a time period, do they not? From recollection, this committee had something to do with those conclusive certificates. We were looking at the time period under which they could be withheld. It is not an absolute thing, whereas in this case it is absolute, is it not?

Mr Evans—I am struggling to remember all the provisions of the Freedom of Information Act. I think some of those conclusive certificates under the Freedom of Information Act are absolute, but I do not recall those particular provisions of the act.

Senator ABETZ—Are you saying that there ought to be a division of power? The judiciary ought to be interpreting the effect of the legislation and the Attorney-General should not be allowed the capacity to interpret the government's legislation?

Mr Evans—Yes. I think to allow a minister to issue a conclusive certificate as to what an act of parliament means in relation to a particular circumstance is a very bad precedent to set. In this context, one can see the reason for it, as I said. Where there is doubt, the tendency will be for registration to be played safe and things to be registered where they may not need to be registered. But that is better than having this sort of provision. There is also a danger of overuse of that provision too. You can say that the Attorney-General is a responsible officer and will not be easily persuaded, but once you have a provision like that there is always a potential for it to be overused.

CHAIRMAN—In another part of your submission you draw attention to clause 47. You advise that incorporated documents should be tabled in both houses rather than, as provided in clause 47, merely being available during the period of possible disallowance. You then go on to say:

> . . . if a document is voluminous it could be tabled in electronic form.

Could you expand further on how electronic tabling would operate?

Mr Evans—The documents can be tabled in electronic form at the moment. We have had information in electronic form tabled already, but I envisage that it could be tabled in the form of a disk. A disk or a set of disks can be tabled. The problem which may exist here is that some of these documents may be enormous and may not exist in electronic form. I do not know. There may be some that it would be very difficult to table. I think the committee should be persuaded of that before making a decision on this particular point.

Senator ABETZ—In your submission you dealt with clauses 17 and 19 and said that a written decision by a rule-maker under subclause 19(2) should be tabled in each house of the parliament. Are you saying that at the moment that is not the requirement?

Mr Evans—There does not seem to be any requirement that those documents be tabled. I think that they ought to be, simply so the houses are formally aware of those sorts of documents and that those sorts of decisions have been made.

Senator ABETZ—How else would they necessarily come to the attention of the parliament?

Mr Evans—That is the whole question. I think they should be formally drawn to attention by means of tabling.

Senator ABETZ—I want to clear up. Other than that, there is no mechanism for that to be, is there?

Mr Evans—No. There is no formal mechanism. If we are serious about having consultation, then exemptions from the consultative process, obviously, are necessary in some circumstances, but I think the houses should be formally told when that occurs.

CHAIRMAN—You would be aware that this year the committee has had a number of problems with rules of court. We still have one before us at the moment. The bill expressly provides that rules of court are not legislative instruments and that the regulations may modify the bill in its application to rules of court. There appear to be no limits to this power, except for mandatory consultation processes for rules affecting businesses. What are your views on parliamentary scrutiny of rules of court?

Mr Evans—I think they should be disallowable and subject to the normal tabling and disallowance provisions. As I understand it, the amendments of the relevant acts in schedule 4 continue the provisions whereby those rules of court are to be subject to disallowance. I think that should be the case.

I have drawn attention to what appears to me to be a bug in the schedule—I am not sure whether it is or not or whether I am missing something—that is, the point about rules of court under the Judiciary Act, which do not seem to be mentioned. I am not sure whether that is an oversight or whether there is some explanation of that. The committee can seek an explanation to that, no doubt. As a principle, I think rules of court should be subject to disallowance. In relation to the regulation making power that you mentioned earlier, those regulations would themselves be subject to disallowance, so I did not think that was objectionable.

CHAIRMAN—Mr Evans, you mentioned a few matters in your outlining statement. I was wondering whether you had a chance to look at any of the other submissions and, if you have, are there any matters in those that you would like to raise with the committee?

Mr Evans—As I said, there were some technical points in some of the submissions which appear earliest in your folder which need to be looked at. The submission from Capital Monitor signed by Mr Richard Griffiths refers to a point about section 49(2)(b) and says:

> . . . it appears that, for the period from the making of the second instrument until its disallowance, both instruments will be effective.

This is in relation to an instrument which repeals another instrument. I am not sure that is right. I do not totally follow that, and I am not sure that it is correct. But the committee would need to look at that and satisfy itself that there is not some difficulty there.

This submission also raises a point about the integrity of the register and the possibility of tampering with the register. The first point that occurs to me is that I suppose it is possible for falsification to take place—documents falsified and dates changed—under the existing system. I am not sure whether there is any solution to this problem. The only thing that occurs to me is to set up some system for independent auditing of the register. Some independent person would have the ability to audit the register to see that there is nothing wrong with it. Apart from that, I am not sure how you would solve this problem. I suppose, basically, you have to trust the principal legislative counsel to perform his or her duties in accordance with the statute. As I say, there is a potential problem with the existing system anyway.

The submission of Mr John McKenzie raises a number of interesting technical points which I think the committee will have to look at closely. Under the heading 'Disallowable instruments' on page 1, there is a point that an instrument might be caught by paragraph 4(2)(d), but if it is repealed and remade the remade instrument may not be caught by the definition of 'legislative instrument' in clause 4, which is a very interesting point. I am not

sure whether there are any instruments that would fall into that category, but it is something that would be worth ascertaining anyway.

On page 2 of that submission there is a very interesting discussion about proclamations which bring an act into effect. I presume that those sorts of proclamations are in fact disallowable, going on the bill. I cannot imagine a circumstance in which a house of the parliament would disallow a proclamation which brought an act into operation, but there may be a very technical legal problem there as to what the effect of such a disallowance motion would be.

I would think that if the commencement date had not passed then the act would not commence on that day, but if the commencement date had passed then the proclamation would be spent and disallowing it would have no effect. I would think that the so-called Macklin provision would operate in any case so that if a proclamation were disallowed then the act would automatically come into effect at the specified time anyway. These are very interesting technical questions which the committee should have a look at.

On page four of that submission there is a very interesting point about prejudicial retrospectivity of a period of a few hours. From my reading of it, I believe that is theoretically possible. I am not sure whether there are any circumstances in which it would have any great consequences. Again, I think it is a matter that the committee should have a close look at to see whether it requires fixing up by means of some amendment. Those were the points that particularly struck me when reading the other submissions.

CHAIRMAN—The matter relating to proclamation is quite interesting. I think what you said is probably correct in that the proclamation would have been spent and the act would have commenced. I think we had one case very like that some years ago in relation to the Australia Card, but the commencing date was not by proclamation, it was by regulation. It seems to me that even if that regulation had been disallowed the commencing date would have been set and it would have gone anyway.

Mr Evans—That is a very fine question, but that is probably right.

CHAIRMAN—The statement at the time was that the commencing date should have been by proclamation rather than by regulation. I am not sure whether there would have been much difference. I thank you for appearing today. It may be that after we have had heard further evidence we might like some further evidence from you. If that is the case we will let you know.

Davies, Ms Amanda Margaret, Counsel, Family and Administrative Law Branch, Attorney-General's Department, Robert Garran Offices, Barton, Australian Capital Territory,

Mackay, Mr Roger Macleod, Acting Senior Legislative Counsel, Attorney-General's Department, Robert Garran Offices, Barton, Australian Capital Territory,

Morgan, Mr Richard John, Senior Government Counsel, Family and Administrative Law Branch, Civil Law Division, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory, and

Wainwright, Mr Jeremy Winton, Acting Principal Legislative Counsel, Office of Legislative Drafting, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory.

CHAIRMAN—I welcome representatives from the Attorney-General's Department. Before proceeding with any questions the committee might have, I wonder whether you have any opening statements you wish to make.

Mr Morgan—Thank you. This bill sets out to implement most of the recommendations in the ARC report *Rule making by Commonwealth agencies*. It does so in a way which seeks to improve upon existing mechanisms for issues such as parliamentary scrutiny. It does so in a way which shortens time frames in which parliament can examine delegated legislative instruments. It does so in a way which ensures that people are not hijacked in the future by legislative instruments which affect them and which are not accessible to the public.

To do this it establishes a register. It is an image based electronic register and all new instruments to be enforceable after 1 January next year are to appear on that register before they become enforceable. For existing instruments it makes provision for a timetable to enable back capturing of instruments. That timetable is short enough to ensure that matters that are likely to affect the public are on the register quickly and for long enough to enable departments to hunt their records and get the documents for registration.

At the present time there is no doubt there is a large number of instruments of a legislative character made under delegated authority which are unbeknown to the public and even to the parliament. We do not know the names of all those instruments. We do know from very extensive discussions we have had with government departments and agencies that some of them have never been gazetted. Some of them have been in the bottom drawer since the day they were made and they are potential time bombs waiting to be used if somebody steps outside the reach of them. We see this bill as a marked improvement on delegated legislative instruments and access to them.

Senator Colston, in your capacity as the chairman of the scrutiny of bills committee, in *Alert Digest No. 12 1994* you drew attention to a number of concerns that committee had with the bill. I have delivered to the secretary of this committee a copy of a letter of today's date that the Attorney-General has written to you in your capacity as chairman of that other committee. It deals with the issues that were raised by the scrutiny of bills committee. When you have had a chance to read it, perhaps over the lunch break, I will assist if you wish to ask any questions about it.

CHAIRMAN—I am happy to advise that as of Monday I will be relieved of that capacity. At this stage do you have any comments to make about any of the other submissions that have been made to the committee? By that I refer to matters that you think are either not correct or are of sufficient import that we should have a look at them more carefully.

Mr Morgan—There were a number of matters that we ought to perhaps pick up on. I go to Mr Evans's submission and to some of the comments he made. I also go to the scrutiny of bills committee because it raised the same issue. That issue is the very vexed question at the very start about whether or not clause 7, which provides for the conclusive certificate of the Attorney-General, is judicial in character.

We have formed the view in our own division, and we have then gone to the Chief General Counsel who has confirmed that view, that clause 7 is not judicial in character. Basically, what clause 7 is designed to do is to put, as Mr Evans quite eloquently did a few moments ago, a proper regime into determining whether or not an instrument was legislative and therefore needed to go onto the register.

This could have been left to individual ministers, and we think there would have been a wide variation in the way in which they came to their conclusions about that. By referring it to the Attorney, that means there will be a consistency of approach adopted in relation to the determination of those very few—we stress that—instruments. It will be really difficult or perhaps difficult to see whether they are truly legislative or truly administrative.

We do not believe that there will be many of those instruments but, for the sake of consistency, we want to have the Attorney-General, as the law officer, determining whether or not they should be on the register. Mr Evans raised the issue of the Freedom of Information Act and conclusive certificates. There are provisions, where the Attorney has given a conclusive certificate, which indicate that access to documents to which the certificate relate is not available.

Similarly, there is a provision in the Administrative Appeals Tribunal Act which allows the Attorney-General to give a conclusive certificate. That is in there so that certain material does not have to be disclosed to other than the members of the tribunal but not publicly made available, as I recollect. There are reasons for it which are set out in the legislation. I do not have the legislation with

me so I cannot expand any further. We believe that clause 7 does provide a good framework to ensure that where instruments really are legislative they get on the register, and where they are not there is a definitive statement that they do not have to be on it.

Senator ABETZ—It seems to me that the term you used 'where they really are legislative' is going to be a judgment made by the Attorney, is it not? You are going to leave it to one person to make that determination. Although I am a parliamentarian and one day we might in fact be in government, I could foresee the possibility of the other side of politics as well abusing this sort of provision if there is a difficult political situation, if there is the convenience. I am not saying that this current Attorney would necessarily do it, but I think there would be the temptation for all sides of politics once in power to abuse a provision like that. You say, 'Where it really is legislative the Attorney can sign,' but who is to determine that? Surely the judiciary ought to be determining that.

Mr Morgan—The Attorney is the first law officer. Therefore, he gets certain special powers under the Law Officers Act in relation to the parliament and to the executive. The issue here is whether a particular instrument is legislative. In most cases, on the very face of that document, it will be quite apparent to everybody whether it is legislative or not. There may be some documents or some instruments around—and we have not tried to drag any out—which, on their face, may appear as if they are legislative but which turn out to be really administrative or executive documents. In that case, the Attorney-General would express a view in a conclusive certificate as to whether it was legislative or not.

Senator ABETZ—Is the Attorney the appropriate person to make such a determination when the Attorney or his or her government is potentially embarrassed by it? Should it not be left to the judiciary to determine? I can hear what you are saying but, with respect, you have not convinced me that—

Mr Morgan—That is my bad explanation.

Senator ABETZ—I can understand that the Attorney-General would want the power, but for good government and division of powers within a democracy I wonder whether that is the most suitable way.

Mr Morgan—If the power given by clause 7 were judicial—that is, there was a determination between litigants or parties—then it would be properly classified as judicial, and it would not be appropriate for the Attorney-General. However, when you look at this mechanism, one minister in a total cabinet is looking at particular pieces of delegated legislation within the whole of the governmental framework, and saying, 'This piece is legislative' or 'This piece is not legislative.'

Senator ABETZ—What if the Attorney-General is wrong?

Mr Morgan—If the Attorney-General is wrong, there is power under the constitution for someone to raise the issue of a prerogative writ to find out whether he is wrong. It is not without remedy, notwithstanding that the AD(JR) Act would not apply.

Senator ABETZ—You indicated that this legislation was a result of the ARC. Did that committee not recommend that this power should be left to the judiciary as opposed to the executive? If that is so, you have not followed that ARC recommendation?

Mr Morgan—We have not followed the ARC for a very specific reason. The ARC did not recommend any definition of legislative instrument. It left it to individual departments and agencies to work out whether or not they were covered by the legislation. We have departed from that because we sought to introduce certainty into the process. We tried to define it in a way which was both all-embracing and clear. Clause 7 was then introduced to cover the odd case where a general administrator could not work it out. You then need the Attorney-General to tell you whether that is the case or not.

Senator ABETZ—That makes for administrative neatness, and I can understand that, but are there not considerations other than administrative neatness and the convenience of departments?

Mr Morgan—I am having some difficulty in comprehending what you mean because if a matter is not judicial the judiciary does not need to be involved.

Senator ABETZ—We are back to the question: 'Who is to make this determination?' You are saying that the Attorney-General, with the stroke of a pen, will say that it is legislative so it is okay or it is not legislative so it falls into another category.

Mr Morgan—Any instrument will fall into one of two categories: legislative or administrative. There will be very few cases where it is not apparent in which camp they fall. The Attorney-General's certificate will determine those odd ones that turn up.

Senator ABETZ—That is the point. The vast majority will slip into one camp or the other quite easily on the face of it so we are talking about only a few over which there may be confusion, ambiguity or whatever. Hopefully there will not be that many. Should those few not be left to be determined by someone other than the Attorney-General?

Mr Morgan—I do not understand how we can produce another mechanism for determining that. Because an issue is not judicial, you cannot go and get a judicial determination on it. The only other possible alternative would be to have the parliament determine the matter, but it has already said, 'You may exercise a certain power to give a framework for detail about a particular issue.'

Luncheon adjournment

CHAIRMAN—I call the committee to order. Mr Morgan, could you continue with what you were outlining before in relation to some other submissions?

Mr Morgan—I will make one final point about clause 7. The process in clause 7 is dealing with a prospective determination, bearing in mind the fact that if an instrument is not registered it is unenforceable if it should have been registered. In relation to the suggestion that you might get judicial determination which would lead to considerable delay, one of the effects of that may be that an instrument needs to be enforced but does not get enforced and cannot be enforced for a very long time because you are waiting on a court to determine something.

Senator ABETZ—But that is not uncommon in respect of legislation whether they are tax rulings or—

CHAIRMAN—Perhaps we can come back to that when Mr Morgan has finished.

Mr Morgan—No, that is not uncommon. One issue that Mr Evans picked up on this morning was the submission from Capital Monitors about paragraph 49(2)(b). I agree entirely with what was said this morning; it is not the problem that Capital Monitors said it was. That is the provision which deals with the disallowance and decision to have effect.

Some mention was made this morning—and you, Senator, referred to it in the Australia card instance and the regulations—about proclamations being disallowable and being subject to the disallowance procedures. We have gone to the Attorney-General and to the government with some further amendments. One of those is, in fact, to clarify definitively that proclamation documents on commencement of legislation will not be subject to disallowance. We will take that outside the scope of the disallowance provisions. They will still have to be tabled and they will still be in the register, but they will not be disallowable.

I was talking earlier about some of the departures from the ARC. I mentioned that the definition of a legislative instrument was one departure. There are two other major departures from it, both of which are tied up with resource issues in a sense. They are: the scope of the consultation process and the back capturing recommendations of the ARC. On consultation, the ARC recommended that all legislative instruments go through a consultation process which would have as a minimum the requirements which are set out in this bill. But it recognised that some other specific legislation—for example, the parks and wildlife act—have their own specific provisions for consultation mechanisms; therefore, it would not want to disturb those.

The difficulty government had with the recommendation when we went to other departments and agencies was that the consultation process is a very resource intensive exercise. There was resistance to it on the basis of the resource burden that was going to be brought about by using it. The government has decided that it will confine its consultation process to those instruments which

directly affect business. It did so on the basis that this legislation is to be evaluated after three years by the Administrative Review Council and the Department of Finance. That will enable us to work out in a better and clearer way the likely resource implications of the consultation process now involved and the proposals for extension of no consultation process to all instruments in the future. In other words, we have not gone away from all-embracing consultation; we have limited it at the moment because of concerns in the bureaucracy and of government ministers that the resource cost is too great.

Similarly, the ARC recommended a scheme of sunsetting all legislation. New instruments were to be sunsetted after 10 years, and there was to be a time span for dealing with existing instruments, such as the provisions in clause 37. Sunsetting has been used in some areas and jurisdictions in the past. Because it was introduced in Victoria a few years ago, the ARC thought it would be a good idea to have sunsetting in the regime that it was proposing. The one difficulty with sunsetting is that nobody has ever tested the efficiency and effectiveness of it. Sunsetting legislation is a very resource intensive exercise.

What the government has decided to do in lieu of that is to back-capture—that is, make certain that at least those instruments which do affect the general public are on the register and are accessible to the public. Whether they are still relevant and whether or not you need to modify them are issues that can be looked at after they are registered. We are providing for that to occur because in the Office of Legislative Drafting we are establishing a revision unit which will look at all instruments that are registered to see whether or not they are still appropriate and whether or not some changes need to be made. When they see a need for change, they will be contacting the relevant department or agency and arranging for discussions about the changes that might occur.

Because of this, we think we have virtually put in place the back-capturing. But because of the evaluation in three years time, we can give some further consideration to the sunsetting procedures that the ARC recommended. At that time, a very specific term of reference to the ARC will be to examine the suitability and effectiveness of sunsetting provisions to see whether we should be taking that course of action.

In Mr Evans's comments this morning, he raised a concern—and I am sorry to jump from clause to clause—about clauses 17 and 19. They are the provisions that provide for certificates and explanations about consultation. He said that they should be made available to the parliament. In fact, clause 32 specifically provides that at the time of lodging a legislative instrument, or very soon thereafter, an explanatory statement is to be tabled in parliament. That explanatory statement is to set out a wide range of matters which are contained in clause 32(2). Clause 32(2)(a)(ii) refers to 'a statement of the decision made under section 17', which is a statement about the extent of consultation. Clause 32(2)(a)(vi) states:

> . . . consultation was not required under Part 3 because the rule-maker was satisfied that paragraph 19(1)(a)—

Clause 32(2)(a)(vii) says:

> . . . consultation was not required under Part 3 because the Attorney-General had so certified under paragraph 19(1)(b)—

So those documents will be tabled in the parliament either at the time a legislative instrument is tabled or very soon thereafter.

If the documents are produced to our department before our department brings the instrument up for tabling in the six sitting days, then they will be tabled at that time. If not, it will be the responsibility of the department or agency who made the instrument to produce that to the parliament. If they fail to produce it in time for us to do it, there is another requirement on them: they have to give you a further statement which gives the reasons why they did not have it up there. So, all in all, I think you should get them quickly and in detail.

One other matter was raised by the submission of Mr McKenzie: the issue of the commencement of the register. On page 4 of his submission, he said:

> 22. The Bill contains no provisions saying how the registration of an instrument is to be effected.

I think he has just overlooked clause 3(2)(b), which says that, unless the contrary intention appears:

> a reference to a document being registered, or entered on the Register, is a reference to the recording of an image of that document as part of the Register;

Using a word processing facility in your own office, you can key in what you like. If you want to send it to somebody, when you press a button to send or if you press the button to print, you get what is there. What is to be set up under the register is very similar. The instrument will come in, it will be sent through a scanner and copies or images of the instrument will be obtained. They will be checked against the original document that we work from. When we are satisfied that the two align, someone will press the button, a number or an identifier will be put on the top of the instrument and it will then be in the register. Most of these things will go through at a very quick rate. If you had a migration regs document which came to a couple of hundred pages, it might take a couple of minutes to get it all in there. But there will be an imprint on the document as to when it was actually registered. That is the process by which it will be registered.

I do not particularly want to raise any other issues at this stage. My colleagues will also answer questions put by the committee if they have a greater knowledge than I of the information being sought.

CHAIRMAN—One of the submissions made to us indicated that the person who wrote the submission thought that there might be difficulties with accessibility by practitioners to instruments that go on the register. He suggested that they might have to be obtained electronically and that some practitioners might not have the facilities necessary to be able to do this. Could you outline to the committee how people will have access to instruments once this new procedure comes about?

Mr Wainwright—It is probably best that I answer that question. The principal outlet envisaged for the material is, in fact, the traditional outlet presently used; namely, the AGPS bookshops. The terminals that are contemplated but not specifically provided for in the bill will be in AGPS sales points. The individual instruments will certainly be accessible on screen there. But my expectation is that customers will do as they ordinarily do and will want to buy something to take away.

The image will be accessible in each of those outlets effectively on a same day, same hour basis from registration and demand printing of them will take place in the various outlets. If a particular instrument is expected to be a high demand one—say, important amendments of bankruptcy law or something like that—the AGPS staff will get a print from the system as soon as it is available and make further copies on the spot in their various outlets. This would also be a means of servicing subscription customers who want everything.

Something of very low demand—there will be hundreds of those—classically those that, in the past, have been bottom draw instruments anyway, will generate, presumably, a very small demand. It may well be that the first copy run off the printer in the office will be the only one ever handled in that particular outlet. The aim is essentially that the material will be available for viewing on screen but dumped to a paper format in that manner.

Likewise, reprinted versions of consolidated texts would continue to be available in the bookshops. Of course, in the case of the migration regulations type of exercise just mentioned, which, I might say, ran to 700 pages and not a couple of hundred pages, the procedure followed would, I expect, be the procedure that was followed in that precise case. The rule maker made the instrument with a prospective commencement date some six or eight weeks in advance so that traditionally printed copies were well and truly available throughout the country and, in that case, throughout the world for the immigration posts. The prospect that the capital monitor has put up of queues of anxious practitioners waiting around the refreshment tent to get a copy of the migration regulations would not be an issue.

Mr Morgan—I would like to add to that a little more. Some consideration is being given

within our own department to having the Australian Government Solicitor Office in each state and territory set up so that people can access the register through those particular outlets. If that occurred, at least at this stage any such print that was taken from the register would not be an authoritative print if you wanted to use it for purposes of legal proceedings. Otherwise it would be the same as you would get if you went to the AGPS, which will have the authoritative print. Further to that, our department is expending significant funds in upgrading and developing its scale system which is available on line, and a lot of lawyers use the scale system. The register will be able to be accessed through that scale system and, as a consequence, there will be significant access to the legal profession.

CHAIRMAN—So if you live outside of the metropolitan area—

Mr Morgan—You will still be able to access it.

CHAIRMAN—Whether you be a legal practitioner who has access or you go to a legal practitioner who has access?

Ms Davies—The scale system will also be made available to local libraries and schools who have the equipment to be able to access it, but it will be made available free of charge to those as well.

CHAIRMAN—When the legal practitioner has access, is there a charge for that access?

Mr Morgan—Yes, there will be a charge for any demand print that is taken. I do not know exactly what the amount will be but it will be fairly small. I would think it would be no greater than if you went to the AGPS and bought the regulation or the instrument across the counter.

CHAIRMAN—What concerns me, and I am sure will concern my colleagues, is that in all of our states there are many people outside the metropolitan area or outside areas where there is an office of the AGPS. We just want to make sure that that does not pose any difficulties for them.

Mr Morgan—They should get that through the scale system and through libraries.

Ms Davies—At the moment people who are outside those capital cities or outside the reach of an AGPS office receive hard print copies by things like subscription services or by directly requesting copies of particular instruments or regulations from AGPS. AGPS has a community service obligation to continue to provide copies of the law. Although the precise details of exactly what subscription services they will offer have not been finally determined because, obviously, at the moment they offer statutory rules, you will now be able to, if you are outside those cities, ring or write to the AGPS offices and obtain a print of any legislative instrument, which you could not possibly do at the moment.

Senator O'CHEE—I return to the vexed issue of clause 7 about conclusive certificates. My understanding is that if a conclusive certificate is issued then the instrument in question is not a legislative instrument for the purposes of the bill; is that correct?

Mr Morgan—That is what clause 7 allows.

Senator O'CHEE—If it is not a legislative instrument, then all of the provisions in relation to parliamentary scrutiny do not apply because they only apply to instruments which are legislative instruments. So the effect is that, in addition to the question of whether it is a judicial power or not, there is really another issue at stake here; that is, whether it is repugnant to the rights of individuals and to the obligations of the parliament and the rights of the parliament that a minister can, by an instrument in writing signed by himself, exclude instruments from the process of parliamentary scrutiny. Surely that too is an issue; is it not?

Mr Morgan—If a bill is disallowable by the terms of its enabling legislation, even if it is not a legislative instrument, it will still go on the register. It will still be subject to parliamentary scrutiny. The fact that we have by the bill repealed schedule 4, part XI of the Acts Interpretation Act, in itself does not mean that a non-legislative instrument will not be still subject to parliamentary scrutiny and disallowance, so long as the enabling legislation requires it to be disallowed or requires that procedure to be operative. If it does, then the provisions of this bill will apply to that instrument in so far as disallowance mechanisms are concerned.

Senator O'CHEE—That is a moot point—that is not set out in the bill. Provisions in proposed section 46B refer to 'disallowable non-legislative instruments' but are a little vague, to say the least. However, clause 44 of the bill on page 21 states:

> The purpose of this Part is to facilitate the scrutiny by the Parliament of registered legislative instruments and to set out the circumstances and manner in which such instruments may be disallowed, as well as the consequences of disallowance.

It refers solely to legislative instruments. If an instrument is not a legislative instrument by virtue of the operation of a conclusive certificate issued pursuant to clause 7, the provisions of part 5 of the bill do not apply.

Mr Morgan—They do not apply if you go back to 46B on page 41. That should bring into the disallowable provisions in part 5 of the bill instruments which should be, by their enabling legislation, disallowable or examinable by the parliament, and it applies the mechanisms of part 5 to those instruments notwithstanding that they are non-legislative instruments.

We put the Acts Interpretation Act provisions in this bill because this is where we see the logical place to have them. Where a document is not of a legislative character then we have made provision for the scrutiny part of the bill to continue to apply in its new form rather than the Acts Interpretation Act, so we only have one system for scrutiny rather than two.

Senator O'CHEE—If you follow that then you have a contradiction between proposed section 46B subsection (3), specifically, and the definition of a legislative instrument contained in clause 4, because in proposed section 46B subsection (3) you refer to the instrument in question resulting in the rights of a person being adversely affected or the imposition of liabilities. Yet, if as you say, 46B is there as a catch-all and would cover instruments which are deemed to be non-legislative by virtue of clause 7, then it seems that those instruments were not properly issued with a conclusive certificate because the character of the instruments referred to 46B(3) is such that they are clearly legislative instruments and yet they are not non-legislative instruments because the Attorney-General has come to the view that they are non-legislative instruments. It really is an awful contradiction.

You have an instrument which the Attorney-General has deemed to be non-legislative which has all the characteristics of a legislative instrument and therefore should never have been deemed to be a non-legislative instrument in the first place and then being caught up in proposed new section 46B. If the instrument affects the rights of individuals or can impose a liability, then it should never been issued with a conclusive certificate under clause 7. Clause 7 applies if the Attorney-General is—

Mr Morgan—Clause 7, as I said earlier, is not seen as having a significant usage. If a document is quite clearly non-legislative in character, then that is when the Attorney-General will give it a certificate under clause 7.

Senator O'CHEE—There are two issues here now. The first is whether or not it will be used heavily or otherwise. That is by the by. The question is solely about the appropriateness of the provision and whether it is a good and proper provision to put in the bill. That does not go to how frequently it may or may not be used. For good examination of this I think we should confine ourselves to the second issue.

The issue at hand is this: under clause 7, the Attorney-General should only be issuing those conclusive certificates if he is of the view that the instrument is not legislative. If the instrument is not legislative, then it cannot have the characteristics referred to in proposed new subsection 46B(3) because those characteristics would make the instrument a legislative instrument by virtue of clause 4.

Mr Morgan—I agree with you, senator, that proposed new subsection 46B(3) is certainly framed in a way which brings about the character that you described, that they look as though they are legislative in character. Maybe we have proposed new subsection 46B(3) wrong and we need to have a—

Ms Davies—Proposed new section 46B only applies to instruments where the enabling provision—a provision that confers power to make the instruments—expressly provides that such instruments are disallowable instruments for the purposes of this section. Once this legislation is in operation proposed new section 46B will apply to instruments where parliament, in looking at new legislation or legislation providing for new instruments, considers that, although something is not a legislative instrument or for some other reason should not be within the legislative instruments regime, it wants to preserve the scrutiny and therefore applies this section.

Senator O'CHEE—Can you say that again slowly, please? I missed the first part and I want to make sure that I understand you correctly.

Ms Davies—The proposed new section 46B in the Acts Interpretation Act applies under paragraph 46(1)(b) only where the enabling provision provides that the instruments are disallowable instruments for the purposes of this section. This will apply, in the case of new legislation or legislation providing for new instruments after the legislative instruments legislation is in place, where the parliament decides that although an instrument is not legislative or for some other reason excludes a particular instrument from the legislative instruments regime but wishes to scrutinise the instrument. This gives you a mechanism to do that.

Senator O'CHEE—There is the problem. You can have all sorts of instruments which clearly have a character which is legislative but unless there is a special provision put in the bill bringing them under proposed new section 46B of the Acts Interpretation Act then they will not be caught. If a future bill does not make the delegated instruments such that they are caught under paragraph 46(1)(b) then all of these wonderful provisions do not apply at all. We have to opt into parliamentary scrutiny of a subordinate instrument.

Ms Davies—Before you get to the point of needing to opt in, it has to be unclear whether the instrument is or is not a legislative instrument. You have the option with every instrument that is not a regulation or one of the expressly covered types of stating whether it is or is not a legislative instrument.

Senator O'CHEE—There is a problem. You are telling me that 46B is the catch-all that permits the disallowance by parliament of instruments which are deemed by the Attorney-General to be non-legislative. The problem is that you have a provision that the Attorney-General can deem the instrument to be non-legislative, but unless the original act of parliament chooses to opt into the provisions then this will not apply anyway.

When you advanced 46B as the catch-all which provided parliamentary scrutiny and disallowance of non-legislative subordinate instruments by virtue of section 7 of the bill, you were not quite correct because it is not a catch-all. Parliament has to opt in before it can become a catch-all. That is the difficulty. Section 7 as it stands, even in conjunction with 46B, does not give parliament the capacity to disallow an instrument.

Mr Wainwright—The case that you are positing, which looks as though it is something that is falling between the floor boards, is possibly dealt with in what others might think of as a rather heavy-handed way. I draw your attention to proposed new paragraph (d) of subclause 4(2) of the bill. That paragraph brings within the definition of legislative instrument any instrument at all that is required under present law to be a proposed new section 46A disallowable instrument—that is, even one that is quite demonstrably not legislative. Any disallowable instrument made under an existing power is willy-nilly made an instrument under this act. Proposed new section 46B is only addressing the non-legislative instrument that is declared by a new act to be disallowable.

Senator O'CHEE—The problem is that you are confusing instruments made under existing acts of parliament with instruments that may be made under future acts of parliament. There is a problem in that argument as well. Even if the argument were to stand, you still fail if the Attorney-General forms a view that it is not a legislative instrument and issues a conclusive—

Mr Wainwright—The Attorney-General does not have a carte blanche power to certify instruments out of the act. If an instrument is within the terms of proposed new paragraph (d)—that is, it is stated by an act to be disallowable—the Attorney-General has no room to manoeuvre. Section 7 only operates where there is doubt which arises from the question of whether the instrument affects the world at large or is directed at an individual case such as an instrument of appointment.

Senator O'CHEE—There is a bit of a problem because you are confusing an instrument which is disallowable with an instrument which is legislative. They are two distinct things under the bill.

Mr Wainwright—What I am saying is that proposed new paragraph (d) in 4(2) actually arrogates to itself to make legislative that which is not legislative. If it is provided for under an existing power as a disallowable instrument, regardless of its actual nature, then we are scooping it up and putting it in with the legislative instruments under 4(2), come what may.

Senator O'CHEE—Yes, but if the Attorney-General issues the conclusive certificate, the only way, according to Mr Morgan, that can be examined is by taking out a prerogative writ which means rushing off to the High Court, which is a fairly expensive process.

Mr Wainwright—Certainly, I agree. If the Attorney-General presumed to issue a certificate in that situation, that would be it.

Senator O'CHEE—That is what we are talking about. We are talking about cases where he has issued the certificate.

Mr Wainwright—What I am suggesting is that he will be advised that the situation has not arisen for him to issue a certificate in that situation. Certainly if a slip was made and someone inadvertently recommended to the Attorney-General that he certify such an instrument that is the remedy. I have to concede that. But I would say that that is not a situation that is going to arise. An instrument that answers this description and is abundantly obviously within the definition would not be one that would be so certified.

Senator O'CHEE—I think that might be a moot point, but others of my colleagues may wish to ask questions.

Prof. Whalan—I was interested in that explanation in relation to acts where the power exists before the commencing day of this act. But that still leaves open Senator O'Chee's problem in relation to new acts unless the Scrutiny of Bills Committee recommends that an enabling provision be put in every bill it sees, does it not?

Mr Wainwright—A disallowance provision?

Prof. Whalan—Yes.

Mr Wainwright—Most certainly.

CHAIRMAN—Does that mean that in future, if the Senate wants to be sure that instruments be disallowable, every bill we face will have to have a provision in it to overcome clause 7?

Mr Wainwright—It means that a bill that has an instrument that is clearly not legislative and you wish to scrutinise the exercise of the power to make such an instrument and the contents of such an instrument, the enabling legislation should contain a provision providing for disallowance.

CHAIRMAN—So that provision would be seen more and more in legislation in future?

Mr Morgan—I do not know whether it would be more and more. There are provisions for disallowance in most acts so whether there would be any greater usage I do not know. Certainly where there is a provision which is not legislative or makes a delegated provision and it is not going to legislative character, then you would expect to see a provision in the enabling legislation for disallowance.

Mr Wainwright—I would suggest that you will not find that it is a provision that is required in a vast number of cases. I would suggest that the vast majority of instruments that are currently categorised as disallowable under clause 46A of the Acts Interpretation Act are indeed legislative in character and will be caught by the bill anyway. The group we are talking about are, as Mr Morgan said, the non-legislative ones that it is thought

should be subject to a measure of control. Sometimes the control that is appropriate is in fact an application of administrative appeals provisions rather than parliamentary scrutiny anyway, but certainly where it was seen by the parliament to be appropriate that parliament scrutinise the exercise of that power, that would be the signal to insist on the inclusion of such a provision in the relevant bill. As I say, I think where that has been done, in the vast majority of cases, the instruments have been demonstrably legislative in character.

Senator LOOSLEY—In order for the parliament to guarantee that capacity for scrutiny, it would be necessary to write the appropriate clause into each and every bill, as the chairman has said.

Mr Wainwright—Just as is the case with the requirement of application 46A to the approval of forms under the Customs Act.

Senator LOOSLEY—Is there a mechanism for reporting on the operation of the bill to the parliament, or would it simply be included in the department's annual report?

Mr Morgan—There is no specific mechanism at present. It would be reported as a matter of course in our annual report. Whether or not some other mechanism is seen as appropriate would be a matter for the parliament, I would have thought. For example, the FOI Act introduced a new regime. There is a requirement for parliamentary reporting by the minister. This has a likeness to the FOI regime, in a sense, and maybe this is an appropriate measure, but we have not provided for it.

Senator LOOSLEY—Given the significance of the change, perhaps a ministerial statement or a separate report to the parliament for the first five years of its operation might be appropriate.

Mr Morgan—That would require amendment to the bill, but that may be an appropriate way.

Senator LOOSLEY—Would there be an objection from the department to a procedure like that being incorporated?

Mr Morgan—As I have a responsibility for the FOI Act and we have just finished the FOI this year's annual report for the minister, I cannot see how we could complain.

Senator LOOSLEY—It might be useful for the committee to take that aboard, then.

Mr Morgan—A lot of the input into those sorts of reports—we make this point in the FOI annual report for this year; we made it last year and the years before—depends upon the cooperation and the gathering of information by other departments and agencies. We cannot always guarantee the accuracy of some of the information, particularly statistical information, that comes from other departments and agencies.

Senator LOOSLEY—So you are writing an early caveat into your report.

Mr Morgan—I am just highlighting that there is a danger. If we said that 354 instruments needed to be brought under this measure, it might have been 473 because the counting was not too good.

Senator LOOSLEY—I understand.

CHAIRMAN—Perhaps we could turn to any other matters.

Senator O'CHEE—I want to return to the explanation that Mr Wainwright gave in relation to instruments made pursuant to future acts of parliament which require a clause saying that they are disallowable instruments. If that clause is not present, are they not only disallowable but also not subject to registration?

Mr Wainwright—I do not quite follow the question.

Senator O'CHEE—You said that all future acts of parliament would require a provision saying that instruments made pursuant to that act were disallowable instruments.

Mr Wainwright—If the instruments themselves were not legislative in character. If they come within the terms of the bill itself, the whole regime of the bill would apply. Take for example an instrument of appointment, where the power is to appoint someone to be the chairman of some commission. I do not think anyone would argue that is a legislative instrument. If the parliament decided that, instead of leaving the appointment to the minister or to the Governor-General, it would like to have a US-style review of these things, then that instrument could be made disallowable.

Senator O'CHEE—I was hoping that you might be able to show me a legislative instrument in definition in clause 4 made pursuant to a future act of parliament which does not have the inclusive provision to which you refer.

Mr Wainwright—It is not in that case. You are then dependent on the earlier paragraphs of subclause 4(2).

Senator O'CHEE—I was hoping you might be able to show me which one.

Mr Wainwright—The principal definition of legislative instrument in subclause 4(1), with its four ingredients, is one:

> (a) that is or was made in the exercise of a power delegated by the parliament;
>
> (b) that determines the law . . .
>
> (c) that has the direct or indirect effect of imposing an obligation, . . . and
>
> (d) that is binding in its application.

That is a general statement of what is a legislative instrument. It is also a statement that, regrettably, catches the odd case that one might argue is not legislative. It is in connection with those that clause 7 covers anyway where, for example, the instrument is one that confers, say, a right directly on a particular case.

Senator O'CHEE—I am not referring to clause 7.

Mr Wainwright—I know you are not.

Senator O'CHEE—You told us that bills will have to have an inclusive provision before the instrument is disallowable.

Mr Wainwright—No. I said that if the instrument for which provision is made in a new act is not legislative within the cannons of clause 4 of the bill, but it is desired that it be made disallowable, then specific provision would be required under proposed section 46B of the Acts Interpretation Act.

Senator O'CHEE—But it will not have to be registered?

Mr Wainwright—It will not have to be registered.

Mr Mackay—What will happen now is that if you want to make something disallowable you have to say so. In fact, a wider range of instruments will not be required to be stated as disallowable because they will be caught by the bill. So you will be required to decide as to whether you want parliamentary scrutiny or not on a smaller number of them.

Senator O'CHEE—Subject always to the fact that the system may decide at some point in time that the intention of the bill notwithstanding is not legislative. It is a real problem that you have a provision of an act of parliament which can be overridden at the discretion of a minister.

CHAIRMAN—Could I just interrupt here. I am afraid I have to go and carry out some duties with the Governor-General of New Zealand. Unfortunately, because she is from New Zealand, she cannot swear me into anything. I will ask Senator O'Chee, as the deputy chairman, to continue the proceedings. I will come back, but I presume we will be finished by the time I am back.

Senator ABETZ—Did you read the National Farmers Federation's submission? Were you given that?

Mr Mackay—Yes, we have.

Senator ABETZ—Do you have any comments to make? There is going to be consultation with business in the event that it affects business but yet the Endangered Species Act was not included. That is something the farmers would say impacts on their businesses. Are you able to comment on that?

Ms Davies—Basically the endangered species legislation already sets up a number of consultative regimes. It has advisory councils. It has a process in place, which has been considered to be the appropriate mechanism to deal with that particular subject and to ensure that the particular considerations in those areas are looked at. There are comparable consultation regimes, or specifically targeted regimes, already in existence designed to make sure that the appropriate interests have been considered, but here we are looking at providing a general mechanism. Obviously there will be cases where a particu-

lar mechanism is more appropriate to the particular legislation.

Senator ABETZ—Are you able to give any other examples of that? The National Farmers Federation raised the question of endangered species legislation. Can you think of any other examples to which that might apply?

Ms Davies—That have not been included?

Senator ABETZ—Yes, because they have a specific consultative provision.

Mr Morgan—There is one that has a very specific consultation provision, yet is still in our schedule 2, which is the consultative. That is the national parks and wildlife legislation, which has some very detailed proposals for consultation on its primary legislation and also on its delegated legislation.

Quite obviously—and I said this straight after lunch—we are not trying to take away from the processes. Where those can operate, they will continue to operate. In those cases where there are no consultative processes involved, we are putting in a minimum standard in so far as it affects business. When the review comes along in three years time we will see whether we should be moving to a minimum standard in respect of all delegated instruments.

There are a number of examples, including some in the primary industry, which have very specific consultative provisions, but I cannot tell you offhand what they are. We are not attempting to override those.

Senator ABETZ—Would it be overriding them or just being complementary?

Mr Morgan—This will be complementary in the sense that if they have more than what is required by the bill, they will follow their own provisions; if they have something that is less than what is in the bill, they should pick this up.

Senator ABETZ—So this is not a one-stop shop, if you like, to determine what legislation falls under the consultative process.

Mr Morgan—Certainly not at the moment. Parliament for a long time has given very serious consideration to what consultative mechanisms ought to be in place in particular issues. For us to say to the parliament, 'Pass another bill which says wipe all those out and put this one in,' I do not think is a very appropriate response.

Senator ABETZ—Would you need to wipe them out?

Mr Morgan—If you were supplanting those mechanisms with this one, it may be that some of them would be at a higher level than what we currently have in this bill. In effect you would be wiping that out, if you were to say that this was a general mechanism. But we are not saying that.

Senator ABETZ—In clause 19 there are eight provisions where submissions may not be required. There will not have to be a submission in relation to those eight categories if the rule-maker is satisfied that, for example, there are international treaties, which is the first one. Why should the fact that an international treaty or an international agreement is the basis of it make any difference?

Mr Morgan—This provision actually says that you do not have to consult. A number of international agreements set up a very specific regime for regulating a matter with which they are dealing with and they have been the subject of a very detailed and concerted negotiation between the governments of various countries which participated in the international forum. They have settled on a particular regime which they think should apply.

To then say to the Australian population, 'This is what we are proposing to put in. We will consult you to see whether or not it is appropriate,' is not appropriate. That is a government decision. There are lots of examples of international arrangements that have been entered into where governments of both persuasions have said, 'This is the way we are going to operate because that is what the international community has decided is the appropriate way to operate.'

Senator ABETZ—But with the growth in this area in relation to our domestic laws, can it not become a fairly large area of legislative power that will be—if you like—quarantined from this process?

Mr Morgan—It depends on the breadth of what you are talking about. If there is a very specific regulatory regime, on one hand it is not appropriate to consult again. If what you are contemplating is perhaps not a very specific regime of detailed regulation but, in fact, a regime of a more general application of principles—for example, a document such as the UN Convention on the Rights of the Child, which has very broad statements of principles that ought to apply in relation to children—that is a different kettle of fish. That is not within the realms of clause 19(1)(a)(i). I think that is more confined to the very detailed regulatory scheme that has been negotiated in the international forum.

Senator ABETZ—Is that just an opinion? The bill says, 'if the rule-maker is satisfied', so it is only the rule-maker who has to be satisfied.

Mr Morgan—It is the rule-maker who needs to be satisfied that it is not appropriate to consult, because of the way in which the scheme is structured. Clause 32 states that when the rule-maker has been satisfied under clause 19(1)(a), the explanatory statement requires the rule-maker to provide a statement as to why he was so satisfied. The parliament can examine whether or not it was appropriate for him to have been so satisfied. If the parliament decides that it was not appropriate, it has powers under this legislation and it has broader powers in the parliament.

Senator ABETZ—Can you guide me on this? If the rule-maker were to say, 'I am satisfied,' and the Senate said, 'We have looked into this. We don't think that was an objective assessment. We don't think you should have been satisfied', where does the Senate go from there? What powers would we have under this legislation to say, 'We are going to unscramble the egg?'

Mr Morgan—I do no know that we are 'unscrambling'. Presumably, if this legislation requires you to table the document, the powers in the Senate are initially of disallowance. Beyond that, as I understand it in the Senate or the House of Representatives, if a particular discretion is exercised by a minister and the parliament thinks it has not been properly exercised, there are mechanisms other than disallowance that parliament has used from time to time to criticise ministers for the way in which they have acted.

Senator ABETZ—You can criticise and you can censure, but life goes on. It is water off a duck's back. I want to know what can be done about it.

Mr Morgan—The only power under this bill is 'disallowance'.

Senator ABETZ—Following that through, if the rule-maker says, 'I am satisfied' and then the Senate says, 'We are not satisfied'—

Mr Morgan—And you were unreasonable.

Senator ABETZ—we can then disallow. Is that what you say?

Mr Morgan—And if you were unreasonable to be so satisfied.

Senator ABETZ—Can we then disallow?

Mr Morgan—The reason for the legislative instrument and the explanatory statement being there is that the document has been tabled and is subject to part 5, which is subject to disallowance. If it were so bad that the Senate was so concerned about it, it could take the step of disallowance if that were the only appropriate step left to it.

Prof. Whalan—Does that apply also to the Attorney-General's certification in writing under clause 19(1)(b)? Is that a disallowable certificate?

Mr Morgan—Again, 32(2)(a)(vii) also makes that subject to inclusion with the explanatory statement. Therefore, the powers that the parliament has in respect of disallowance would be available.

Prof. Whalan—I accept that that explanation goes into the explanatory statement, but you cannot disallow an explanatory statement.

Mr Morgan—You cannot disallow an explanatory statement, no.

Prof. Whalan—But you are telling me that you could disallow. What can you disallow: the certificate by the—

Mr Morgan—No, you cannot disallow the certificate.

Prof. Whalan—That is what I thought.

Mr Morgan—You can only disallow the legislative instrument if you are so dissatisfied

with it that it is the only course left to the Senate or to the House.

Prof. Whalan—Yes.

Ms Davies—As well as disallowing within the initial disallowance period, I think the option is open to you under 48(4) to defer consideration of a disallowance motion to enable the remaking of the instrument, after consultation, in order to achieve the objective specified in the resolution. The objective would be that the consultation procedures be followed or that that process be gone through so that, if you were dissatisfied with a rule-maker's decision that a particular instrument was exempt, you would have a mechanism to allow that process to take place.

Senator ABETZ—I suppose the bottom line is this: I am asking whether, if a rule-maker says that he or she is satisfied but the Senate is of the view that he or she should not have been so satisfied, we can, in effect, disallow that.

Ms Davies—You could disallow the instrument, absolutely.

Mr Morgan—You could disallow the instrument if you thought the instrument was wrong.

Mr Harders—Why is it that in (a) and (b) of clause 32(2) the direction is that the explanatory statement 'should also contain' those items rather than 'must also contain' those items?

Mr Morgan—I think it is only a current drafting style. Looking at 32(1), you must table the explanatory statement. I think it is just a form and style of drafting which says you should include the following, because not every one of them will be applicable.

Senator ABETZ—Could we put 'must also contain if relevant'?

Mr Harders—It already has the notion 'if relevant', anyway. So it would not matter if 'must' were substituted, would it?

Mr Morgan—No, I do not think it makes any difference. As I said, I think it is just a style of drafting.

Mr Harders—And it does not matter because under (3) you do not have to do it, anyway.

Mr Wainwright—That is probably the colour of it; the fact that (3) provides the let-out, I think, does colour the choice of language.

Senator ABETZ—Why should it be the case in subclause (3) that, if the rule-maker fails to provide the explanatory statement, it will not affect the validity or enforceability of the instrument?

Mr Wainwright—As I say, I think the fact that the let-out provision has been included has coloured the choice of language.

Senator ABETZ—I understand that.

Mr Wainwright—I can make no stronger case than that for using the word 'should'.

Senator ABETZ—Why should subclause (3) be there if a rule-maker wants to bypass a process because he or she is satisfied of certain things, such as that there has been sufficient public consultation? Surely the onus is then on that rule maker to provide a statement indicating that he or she has come to this conclusion.

Mr Morgan—I think subclause (3) is there because it is seen as a procedural or practical issue about making the explanatory statement and does not actually go to the content of the legislative instrument itself. The fact that a rule maker has failed to produce the explanatory statement at the time or subsequent to the tabling of the legislative instrument does not in itself do it and the parliament still has the powers available to—

Senator ABETZ—And the Senate would determine whether it was a reasonable exercise?

Mr Morgan—That is right. And it would no doubt call for the documentation that this explanatory statement is saying should be tabled in the event that it does not turn up or had not turned up with the document.

Senator ABETZ—I understand that and accept that.

Mr Morgan—I think there is another place in the bill which has the same sort of formula which says that failure to do this does not affect the validity.

Prof. Whalan—Clause 20.

Mr Morgan—Yes. It is the same sort of thing. It is a practical thing. It does not do it automatically, but there may be some way in which the Senate or the House can deal with it.

ACTING CHAIRMAN (Senator O'Chee)—While we are on the subject of tabling things, would you have any problems with a requirement to table material incorporated by reference in legislative instruments in electronic form if necessary?

Mr Morgan—We do. I was interested to hear Mr Evans speaking on this this morning. The reason we incorporate things in the way in which we do is to enable inspection. If there were a set of bookshelves in the centre of the back wall behind me, it would take up roughly half of that area and that would contain the service manual to a Boeing 747. The service manual is provided to operators and it is also provided to the registering authority. The information in it is subject to copyright. It is hard copy, so if you make a copy of that in electronic form you are breaching copyright provisions. That is one example of why electronic provision of information or incorporation is not an appropriate way.

ACTING CHAIRMAN—I do not understand that because if a document is tabled in parliament copies can be requested and copyright provisions do not apply.

Mr Morgan—The way in which this bill is structured is for either document copies to be provided to the parliament or there is provision for inspection. But that means that in the case of the 747 manuals it is possible that they would load a truck and bring them in here for inspection. But it is more likely that someone from the committee would go and inspect them on the premises because they are so difficult to manoeuvre around.

ACTING CHAIRMAN—In that case, would you be happy with the tabling of that material in electronic form?

Mr Morgan—I do not think we are.

Senator ZAKHAROV—What would be the cost?

Mr Morgan—The cost is tremendous as well.

Senator ZAKHAROV—It would be enormous, would it not?

Mr Mackay—They may not be in electronic form. They may only be in hard copy form in this country. The manuals Mr Morgan is talking about are hard copy manuals that come from the US.

Prof. Whalan—I wondered why the recommendations of the ARC in relation to the rules of court were not followed. I say that because on many occasions this committee has had problems with the rules of court, and that happened quite recently. We have a number of queries out on the rules of court.

Mr Morgan—The reason the rules of court system is devised differently, and the rules of court are specifically excluded from the operation of the bill, is that the tenor the bill has brought in in the amendments to the various court acts themselves is on a very clear principle of separation of powers between the judiciary and the executive. One of the things that this bill provides for is the supervision of the drafting of legislative instruments. Judges and courts, of course, are separate and we could not provide the oversighting of that in this particular bill. We offer the services of drafting people, and in some courts those services are utilised by the court in drafting. So we have set up a system within the enabling legislation of the courts which says that the principle in this act will apply to them. Where it does not apply as written, we will make regulations which will depart so as not to break the basic thread of this legislation.

Prof. Whalan—That is true, but the modifications that could be made by regulations could, theoretically, undo those principles, could they not?

Mr Morgan—I do not think so. Certainly that is not the way the chief justices in each of the courts see it.

Prof. Whalan—So you are saying that it is legally impossible?

Mr Morgan—They have all agreed that the principles should apply to them. What they had a concern about was the possible conflict between the separation of powers doctrine;

therefore, we have gone about it in this way to overcome those concerns.

Prof. Whalan—I asked whether it was legally possible to break that by regulation, rather than what the arrangements and agreements have been.

Mr Wainwright—Subject to disallowance, yes it is.

Mr Morgan—Yes. Whatever the regulations are, they will be legislative instruments that will be on the register.

Prof. Whalan—That is what I wanted to be sure of. So any regulations are subject to the ordinary rules about disallowance?

Mr Morgan—Yes.

Prof. Whalan—So if there were major modifications of the principles that apply to every other sort of legislative instrument, then that would have to be in a regulation and would be subject to the normal disallowance process?

Mr Morgan—It would be on the register from the date of commencement in 1995 or, if they were made in 1994, they would be on there before the relevant dating in clause 32 of the bill. But regulation 4(2)(a) says that if an instrument is said to be a regulation then this act applies to it.

Senator ABETZ—Wendy Brazil made a submission. Have you seen that submission?

Mr Morgan—We have received all of the submissions, yes.

Senator ABETZ—Do you have any comments to make about her comments, in particular, the concluding page which, surprisingly, is headed 'Conclusion'—'To conclude, I include a summary of matters which I find inadequately dealt with by this legislation or as still of some concern'. Then she raises three matters. Do you have any response to that and 'Whilst we can cogitate for a while about definitions, the areas of access to public and abrogation of the rights of parliament'?

Ms Davies—In relation to the first one, definitions, for example, clause 4(2)(d)(i) deals with instruments where the enabling provision was already in existence before this legislation. Looking at the time frames within which each different cross-reference is placed, although it refers to legislation which will be repealed, it refers to a past time frame when it was in existence.

Mr Wainwright—The reference in the section is clearly to section 46A of the Acts Interpretation Act as in force at any time before the commencement day. It is quite explicit.

Ms Davies—In terms of access, there seems to be a misapprehension that the register will physically be inspected within a department. I think that was dealt with earlier in terms of access through AGPS bookshops and those sorts of things. The location of a computer will be within a department.

Mr Mackay—There will also be an index that will come out more frequently than the normal gazettes which will be available widely in hard copy. So that to find out whether something is on the register, you can go to the index.

Senator ABETZ—So public access will not be diminished in any way compared with what it is now.

Mr Morgan—It certainly will not be diminished, and we think it will be enhanced from what it is now.

Senator ABETZ—What about the last one? We parliamentarians are always concerned if our rights are abrogated. Do the officers have any comments to make on that last one?

Ms Davies—The point of having the sort of definition that this bill has with clause 4(1), which picks up instruments by their nature, is intended to overcome the existing state of affairs where instruments are only disallowable if they are named regulations or if parliament expressly provides that they be disallowable. Under this legislation, if they have the characteristics of a legislative instrument then they will automatically be subject to this process.

Mr Morgan—Whether parliament wishes to make something delegated as against primary legislation is a matter for the parliament.

ACTING CHAIRMAN—If there are no further questions we will discharge the officers and ask Mr Evans whether he wants to say anything in conclusion.

Evans, Mr Harry, Clerk of the Senate, Department of the Senate, Parliament House, Canberra, Australian Capital Territory.

Mr Evans—There are a few points that I could make which may be useful to the committee. The discussion has convinced me that clause 7 ought not to be there. I suppose the bottom line is that if it is going to be used so infrequently why have it? It does not particularly matter whether it amounts to the exercise of a judicial power or not. That is a question about which lawyers can get very tangled up and have great disagreements, whether a particular function is a judicial function. The point is that the Attorney-General would be saying how the provisions of this act apply in a particular case.

I go back to the point that practically every act of parliament that you pass raises issues which might be doubtful. You can settle all the doubts by allowing the Attorney-General to issue a conclusive certificate to settle the matter. It would be a very bad precedent to set. You pass acts of parliament so that they will apply according to their tenor. You do not solve problems of interpretation by allowing the Attorney-General to issue a conclusive certificate.

The point that you were making, Mr Acting Chairman, is quite correct. The issue of a certificate by the Attorney-General will in some cases mean that instruments which would otherwise have been disallowable will not be disallowable because when the parliament passed the act under which they were made it was assumed that they were legislative instruments. The effect of the Attorney-General's certificate will mean that they are not legislative instruments and they will not be subject to disallowance.

As I think committee members pointed out in the discussion, the effect of that could well be that when passing an act which contains provision for the making of some sort of instrument the Senate will be tempted to say, 'This would clearly be a legislative instrument, but we do not trust the Attorney-General not to say that it is not, so we will bung in a disallowance provision.' People will be moving disallowance provisions to go into bills as a safeguard. So all that discussion has convinced me anyway—whether it convinces the committee is another matter—that clause 7 should not really be there.

The point about decisions and certificates under clauses 17 and 19 being included in the explanatory memo I do not think really answers the point that I was raising. The explanatory memo may come along some time after the instrument. As Mr Geoff Harders pointed out, it may not come along at all, as a result of which there may be a delay in the houses formally knowing that the powers under clauses 17 and 19 have been exercised or perhaps even not knowing at all. I still think that if those powers are exercised under those clauses it should be made known to the houses for certain at the time when the legislative instrument is tabled. It should not wait for the explanatory memo. The explanatory memo could be delayed or perhaps not produced at all.

I would not like Senator Loosley's suggestion of a report on the operation of the act to be taken up as a means of solving all these problems. Once you pass this bill as an act and problems are detected with it, it will then take the agreement of both houses to solve those problems. It is far better to solve any problems now, if you possibly can, while you have the bill before you.

In the comments I made I think I anticipated the difficulties which were mentioned about tabling incorporated documents. Because of the nature of the documents it may not be possible to table them. As has been pointed out, the copyright consideration would not, in itself, be a problem because parliamentary privilege would overcome that, but the difficulty of producing these documents in a form that could be tabled might well make the provision for inspection the only way of reasonably dealing with the issue. Those were the things that occurred to me as the discussion progressed. I hope that is of some use to the committee.

ACTING CHAIRMAN—I thank Mr Evans for appearing. I thank all those who have made submissions and appeared before the committee and I also thank *Hansard*.

Committee adjourned at 3.06 p.m.