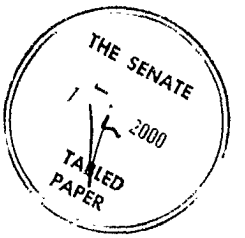
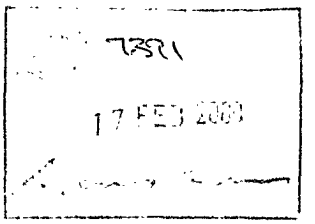
The Parliament of the Commonwealth of Australia





Senate Standing Committee on Regulations and Ordinances

108th Report

Annual Report 1998-99

February 2000

Contents

Preface

Current Membership of the Committee

The current members of the Committee were appointed in August 1999 and are as follows:

Senator Helen Coonan, New South Wales, Chair

Senator Andrew Bartlett, Queensland

Senator Joseph Ludwig, Queensland

Senator Jan McLucas, Queensland

Senator Brett Mason, Queensland

Senator Marise Payne, New South Wales

Acknowledgments

In tabling this report for the period 1998-99, the Committee acknowledges the thorough and dedicated approach adopted by members of the previous Committees in undertaking their important work. In particular, the Committee recognises the outstanding contribution made by the then Chair of the Committee, Bill O'Chee.

The Committee also notes the able assistance provided during the reporting period by the Committee's Legal Adviser, Professor Jim Davis, its Secretary, Mr David Creed and its other support staff, Ms Janice Paull, Ms Dianne Simpson and Ms Sonia Jacobsen.

Senator Helen Coonan
Chair
February 2000

CHAPTER 1

OVERVIEW AND STATISTICS

Overview

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

1.2 The general requirements of personal rights and parliamentary proprieties under which the Committee operates are refined by the Standing Orders into four principles. In accordance with these principles, the Committee scrutinises delegated legislation to ensure that it:

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

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

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

Membership

1.5 The Committee has six members and, in accordance with the Standing Orders, is chaired by a Government Senator. During the reporting period the membership of the Committee spanned two parliaments and was as follows;

38th Parliament - for the period 1 July 1998- 10 November 1998

Senator Bill O'Chee, Queensland, *Chair*

Senator Mal Colston, Queensland, *Deputy Chair*

Senator Brenda Gibbs, Queensland

Senator Steven Hutchins, New South Wales

Senator Julian McGauran, Victoria

Senator Marise Payne, New South Wales

39th Parliament - for the period 11 November 1998 - 30 June 1999

Senator Bill O'Chee, Queensland, Chair

Senator Andrew Bartlett, Queensland

Senator Helen Coonan, New South Wales (from 31 March 1999)

Senator Brenda Gibbs, Queensland

Senator Steven Hutchins, New South Wales

Senator Julian McGauran, Victoria (to 30 March 1999)

Senator Marise Payne, New South Wales

Independent Legal Adviser

1.6 The Committee is advised by an independent legal adviser, who examines and reports on every instrument of delegated legislation, comments on all correspondence received from Ministers, writes special reports and attends meetings of the Committee when required. The Committee's independent legal adviser is Professor Jim Davis, Faculty of Law, Australian National University.

Statistics

1.7 During the year the Committee scrutinised 1672 instruments, approximately 200 fewer than in the previous financial year. The election period in the second half of 1998 may account for this decrease. The following table sets out the number and broad categories of these instruments:

Instruments examined by the Committee in 1998-99	Number
Civil Aviation instruments	579
Statutory Rules	330
Public Service determinations	160
Veterans' Entitlements instruments	85
Customs instruments	81
Defence determinations	43
Higher Education funding determinations	32
National Health instruments	32
Telecommunications instruments	29
Radiocommunications instruments	22
Remuneration Tribunal determinations	20
Aged Care principles	19
Marine Orders	17
Childcare instruments	13
Safety, Rehabilitation and Compensation Notices	12
Miscellaneous	198
Total	**1672**

1.8 A breakdown of instruments included in the category of miscellaneous appears at Appendix 1.

1.9 The Committee notes that the number of instruments made in the financial year continues to be significantly greater than a decade ago. Similarly, the proportion of Statutory Rules to other instruments continues to be small. These longer term trends are illustrated in the table on the following page.

Proportion of Statutory Rules to other disallowable instruments

Year	Statutory Rules	Other Instruments
1985-86	429	426
1986-87	322	510
1987-88	345	690
1988-89	398	954
1989-90	411	847
1990-91	484	1161
1991-92	531	1031
1992-93	408	1244
1993-94	490	1313
1994-95	419	1668
1995-96	398	1502
1996-97	395	1396
1997-98	454	1434
1998-99	330	1342

Ministerial Undertakings

1.10 During the year, Ministers and other officials undertook to amend or review several different instruments or parent Acts to meet the concerns of the Committee. Details of undertakings are given in Chapter 4.

Committee's principles and approach to delegated legislation

Principle (1): Is delegated legislation in accordance with the statute?

- technical validity and effect
    - compliance with enabling Act and any other legislation such as the *Acts Interpretation Act 1901* and in other respects, be validly made.
    - generally void if instrument purports to subdelegate legislative power without express authority.
    - legislative instruments that take effect before gazettal and that affect adversely any person other than the Commonwealth, are void under subsection 48(2) of the Act Interpretation Act.
    - legislative instruments may incorporate or adopt the provisions of an Act or other legislative instrument in force from time to time. However, it may only incorporate other material as in force or existing when the incorporating instrument takes effect, in accordance with section 49A of the Acts Interpretation Act.
    - certainty of meaning and operation.
- possible breaches of parliamentary propriety
- drafting defects
- inadequate explanatory material
- proper numbering and citation.

Principle (2): Does delegated legislation trespass unduly on personal rights and liberties?

- rights of individuals are protected
- unreasonable burdens are not placed on business
- fees, allowances and expenses are not unfair or unusual
- right to privacy is protected
- offence provisions include appropriate safeguards
- terms and conditions of public sector employment operate fairly.

Principle (3): Does delegated legislation make rights unduly dependent upon administrative decisions which are not subject to independent review of their merits?

- discretions should be as narrow as possible, include objective criteria to limit and guide their exercise, and include review of the merits of decisions by an external, independent tribunal, which would normally be the Administrative Appeals Tribunal
    - commercial, livelihood and personal implications.
- express statement required that power must be exercised reasonably
- decision should be notified within 28 days
- notice of appeal rights and availability of statement of reasons for decision should be given to affected person.

Principle (4): Does delegated legislation contain matter more appropriate for parliamentary enactment?

- legislation which fundamentally changes the law
- legislation which is lengthy and complex
- legislation which intended to bring about radical changes in relationships or community attitudes
- legislation which is part of a uniform laws scheme.

CHAPTER 2

COMMITTEE PRINCIPLES APPLIED TO INSTRUMENTS CONSIDERED IN 1998-99

Introduction

2.1 As noted in the previous Chapter, Senate Standing Order 23(3) establishes the four principles under which the Committee scrutinises every disallowable instrument of delegated legislation. The Committee interprets the principles in a broad and expanding fashion, to address any possible technical defect as well as issues affecting personal rights or parliamentary proprieties.

2.2 During the reporting period, the Committee raised concerns on 107 instruments with ministers and other office holders. Of these, the Committee proceeded to give a notice of motion to disallow 12 instruments and these are addressed in detail in the next Chapter.

2.3 In this Chapter, the Committee highlights aspects of delegated legislation in relation to its principles that it raised with Ministers and other officials during 1998-99. The Committee does not refer to every instrument on which it sought advice from Ministers but provides examples of instruments that reflect the application of its principles of scrutiny.

Principle (1): Is delegated legislation in accordance with the statute?

2.4 The Committee has applied this principle in the following five broad areas:

Technical validity and effect

2.5 Technical validity is an important aspect of the work of the Committee. For instance, the Committee is concerned to ensure that legislative instruments are made validly under both the enabling Act and any other legislation such as the *Acts Interpretation Act 1901*.

2.6 The Committee's consideration of the Primary Industries Levies and Charges (National Residue Survey Levies) Regulations 1998 (Amendment), Statutory Rules 1998 No. 245, illustrates well its concern to ensure technical validity.

2.7 The Committee noted that on 18 June 1998 the Governor-General made three proclamations fixing 3 July 1998 as the day of commencement of part or all of *National Residue Survey Administration Amendment Act 1998*, the *National Residue Survey (Customs) Levy Act 1998* and the *National Residue Survey (Excise) Levy Act 1998*. However, the proclamations were not gazetted until 8 July 1998 and therefore appeared to be void. The Committee also noted that the Governor-General on 30 July 1998 made three more proclamations, gazetted on 31 July 1998, commencing the Acts from 1 August 1998.

2.8 The Committee further noted that other statutory rules appeared to have been made on the basis that the Acts commenced on 3 July 1998 and this in turn raised questions about their validity. These concerns led to an exchange of correspondence with the Parliamentary Secretary and concluded with the following advice from the Attorney-General in September 1999:

> At issue are the consequences flowing from the Regulations specifying a commencement date of 3 July 1998, although the Principal Act, the *National Residue Survey (Excise) Levy Act 1998*, did not commence until 1 August 1998. The question that arose was whether the whole of the Regulations were invalidated because an invalid commencement date was specified in the instrument or whether only the commencement date was invalid and the Regulations were otherwise validly made. The Office of Legislative Drafting view was that the latter was the case, with the Regulations commencing on the commencement date of the Principal Act.
>
> The Chief General Counsel has now provided advice on the question. In the light of that advice, and following further consideration of the operation of section 4 of the *Acts Interpretations Act 1901*, it is now my Department's view that, where Regulations are made in anticipation of the commencement of the Principal Act and specify an invalid date of commencement, the Regulations as a whole are not invalid but are simply inoperative until amended to include a valid date of effect.
>
> The Department considered whether Regulations with an invalid start date can instead come into effect on the date the Principal Act commenced, relying on section 4(2a)(c) of the *Acts interpretation Act 1901*. The Department's settled view, however, is that s4(2A)(c) is not a default clause which can be used where a date specified in the Regulations is inconsistent with each of the paragraphs 4(2a)(a), (b) and (c).
>
> While the problem that has arisen with the Primary Industries Levies and Charges (National Residue Survey Levy) Regulations 1998 (Amendment) can be addressed by amending the Regulations to insert a valid commencement date that date must be prospective in effect.
>
> My Department has advised the Department of Agriculture, Fisheries and Forestry of the problem and that Department is informing the relevant levy payers and will consider what further action to take in relation to the Regulations.
>
> This issue has highlighted difficulties interpreting section 4 of the Acts Interpretation Act. This section will be reviewed as part of my Department's current review of the *Acts Interpretation Act 1901*.[1]

2.9 Another example of the Committee's work in this area, and in particular its concern to ensure compliance with other legislation, is its consideration of the

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1 *Correspondence,* Attorney-General to Committee, 12 September 1999.

Commercial Television Conversion Scheme 1999. Under this scheme, subsections 25(3), 28(2), 38(4) and 64(2) made it clear that applicants for approval of implementation plans and the like must comply strictly with the forms to be promulgated by the Australian Broadcasting Authority. However, neither the Notes to the Scheme nor the Explanatory Paper gave any indication of the reason for this insistence on strict compliance with the forms, in derogation of section 25C of the *Acts Interpretation Act 1901*. In response, the Minister advised that the provisions for strict compliance was included on the advice of the Office of Legislative Drafting and provided an explanation for their inclusion.

2.10 In order to ensure technical validity, the Committee adopts the approach that legislative instruments are generally void if they purport to subdelegate legislative power without the express authority of an Act. The Committee on several occasions during the reporting period raised concerns but received satisfactory responses on the possible invalid subdelegation of power. Instruments included Australian Radiation Protection and Nuclear Safety Regulation 1999, Statutory Rules 1999 No. 37, the Financial Accountability Amendment Regulations 1999 (No. 3), Statutory Rules 1999 No. 107, and the Order No.LC2/98 made under s.17 of the *Australian Meat and Live-stock Industry Act 1997*.

2.11 The Committee also adopts the approach that legislative instruments that take effect before gazettal and that affect adversely any person other than the Commonwealth, are void under subsection 48(2) of the Acts Interpretation Act.

2.12 The Committee has assiduously sought explanations from Ministers if a regulation has retrospective effect and the rights of a person may be affected so as to disadvantage that person. For example, the Committee invoked this approach when scrutinising the Family Law (Bilateral Arrangements-Intercountry Adoption) Regulations 1998, Statutory Rules 1998 No. 248, that were made on 30 July 1998, gazetted on 6 August 1998 but were taken to have commenced on 14 July 1998. The Committee was advised by the Attorney-General that the regulations "are merely facultative" and that "no new liabilities are imposed and the rights of persons are not disadvantaged by the regulations".[2]The Committee raised similar concerns with the Determination No. 1/1999-Determination of Education and Courses made under the *Student Assistance Act 1973* and the Declaration of Approved Donor, made under subsection 61(1) of the *Australian Meat and Live-stock Industry Act 1997*.

2.13 The Committee also considers that legislative instruments may incorporate or adopt the provisions of an Act or other legislative instrument in force from time to time. However, it may only incorporate other material as in force or existing when the incorporating instrument takes effect, in accordance with section 49A of the Acts Interpretation Act. During the reporting period, the Committee did not have to address this principle to any great extent. However, it did seek advice and received assurances

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2 *Correspondence*, Attorney-General to Committee, 24 February 1999.

from the Minister that the Remuneration Tribunal Determination Nos. 4 and 5 did not subdelegate legislative authority.[3]

2.14 The Committee is also of the view that legislative instruments must comply with specific requirements of the enabling Act and must, in other respects, be validly made. For example, the Committee considered the Corporations (Fees) Regulations (Amendment), Statutory Rules 1998 No.184, the Corporations Regulations (Amendment), Statutory Rules 1998 No.185 and the Insurance Regulations (Amendment), Statutory Rules 1998 No.189. In each of these Statutory Rules, provision was made for them to commence, in part, immediately after the commencement of some one or more of the provisions of the *Company Law Review Act 1998* and, in part, on the commencement of the *Managed Investments Act 1998*.

2.15 Unfortunately, neither the Rules themselves, nor the Explanatory Statement, give any indication of when these commencements might occur. However, the Corporations Regulations (Amendment), Statutory Rules 1998 No.186, were, by virtue of regulation 1.1, to commence at the same time as that Act, and the Explanatory Statement advised that the Regulations commenced on 1 July 1998 coinciding with the commencement of the *Managed Investments Act 1998*. The Committee queried why the same information was not provided in relation to the other Statutory Rules. Similarly, the Australian Prudential Regulation Authority Regulations 1998, Statutory Rules 1998 No.200, provided that these Statutory Rules commenced when the *Australian Prudential Regulation Authority Act 1998* commenced. The Explanatory Statement advised that the Act was expected to commence on 1 July 1998. However, Statutory Rules 1998 Nos.192, 193, 196, 197 and 199 were equally premised on the fact that the Act would be in force when they commenced. In each case, there was express provision that the regulations would commence on 1 July 1998. The Committee sought advice as to why the same provision was not made in respect of Statutory Rules No. 200.

Possible breaches of parliamentary propriety

2.16 When determining whether delegated legislation is in accordance with the statute, the Committee ensures that legislative instruments do not breach parliamentary propriety.

2.17 Excessive delay in making legislative instruments may be a breach of parliamentary propriety. For example, the Committee raised this concern when considering the Corporations Regulations (Amendment), Statutory Rules 1998 No. 161. The Explanatory Statement advised that the Regulations implemented recommendations made by the Australian Securities Commission in a report published in 1995. No explanation was given why the recommendations had taken three years to implement, even though they did not appear to be complicated or contentious.

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3 *Correspondence*, Minister for Finance and Administration to Committee, 2 June 1999.

2.18 The relevant Minister provided the Committee with a comprehensive statement on the issue, highlighting a decision to delay implementation until the completion of the Financial Systems Inquiry and the Corporate Law Economic Reform Program.

2.19 The Committee raised similar concerns with the Commerce (Imports) Regulations (Amendment), Statutory Rules 1998 No. 100, the Family Law Amendment Regulations 1999 (No. 1), Statutory Rules 1999 No. 39, Parliamentary Entitlements Regulations (Amendment), Statutory Rules 1998 No. 269, and the Ningaloo Marine Park (Commonwealth Waters) Plan of Management under section 12 of the *National Parks and Wildlife Conservation Act 1975*.

Drafting defects

2.20 Proper drafting is an essential component of the Committee's first principle and it considers that the standard of drafting for legislative instruments should not be less than that of Acts.

2.21 When considering the Civil Aviation Regulations 1998, Statutory Rules 1998 No. 237, the Committee noted that although the regulations covered 174 pages there was no table of contents making it virtually impossible for a reader to get a clear idea of the content of them. The Minister responded that "the Committee's point is taken". The Minister explained that "ordinarily a drafting exercise of this magnitude would have included a table of contents however, in this particular case, time constraints did not permit a table of contents to be prepared". The Minister advised that "a table of contents will be inserted when the regulations are printed".[4]

2.22 The Committee also raised concerns with specific drafting defects within the same instrument. In particular, it advised the Minister that:

> In regulation 21.3, there are a number of defects in the cross-referencing. In subregulation (1), the reference to subregulation (4) should be to subregulation (5), and the reference to subregulation (3) should be to subregulation (4). In subregulation (2), the reference to subregulation (3) should be to subregulation (4).[5]

2.23 The Minister replied that amendments to rectify these cross-referencing errors would be made at the next available opportunity.[6]

2.24 The Committee raised similar concerns about drafting with the Declaration of Approved Donor, made under subsection 61(1) of the *Australian Meat and Live-stock Industry Act 1997*, the Directions Nos. NPFD 25 and NPFD 27 made under subsection 17(5A) of the *Fisheries Management Act 1991* and Order No.LC2/98 made under s.17 of the *Australian Meat and Live-stock Industry Act 1997*.

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4 *Correspondence*. Minister for Transport and Regional Services to Committee, 1 December 1998.

5 *Correspondence*, Committee to Minister for Transport and Regional Services, 27 August 1998.

6 *Correspondence*, Minister for Transport and Regional Services to Committee, 1 December 1998.

Inadequate explanatory material

2.25 As a result of a consistent and persistent approach by the Committee, it is now accepted that legislative instruments must be accompanied by adequate explanatory material.

2.26 Nevertheless, the Committee identified several instruments that did not provide comprehensive and helpful explanations of delegated legislative instruments. For example, the Committee expressed concerns about aspects of the Commercial Television Conversion Scheme 1999 and, in response, the Minister advised that the Department would amend the Explanatory Statement on its web site and further copies it distributes to members of the public to clarify the reasons for specific provisions of the Scheme. Similar concerns were also raised with the Directions Nos. NPFD 25 and NPFD 27 made under subsection 17(5A) of the *Fisheries Management Act 1991*.

2.27 On a number of occasions, the Committee also contacted Ministers when explanatory statements with missing pages or attachments were tabled.

Proper numbering and citation

2.28 As a result of previous efforts by the Committee, it is now accepted that every legislative instrument should include a clear system of numbering and citation. Without such a system, legislative instruments may be imprecise and confusing.

2.29 The application of this approach is illustrated in the Committee's consideration of the Approvals, given under s.9 of the *Payment Systems and Netting Act 1998*, of the Austraclear System and the Reserve Bank Information and Transfer System as approved RTGS systems.

2.30 The Committee noted that the Approvals had no unique identification number or citation. Additionally, the Approvals were produced as letters and did not contain any formal making words. The Committee requested that the Minister ensure that future approvals be numbered and that future instruments should include such words so that the reader is aware clearly and unambiguously of the authority under which the approvals are made.[7]

2.31 The Committee raised similar concerns in relation to this principle with several instruments including the Declaration made under section 190 of the *Radiocommunications Act 1992*, the Declaration of Approved Donor, made under subsection 61(1) of the *Australian Meat and Live-stock Industry Act 1997* and the National Land (Amendment) Ordinance 1998.

Principle (2): Does delegated legislation trespass unduly on personal rights and liberties?

2.32 The Committee applies this principle in order to ensure the following:

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7 *Correspondence,* Committee to Assistant Treasurer, 2 December 1998.

The rights of individuals are protected

2.33 The Committee has a long history of concern for personal rights and liberties and during the reporting period questioned several Ministers on instruments that may unduly trespass on personal rights and liberties. For example, the Committee scrutinised the Airports (Building Control) Amendment Regulations 1999 (No.1), Statutory Rules 1999 No.52, which set up an infringement notice regime. It was concerned, and sought assurances from the Minister, that new subregulation 5.03(4) which allowed an infringement notice to be served on a person at any time up to 12 months after the alleged commission of the offence was not in breach of personal rights.

2.34 Another interesting example of the Committee's work in this area is provided by the Imprisonment and Custody of Offenders Ordinance 1998, Territory of Christmas Island Ordinance No.4 of 1998 and the Imprisonment and Custody of Offenders Ordinance 1998, Territory of Cocos (Keeling) Islands Ordinance No.4 of 1998.

2.35 The Committee noted that each of these Ordinances proposed to replace the current section 33 of the *Prisons Act 1981* (WA) in its application to each of the Territories. Specifically, subsection (1) granted to the chief executive officer a discretion to give a released prisoner the money for the fare home to the Territory, rather than making the payment of that fare a right of which the prisoner may avail himself or herself. It also apparently failed to provide any rights of review of an unfavourable exercise of that discretion. The Committee was concerned that while section 33 of the Western Australian statute may be equally limited, this may be a breach of the rights of released prisoners.

2.36 In response, the Minister gave the following assurance:

> I undertake to authorise a further amendment to section 33 of the *Prisons Act 1981(WA)(CI)(CKI)* to make it clear that a prisoner is entitled to be returned to the Territory at Commonwealth expense within a certain period of being released from prison, if that person is ordinarily resident in the Territory.[8]

2.37 The Committee was grateful for this advice.

Unreasonable burdens are not placed on business

2.38 During 1998-99, the Committee considered the Grape Research Levy Regulations 1999, Statutory Rules 1999 No.3, and the Wine Grapes Levy Amendment Regulations 1999 (No.1), Statutory Rules 1999 No.4, and was concerned that both of these sets of Statutory Rules increase the amount of levy payable by grape growers –

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8 *Correspondence*, Minister for Regional Services, Territories and Local Government to Committee, 29 March 1999.

in the case of Statutory Rules 1999 No.3, by 82 per cent, and in the case of Statutory Rules 1999 No.4, by 58 per cent. Although the amounts of the increase in dollar terms are not high, when expressed as a percentage of the previous rate of levy, the Committee considered them as considerable. The Explanatory Statements for both sets of Statutory Rules advised that the increase was recommended by the respective representative organisations but no reason was given for the rate of increase. The Committee pursued the matter with the Minister and received a satisfactory response.

2.39 The Committee's consideration of the Export Inspection (Quantity Charge) Amendment Regulations 1998 (No. 2), Statutory Rules 1998 No.328, provides another good example of its vigilance in applying this principle. The Explanatory Statement to this instrument advised that the amendments provided for an across the board reduction of 10 per cent in various charges made by the Australian Quarantine and Inspection Service. However, the Committee noted that the reduction in item 3 of Schedule 1 to these regulations, from 5.1 to 3.6, was in the order of 29.4 per cent.

2.40 The Committee made similar representations on several instruments including the Fisheries Management Amendment Regulations 1999 (No. 2), Statutory Rules 1999 No. 98, and the Fisheries Management (Refund) Amendment Regulations 1999 (No. 1), Statutory Rules 1999 No. 55.

Fees, allowances and expenses are not unfair or unusual

2.41 In order to ensure that delegated legislation does not trespass unduly on personal rights and liberties, the Committee is concerned that fees, allowances and expenses are not unfair or unusual. In 1998-99, the Committee examined a number of instruments that raised concerns in relation to this principle. For example, the Committee noted that Migration Amendment Regulations 1999 (No.6), Statutory Rules 1999 No.81, increased various fees and charges and made certain decisions reviewable by the Migration Review Tribunal and changed criteria for the grant of certain visas.

2.42 In particular, the Committee noted that the amendment made by item [101] in Schedule 1 substituted a new subregulation 4.13(1) in the Principal Regulations thereby increasing the prescribed fee for an application for review by the Migration Review Tribunal from $850 to $1400. However, the Statement did not advise that the fee of $850, set by Migration Amendment Regulations 1999 (No.4), was to take effect from 1 June 1999, and the current increase to $1400 would take effect from 31 May 1999. The statement did not indicate the amount of the fee, prior to the increase to $850, and the length of time that the previous fee had been in place. When the Principal Regulations were made, with effect from 1 September 1994, the fee was $300, which was increased to $500, with effect from 1 July 1997, by Statutory Rules 1997 No.109.

2.43 The Minister provided satisfactory responses and explanations on this matter.

The right to privacy is protected

2.44 The right to privacy is an integral element of the Committee's second principle. When examining Determination No.1 of 1999 made under subsection 356(1) of the *Student Assistance Act 1973*, the Committee noted that the Guidelines made by this Determination relate to the circumstances in which the Secretary to the Department may disclose information gathered under the Act for purposes other than the administration of the Act. The Explanatory Statement observed that the 'disclosure of personal information is aligned with paragraphs in Information Principle 11 in the *Privacy Act 1988*'. However, the Explanatory Statement did not indicate whether the Privacy Commissioner was consulted prior to these Guidelines being made and, if so, the Privacy Commissioner's attitude to the Guidelines.

Offence provisions include appropriate safeguards

2.45 This principle underpinned concerns that the Committee raised with the Minister in regard to the Occupational Health and Safety (Maritime Industry) Amendment Regulations 1999 (No.1), Statutory Rules 1999 No.101, which replaced existing provisions relating to the time within which certain accidents and occurrences must be notified and reported.

2.46 The Committee noted that new subregulation 12(2) and 13(2) of the Principal Regulations imposed an apparently strict obligation on an operator to give notice of, and to report, an incident. Further, subregulation 12(3) and 13(3), granted to the operator grounds of exculpation from that strict liability. However, the Explanatory Statement gave no reason for the imposition of strict liability or for the apparent reversal of the onus of proof, in that it is for the operator to establish the grounds of exculpation. The Committee welcomed a response from the Minister explaining the reasoning behind these provisions.

Terms and conditions of public sector employment operate fairly

2.47 In order to protect personal rights and liberties, the Committee examines instruments to satisfy itself that terms and conditions of public sector employment operate fairly. For example, the Defence Determination 1999/25 increased various contribution rates of members of the Defence Force for Defence housing assistance. The Committee noted that neither the Explanatory Statement, nor the Determination itself, indicated the amount of the increases, expressed either in dollar terms or as a percentage over the former contributions, nor the basis on which such increases were calculated. The Minister provided a comprehensive response and assured the Committee that future explanatory statements will indicate the amount of increases and the basis upon which they are calculated.[9]

2.48 The Committee raised concerns about the conditions of panel members appointed under the Film Licensed Investment Company (Application) Rules 1998 and in particular the capacity of the Minister to cancel such an appointment with no

9 *Correspondence*, Minister Assisting the Minister for Defence to Committee, 15 September 1999.

obligation to give notice to the panel member of intention to cancel and no opportunity for a panel member to respond to adverse material. The Committee's concerns were addressed in a helpful response containing specific assurances from the Minister.[10]

2.49 The Committee entertained similar concerns when it considered the Locally Engaged Staff Determination 1998/45, which provides for a change in the medical insurance provider for staff locally engaged in the Australian mission in Fiji.

2.50 The Explanatory Statement to this Determination observed that the reason for its being made was that the service provided to staff locally engaged in the High Commission by Blue Shield has deteriorated markedly over the last 12 months. There was, however, no assurance in the Statement that staff was not adversely affected by that deterioration in service, nor out of pocket as a result. The Minister provided such an assurance.[11]

Principle (3): Does delegated legislation make rights unduly dependent upon administrative decisions which are not subject to independent review of their merits?

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

2.52 In the past, the Committee has on numerous occasions referred concerns on instruments in relation to this principle to Ministers for advice. This was the case again in 1998-99. For example, the Committee, when considering the Commercial Television Conversion Scheme 1999 was concerned that subsection 9(8) and paragraphs 22(1)(b), 28(1)(b) and 64(1)(b) allowed the Australian Broadcasting Authority (ABA) to take into account matters which it subjectively regards as relevant, rather than permitting the Authority to take into account only such matters as are objectively relevant.

2.53 In response to these concerns, the ABA advised that it has a legal obligation under the enabling legislation to ensure that the radio frequency spectrum is planned efficiently and must therefore determine for itself those matters that are relevant in the particular circumstances of the decisions to be made. Decisions in this regard are subject to the *Administrative Decisions (Judicial Review) Act 1977* and, as such, may only take account of relevant considerations in the context of each decision.

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10 *Correspondence,* Minister for the Arts and the Centenary of Federation to Committee, 9 March 1999.

11 *Correspondence,* Minister for Foreign Affairs and Trade to Committee, 21 March 1999.

The right to privacy is protected

2.44 The right to privacy is an integral element of the Committee's second principle. When examining Determination No.1 of 1999 made under subsection 356(1) of the *Student Assistance Act 1973*, the Committee noted that the Guidelines made by this Determination relate to the circumstances in which the Secretary to the Department may disclose information gathered under the Act for purposes other than the administration of the Act. The Explanatory Statement observed that the 'disclosure of personal information is aligned with paragraphs in Information Principle 11 in the *Privacy Act 1988*'. However, the Explanatory Statement did not indicate whether the Privacy Commissioner was consulted prior to these Guidelines being made and, if so, the Privacy Commissioner's attitude to the Guidelines.

Offence provisions include appropriate safeguards

2.45 This principle underpinned concerns that the Committee raised with the Minister in regard to the Occupational Health and Safety (Maritime Industry) Amendment Regulations 1999 (No.1), Statutory Rules 1999 No.101, which replaced existing provisions relating to the time within which certain accidents and occurrences must be notified and reported.

2.46 The Committee noted that new subregulation 12(2) and 13(2) of the Principal Regulations imposed an apparently strict obligation on an operator to give notice of, and to report, an incident. Further, subregulation 12(3) and 13(3), granted to the operator grounds of exculpation from that strict liability. However, the Explanatory Statement gave no reason for the imposition of strict liability or for the apparent reversal of the onus of proof, in that it is for the operator to establish the grounds of exculpation. The Committee welcomed a response from the Minister explaining the reasoning behind these provisions.

Terms and conditions of public sector employment operate fairly

2.47 In order to protect personal rights and liberties, the Committee examines instruments to satisfy itself that terms and conditions of public sector employment operate fairly. For example, the Defence Determination 1999/25 increased various contribution rates of members of the Defence Force for Defence housing assistance. The Committee noted that neither the Explanatory Statement, nor the Determination itself, indicated the amount of the increases, expressed either in dollar terms or as a percentage over the former contributions, nor the basis on which such increases were calculated. The Minister provided a comprehensive response and assured the Committee that future explanatory statements will indicate the amount of increases and the basis upon which they are calculated.[9]

2.48 The Committee raised concerns about the conditions of panel members appointed under the Film Licensed Investment Company (Application) Rules 1998 and in particular the capacity of the Minister to cancel such an appointment with no

9 *Correspondence*, Minister Assisting the Minister for Defence to Committee, 15 September 1999.

2.54 The Committee raised similar concerns about external merits review and received satisfactory responses from Ministers on several instruments, including the Civil Aviation Regulations (Amendment), Statutory Rules 1998 No. 288, and the Disability Assessment Determination 1999.

2.55 When applying this principle, the Committee has particular regard to those instruments that include discretions that have commercial and livelihood implications and those that affect personal rights.

Commercial and livelihood implications

2.56 Delegated legislation often provides for discretions that affect business operations. In such cases, the Committee considers that discretions should be limited and guided by objective criteria and be subject to external review of their merits by an independent body, usually the Administrative Appeals Tribunal.

2.57 The Committee was mindful of this principle when it scrutinised the Civil Aviation Regulations (Amendment), Statutory Rules 1998 No. 235. New regulation 262AN gave to the Civil Aviation Safety Authority a discretion to approve an organisation to administer the operation of certain aircraft, a discretion which, if exercised against a particular applicant, could have a detrimental financial impact. However, although the exercise of many of the discretions vested in the Authority are subject to review by the Administrative Appeals Tribunal under the Civil Aviation Regulations 1998, it was not clear that the exercise of the discretion in regulation 262AN was so subject. The Minister advised that "the policy intention is that the discretion ... should be subject to review by the AAT" and that "the regulation will be amended at the next available opportunity".[12]

2.58 The Committee's work in this area is perhaps best illustrated by its scrutiny of the Occupational Health and Safety (Commonwealth Employment) (National Standards) Amendment Regulations 1999 (No.1), Statutory Rules 1999 No.66, which amended the Principal Regulations in the light of new Codes of Practice relating to the control of carcinogenic substances and the use of inorganic lead.

2.59 In relation to new paragraph 6.16B(2)(a) the Committee advised the Minister that it "may operate harshly on employers". The Minister agreed and undertook to amend the paragraph.[13]

2.60 The Committee raised and received satisfactory explanations or assurances from Ministers in relation to merits review in a number of instruments with commercial implications, including Determination No.HIG4/1998 made under paragraph (bj) of Schedule 1 to the *National Health Act 1953*, Health Insurance (1998-99 Diagnostic Imaging Services Table) Amendment Regulations 1999 (No.1),

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12 *Correspondence*, Minister for Land Transport and Regional Services to Committee, 1 December 1998.

13 *Correspondence*, Minister for Employment, Workplace Relations and Small Business to Committee, 12 August 1999.

Statutory Rules 1999 No.20 and Order No.LC2/98 made under s.17 of the *Australian Meat and Live-stock Industry Act 1997.*

Discretions that directly affect individuals

2.61 The Committee applied this principle when it raised with the relevant Minister issues relating to the Childcare Assistance Immunisation Requirements IMCA/12G/98/3 made under s.12H of the *Child Care Act 1972*, which, in some circumstances, allowed more time for parents to comply with the immunisation requirements of that Act before they lose their eligibility for Childcare Assistance. The Explanatory Statement advised that on 6 January 1999 Centrelink would write to parents of children under seven not shown as being immunised advising them of the link between Childcare Assistance and immunisation. Section 12G of the enabling Act indicates that this link is established only when the Secretary to the Department is satisfied as to various matters. The Committee was concerned that it was not apparent whether a parent has a right of review of an adverse decision by the Secretary and whether, if there is such a right, the parent is to be informed of it. The Minister responded that this right would be recognised when the proposed Family Assistance Act comes into force from 1 July 2000.[14]

Principle (4): Does delegated legislation contain matter more appropriate for parliamentary enactment?

2.62 This is a principle not raised as often by the Committee as its other three principles. It is, however, a breach of parliamentary propriety if matters that should be subject to all the safeguards of the parliamentary passage of a Bill are included in a legislative instrument.

2.63 During the reporting period, the Committee finalised its scrutiny of the Financial Management and Accountability Orders (Amendment) 1998, an instrument that raised particular concerns in relation to this principle. The instrument was one that the Committee gave notice of motion to disallow and is dealt with in detail in the next Chapter.

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14 *Correspondence*, Minister for Family and Community Services to Committee, 19 January 1999.

CHAPTER 3

INSTRUMENTS ON WHICH THE COMMITTEE GAVE A NOTICE OF MOTION TO DISALLOW IN 1998-99

Introduction

3.1 Section 48(4) of the *Acts Interpretation Act 1901* provides:

> If either House of the Parliament, in pursuance of a motion of which notice has been given within 15 sitting days after any regulations have been laid before that House, passes a resolution disallowing any of those regulations, any regulation so disallowed thereupon ceases to have effect.

3.2 These provisions also apply to disallowable instruments under section 46A of the same Act.

3.3 Senate Standing Order 78 provides for the withdrawal of a notice of motion to disallow in the following terms:

> A senator who wishes to withdraw a notice of motion standing in the senator's name 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 the Parliament declaring the instrument to be void and of no effect, shall give notice to the Senate of the intention to withdraw the notice of motion.

3.4 During the reporting period, the Chair, on behalf of the Committee, gave notice of motion to disallow 12 instruments. It should be noted that, in some instances, the giving of notice gave the relevant Minister and the Committee more time to consider issues and reach a satisfactory outcome. In the following section of this report, the Committee reviews issues raised with instruments on which it gave a notice of motion to disallow.

High Court Rules (Amendment), Statutory Rules 1998 No. 61

3.5 These Rules among other things increased the amount that solicitors may charge in respect of proceedings in the High Court by 4.5 per cent. The Committee had concerns with this increase in solicitors' costs and that the Explanatory Statement gave no explanation for the increase apart from advice that the Justices of the High Court accepted the recommendations of the Federal Costs Advisory Committee (FCAC).

3.6 In a timely response to the Committee's inquires, the Chief Executive and Principal Registrar of the High Court explained that the FCAC recommended the increase of 4.5 per cent on the basis of movements in indices from March 1996 to

September 1997 and February 1997 to August 1997. These recommendations followed newspaper advertisements inviting public submissions, the holding of public hearings and representations from the Commonwealth Government and the Law Council of Australia.

3.7 The Committee was unable to meet to consider this response as it was received at the end of the 1998 Autumn sittings. In order to protect its options, the Chair, on 1 July 1998, gave a notice of motion to disallow the Rules.

3.8 Subsection 48(5A) of the *Acts Interpretation Act 1901* provides that instruments that were the subject of a notice of motion to disallow but unresolved at the end of a Parliament are deemed to have been tabled on the first sitting day of the new Parliament. Following the 1998 election and in keeping with the Act, these Rules were deemed to have been tabled in the Senate on 9 November 1998, the first sitting day of the 39th Parliament. Given the satisfactory response from the High Court, the Committee decided not to give a further notice of motion.

Archives Regulations (Amendment), Statutory Rules 1998 No. 273

3.9 These Rules amend the Principal Regulations with respect to the charges that may be made for copying and discretionary services.

3.10 The Explanatory Statement indicated that, in relation to most matters, the charges set out in the Schedule substituted by these regulations have increased. The Statement also indicated that there had been no change to the charges made for training courses, the reason being that 'these are already high in comparison with the prevailing prices in the market'. The Committee presumed that the Archives was able to charge above market rates for training sessions because it is a monopoly supplier. The Committee sought advice as to why, if the charge for training sessions were high, Archives did not take the opportunity to reduce the level of charges for them.

3.11 The Committee, on 9 December 1998, gave notice of motion to disallow the regulations.

3.12 In a reply, dated 23 December 1998, the responsible Minister advised the Committee that the Explanatory Statement to the Regulations was "inadvertently incorrectly worded". The statement that charges "are already high in comparison with prevailing prices in the market" was in fact not the situation. The Minister then provided the Committee with comprehensive information on training courses and the basis of fees charged for them, including comparisons with the private sector.

3.13 As this advice met its concerns, the Committee withdrew its notice of motion on 22 March 1999.

Childcare Assistance Immunisation Requirements IMCA/12G/98/3 made under section 12H of the *Child Care Act 1972*

3.14 The Committee's concerns with this instrument centred on whether a discretionary decision was subject to merits review.

3.15 Specifically, this instrument, in some circumstances, allows more time for parents to comply with the immunisation requirements of the Act before they lose their eligibility to Childcare Assistance.

3.16 The Explanatory Statement advised that, on 6 January 1999, Centrelink would write to parents of children under seven, not shown as being immunised, advising them of the link between Childcare Assistance and immunisation. The Committee noted that section 12G of the enabling Act establishes this link only when the Secretary to the Department is satisfied as to various matters. However, it did not readily appear from the legislation whether a parent has a right of review of an adverse decision by the Secretary and whether, if there is such a right, the parent is to be informed of it.

3.17 On 9 December 1998, in order to protect its options, the Committee gave notice of motion to disallow the instrument.

3.18 In a response dated 19 January 1999, the Minister for Family and Community Services, Senator the Hon Jocelyn Newman, advised that there will be review rights for parents in relation to the link between the proposed Childcare benefit and immunisation in the proposed Family Assistance Act, expected to be in effect from 1 July 2000.

3.19 Having received this satisfactory undertaking from the Minister, the Committee withdrew its notice of motion on 22 March 1999.

Excise Amendment Regulations 1998 (No.2), Statutory Rules 1998 No. 275

3.20 The Committee's concern with these Rules also related to external merits review.

3.21 The Excise Amendment Regulations establishes an administrative framework for claiming payment for the production of naphtha. New subregulation 52AAAA(1), inserted by r.5.1, gives the Minister for Primary Industries and Energy a discretion to approve a plant that produces naphtha. The Committee noted that exercise of this discretion could be commercially valuable, but there did not appear to be any provision, either in the regulations or in the enabling Act, for external merits review of the exercise of this discretion.

3.22 New subregulation 52AAAA(9) permits a Collector of Customs to require an applicant for approval to produce records, or give additional information, within the period specified in the notice. The Committee also noted that the subregulation did not require the Collector to specify a period that is reasonable in the circumstances and suggested to the Minister that it would be preferable to include this further requirement.

3.23 On 9 December 1998, in order to protect its options, the Committee gave notice of motion to disallow the instrument.

3.24 In a reply dated 3 March 1999, Senator the Hon Rod Kemp, Assistant Treasurer, agreed with the Committee's suggestion that there should be provision for external merits review of the exercise of Ministerial discretion to approve a plant at which naphtha is produced The Minister also agreed that a further requirement relating to a reasonable period to produce records or give additional information should be included. The Minister undertook to propose to the Executive Council at the first practicable opportunity necessary amendments to the regulations to address the Committee's concerns.

3.25 Having received these satisfactory undertakings from the Minister, the Committee withdrew its notice of motion on 23 March 1999.

Health Insurance (1998-99 General Medical Services Table) Regulations 1998, Statutory Rules 1998 No. 301

3.26 As noted in Chapter 2, the Committee concerns itself with matters relating to technical validity and drafting.

3.27 In relation to this instrument, the copy of the regulations received by the Committee listed the fee for item 319 of the Table as '71', although a slip attached to the front of the regulations substituted '71' with '$132.65'. The Committee asked the Minister for Health and Aged Care for an assurance that the version of the regulations made by the Governor-General had the correct figure in the fee column against item 319.

3.28 The Minister assured the Committee that the regulations signed by the Governor-General contained the correct fee of $132.65, explaining that a typographical error occurred between the original document being signed and the regulations being printed for general distribution.

3.29 This explanation and assurance satisfied the Committee and its notice of motion to disallow was withdrawn on 22 March 1999.

Instrument of Approval for Forms made under subsection 30(2) of the *Chemical Weapons (Prohibition) Act 1994*

3.30 The Committee was concerned that, although the instrument was made on 12 October 1998, it was stated to have had effect from 4 September 1998. There was no indication that this retrospectivity did not prejudicially affect the rights of a person other than the Commonwealth and might therefore be of no effect.

3.31 The Committee also noted that although the Forms themselves were numbered, the instrument did not have any unique identifying number or symbol.

3.32 The Committee further noted that Forms 2RA and 2RP indicated that the signature at the foot of the form is (inter alia) a declaration that the information provided is 'true and correct in every material particular', but the other Forms did not include such a statement. There was no indication that the information to be provided by the other Forms need not be accurate. Also, the forms, especially 2RA and 2RP,

did not contain a statement of the consequences of either refusing to provide the information, or of providing information that is not true and correct in every material particular.

3.33 The Committee sought advice on these matters and on 9 December 1998 gave notice of motion to disallow the instrument.

3.34 In a letter, dated 19 December 1998, the Minister for Foreign Affairs noted the Committee's comments on retrospectivity and assured the Committee that retrospective application of this Instrument had not adversely affected the rights of any person. The Minister explained further in the following terms:

> The need for retrospective application of the instrument arose from complications in timing with respect to entry into force of those provisions in the Act enabling the Instruments to be made (7 October), and the need to collect the information necessary to prepare Australia's annual declarations to the Organisation for the Prohibition of Chemical Weapons, required under the Chemical Weapons Convention, by 31 October.[1]

3.35 The Minister also noted that the Explanatory Memorandum prepared for the Instrument should have included words making clear that its retrospective application was not prejudicial to the rights of any person (other than the Commonwealth), and that its omission was an oversight.

3.36 The Minister also advised the Committee that in keeping with current practice, the Instrument was referenced by date and signature rather than any unique identifying number or symbol. The Minister indicated that "if ... the Committee considers such a numbering system appropriate, then I will ensure that such arrangements are implemented in the future".

3.37 In relation to the forms approved by the Instrument of 12 October 1998, the Minister told the Committee that:

> [the forms] apply to existing permit holders under the Act. Information provided previously to those persons has noted the existence of penalties for provision of false or misleading information in any document given pursuant to the Act. Nevertheless, the Committee has made a valid point about the need for these provisions to be highlighted on documents such as approved forms, and the forms will be amended to this effect before the next set of reporting obligations falls due.[2]

3.38 After considering the positive and helpful response from the Minister, the Committee withdrew its notice of motion on 23 March 1999.

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1 *Correspondence*, Minister for Foreign Affairs and Trade to the Committee, 19 December 1998.

2 *Correspondence*, Minister for Foreign Affairs and Trade to the Committee, 19 December 1998.

National Native Title Tribunal Regulations 1998 (No. 3), Statutory Rules 1998 No. 281

3.39 The Committee noted that the National Native Title Tribunal Amendment Regulations 1998 (No.3) deleted references in the existing Regulations to native title and compensation applications being made to the Tribunal. Specifically, new paragraph 8(d) of the Principal Regulations, inserted by r.9.1, gave the Registrar a discretion to waive the fee otherwise payable on the lodgement of a native title application. The Explanatory Statement indicated that the Federal Court of Australia Regulations provides a similar waiver of fees for applications filed in that Court. The Committee further noted that the Federal Court of Australia Regulations, while making an identical provision in paragraph 2(4)(c), also provides, in r.2B, for review by the Administrative Appeals Tribunal of the exercise of that discretion, among others. There appeared to be no similar provision in these Regulations. On 9 December 1998, the Committee gave notice to disallow these regulations in the Senate.

3.40 In a response, dated 20 December 1998, the Attorney-General, advised that this was an unintentional oversight which occurred when the original Regulations were made in 1993. The Attorney advised that the Regulations would be amended to provide for such a review.

3.41 This explanation and assurance satisfied the Committee and its notice of motion to disallow was withdrawn on 23 March 1999.

Therapeutic Goods (Charges) Amendment Regulations 1998 (No. 2), Statutory Rules 1998 No. 260

3.42 These regulations provide that upon the lodgement of an application, the Secretary may declare that the applicant's turnover is of low volume and low value.

3.43 The Committee was concerned that new subregulation 4C(3) obliges the Secretary to either accept or reject an application for a person to be registered as having a low volume/low value turnover as soon as practicable, but did not provide a time limit within which a decision must be made. The Committee also noted that new r.4D permits the Secretary to delegate the power to consider such applications to any officer in the Department.

3.44 Accordingly, the Committee wrote to the responsible Minister suggesting that the interests of applicants for such declarations may be better protected if subregulation 4C(3) were to provide instead that any application in relation to which the applicant had not been advised of a decision within, say 28 days, would be deemed to have been refused. This would trigger the applicant's right to independent review of that decision and provide a clear time frame from the outset.

3.45 The Parliamentary Secretary to the Minister for Health and Aged Care, Senator the Hon. Grant Tambling replied on 11 March 1999, agreeing with the Committee that "the applicants' interests would be better protected by the inclusion of a clear time frame in subregulation 4C(3). The Parliamentary Secretary advised that in

order to allow a proper assessment of each application a period of 40 days was considered a more appropriate time frame. The Parliamentary Secretary indicated that the relevant amendments to subregulation 4C(3) would be made in the near future.

3.46 Having received this satisfactory response to its concerns, the Committee withdrew its notice of motion on 30 March 1999.

Financial Management and Accountability Orders (Amendment) 1998

3.47 These Orders, made on 24 June 1998 and tabled in the Senate on 10 November 1998, were the subject of considerable scrutiny by the Committee and it was only on 23 March 1999 that the Committee was sufficiently satisfied to remove its notice of motion to disallow.

3.48 The Financial Management and Accountability Orders (Amendment) 1998 were made by the Minister for Finance and Administration, the Hon John Fahey MP, on 24 June 1998 and expressed to commence on 1 July 1998. The substantive part of the Orders, which in the original print was six lines long, read as follows:

> 6.3.1 A managed insurance fund to be known as Comcover will be established within the Department of Finance and Administration.
>
> 6.3.2 Comcover will indemnify, or arrange indemnity, for all member organisations in respect of all insurable losses, except employers' liability risks already covered by Comcare, specified in writing by Comcover to each member organisation. It will also promote transparency, accountability, and the better management of the Commonwealth's insurable risks.

3.49 The substantive part of the Explanatory Statement that accompanied the Orders was also very brief.

3.50 After its initial scrutiny of the Orders, the Committee decided to write to the Minister, expressing its concern at that stage that it had virtually no information about the nature and operation of Comcover, although it was clear that it would be a substantial financial operation. The Committee noted that Comcare, to which the Orders expressly referred, was established by detailed provisions of an Act and it seemed appropriate to ask the Minister why Comcover was not similarly set up by primary legislation. Accordingly, the Committee wrote to the Minister on 27 August 1998.

3.51 In his reply, the Special Minister of State, Senator the Hon Chris Ellison, advised:

> Accurate information on the size and nature of the Commonwealth's insurable risks is not available as there has been no systematic collection of such information since Federation. Indeed, one of the principal reasons for establishing Comcover is to provide a mechanism for capturing and recording this information. Seeding funds of $70 million were set aside in

> the 1998/99 Budget for the establishment of Comcover, but work is currently under way to more accurately assess the size of the risk pool.
>
> The ultimate objective of Comcover is to reduce the cost of the Commonwealth's insurable risks. It will underwrite, and assist in the management of, the general insurance risks of over 150 Commonwealth bodies in the General Government Sector. I attach a copy of Comcover's Charter for your information.
>
> I note the Committee's view that it might have been more appropriate to establish Comcover through primary legislation. However, Comcover is an administrative unit in the Department of Finance and Administration promoting policy objectives already established in the FMA Act, and I am advised that the Order provides it with the necessary level of authority.[3]

3.52 The Committee considered the reply and decided to write again to the Minister as the Committee was still concerned that it did not have sufficient detail to decide on its core concerns about whether Comcover should be set up by Act. In addition, the Charter for Comcover, attached to the Minister's reply, revealed other problem areas. These were that, first, the nature of the fund may have been such that it was beyond the power provided in the enabling Act. Secondly, the Charter expressly referred to improved accountability to the Parliament, but there was no provision for this either in the Orders, the Explanatory Statement or the Charter.

3.53 The Minister replied on 7 December 1999. However, after considering this reply the Committee considered that its key concerns had still not been resolved. It therefore decided that a briefing would be useful and on 10 December 1998 two senior officials of the Department, including the head of Comcover, met with the Committee to discuss its concerns.

3.54 The Committee was still not satisfied with the explanations provided by the officers and wrote again to the Minister on 17 December 1998, raising other aspects concerning the legality of the proposed arrangements. The Minister replied to this correspondence on 20 January 1999.

3.55 Notwithstanding the clarification of some earlier concerns, the Committee continued to take issue with certain aspects of the Orders, particularly their effect on Commonwealth Authority and Companies agencies established by Act, and suggested that the Chairman meet with the Minister to discuss the situation.

3.56 Following this meeting, the Minister wrote to the Committee on 11 March 1999 stating:

> In view of the Committee's concerns, I undertake to amend the Orders to clarify that the Orders do not place any express obligation on CAC bodies to insure with Comcover. This would provide an assurance to all CAC

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3 *Correspondence*, Special Minister of State to the Committee, 23 November 1998.

> members, including those funded in part or whole by a statutory levy, that they can be exempted from the Fund on a case by case basis. Bodies wishing to be exempted would, of course, need to put forward a case for exemption via their portfolio Minister.
>
> In seeking to not be insured with Comcover these agencies would need to clearly indicate what alternative arrangements are proposed or in place. [4]

3.57 The Committee agreed that these assurances made it possible to remove its motion of disallowance, which the Chair did on 23 March 1999.

3.58 Given the significant issues raised in its scrutiny of the Financial Management and Accountability Orders 1998 (Amendment), the Committee tabled a special report on the matter in the Senate in May 1999.[5] In this report, the Committee concluded that:

> The Committee's scrutiny of the Financial Management and Accountability Orders 1998 (Amendment) is a case study of action by it in relation to a legislative instrument which may have contained matter more appropriate for parliamentary enactment. [The Committee] does not raise this principle as often as its other three principles, but it is nevertheless a fundamental element of parliamentary propriety, complementing its first principle, which is that the instrument is in accordance with the statute.
>
> The case illustrates the thoroughness with which the Committee pursues a matter when it is not satisfied that a legislative instrument meets its principles. [The Committee's] actions demonstrated the range of steps and options available to it to achieve an acceptable outcome.
>
> In the present case, ... there were seven letters exchanged between the Chair and the Minister, each of which involved a further stage in scrutiny by the Committee. This correspondence was, among other items, considered by six separate meetings of the Committee. In the course of its consideration the Committee also met with senior officials of the Department and, in order to preserve its options, placed a protective notice of disallowance on the instrument. Finally, the Chairman met with the Minister to discuss the matter.
>
> These stages demonstrate that the Committee has a variety of responses available to it to ensure that instruments are of an acceptable quality, with sufficient flexibility to enable the Minister to achieve his or her policy objectives, but at the same time making sure that an instrument complies with parliamentary propriety and personal rights [6]

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4 *Correspondence*, Special Minister of state, 11 March 1999.

5 Senate Standing Committee on Regulations and Ordinances, *107th report - Orders made under the Financial management and Accountability Act 1997*, May 1999.

6 Senate Standing Committee on Regulations and Ordinances, *107th Report - Orders made under the Financial Management and Accountability Act 1997*, May 1999, pp. 19-20.

Accountability Principles 1998 and Accreditation Grant Principles 1998 made under section 96-1(1) of the *Aged Care Act 1997*

3.59 The Accountability Principles 1998 set out various aspects of the access to a residential care service that an approved provider of that service must afford to a person authorised by the legislation to undertake a review of that service.

3.60 The Committee noted that the note to section 1.8 indicates that an approved provider who refuses consent to a representative's access to the service, or withdraws that consent, may suffer one of the sanctions referred to in Part 4.4 of the *Aged Care Act 1997*. However, these Principles impose no obligation on a member of the Department, or a person seeking access to the service, to advise the provider of that fact. The Committee suggested that it may be appropriate for the Principles to require that such information should be given to providers.

The Committee further noted that section 1.12 forbids an approved provider from impeding access by a representative, and the latter's ability to make inquiries, so long as the access and questioning is relevant and necessary. The section does not, however, indicate who is to decide the relevance and necessity of that access or questioning, or when a decision on those matters may be made.

In reply, the Minister advised in relation to section 1.8 that

> I agree with the Committee' s suggestion and consider that it could be accommodated by requiring that the letter giving notice of intended access in section 1.7 refer to the fact that failure to consent could lead to sanctions action. Representatives permitted under subsection 1.7(2) to give notice orally could also be required to state this. Further, there could be a requirement in section 1.9 that the letter of authority identifying a representative also state that a consequence of failure to consent to access could, in some circumstances, lead to sanctions action.
>
> Given that the full versions of the Accountability Principles and the Accreditation Grant Principles are currently being prepared, I propose to instruct the Department to put these requirements into effect administratively until they can be incorporated into the full version of the Accountability Principles.[7]

3.61 In relation to section 1.12, the Minister advised that "if sanctions are imposed for failure to comply with [the section], it will be the Secretary's delegate deciding this who will address what was relevant and necessary. That delegate's decision would also be subject to internal review and review by the Administrative Appeals Tribunal under section 85-8 of the Act".[8]

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7 *Correspondence*, Minister for Aged Care to the Committee, 13 April 1999.

8 *Correspondence*, Minister for Aged Care to the Committee, 13 April 1999.

3.62 The Committee also raised with the Minister six specific concerns about the Accreditation Grant Principles 1998 that set out the procedures to be followed, and the matters to be taken into account, by the Aged Care Standards and Accreditation Agency when it assesses residential care services, and the conditions to which the grant of accreditation is subject.

3.63 Having received specific assurances and satisfactory explanations to its concerns, the Committee withdrew its notice on 28 April 1999.

Australian Radiation Protection and Nuclear Safeguards Regulations 1999, Statutory Rules 1999 No. 37

3.64 The Committee had a number of concerns with these Regulations, including possible invalid subdelegation of legislative power, a declaration that is not required to be tabled in Parliament, a discretion with no indication whether it is subject to merits review and membership and reporting requirements of a statutory council and committees which may be inadequate.

3.65 In a reply, dated 19 May 1999, the Minister for Health and Aged Care provided satisfactory responses to these concerns and in two instances undertook to amend the regulations to address the Committee's concerns. Accordingly, the Committee withdrew its notice on 23 June 1999.

Airports (Building Control) Amendment Regulations 1999 (No. 1), Statutory Rules 1999 No. 52

3.66 The Airports (Building Control) Amendment Regulations 1999 (No.1), set up an infringement notice regime.

3.67 The Committee raised several concerns with the Minister including matters relating to subjective discretions, reasonable time in which an infringement notice must be served and independent merits review.

3.68 It should be noted that this matter was not resolved by the end of June 1999, the end of the period of this report. Following the receipt of a detailed response that addressed concerns, the current Committee, on 23 August 1999, withdrew the notice of motion given on 26 May 1999.

CHAPTER 4

MINISTERIAL UNDERTAKINGS

Introduction

4.1 Each year, Ministers give undertakings to the Committee to amend primary and delegated legislation to meet its concerns. The following section of the Report summarises these undertakings and their implementation.

Undertakings from previous reporting periods that were not implemented by 30 June 1999

4.2 Ministers have given undertakings in previous years on 16 instruments which had not been implemented by 30 June 1999:

Australian Dried Fruits Board (AGM) Regulations, Statutory Rules 1993 No.144
Australian Sports Drug Agency Regulations (Amendment), Statutory Rules 1996 No.72
Civil Aviation Regulations (Amendment), Statutory Rules 1997 No.111
Excise Regulations (Amendment), Statutory Rules 1995 No.425
Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1995 No.257
Family Law Regulations (Amendment), Statutory Rules 1996 No.71
Guidelines T6-98 made under the *Higher Education Funding Act 1988*
National Crime Authority Regulations (Amendment), Statutory Rules 1996 No.286
Northern Prawn Fishery Management Plan 1995, Direction No.NPFD 17
Quarantine (General) Regulations (Amendment), Statutory Rules 1997 No.85
Road Transport Reform (Dangerous Goods) Regulations, Statutory Rules 1997 No.241
Road Transport Reform (Heavy Vehicle Standards) Regulations, Statutory Rules 1995 No.55
Road Transport Reform (Mass and Loading) Regulations (Amendment), Statutory Rules 1996 No.342
Road Transport Reform (Oversize and Overmass Vehicles) Regulations, Statutory Rules 1995 No.123
Telecommunications (Arbitration) Regulations, Statutory Rules 1997 No.350
Tenth Amending Deed to Establish an Occupational Superannuation Scheme for Commonwealth Employees and Certain Other Persons

4.3 It should be noted that a number of these undertakings have been implemented in 1999-2000. Details of the instruments implementing these undertakings will appear in the Committee's next report.

Undertakings from previous periods that were implemented in 1998-99

4.4 Ministers have given undertakings in previous years on 24 instruments that were implemented during the reporting period.

Air Navigation Regulations (Amendment), Statutory Rules 1995 No.342
Exempt Nursing Homes Fees Redetermination Principles (Amendment No.1 of 1996)
Exempt Nursing Homes Principles (Amendment No.1 of 1996)
Export Control (Fees) Orders (Amendment), Export Control Orders No.1 of 1996
Fisheries Levy (Northern Fish Trawl Fishery) Regulations (Amendment), Statutory Rules 1992 No.13
Hazardous Waste (Regulation of Exports and Imports)(OECD Decision) Regulations, Statutory Rules 1996 No.283
Income Tax Regulations (Amendment), Statutory Rules 1995 No.461
Marine Orders Part 32 (Cargo Handling Equipment) Issue 2, Order No.14 of 1997
Marine Orders Part 91 (Marine Pollution Prevention - Oil) Issue 2, Order No.5 of 1998
Marine Orders Part 93 (Marine Pollution Prevention - Noxious Liquid Substances) Issue 2, Order No.6 of 1998
Meat and Live-stock Order No.73/95 made under s.68 of the *Meat and Live-stock Industry Act 1995*
Northern Prawn Fishery Management Plan 1995, Directions Nos 13 and 14
Occupational Health and Safety (Commonwealth Employment) (National Standards), Statutory Rules 1996 No.129
Occupational Health and Safety (Commonwealth Employment) (National Standards), Statutory Rules 1996 No.288
Order No.M79/98 made under c.68 of the *Meat and Live-stock Industry Act 1995*
Ozone Protection Regulations, Statutory Rules 1995 No.389
Patents Regulations (Amendment), Statutory Rules 1998 No.56
Plant Breeder's Rights Regulations (Amendment), Statutory Rules 1995 No.290
Primary Industries and Charges Collection (National Residue Survey - Aquatic Animal Export) Regulations 1998, Statutory Rules 1998 No.30
Public Interest Determination No.7 made under Part VI of the *Privacy Act 1988*
Superannuation Industry (Supervision) Regulations (Amendment), Statutory Rules 1995 No.430
Therapeutic Goods Order No.54A made under s.10 of the *Therapeutic Goods Act 1989*
Veterans' Vocational Rehabilitation Scheme
Wool Research and Development Corporation Regulations (Amendment), Statutory Rules 1992 No.443

Undertakings given and implemented during 1998-99

4.5 Ministers have given and implemented undertakings during the reporting period on the three instruments:

Adult Disability Assessment Determination 1999 made under s.38C of the *Social Security Act 1991*
Approvals given under s.9 of the *Payment Systems and Netting Act 1998*

Sydney Airport Demand Management Regulations 1998, Statutory Rules 1998 No.119

Undertakings given during 1998-99 that had not been implemented at 30 June 1999

4.6 Ministers have given undertakings on 28 instruments that had not been implemented by 30 June 1999:

Accountability Principles and Accreditation Grant Principles made under the *Aged Care Act 1997*
Air Navigation Amendment Regulations 1998 (No.1), Statutory Rules 1998 No.321
Airports (Environment Protection) Amendment Regulations 1998 (No.3), Statutory Rules 1998 No.349
Australian Meat and Live-stock Industry (Export Licensing) Regulations 1998, Statutory Rules 1998 No.202
Australian Radiation Protection and Nuclear Safeguards Regulations 1999, Statutory Rules 1999 No.37
Authorised Non-operating Holding Companies Supervisory Levy Imposition Determination 1998
Childcare Assistance Immunisation Requirements IMCA/12G/98/3 made under s.12H of the *Child Care Act 1972*
Civil Aviation Regulations (Amendment), Statutory Rules 1998 No.235
Civil Aviation Regulations (Amendment), Statutory Rules 1998 No.237
Customs Regulations (Amendment), Statutory Rules 1998 No.38
Direction No.NPFD 25 made under subsection 17(5A) of the *Fisheries Management Act 1991*
Excise Amendment Regulations 1998 (No.2), Statutory Rules 1998 No.275
Financial Management and Accountability Orders (Amendment) 1998 made under paragraph 63(1)(b) of the *Financial Management and Accountability Act 1997*
General Insurance Supervisory Levy Imposition Determination 1998
Health Insurance (1998-99 Diagnostic Imaging Services Table) Amendment Regulations 1999 (No.1), Statutory Rules 1999 No.20
Imprisonment and Custody of Offenders Ordinance 1998, Territory of Christmas Island Ordinance No.4 of 1998
Imprisonment and Custody of Offenders Ordinance 1998, Territory of Cocos (Keeling) Islands Ordinance No.4 of 1998
Life Insurance Supervisory Levy Imposition Determination 1998
National Native Title Tribunal Regulations 1998 (No.3), Statutory Rules 1998 No.281
Order No.LC2/98 made under s.17 of the *Australian Meat and Live-stock Industry Act 1997*
Primary Industries Levies and Charges Collection (Grain Legumes) Regulations (Amendment), Statutory Rules 1998 No.154
Primary Industries Levies and Charges Collection (Oilseed) Regulations (Amendment), Statutory Rules 1998 No.153
Providers Supervisory Levy Imposition Determination 1988

Radiocommunications (Compliance Labelling - Incidental Emissions) Notice 1998
Retirement Savings Account
Supervision Supervisory Levy Imposition Determination 1998
Therapeutic Goods (Charges) Amendment Regulations 1998 (No.2), Statutory Rules 1998 No.260
Trade Marks Amendment Regulations 1998 (No.4), Statutory Rules 1998 No.346

4.7 It should be noted that a number of these undertakings have been implemented in 1999-2000. Details of the instruments implementing these undertakings will appear in the Committee's next report.

Undertakings that lapsed during 1998-99

4.8 Minister advised that the undertakings given to the Committee on the following instruments would no longer be relevant because of changes to legislation or programs.

Federal Airports (Amendment) By-Laws No.1 of 1997
Hearing Services Regulations (Amendment), Statutory Rules 1996 No.149
National Gallery Regulations (Amendment), Statutory Rules 1996 No.92
Prawn Export Promotion Levies and Charges Regulations, Statutory Rules 1995 No.245

Detailed summary of all undertakings

4.9 The following table provides detailed information on all undertakings.

Table: Ministerial undertakings to amend legislation

Instrument	Date Undertaking Given	Undertaking	Implemented by
Agriculture, Fisheries and Forestry			
Australian Dried Fruits Board (AGM) Regulations, Statutory Rules 1993 No.144	4 July 1996	To repeal inoperative Regulations	Outstanding at 30 June 1999. (It should be noted that the undertaking was implemented on 21 July 1999.)
Australian Meat and Live-stock Industry (Export Licensing) Regulations 1998, Statutory Rules 1998 No.202	18 September 1998	To amend the Regulations to limit intrusive provisions to more serious cases (6(1)(d), 6(1)(e), para 8(a) and (b), 10(2)(b), 13(c) to offences for which the maximum penalty is a period of imprisonment or a $1000 fine); and to remove the discretion to delegate powers of the Secretary (r.14).	Outstanding at 30 June 1999. (It should be noted that the undertaking was implemented on 25 August 1999.)
Direction No.NPFD 25 made under subsection 17(5A) of the *Fisheries Management Act 1991*	10 June 1999	To amend the Determination to correct cross-referencing errors (para 7(a) should refer to Schedule 3 and not Schedule 2; and para 7(b) should refer to Schedule 4 and not Schedule 3)	Outstanding at 30 June 1999. (It should be noted that the undertaking was implemented on 28 September 1999.)
Export Control (Fees) Orders (Amendment), Export Control Orders No.1 of 1996	6 May 1996	To amend charging legislation to provide for Administrative Appeals Tribunal review.	The Minister advised on 24 May 1999 that Order 19 of the Export Control (Fees) Orders makes provision for AAT review.
Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1995 No.257	30 November 1995	To amend the Regulations to provide for merits review.	Outstanding at 30 June 1999. (It should be noted that the undertaking was implemented on 25 August 1999.)

Fisheries Levy (Northern Fish Trawl Fishery) Regulations (Amendment), Statutory Rules 1992 No.13	4 July 1996	To repeal inoperative Regulations	The Minister advised on 24 May 1999 the undertaking was implemented by Fisheries Levy Act 1984 Regulations (Repeal), Statutory Rules 1996 No.319 of 20 December 1996.
Meat and Live-stock Order No.73/95 made under s.68 of the *Meat and Live-stock Industry Act 1995*	18 June 1996	To correct a drafting defect.	Meat Order M80/98 made under s.68 of the *Meat and Live-stock Industry Act 1995* of 26 June 1998.
Northern Prawn Fishery Management Plan 1995, Directions Nos. NPFD 13, 14 and 17	25 June 1998	To amend Directions 13 and 14 to provide for internal review of a discretion (subclause 8(b) or 7(b)) and Direction 17 to remove a strict liability provision (subclauses 4.2 and 4.3)	Directions NPFD 21 and 22 of 31 July 1998 respectively. Outstanding at 30 June 1999
Order No.LC2/98 made under s.17 of the *Australian Meat and Live-stock Industry Act 1997*	12 January 1999	To take Committee's concerns into account when Order is rewritten - paragraphs 4(a), 4(e) and (f) and subparagraph 4(c)(iii).	Outstanding as at 30 June 1999. (It should be noted that the undertaking was implemented on 24 November 1999.)
Order No.M79/98 made under s.68 of the *Meat and Live-stock Industry Act 1995*	30 June 1998	To amend the Order to remove an unnecessary discretion (clause 4.4)	Order No.M80/98 made under s.68 of the *Meat and Live-stock Act 1995* of 26 June 1998.
Plant Breeder's Rights Regulations (Amendment), Statutory Rules 1995 No.290	20 December 1995	To amend the Regulations to provide for Administrative Appeals Tribunal review of a discretion and to improve drafting.	Plant Breeder's Rights Amendment Regulations 1999 (No.1), Statutory Rules 1999 No.83 of 28 May 1999.

Prawn Export Promotion Levies and Charges Regulations, Statutory Rules 1995 No.245	10 November 1995	To amend the Regulations to include a right of appeal to the Administrative Appeals Tribunal.	Minister advised on 24 May 1999 that under the *Fisheries Legislation Amendment Act (No.1) 1998* charges will not be imposed on prawns exported after 31 December 1997. The provision allowing AAT review was therefore no longer relevant.
Primary Industries Levies and Charges Collection (National Residue Survey - Aquatic Animal Export) Regulations 1998, Statutory Rules 1998 No.30	18 May 1998	To correct drafting defects.	Primary Industries Levies and Charges (National Residue Survey Levies) Regulations 1998, Statutory Rules 1998 No.147 of 18 June 1998.
Primary Industries Levies and Charges Collection (Oilseed) Regulations (Amendment), Statutory Rules 1998 No.153 and Primary Industries Levies and Charges Collection (Grain Legumes) Regulations (Amendment), Statutory Rules 1998 No.154	8 October 1998	To amend the Regulations to correct a technical error (rr.3A and 3B)	Outstanding at 30 June 1999. (It should be noted that the undertaking was implemented on 8 December 1999.)
Quarantine (General) Regulations (Amendment), Statutory Rules 1997 No.85	25 August 1997	To amend the Regulations to provide safeguards for administrative penalties.	Outstanding at 30 June 1999. (It should be noted that the undertaking was implemented on 8 December 1999.)
Wool Research and Development Corporation Regulations (Amendment), Statutory Rules 1992 No.443	4 July 1996	To repeal inoperative Regulations	The Minister advised on 24 May 1999 the undertaking was implemented by the Wool Research and Development Corporation Regulations (Repeal), Statutory Rules 1996 No.160 of 17 July 1996.

Attorney-General's Department			
Customs Regulations (Amendment), Statutory Rules 1998 No.38	7 July 1998	To amend the Regulations to provide that public officials must make a decision within 21 days (r.72) and take into account objectively rather than subjectively relevant information (r.74A(5)(b)).	Outstanding as at 30 June 1999.
Family Law Regulations (Amendment), Statutory Rules 1996 No.71	10 September 1996	To amend the Regulations to provide for Administrative Appeals Tribunal review of discretions.	The Attorney-General advised on 19 May 1999 that the approval/authorisation regime was being reviewed. If the outcome of the review requires regulations to continue to make provision for authorisation of counsellors, mediators and organisations, new regulations will be made to make those decisions reviewable by the AAT.
National Crime Authority Regulations (Amendment), Statutory Rules 1996 No.286	24 July 1997	To amend the Act to include an appropriate safeguard (s.31)	Outstanding as at 30 June 1999
National Native Title Tribunal Regulations 1998 (No.3), Statutory Rules 1998 No.281	16 February 1999	To amend the Regulations to provide for review by the Administrative Appeals Tribunal of a decision to refuse to waive fees.	Outstanding as at 30 June 1999. (It should be noted that the undertaking was implemented on 8 December 1999.)
Public Interest Determination No.7 made under Part VI of the *Privacy Act 1988*	12 March 1998	To amend Determination to improve privacy safeguards.	Public Interest Determination No.7A made under Part VI of the *Privacy Act 1988* of 7 January 1999.

Communications, Information Technology and the Arts			
National Gallery Regulations (Amendment), Statutory Rules 1996 No.92	6 November 1996	To amend the Regulations to remove unnecessary provisions and to correct a drafting error.	The Minister advised on 22 April 1999 that it was no longer necessary to implement the undertaking as references to the Act had been removed from the Regulations.
Radiocommunications (Compliance Labelling - Incidental Emissions) Notice 1998	20 April 1999	To amend the Labelling Notice to include a note advising suppliers that they can apply for a permit if a competent body determines their device to be non-standard.	Outstanding as at 30 June 1999.
Telecommunications (Arbitration) Regulations, Statutory Rules 1997 No.350	7 April 1998	To amend the Regulations to provide for an objective safeguard for a decision and to review personal rights safeguards.	Outstanding as at 30 June 1999
Education, Training and Youth Affairs			
Guidelines T6-98 made under the *Higher Education Funding Act 1988* (Merit-Based Equity Scholarships Scheme)	19 May 1998	To amend the Guidelines to ensure that institutions are required to comply with provisions of the *Privacy Act 1988*.	Minister advised on 28 April 1999 that the undertaking would be fulfilled when the Guidelines were reissued following a policy change or when other circumstances created a need for change. No Guidelines have been reissued as at 30 June 1999.
Employment, Workplace Relations and Small Business			
Occupational Health and Safety (Commonwealth Employment) (National Standards) Regulations (Amendment), Statutory Rules 1996 No.129	23 August 1996	To amend the Regulations to remove one discretion and to provide for Administrative Appeals Tribunal review of another.	Occupational Health and Safety (Commonwealth Employment) (National Standards) Amendment Regulations 1999 (No.2), Statutory Rules 1999 No.86 of 28 May 1999.

Occupational Health and Safety (Commonwealth Employment) (National Standards) Regulations (Amendment), Statutory Rules 1996 No.288	27 October 1997	To amend the Regulations to provide for merits review of a decision.	Occupational Health and Safety (Commonwealth Employment) (National Standards) Amendment Regulations 1999 (No.2), Statutory Rules 1999 No.86 of 28 May 1999.
Environment and Heritage			
Hazardous Waste (Regulation of Exports and Imports)(OECD Decision) Regulations, Statutory Rules 1996 No.283	9 April 1997	To amend the Regulations to provide an opportunity to respond to adverse information.	Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Amendment Regulations 1999 (No.1), Statutory Rules 1999 No.74 of 12 May 1999.
Ozone Protection Regulations, Statutory Rules 1995 No.389	21 June 1996	To amend the Regulations to provide for Administrative Appeals Tribunal review of a discretion.	Ozone Protection Amendment Regulations 1999 (No.1), Statutory Rules 1999 No.73 of 12 May 1999.
Family and Community Services			
Adult Disability Assessment Determination 1999 made under s.38C of the *Social Security Act 1991*	22 June 1999	To amend the Determination to make it clear that specific discretionary powers (subsections 1.5(1) and (2) and subsection 2.2(3)) are subject to the review provisions of Chapter 6 of the *Social Security Act 1991*.	Adult Disability Assessment Amendment Determination 1999 (No.1) made under s.38C of the *Social Security Act 1991* of 22 June 1999.
Childcare Assistance Immunisation Requirements IMCA/12G/98/3 made under s.12H of the *Child Care Act 1972*	19 January 1999	To include review rights for parents in relation to the link between the proposed Child Care Benefit and immunisation in the proposed Family Assistance Act.	Outstanding as at 30 June 1999.

Finance and Administration			
Financial Management and Accountability Orders (Amendment) 1998 made under paragraph 63(1)(b) of the *Financial Management and Accountability Act 1997*	11 March 1999	To amend the Orders to clarify that they do not place any express obligation on Commonwealth Authorities and Companies (CAC) bodies to insure with Comcover.	Outstanding as at 30 June 1999. (It should be noted that these Orders were repealed on 9 August 1999.)
Tenth Amending Deed to Establish an Occupational Superannuation Scheme for Commonwealth Employees and Certain Other Persons	7 August 1996	To amend the *Superannuation Act 1990* to validate administrative actions.	The Minister advised on 7 April 1999 that the Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 1998 had been introduced and passed by the House of Representatives and was still to be considered by the Senate.
Health and Aged Care			
Accountability Principles and Accreditation Grant Principles made under the *Aged Care Act 1997*	13 April 1999	To provide for the following matters in the full version of the Principles. Accountability Principles To require oral notice and a letter giving notice of intended access to refer to the fact that failure to consent could lead to sanctions action (s.1.7 and s.1.7(2)). To require a letter of authority identifying a representative also to state that a consequence of failure to consent to access could, in some circumstances, lead to sanctions action (s.1.9) Accreditation Grant Principles To specify qualifications of assessors.	Outstanding as at 30 June 1999. (It should be noted that the undertaking was implemented on 2 September 1999.)

Australian Radiation Protection and Nuclear Safeguards Regulations 1999, Statutory Rules 1999 No.37	14 May 1999	To amend the Regulations to affirm the declaratory power of the Chief Executive Officer to determine which radiation facilities are prescribed (subregulation 6(5)).	Outstanding as at 30 June 1999.
Exempt Nursing Homes Principles (Amendment No.1 of 1996) and Exempt Nursing Homes Fees Redetermination Principles (Amendment No.1 of 1996)	21 March 1997	To amend the Principles to remove a superfluous power and a discretion.	The Minister advised on 17 June 1999 that these Principles were regarded as being repealed under the *Aged Care Act 1997*.
Health Insurance (1998-99 Diagnostic Imaging Services Table) Amendment Regulations 1999 (No.1), Statutory Rules 1999 No.20	2 June 1999	To amend the Regulations to make it clear that the regulations were not intended to provide a discretion (subrule 9A).	Outstanding as at 30 June 1999.
Hearing Services Regulations (Amendment), Statutory Rules 1996 No.149	21 October 1996	To review the enabling Act to provide for refunds of charges.	The Minister advised on 1 June 1999 that the Hearing Services program had been changed and there was no longer a need for a statutory scheme for refunds.
Therapeutic Goods (Charges) Amendment Regulations 1998 (No.2), Statutory Rules 1998 No.260	11 March 1999	To amend the Regulations to prescribe a time limit (40 days) in which a decision must be made (subregulation 4C(3)).	Outstanding as at 30 June 1999.
Therapeutic Goods Order No.54A made under s.10 of the *Therapeutic Goods Act 1989*	6 January 1998	To amend the Orders to correct cross-referencing errors.	Therapeutic Goods Order No.54B made under s.10 of the *Therapeutic Goods Act 1989* of 12 May 1999.

Industry, Science and Resources			
Australian Sports Drug Agency Regulations (Amendment), Statutory Rules 1996 No.72	12 December 1996	To amend the Regulations to protect the rights of intellectually disabled competitors, to provide for companies to apply to because a prescribed courier service and to provide for Administrative Appeals Tribunal review of decisions.	Outstanding as at 30 June 1999. (It should be noted that the undertaking was implemented on 21 July 1999.)
Patents Regulations (Amendment), Statutory Rules 1998 No.56	30 June 1998	To amend the Regulations to specify Board members qualifications (r.20.32) and to remove age discrimination (omit r.20.34(2) and (3)).	Patents Amendment Regulations 1998 (No.10), Statutory Rules 1998 No.345 of 17 December 1998.
Trade Marks Amendment Regulations 1998 (No.4), Statutory Rules 1998 No.346	23 March 1999	To redraft r.20.9 to make it consistent with r.20.19A of the Patents Regulations to provide a protective safeguard for patent and trade mark attorneys.	Outstanding as at 30 June 1999. (It should be noted that the undertaking was implemented on 7 July 1999.)
Transport and Regional Services			
Air Navigation Amendment Regulations 1998 (No.1), Statutory Rules 1998 No.321	9 March 1999	To clarify the safeguards for identity cards (to be included in a note to r.297PB - since renumbered to r.35)	Outstanding as at 30 June 1999.
Air Navigation Regulations (Amendment), Statutory Rules 1995 No.342	23 May 1996	To amend the Regulations to require security officers to carry photographic identification cards.	Air Navigation Amendment Regulations 1998 (No.1), Statutory Rules 1998 No.321 of 24 November 1998.
Airports (Environment Protection) Amendment Regulations 1998 (No.3), Statutory Rules 1998 No.349	16 March 1999	To amend the Regulations to provide for a reasonable period for reporting (r.6.03(1)).	Outstanding as at 30 June 1999.

Civil Aviation Regulations (Amendment), Statutory Rules 1997 No.111	30 September 1997	To amend the Regulations to provide that certain directions must be given in writing.	Outstanding as at 30 June 1999. (It should be noted that the undertaking was implemented on 9 September 1999.)
Civil Aviation Regulations (Amendment), Statutory Rules 1998 Nos.235 and 237	1 December 1998	To amend the Regulations as follows: provide table of contents; include a definition of a type certificate; include a definition of incidental provisions; r.262AN to provide for Administrative Appeals Tribunal review; r.21.2B(2) remove latter part as it is unnecessary; r.21.3(1) reference to (4) should be to (5) and (3) to (4); r.21.3(2) reference to (3) should be to (4); and r.201.4 amend to reflect that the decision to refuse to consider an application under r.21.43 should be reviewable.	Outstanding as at 30 June 1999. (It should be noted that the undertaking was implemented on 9 August 1999.)
Federal Airports (Amendment) By-Laws No.1 of 1997	23 April 1997	To amend the By-Laws to remove a reversal of proof provision.	The Minister advised on 10 May 1999 that the legislation has been amended which meant that By-Laws no longer have any application.
Imprisonment and Custody of Offenders Ordinances 1998, Territory of Christmas Island Ordinance No.4 of 1998 and Territory of Cocos (Keeling) Islands Ordinance No.4 of 1998	29 March 1999	To amend s.33 of the *Prisons Act 1981 (WA)(CK)(CKI)* to make it clear that a prisoner is entitled to be returned to the Territory at Commonwealth expense within a certain period of being released.	Outstanding as at 30 June 1999.
Marine Orders Part 32 (Cargo Handling Equipment) Issue 2, Order No.14 of 1997	28 April 1998	To amend the Orders to correct a definition and a reference error.	Marine Orders Part 32 (Cargo Handling Equipment) Issue 2 (Amendment), Order No.9 of 1999 of 6 April 1999.

Marine Orders Part 91 (Marine Pollution Prevention - Oil) Issue 2, Order No.5 of 1998 Marine Orders Part 93 (Marine Pollution Prevention - Noxious Liquid Substances) Issue 2, Order No.6 of 1998	16 June 1998	To amend the Orders to provide for a sanction for failure to report certain accidents or defects.	Marine Orders Part 91 (Marine Pollution Prevention - Oil) Issue 2 (Amendment), Order No.10 of 1999 of 6 April 1999. Marine Orders Part 93 (Marine Pollution Prevention - Noxious Liquid Substances) Issue 2 (Amendment), Order No.11 of 1999 of 6 April 1999.
Road Transport Reform (Dangerous Goods) Regulations, Statutory Rules 1997 No.241	28 November 1997	To amend the Regulations to remove three strict liability provisions and to provide for safeguards for administrative penalties.	Outstanding as at 30 June 1999. (It should be noted that the undertaking was implemented on 9 September 1999.)
Road Transport Reform (Heavy Vehicle Standards) Regulations, Statutory Rules 1995 No.55	29 August 1995	To amend the Regulations to provide for Administrative Appeals Tribunal review of discretions and to remove a strict liability provision.	The Minister advised on 10 May 1999 that the Regulations were to be replaced by a new package of Vehicle Standard Regulations and Vehicle Standard Rules. Amendments had been included in new regulations approved by the ATC in January 1999 but the commencement of these regulations was dependent upon an agreement with the Australian Capital Territory Government.
Road Transport Reform (Mass and Loading) Regulations (Amendment), Statutory Rules 1996 No.342 Road Transport Reform (Oversize and Overmass Vehicles) Regulations, Statutory Rules 1995 No.123	2 May 1997 29 August 1995	To amend the Regulations to provide for Administrative Appeals Tribunal review of discretions.	The Minister advised on 10 May 1999 that it was most unlikely that the regulations would be commenced as a review of the Road Transport Reform (Restricted Access Vehicles) Regulations, which will encompass the Oversize and Overmass and Mass and Loading Regulations was about to be undertaken. The National Road Transport Committee had given an undertaking that revised regulations would include independent review rights.

Sydney Airport Demand Management Regulations 1998, Statutory Rules 1998 No.119	5 August 1998	To amend the Regulations concerning the membership and operations of the Compliance Committee.	Sydney Airport Demand Management Amendment Regulations 1998 (No.1), Statutory Rules 1998 No.337 of 9 December 1998.
Treasury			
Approvals given under s.9 of the *Payment Systems and Netting Act 1998*	18 February 1999	To issue new Approvals to ensure they are enforceable.	Approvals of RTGS Systems given under s.9 of the *Payment Systems and Netting Act 1998* of 19 February 1999.
Authorised Non-operating Holding Companies Supervisory Levy Imposition Determination 1998 General Insurance Supervisory Levy Imposition Determination 1998 Life Insurance Supervisory Levy Imposition Determination 1998 Retirement Savings Account Providers Supervisory Levy Imposition Determination 1998 Superannuation Supervisory Levy Imposition Determination 1998	27 April 1999	To validate the retrospective action of the Determinations in the Financial Sector Reform (Amendments and Transitional Provisions) Bill (No.2) 1999 to prevent ambiguity.	Still to be considered to the Senate at 30 June 1999.
Excise Regulations (Amendment), Statutory Rules 1995 No.425	16 May 1996	To amend the *Excise Act 1901* to provide for Administrative Appeals Tribunal review of decisions.	Outstanding as at 30 June 1999.

Excise Amendment Regulations 1998 (No.2), Statutory Rules 1998 No.275	3 March 1999	To amend the Regulations to provide for merits review of a discretion and to provide a safeguard for an official decision (subregulation 52AAAA(1) - approval of a plant and subregulation 52AAAA(9) - specify reasonable period for production of records or additional information).	Outstanding as at 30 June 1999.
Income Tax Regulations (Amendment), Statutory Rules 1994 No.461	31 May 1995	To amend the Regulations to provide for merits review.	Income Tax Amendment Regulations 1999 (No.2), Statutory Rules 1999 No.20 of 12 May 1999.
Superannuation Industry (Supervision) Regulations (Amendment), Statutory Rules 1995 No.430	9 April 1998	To amend the Regulations to provide for merits review.	Superannuation Industry (Supervision) Regulations (Amendment), Statutory Rules 1998 No.83 of 28 April 1998.
Veterans' Affairs			
Veterans' Vocational Rehabilitation Scheme	9 April 1998	To provide for Administrative Appeals Tribunal review of a discretion.	Instrument Varying the Veterans' Vocational Rehabilitation Scheme of 1 May 1998.

Appendix 1

Breakdown of Miscellaneous instruments

Miscellaneous Instruments

Accounting standards	10
Australian Meat and Live-stock Industry instruments	10
Health Insurance instruments	10
Social Security instruments	10
Endangered Species Protection declarations	9
Christmas Island ordinances	7
Cocos (Keeling) Islands ordinances	7
Financial Management and Accountability instruments	7
Export Control orders	6
Fisheries Management directions	6
Therapeutic Goods instruments	6
Australian Meat and Live-stock Industry orders	5
Currency determinations	5
Fisheries Management plans	5
Native Title determinations	5
Navigation orders	5
Life insurance rules	4
Payment Systems and Netting approvals	4
Quarantine determination	4
Territory Ordinances	4
ACT (Planning and Land Management) notices of approval	3
Broadcasting Services notices	3
Film Licensed Investment Company determinations	3
Student Assistance determinations	3

Australian Prudential Regulation Authority instruments	2
Chemical Weapons (Prohibition) instruments of approval	2
Commissioner's Rules	2
Export Market Development Grants determinations	2
Income Tax Assessment determinations	2
Insurance (Agents and Brokers) instruments of approval	2
Motor Vehicle Standards determinations	2
National Environment Protection Council measures	2
National Parks plans	2
Occupational Health and Safety notices of revocation of approval	2
Aboriginal and Torres Strait Islander Regional Council Election Rules	1
Aged Care guidelines	1
ATSIC heritage protection declaration	1
Australian Capital Territory ordinance	1
Australian Horticultural Corporation order	1
Australian National Training Authority determination	1
Authorised Non-operating Holding Companies Supervisory Levy Imposition Determination	1
Child Care determination	1
Child Care payments guidelines	1
Childcare rebate determination	1
Christmas Island exemption order	1
Commercial Television Conversion Scheme	1
Commonwealth Authorities and Companies orders	1
Excise notice	1
Export Meat orders	1
Fisheries Management order	1
General Insurance Supervisory Levy Imposition determination	1
Income Tax Assessment (Farm Management Deposits) guidelines	1

Income Tax Assessment guidelines	1
Income Tax Assessment RHQ determination	1
International Air Services Commission instrument	1
International Air Services Commission policy statement	1
Interstate Road Transport determination	1
Life Insurance Levy Imposition determination	1
Military Superannuation and Benefits Trust Deed	1
National Rail Corporation amending agreement	1
Notice of defence areas under Defence Regulations	1
Parliamentary Presiding Officers determination	1
Pasture seed levy declaration	1
Public Interest determination	1
Retirement Savings Account Providers Supervisory Levy Imposition determination	1
Rice Levy specification	1
Rules of the High Court	1
States Grants (Petroleum Products) amendment	1
Superannuation determination	1
Superannuation Supervisory Levy Imposition determination	1
Telstra Corporation determination	1
Total	**198**

Appendix 2

Special Statements presented to the Senate

During 1998-99 the Chairman made the following special statements to the Senate.

Statement on the first meeting of the Committee
Senator O'Chee, 3 December 1998, Senate Hansard, p. 1161

On behalf of the Standing Committee on Regulations and Ordinances I would like to report on the first meeting of the Committee for the present Parliament, held on 26 November 1998. The Committee scrutinises all disallowable legislative instruments for compliance with its principles, set out in the Standing Orders, which protect parliamentary propriety and personal rights. The Committee operates in a non-partisan fashion and does not deal with policy issues.

Between its last meeting of the previous Parliament and the first meeting of this one, the Committee received 48 letters from Ministers in reply to concerns which it raised. This indicates the active nature of the Committee and the variety of issues which it raises. The Ministers undertook to amend nine separate instruments to meet our concerns, with some multiple amendments. Ministers also undertook to take other action in relation to seven other instruments, such as to provide numbering or to improve Explanatory Statements. The Committee was not satisfied with a further six letters and agreed to write back to the Ministers for further advice.

Set out below are summaries of some of the replies from Ministers, which are intended to illustrate the more significant matters of concern to the Committee. The Committee trusts that it will also demonstrate to the Senate that the Committee is ensuring that the quality of legislative instruments in relation to parliamentary propriety and personal rights is not less than that of Acts.

Parliamentary propriety

One significant action in this regard was the discovery by the Committee that three proclamations signed personally by the Governor-General commencing three separate Acts and numbers of sets of regulations made under those Acts, were totally void for prejudicial retrospectivity. This was a fact apparently not known to the Minister or the Department prior to inquiries by the Committee. After these inquiries, however, the Parliamentary Secretary obtained legal advice from the Attorney-General's Department that the Governor-General's personal instruments were a nullity. The Committee also obtained advice that this was the view of the Executive Council secretariat. The Committee sought and obtained advice from the Parliamentary Secretary that all of the provisions of statutory rules made on the basis that the proclamations were valid would be made again, that no person was adversely affected and that all administrative action taken in reliance on the putative proclamations was legally authorised. At its meeting the Committee decided that the reply from the Parliamentary Secretary was not entirely satisfactory and decided to seek further assurances. It is a serious matter that the Governor-General was advised to sign proclamations which were of no effect and the Committee wished to ensure that everything was now in order.

The Committee is also concerned that legislative instruments respect the rights of Parliament. On 30 June 1998 the Committee made a special statement to the Senate on its continuing scrutiny of three Great Barrier Reef Marine Park Zoning Plans, which gave the GBRMP Authority the power to close and open large areas of the reef to fishing and other activities for periods of up to five years. The Committee asked about invalid subdelegation of legislative power. In reply the Minister attached advice from one unit of the Attorney-General's Department that if legislative then the powers certainly and properly should be provided in the Plans themselves and thus be subject to parliamentary scrutiny and possible disallowance, but in fact they were merely administrative. The Committee was surprised at this conclusion and asked the Minister for advice from another unit of the Attorney-General's Department, which was that they were clearly legislative. Further advice from that source, however, was that although legislative they were likely to survive a challenge. The Committee does not accept this view, but whether or not the delegations are void it is a clear breach of parliamentary propriety that these important instruments, which are now accepted by everyone as legislative, are not subject to parliamentary scrutiny. The Committee considered further advice from the Attorney-General at its meeting and resolved to continue to pursue this matter and to report in due course.

Similar although less serious questions of parliamentary propriety arose in relation to an instrument which provided for significant administrative notices relating to the ethnic press to be published in the *Gazette.* The Committee asked the Minister if notices could be tabled as well, because they appeared to address matters which would be of interest to Senators. The Minister in this case advised that copies of notices would be sent to the Committee. In another case of notices extending exemptions for tertiary institutions from certain requirements the Minister advised that these would be tabled.

Many legislative instruments provide for the composition, powers and operations of boards and authorities. The Committee is careful to ensure that these include all the usual safeguards. In one case the Minister undertook to make multiple amendments relating to the Compliance Committee established under the *Sydney Airport Demand Management Act 1997*, which the Committee believes will enhance the open operation of the Committee. The Minister undertook to amend some provisions and review others relating to the Professional Standards Board for Patent and Trade Mark Attorneys, which will align them with contemporary standards of propriety.

Parliamentary propriety also dictates that legislative instruments must be valid under the provisions of its enabling Act or some other Act. One instrument purported to subdelegate a decision-making power in the Act, with no apparent power to do so. The Minister advised that the subdelegation would be removed. Another instrument provided for fees which appeared to go beyond cost recovery and to be taxes, with consequent invalidity. The Act under which the instrument was stated to be made did not provide any such power and the Explanatory Statement did not refer to this

question. The Minister advised that the taxing power was in another Act and that it was unfortunate that the head of power was not advised.

It is also a breach of parliamentary propriety if a legislative instrument provides for matters more appropriate for inclusion in an Act. In this context the Committee considered a reply from the Minister about an insurance operation which was established by a legislative instrument the substantive part of which was six lines long. The Explanatory Statement provided little information about the operation, apart from the information that it appeared to cover all Commonwealth insurable risks, apart from those covered by Comcare, which the Committee noted was established by detailed provision in an Act. The letter from the Minister raised further issues of parliamentary propriety and the Committee decided to write again to the Minister, asking for further advice on a number of aspects of the instrument. The Committee advised the Minister that the enabling Act did not appear to contemplate such a substantial operation and the second reading speech made no mention of it. Indeed, the second reading speech advised that this type of legislative instrument would be used for the day-to-day application of the Act, not to establish major financial bodies. In particular, the Committee asked for full advice on the transparency and accountability to Parliament to which the instrument expressly refers. The Chairman has been in contact with the Minister with a view to expediting a reply so that the Committee may deal with this matter as soon as possible. Once again this is a matter upon which the Committee will report again to the Senate.

Personal rights

The other main function of the Committee is to protect personal rights. Here also the meeting considered a number of replies which illustrate the nature and scope of its concerns. In this context one instrument made under the *Telecommunications Act 1997* provided that a service provider must not allow a person to use a number for an anonymous pre-paid digital mobile service if, among other things, a senior officer of a criminal law-enforcement agency has asked that the service not be provided because the officer suspects on reasonable grounds that the person is likely to use the service to engage in serious criminal conduct. The Regulation Impact Statement advised that the reason for the provision was that the product was available in considerable quantities in criminal circles within one month of its introduction, law enforcement and national security agencies found that previously productive avenues of investigation were closed and there was a sharp decrease in the number of lawful telecommunications interceptions because of the untraceable nature of the telecommunications. The instrument included among other safeguards the requirement that the service provider must tell all applicants and users of its pre-paid carriage services of the effect of the provision, but given the sensitivity of the matter the Committee asked the Minister for further advice. In particular the Committee asked for confirmation that the different safeguards were cumulative and for information on how the provision would actually operate. In this instance the Minister's reply and the RIS satisfied the Committee that the instrument was reasonable, advising that without it millions of dollars spent or committed by government agencies would be wasted

and ASIO and other national security organisations would be less able to perform their functions, with especial reference to the Sydney 2000 Olympics.

Other replies from Ministers to matters raised by the Committee in relation to personal rights illustrate the breadth and diversity of its activities. For instance, the Committee was concerned that refunds of hearing fees in the Family Court required 20 days notice although earlier provisions for the High Court and the Federal Court prescribed only 10 days notice. In this context the Committee noted that clients of the Family Court would usually need the refund more than litigants in the other courts. The Minister advised, however, that 20 days was needed because of the way that resources are allocated in the Family Court. Another instrument required a public official to consider an application which could have important commercial consequences, but did not provide a time limit for the official to come to a decision or at least be deemed to have done so. Also, the official could have regard to matters which were wholly subjective. In this case the Minister agreed to amend the instrument to correct these deficiencies. In a case which involved delays in paying benefits the Minister advised that departmental procedures were being reviewed. In another case related to benefits the Minister assured the Committee that no person was disadvantaged because of defective drafting of an instrument. Another instrument increased from two to 13 the number of types of investigations for which a statutory authority could recover its costs from the body being investigated. Here the Minister assured the Committee that no new investigations had been commenced before the instrument was gazetted.

Many legislative instruments provide for aspects of civil aviation operations and safety and the Committee looks carefully at these. Two almost identical detailed instruments provided authorisation for activities by the Australian Parachute Federation and by the Australian Sky Diving Association, but although parachuting incidents had to be reported there was no such requirement for sky divers. In reply to the Committee's inquiry about safety supervision the Minister advised that this reflected differences in the scale of operations of the two bodies and the difference in operational surveillance.

Another instrument provided for what the Committee suggested were intrusive provisions which may not have been justified. Applicants for a licence were required to divulge whether they or any person in management or control of the relevant business had been charged or convicted of any offence at all. The Committee suggested to the Minister that this should be limited to more serious offences. Another provision required a licence holder to provide the date of birth of the licensee's nominee, even though the licence holder did not have to provide this information. The Minister has now advised that the offence provisions would be amended in accordance with the Committee's suggestion. The omission of the date of birth for the applicant was a mistake which would be corrected, because the information is necessary for integrity checks. Another instrument provided for strict liability for all persons on a fishing boat, even though the offence may have occurred before a deck hand had come on board. Here the Minister advised that an amendment would limit liability to the master of a boat.

It is also a breach of personal rights and of the Committee's principles if decisions made by Ministers or officials are not guided and controlled by suitable criteria and are not subject to appropriate external review of their merits, usually by the Administrative Appeals Tribunal or a similar specialist review body. In this context the Committee noted that one instrument had provided for exemption from prohibition on navigation through a closed fishery, with no criteria for the decision maker and no right of review. In reply the Minister advised that guidelines for the exercise of the discretion would be developed. In relation to review, the Minister advised that an exemption is usually required at short notice and there would not be time for a full AAT review. However, expeditious internal review by a senior officer not involved in the original decision would be provided. The Committee agreed that this was reasonable and would provide an adequate paper trail.

Future activities

This report has addressed the 48 replies which the Committee has received from Ministers for its first meeting of this Parliament. The Committee will also shortly make its usual end of sittings statement setting out a summary of the dozens of letters which the Committee has sent to Ministers and to which it is waiting replies. As indicated above there are a number of matters upon which the Committee will make further special statements to the Senate and there will certainly be other matters which will also justify a special statement. The Committee reports in detail on its scrutiny of individual instruments in its Annual Report and the report for 1997-98 is now being finalised. There are also indications that another Legislative Instruments Bill may be introduced and the Committee will give the same exacting attention to this as it did to the previous Bills.

Statement on work of the Committee during the Spring Sittings 1998
Senator O'Chee, 9 December 1998, Senate Hansard, p. 1587

Overview

During the present short sittings the Committee scrutinised 707 legislative instruments. This number, although historically large, is somewhat less than usual, no doubt due to the caretaker period of government in relation to the election. These instruments were made under the authority of scores of enabling Acts administered through virtually every department of state. Almost every legislative scheme relies on legislative instruments to provide the administrative detail of programs set out in broad policy in enabling Acts which authorise those instruments.

The Committee acts on behalf of the Senate to scrutinise each of these instruments to ensure that they conform to the same high standards of parliamentary propriety and personal rights which the Senate applies to Acts. If the Committee detects any breach of these standards it writes to the Minister or other law-maker in respect of the

apparent defect, asking that the instrument be amended or an explanation provided. If the breach appears serious then the Chairman of the Committee gives notice of a motion of disallowance in respect of the instrument. This allows the Senate, if it wishes, to disallow the instrument. This ultimate step is rarely necessary, however, as Ministers almost invariable take action which satisfies the Committee.

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

Of the 707 legislative instruments scrutinised by the Committee, 163 were statutory rules, which are generally better drafted and presented than other series of legislative instruments. The other 544 instruments were the usual heterogeneous collection of different series.

The Committee scrutinised each of the 707 instruments under its four principles, or terms of reference, which are included in the Standing Orders. There were 85 apparent defects or matters worthy of comment in those 707 instruments. The defects are described below under each of the four principles.

Principle (a)

Are legislative instruments in accordance with the statute?

The Committee interprets this principle broadly. It includes not only technical validity but also every other aspect of parliamentary propriety. The Committee noted that there may have been deficiencies in the following areas.

Validity

Legislative instruments must comply with the provisions of both the enabling Act and umbrella provisions of any other relevant Acts such as the *Acts Interpretation Act 1901*. One instrument purported to be made by a letter from one official to another, with no making words at all. Several instruments appeared to subdelegate legislative power, which is invalid unless expressly authorised by an enabling Act. Another instrument purported to subdelegate a power of delegation in the Act, seemingly with no authority. Another subdelegated what the Explanatory Statement advised were matters related to individual businesses, which would be valid, but the actual provisions seemed to refer to classes of business, which would be void. Other instruments appeared to incorporate material as amended from time to time, which again is invalid unless expressly authorised. Legislative instruments which provide for prejudicial retrospectivity are also generally invalid; one instrument provided for apparently prejudicial commencement six weeks before it was gazetted.

Parliamentary propriety

The Committee ensures that no aspect of a legislative instrument breaches parliamentary propriety. One instrument appeared to indicate that two separate Departments had been granting exemptions to the Principal Regulations with no legislative authority to do so. Another instrument amended provisions of legislative instruments to reflect changed conditions, but there was no indication of when this would be done for the enabling Act. One instrument provided for powers to be delegated to any officer at all in an agency, although other instruments restricted delegations in two related agencies to more senior officers. Another instrument indicated that its provisions would be reviewed before 2001 but did not provide details of who was to conduct the review. The Committee has previously reported to the Senate (3 December 1998) that it had discovered that proclamations by the Governor-General commencing three Acts (two of which related to the public revenue) and consequently many provisions in numbers of sets of regulations, were void. There were various implications for parliamentary propriety flowing from this. Another instrument altogether, of 415 pages, which was made by the Governor-General, had a pink erratum slip glued to the front cover, with no assurance that the Governor-General was aware of the error and its correction.

The Committee understands that the Australian government bookshop is still selling copies of the **Therapeutic Goods Regulations (Amendment), Statutory Rules 1997 No. 401**, apparently as part of the Principal Regulations, although they were disallowed by the Senate on 31 March 1998. It is true that these regulations were in force from 24 December 1997 until disallowance, but are now little more than an historical curiosity. Such sales may mislead users and it would be preferable if they were sold only to people who make a specific request.

Drafting and presentation

The Committee considers that the standard of drafting and presentation of legislative instruments should not be less than that of Acts. Several instruments included otiose provisions already provided in an enabling Act. Others included deficient dictionary or definition provisions, one of which appeared to be circular. Another referred to an investigation without any provision for an investigation and a report with no indication of how or to whom the report is to be made. One instrument inadvertently omitted some words. Several instruments had Explanatory Statements which were deficient in quality. Several instruments were not numbered. Other instruments included cross reference errors. A number of multiple sets of amendments of the same principal instrument was made on the same day. One instrument 174 pages long did not include a table of contents, which made it difficult to follow.

Delay

The Committee questions any apparent delay in making legislative instruments. One instrument corrected errors in provisions for the collection of levies five years later, with a possible lack of a sound legislative basis for their collection during that time. Another instrument provided for exemptions from certain provisions four years after

Departments were granting them. One instrument implemented uncontroversial recommendations of a report three years after it was presented. The Senate Legal and Constitutional References Committee Report *Payment of a Minister's Legal Costs: Part 2*, February 1997, noted that the Department was developing a proposal to make regulations which in fact were not made until 18 months later.

Commencement of instruments

During the sittings the Committee noted a tendency to provide for the commencement of instruments not by reference to a specified date but rather by reference to commencement of a particular Act. The Committee accepts that it may be desirable for legislative instruments to be ready to come into effect at the same time as enabling provisions, but in these cases the expected date of comment should be included in provisions of the instrument, in notes in the body of the instrument or in the Explanatory Statement. Numbers of instruments did not do this, which may inconvenience users. The Explanatory Statements for these instruments did not even include reference to the six months rule, under which Acts which commence on proclamation provide that commencement is deemed if they are not proclaimed within six months of assent. If the actual expected date of commencement is not known the Explanatory Statement should explain the reasons for this. Some instruments dependent upon commencement of Acts did give this information, but enough did not for the Committee to report the tendency. In some cases there is no excuse; for instance, one instrument provided for commencement on the commencement of a specified Act with no further information, while the Explanatory Statement for another series of instruments advised that the Act would commence on a particular date. The Committee also could do nothing but ask about an instrument which provided for commencement on a specified date although the Explanatory Statement advised that it would commence on a different date.

Principle (b)

Do legislative instruments trespass unduly on personal rights and liberties?

The Committee also interprets this principle broadly, to include every aspect of personal rights. The Committee noted deficiencies in the following instruments.

Safeguards on powers of public officials

Legislative instruments which confer powers on public officials to affect individuals should be reasonable and include appropriate safeguards. One instrument provided that a form must be returned by a specified date but a warning on the form itself indicated that the form must be returned within two months of receipt. The form also warned that if the form was not returned by the (wrongly) specified date then the Minister may impose sanctions. This warning was also wrong because the enabling Act provided only for the Secretary to impose sanctions. The form also did not advise that any decision to impose sanctions was reviewable. Another instrument approved

six forms in relation to the *Chemical Weapons (Prohibition) Act 1994* but only two of them included a declaration that the information given was true and correct. There was also no indication in any of the forms of the consequences, if any, of providing information which was not true. One instrument provided only that an application must be made in a manner and form acceptable to an agency. The rules of a court provided for some application forms but advised that eight others had not yet been made; the Committee asked when it was likely that these would be made. One instrument provided for intrusive information in relation to past trivial offences, for details which may not have been necessary to satisfy a "fit and proper person" test and for date of birth information which may not have been justified. Another instrument provided only for subjective safeguards in a search warrant. Another instrument provided that an official must accept or reject an application as soon as practicable, although it may have been preferable to specify a certain period within which this must be done, which would then trigger review rights. Another instrument provided that an official may demand information from people within a period set by the official, with no reasonability safeguard.

Personal rights

The Committee questions any provisions which may operate harshly or which impinge directly upon rights. One instrument revoked the appointment of a body because the Minister was apparently satisfied that it had failed to perform its functions adequately, but there was no indication of the grounds on which the Minister relied in coming to that conclusion, or of whether the body was warned of the possibility of revocation and given an opportunity to present its case. Another instrument exempted an agency from being sued in Australian courts in relation to "personnel matters", but neither the Act nor the regulations defined that expression. In another case the Committee was concerned that people may have been adversely affected while a drafting error was being corrected. Another instrument provided that one private body must report all safety incidents to the civil aviation authorities even though there was no such requirement for a similar private body. The Explanatory Statements for other instruments gave no assurance that retrospectivity was beneficial. One instrument provided for the exchange of personal information between the Department and private financial institutions in relation to people who wished to participate in a financial supplement scheme, with no assurances about privacy.

Fees, charges and allowances

Many legislative instruments provide for fees, charges, allowances and benefits. The Committee questions any such provisions which are unusual or unexpected. The Committee was disturbed by advice in the Explanatory Statement for one instrument which generally increased charges for services by an agency, that charges for training courses were not being increased because they were already high in comparison with prevailing prices in the market. The Committee asked whether the agency had been abusing its position as monopoly supplier and whether the charges should not be reduced. One instrument increased greatly the types of investigation for which an

agency could recover its expenses from the private body being investigated, without adequate safeguards. Another instrument provided for certain levels of charges although the Explanatory Statement advised that other levels were intended. Other instruments did not explain increases in costs payable to legal practitioners for work in Commonwealth courts which were many times greater than the CPI.

Principle (c)

Do legislative instruments make rights unduly dependent on administrative decisions which are not subject to independent review of their merits?

Many legislative instruments provide for public officials to exercise administrative discretions. The Committee considers that these discretions should be as narrow as possible, include objective criteria to limit and guide their exercise, and provide for independent, external review of their merits by a specialist tribunal such as the Administrative Appeals Tribunal.

One instrument provided that an agency would write to all parents of children under seven years not shown as being immunised advising them of the link between child care assistance and immunisation. The enabling Act provided, however, that the link was only established if the Secretary was satisfied as to various matters. The Committee asked about review and whether parents would be informed of any such right. The Committee was startled by advice in the Explanatory Statement for another instrument that review would not be available because decisions would be made on a case by case basis; this is usually a reason why review should be provided. Another instrument did not indicate what decision was being made, another did not indicate who was to make a decision, while another delegated a decision making power to the wrong person. As usual, several instruments provided for review of some decisions but not for related ones; the Explanatory Statement for one of these instruments purported to explain this, but not to the satisfaction of the Committee. One instrument provided that an agency may make decisions on such criteria as the agency thinks necessary. Another instrument provided only for internal review when external may have been better. Another instrument did not provide the usual review of a discretion to waive fees and compounded the deficiency because the Explanatory Statement was misleading.

Many administrative decisions affect business and the Committee scrutinises these carefully, particularly those affecting small business, to ensure proper review rights. One instrument provided for an authorised person, who apparently could be anyone, to deny sales tax and customs and excise duty exemptions. Another provided for discretions in relation to test shipments of exports, another for discretion to approve a manufacturing plant. A number of instruments provided for discretions in relation to civil aviation operations, some only of which were subject to review. Another instrument gave the Registered Health Benefits Organisation power to make decisions which could have adverse effects on the financial operations of hospitals. Another

instrument provided for a discretion to approve people to give courses and set examinations in relation to matters which could affect professional qualifications.

Principle (d)

Do legislative instruments contain matters more appropriate for parliamentary enactment?

The Committee does not raise this principle as often as its other three principles, but it is an important part of parliamentary propriety and in this respect complements the first principle of the Committee. One instrument six lines long provided for the operation of Comcover, which appeared to be a substantial insurance operation. The Committee noted that Comcare, the other Commonwealth insurance operation, was set up by Act. The second reading speech for the enabling Act for Comcover discussed legislative instruments and appeared to advise of a far more limited role for them. The Committee has asked the Minister for full advice.

Other Developments

During the sittings the Committee made a special statement to the Senate on 3 December 1998 on its first meeting of the present Parliament. On 3 November 1998 the legal adviser and Committee staff hosted a visit by the Standing Committee on Uniform Legislation and Intergovernmental Agreements of the Western Australian Parliament. The Committee's home page was placed on the Internet and the Delegated Legislation Monitor was also converted to the Internet. The Committee is grateful for the support which it has received from the Senate during the present sittings.

Annual Report 1997-1998
Senator O'Chee , 10 March 1999, Senate Hansard, p. 2651

It is with a sense of achievement that the Standing Committee on Regulations and Ordinances tables its Annual Report 1997-98. By way of background, the Committee is established under the Standing Orders to scrutinise all disallowable legislative instruments to ensure that they comply with non-partisan principles of personal rights and parliamentary propriety. Apart from certain committees dealing with internal parliamentary matters it is the oldest Senate committee, having been established in 1932.

The Committee does not concern itself with the policy merits of legislative instruments, which complements and strengthens its non-partisan operation. Instead, it applies parliamentary standards to ensure that legislative instruments are of the highest quality. It does this by writing hundreds of letters to Ministers each year, drawing attention to apparent defects in tabled instruments. The Committee has the power to recommend to the Senate that an instrument or a discrete provision of an instrument, be disallowed, but in practice Ministers almost invariably agree to amend

the problem provisions or explain the difficulty to the satisfaction of the Committee. The Committee does, however, give numbers of protective notices of disallowance of instruments in suitable cases, to preserve its options and to make sure that it receives early replies from Ministers.

The Committee also makes special statements to the Senate on matters of particular interest and the Report includes these. Also included are papers presented to three conferences describing aspects of the operation of the Committee.

In relation to its core scrutiny function the Committee looked at 1888 instruments during the year, with 313 of these apparently defective or in some way worthy of comment. The Report sets out in detail the types of matters which the Committee raises under each of its four principles, which are set out in the Standing Orders. The following is a brief survey of these matters.

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

The Committee interprets this principle broadly. It includes technical validity, with the Report noting instruments which appeared to be invalid for subdelegation, prejudicial retrospectivity, unauthorised incorporation and failure to comply with requirements of the enabling Act. There is also a substantial segment on possible breaches of parliamentary propriety, illustrating the vigilance of the Committee in raising anything which may impinge on the rights of Parliament. The Report also details numbers of drafting and procedural defects which breached the Committee's position that the drafting and presentation of legislative instruments should be of a standard not less than that for Acts.

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

The Report includes many instances of the Committee questioning instruments which appeared to be unfair, with particular emphasis on protection of the rights of individuals and lessening burdens on business, particularly small business. This principle also includes action by the Committee in relation to the right to privacy and to harsh or unusual aspects of government fees and charges. This segment hopefully illustrates that there is little in the way of breaches of personal rights which escapes the net of the Committee.

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

This segment of the Report includes scores of instruments, all questioned by the Committee, which provided for officials to make decisions which may adversely affect individuals or businesses, but which did not appear to provide for merits review. These were so numerous that it was most convenient to set them out by portfolio.

Principle (d): Do legislative instruments contain matters more appropriate for parliamentary enactment?

This is a principle not raised by the Committee as often as the other three principles, but it is nevertheless an important aspect of parliamentary propriety, complementing the first principle. For instance, the Report relates how, following extended correspondence in relation to one instrument which appeared defective on this ground, the Committee advised the Parliamentary Secretary that it did not accept her advice that it was acceptable to deal with the matter by regulation rather than by Act. In this case, however, the Senate then disallowed the regulations on policy grounds, which precluded any further formal action by the Committee.

In summary, the Report is a comprehensive description of the activities of the Committee, which it hopes will satisfy the Senate that it has carried out its scrutiny and reporting mandate in a satisfactory manner. The Committee would like to thank its Legal Adviser, Professor Jim Davis, and the Committee staff for their assistance. The Committee is also grateful for the support which it has received from the Senate.

107th Report – Scrutiny by the Committee of Orders made under the *Financial Management and Accountability Act 1997*
Senator O'Chee, 27 May 1999, Senate Hansard, p. 5526

The core function of the Standing Committee on Regulations and Ordinances is to scrutinise legislative instruments to ensure that they do not breach personal rights or parliamentary propriety. One aspect of parliamentary propriety is that legislative instruments should not contain matter more appropriate for parliamentary enactment.

The Committee does not raise this principle often, but when it does it often highlights fundamental issues of the proper relationship between the Parliament and the executive and of the appropriate prerogatives of Parliament. This Report describes Committee scrutiny of the **Financial Management and Accountability Orders 1998 (Amendment)**, which illustrates such issues.

The Report first outlines the criteria which the Committee apply to determine whether the subject matter of a legislative instrument should be included in a Bill, where it would face the full rigour of parliamentary passage. The Report describes how these

criteria have been applied in practice. In one such case the Committee obtained an undertaking to amend the Act to bring to an end seven years of yearly extensions by regulations of discrimination based on sex. Some of the other circumstances where the Committee has raised this matter included the censorship of books, magazines, films and computer games; disclosure of personal information by Australia Post to, among others, ASIO and law enforcement agencies; substantial constitutional change to Australian territories; and the prohibition on advertising natural remedies as drug free.

The Report next analyses the enabling *Financial Management and Accountability Act 1997*, which provides for the management of public money and public property. The Report notes a number of wide powers under the Act to make legislative instruments. For instance, it provides for the Minister to issue Special Instructions, which are not subject to tabling or disallowance, breach of which is punishable by two years imprisonment, which override the Act and the regulations. The Report mentions Committee scrutiny of instruments made under some of these powers.

The great bulk of the Report, however, addresses Committee scrutiny of the **Financial Management and Accountability Orders 1998 (Amendment)**. The substantive part of these Orders, which was six lines long, established Comcover, described as a managed insurance fund, which will insure or arrange insurance, for all Commonwealth insurable losses except for employers' liability risks already covered by Comcare. The substantive part of the Explanatory Statement, which was seven lines long, merely repeated what was in the Orders. The Committee obtained further information from the Minister, which advised that Comcover would be a comprehensive disciplined managed fund, collect premiums, accumulate reserves, meet losses out of reserves, be modelled on the best managed funds in Australia and overseas, improve accountability and transparency to the Parliament, deliver a dividend to the government at least comparable to industry standards and adopt a business-like approach to the government's insurance and risk management arrangements through the provision of services at competitive market rates.

In these circumstances the Committee considered that the scheme may have been more appropriate for parliamentary debate and passage, particularly since a similar agency, Comcare, was established by detailed statutory provisions. The Report notes that Committee scrutiny of the Orders took nine months, over two Parliaments, including extensive correspondence, a meeting between the Committee and the head of Comcover and a meeting between the Chairman and the Minister, following which the Minister agreed to amend the Orders to meet the Committee's concerns. The Committee is now able to report to the Senate that the amended arrangements will not contain matter more appropriate for parliamentary enactment.

Scrutiny of Great Barrier Reef Marine Park Zoning Plans
Senator O'Chee, 28 June 1999, Senate Hansard, p. 6651

On 30 June 1998 the Committee reported to the Senate on its continuing scrutiny of the **Great Barrier Reef Marine Park Zoning Plans**, see Annual Report 1997-98, p.91. The Committee advised that there were a number of important matters of continuing concern with these instruments. The Committee can now report that it has pursued the matter and has received assurances from the Minister which it considers acceptable.

The Committee's concerns related to what appeared to be an invalid subdelegation to officials of legislative powers to open or close considerable areas of the Great Barrier Reef to fishing, including recreational fishing and spearfishing, for periods of up to five years. These powers were to be exercised by instruments which were not even subject to tabling, much less to possible disallowance. In reply to the Committee's query the Minister provided advice from the Office of Legislative Drafting (OLD) in the Attorney-General's Department (AGD) that if the powers were legislative then they "certainly" should be provided directly by the Zoning Plans and thus be subject to full parliamentary control. The OLD advised, however, that the powers were in fact administrative and therefore valid.

The Committee reported that it was startled by this advice, which appeared to fly in the face of what it understood to be the difference between legislative and administrative powers. The Committee then asked the Minister for advice on the matter from the Office of General Counsel (OGC) in the AGD. The OGC advice, which accorded with the views of the Committee, was that the powers in question were "clearly" of a legislative nature. The OGC advice did not refer to the earlier advice from OLD. The Committee then suggested to the Minister that the Zoning Plans should be remade as soon as possible to correct the present unsatisfactory position.

The Minister responded to the Committee by providing further advice from the OGC that the powers, although legislative, would be likely to survive a court challenge to their validity on the grounds of subdelegation. The Committee replied that it did not accept this advice but that in any event it was a breach of parliamentary propriety to make legislative instruments which are not subject to tabling and disallowance. This was where the matter stood at 30 June 1998 when the Committee previously reported to the Senate on the Zoning Plans.

Since then the Committee has actively continued its scrutiny and, as noted above, has achieved what it regards as a satisfactory outcome. The Committee first wrote directly to the Attorney-General for more detailed advice on aspects of the legal position, with particular emphasis on the implications for the operation of the Legislative Instruments Bill. In this latter context the Committee wanted to be quite sure that the provisions of that Bill, if enacted, would apply to the instruments for which the Zoning Plans provided. The resulting opinion from the Chief General Counsel,

Australian Government Solicitor, reviewed all the previous advice from the different areas of AGD and concluded that the provisions in question should be properly regarded as legislative. The Chief General Counsel also concluded, however, that the subdelegation of legislative power was not invalid. Nevertheless, the Chief General Counsel noted that, even if valid, there may be quite proper policy issues as to whether it is appropriate in all the circumstances to confer the delegated power. The Attorney-General advised that, in relation to the Legislative Instruments Bill, this latest advice would be drawn to the attention of the relevant officers.

Following this reply the Committee again wrote to the Minister asking that the decisions under the Zoning Plans be made subject to disallowance. The letter reads as follows:

> 2 December 1998
>
> Senator the Hon Robert Hill
> Minister for the Environment and Heritage
> Parliament House
> CANBERRA ACT 2600
>
> Dear Minister
>
> I refer to the three Great Barrier Reef Marine Park Zoning Plan Amendments about which the Committee has previously written to you.
>
> As I mentioned in my letter of 30 June 1998 the Committee wrote to the Attorney-General about the Amendments and has now received an opinion of 24 August 1998 (attached) from the Chief General Counsel which confirms the view of the Committee and which indeed confirms earlier advice from the Office of General Counsel of 19 October 1997 and 16 January 1998 that the instruments are legislative. This is in contrast to earlier advice from the Office of Legislative Drafting of 2 and 5 December 1996 that the instruments are administrative.
>
> The Chief General Counsel remains of the view, however, that although legislative the instruments are not invalid. The Committee does not accept this view, but whether or not the powers in the instruments are void it is a clear breach of parliamentary authority that such significant legislative instruments are not subject to parliamentary scrutiny and possible disallowance. On 30 June 1998 on behalf of the Committee I made a special statement to the Senate to this effect. I also draw your attention to the comments in the final paragraph of the opinion of the Chief General Counsel, viz. "Of course, even if the delegation is valid, there may be quite proper policy issues as to whether it is appropriate in all the circumstances to confer the delegated power on the authority." The Committee endorses this view and would appreciate your advice that amendments will be made to make the exercise of the powers subject to parliamentary disallowance. The present position is deficient in relation to

transparency, accountability, sound public administration and parliamentary propriety.

The Attorney-General has advised that the OLD opinions of 2 and 5 December 1996 are subject to client privilege but that he had passed our request for copies of the opinions to the Authority. The Committee understands that the Authority would prefer a formal request from the Committee before the opinions are released and I now make such a request. The Committee notes, however, advice from the Attorney-General that the latest opinion from the Chief General Counsel will be drawn to the attention of relevant officers in your portfolio. The Committee would welcome your advice that if any of your portfolio areas have previously advised any person that these matters are administrative decisions then that advice will be formally withdrawn in favour of advice that they are legislative. In any event the Committee assumes that you have been doing this since October 1997.

In particular and importantly the Committee understands that there may be matters of litigation, grievance or dispute about the exercise of the powers. Here also the Committee would appreciate your assurance that your portfolio areas have clearly informed everyone affected that it has been the formal position of the Commonwealth since October 1997 that the powers are legislative and not administrative. It should be indicated to such people that they could argue that the powers are void. It would be a serious matter if any people affected or aggrieved about the exercise of the powers were not clearly informed by your officials of the official Commonwealth position.

Because of the importance of these matters the Committee would be grateful for an early reply.

Yours sincerely

Bill O'Chee
Chairman

Almost five months later, despite having asked for an early reply and despite reminders from the Committee staff, the Committee had not received a reply. It therefore decided that it would be helpful to discuss the matter with the Minister and Senator O'Chee and Senator Coonan did this on 29 April 1999. The Minister generously gave the Committee members as much time as they needed to state their case and in turn clarified aspects of his position. The Minister advised that the present round of closures and openings on the Reef was complete and that it was not intended to make any more until the end of the existing experimental period in 2001. However, any future determinations made after that date would be included in Zoning Plans which are subject to full parliamentary scrutiny and control. A subsequent Committee meeting agreed that this was a satisfactory outcome in all the circumstances. The Committee is therefore able to report to the Senate that all future activity in this

important and sensitive area of protection of the Great Barrier Reef Marine Park will accord with parliamentary propriety.

The Committee is grateful to the Minister for the Environment and Heritage, Senator the Hon Robert Hill, for his personal attention to its concerns.

Special statement on ministerial undertakings
Senator O'Chee, 28 June 1999, Senate Hansard, p. 6653

One of the most important elements of the operations of the Standing Committee on Regulations and Ordinances is the practice of accepting undertakings from Ministers to amend or to take other action in relation to legislative instruments about which the Committee has concerns. The Committee accepts such undertakings even though amendment will take place in the future, in order to ensure that the implementation of policy and day to day administration of programs continues smoothly. When it accepts such undertakings the Committee withdraws any protective notice of disallowance which it has placed on the instrument, or refrains from giving a notice if it has not already done so. The Committee therefore relies on the good faith of Ministers to implement promptly any undertakings.

Prompt and timely implementation of undertakings is central to the success of the practice which the Committee has adopted. Failure to honour this principle could constitute a breach of parliamentary propriety and a breach of ministerial ethics. It is also deplorable because delay in implementation means that legislative instruments not only identified by the Committee but also accepted by the Minister as defective in relation to parliamentary propriety or personal rights, continue to be in effect and presumably be administered to the detriment of public life and to those people affected by the deficient instruments.

The Committee records and monitors the progress of ministerial undertakings and each Annual Report describes undertakings implemented during the reporting period and those which are still outstanding. Also, due to the efforts of the Committee, Explanatory Statements for instruments which implement undertakings advise of that fact. The Annual Report 1997-98 listed 87 instruments in relation to which undertakings had been implemented or were still outstanding. Unfortunately 42 of these were still outstanding and the Committee decided to take further action.

The Committee accordingly wrote to every Minister in whose portfolio responsibility there were outstanding undertakings, asking for reasons why the undertaking has not been implemented and for advice on when this would be done. The letter also asked for the date on which the portfolio agency had issued drafting instructions for the required amendments. The letter indicated that in the absence of a satisfactory explanation for delay the Committee intended to ask suitably senior agency officers to appear before it to explain the position in detail. The Committee asked if the matter could be given a high priority for attention.

The Committee can now report that it has received replies from Ministers which indicate that virtually all of the undertakings have been implemented, or that drafting of amending instruments has been completed or drafting instructions issued. This was pleasing, particularly because sometimes undertakings are qualified by saying that they will be implemented when the principal instrument is next amended. In several other cases a review of the program or an amendment of the enabling Act or the instrument had resulted in the concerns of the Committee not being met. In cases where a review was still in progress or was about to be initiated the Minister usually expressly assured the Committee that its concerns would be accommodated. In one case the Committee was advised that regulations had not been implemented due to an oversight, but that this would be rectified as soon as possible. Overall, the replies from Ministers demonstrated an awareness of the importance of an undertaking given to the Committee and of its prompt implementation.

The replies did, however, reveal one matter that was not satisfactory. In this case regulations gave an agency the power to decide subjectively which matters were relevant to arbitration of a dispute, and then to take them into account when making a determination. This provision was in contrast to two other provisions where the agency was either bound or permitted to take account of matters which are objectively relevant to the issue. In reply to the Committee's query, the Minister advised that the regulations would be amended at the next available opportunity to make them consistent. The Committee assumed that this meant that the power would be made objective, but it appears that the Minister meant that another of the powers would be made subjective. The Committee is pursuing this matter.

In two cases the Minister advised that, although undertakings had not yet been implemented by formal amendment, administrative action had been taken to meet the Committee's concerns pending amendment of the respective instruments. In each of these cases this was a less than satisfactory response because the deficiencies in question involved personal rights, which is an area where problems noted by the Committee should be addressed as soon as possible. One of the cases involved a lack of mandatory notice of safeguards for administrative penalties imposed by public officials, which the Minister advised was remedied by a detailed information sheet attached to infringement notices. The other case, which was particularly relevant in the light of recent discussion of the international organisation of the Olympic Games, concerned the **Australian Sports Drug Agency Regulations** made expressly to enable the Agency to provide leadership in the fight against the use of prohibited drugs in sport up to and beyond the Sydney 2000 Olympics. Here, following inquiries by the Committee, administrative action was taken to protect the rights of intellectually disabled athletes and of commercial companies dealing with the Agency. In both the present cases drafting instructions have now been issued.

In a number of cases Ministers had given an undertaking to amend the enabling or some other Act to meet the Committee's concerns. In one such case the required amendments had been passed by the House of Representatives but were still being considered by the Senate and consideration of another had reached an advanced stage

with drafting instructions to be issued shortly. In another case the Minister advised that a particular program did not proceed and an undertaking was inadvertently overlooked. However, the Minister had asked the agency for advice on the amendments to the Act necessary to meet the undertaking and would advise the Committee when this was received. In two other cases the undertaking had been delayed due to the need to amend the enabling Act before implementation could be progressed.

Other undertakings were affected by changes in the enabling Act. In two cases the Minister advised that amendments of the enabling Act resulted in the particular undertakings becoming unnecessary because the relevant legislative provisions had been superseded. In another case the Minister advised that extensive amendments of the Act following a major review had delayed implementation of undertakings, although draft amendments of the required regulations had now been received. In another similar case the Minister advised that amendments of regulations which had now been finalised had been delayed by the commencement of amendments of the Act.

One particularly important area for the Committee to monitor is undertakings relating to national uniform legislative schemes. There are presently four separate undertakings outstanding to amend regulations made under the road transport reform national scheme, which provided for model laws which would then be enacted by all the States and Territories. The legislation also provided for a Ministerial Council which had to approve model laws and any amendment of them. The different Acts which set the broad framework of the scheme did not themselves include any substantive provisions regulating vehicles or traffic, but instead provided for this to be done by regulation. The Committee considered the regulations comprising the different modules of the scheme and over a two year period received undertakings to amend to remove strict liability offences, to provide for AAT review and to improve safeguards for administrative penalties. The Minister also advised that the regulations would not commence before the amendments were made. The Committee reported in detail on these undertakings on 19 September 1995, Senate Hansard p.976, and 12 March 1998, Senate Hansard p.892.

The Minister has now advised that amendments have been drafted in relation to two of the four sets of regulations although final clearance still has to be obtained from the Australian Transport Council and all of the State and Territory governments. However, this was acceptable in light of the Minister's assurance that the original regulations would not commence until amendments had met the Committee's concerns. The Minister also advised that it is unlikely that the other two will commence because a review was about to be initiated. The National Road Transport Commission has advised, however, that any revised regulations will take into account the concerns of the Committee.

There are a few matters arising out of this exercise which require further action, but in general the Committee can report that the position in relation to implementation of

undertakings given to the Committee is broadly acceptable. The Committee intends to continue to monitor closely compliance with undertakings.

Regulation Impact Statements
Senator O'Chee, 28 June 1999, Senate Hansard, p. 6655

On 31 March 1999 the Chairman of the Productivity Commission, Mr Gary Banks; the head of the Office of Regulation Review (ORR), Dr Robyn Sheen; and Ms Sue Holmes, an official of the ORR, met with the Committee to discuss matters of mutual interest. The meeting followed the tabling on 10 December 1998 of the Productivity Commission's report *Regulation and its Review 1997-98*.

The report was the first comprehensive statement on compliance with regulation review requirements, implementing the Productivity Commissioner's obligation to report annually on the Commonwealth's new, best practice procedures for making regulations. A core element of these requirements is the preparation of Regulation Impact Statements (RIS), which are intended to ensure that regulatory action is well informed and meets intended goals, while minimising any adverse effects on business and the community. The RIS requirements apply not only to regulations, but also to Bills, treaties and quasi-legislation.

The ORR, located within the Productivity Commission, has a central role in achieving the implementation of these initiatives. The two most important priorities of the ORR are to advise Commonwealth agencies on quality control mechanisms for regulatory proposals and for the review of existing regulations; and to examine all RIS prepared by agencies and advise on whether they provide an adequate level of analysis and meet the new requirements.

The establishment of RIS requirements has been one of the most significant recent developments in quality control of legislative instruments. At the State and Territory level this has generally been imposed by Act, whereas at the Commonwealth level it has been implemented by administrative direction, although the various editions of the Legislative Instruments Bill have included provisions for RIS. The elements of a RIS may vary between jurisdictions but typically they include:

- an outline of the problem or issues which need action
- the desired objectives of any action
- the different alternative options, including non-regulatory options, by which the desired objectives may be achieved
- an assessment of the impact, costs and benefits for business, government, consumers, and the community of each option
- mandatory consultation with the public and interest groups
- a recommended option
- a strategy to implement and review the preferred option

The Commonwealth RIS requirements were consolidated in *A Guide to Regulation*, published by the ORR, which was endorsed by the Government in September 1997. Since then the Committee has scrutinised the RIS, which are tabled, in addition to the Explanatory Statement, with all legislative instruments affecting business or competition.

The Committee has found the RIS to be of considerable assistance in its scrutiny of legislative instruments, despite the Committee having different priorities to the ORR. The Committee scrutinises delegated legislation to ensure compliance with high standards of personal rights and parliamentary propriety, whereas the ORR responsibilities are for the most effective and efficient regulations from an economy-wide perspective. These different objectives are by no means the same, but they are complementary and RIS have enhanced the ability of the Committee to carry out its functions.

The Committee has found RIS to be particularly useful because they are more detailed and thorough than Explanatory Statements in their background information. Also, RIS are structured in such a way that may reveal areas of especial concern to the Committee. For instance, every RIS must identify a problem which needs to be addressed and these problems are often set out with admirable frankness not usually seen in Explanatory Statements. These problems have included deficiencies in personal rights which have not been remedied for inappropriate lengths of time, or questions about validity which similarly have been left to continue for lengthy periods. The other parts of the RIS may similarly disclose difficulties about which the Committee will require further information from the Minister. This is not to say that RIS should displace Explanatory Statements, because the two emphasise different matters. Explanatory Statements are weighted towards the legal authority for the instrument and the provisions of individual clauses. The RIS, on the other hand, are weighted towards the goals of the instrument in the context of the competitiveness of business and the productivity of the economy.

The Committee closely scrutinises Explanatory Statements for deficiencies either in quality or quantity, taking the position that any such defects are breaches of parliamentary propriety. This view is emphasised by the fact that Ministers usually sign or initial tabled Explanatory Statements for regulations. Every year the Committee writes to Ministers about problems with Explanatory Statements. Sometimes these defects, although significant, are straightforward, with the Explanatory Statement simply not explaining or stating anything of value. Sometimes, however, the question is more serious. For instance, the Explanatory Statement for one set of regulations did not advise whether a statutory requirement to consult the Privacy Commissioner had been followed and, if so, what was the result of that consultation. Following inquiries by the Committee it was revealed that the Privacy Commissioner had indeed been consulted, but that his advice was overruled. The Committee then took action to have the Federal Executive Council Handbook amended to provide that such matters must be included, see the Committee's *Annual Report 1996-97* p.73 and 81. The Committee also presented a paper to an

Administrative Law and Ethics conference suggesting that there were questions about the ethical standards of the officers of the Department who had carriage of this matter, see the Committee's *Annual Report 1997-98*, p.99.

The position is, however, different in relation to RIS. While the Committee carefully reads all RIS and, as noted previously, finds many instances of possible breaches of its principles, it does not scrutinise the actual processes in the making of a RIS or the adequacy of the RIS in complying with the administrative guidelines. The reason for this is that the development of a RIS is essentially a policy development process and the Committee always stays clear of policy matters. The success of the Committee in its core function of scrutiny of legislative instruments is due to the fact that Ministers know that it operates in a non-partisan fashion and does not question policy. The Committee finds RIS to be a valuable source of information, but it is not appropriate for it to become involved in policy development. The ORR is a specialist agency with the mandate to oversee the entire RIS process and liaison with the ORR along the lines of our recent meeting with the Chairman of the Productivity Commission and the head of the ORR will enable the Committee to be aware of any relevant developments. Also, the Senate legislation committees would scrutinise RIS in the course of their work. For these reasons, the Committee would be reluctant to become involved in arguments about the adequacy of RIS or other merits based issues.

There are several other areas where RIS are of particular value to the Committee. For instance, the scrutiny of national uniform legislative schemes presents special challenges for legislation scrutiny committees, see *Annual Reports 1995-96, p.56* and *1997-98, p.83*. It is therefore encouraging that the Council of Australian Governments now has a mandatory requirement that new or amending regulations which are made by Ministerial Councils or national standard setting bodies are to have a RIS and comply with the Competition Principles Agreement. These requirements parallel these at the purely Commonwealth level and are supervised by the Committee on Regulatory Reform. As discussed in the special statements made to the Senate, the scrutiny of national schemes is difficult because of the tendency for Commonwealth, State and Territory Ministers to reply to concerns of scrutiny committees by saying that the schemes are the result of agreements between governments which cannot be changed. This has not affected unduly the operation of the Committee, which has accepted significant undertakings from Ministers to amend national scheme regulations and not to implement these provisions unless the changes were agreed to by the other Ministers. Nevertheless it is a concern.

The introduction of RIS for national uniform regulations is beneficial for the same reasons as for Commonwealth regulations. The RIS enable the Committee to have a much broader perspective on the background of uniform regulations, which will often be more complex than for legislation solely at the Commonwealth level. This may lead the Committee to issues relating to parliamentary propriety or personal rights which it may have missed if it had to rely solely on the Explanatory Statement. As with other RIS, the RIS here are usually quite candid in their comments on the development of regulations and these can be a useful source of inquiry.

Another function of the ORR is to supervise the national Legislative Review Program, which, like the RIS requirements, was established by administrative rather than legislative means. Along with the RIS, review and staged repeal is an important element in improving the standard of delegated legislation. Legislative requirements for this usually include the exotically named backcapturing and sunset provisions. The quantitative control of legislative instruments is important as well as the qualitative and this is another aspect of interest to the Committee.

Finally, the requirements for RIS, Explanatory Statements and staged repeal may change if the Legislative Instruments Bill is reintroduced and is enacted. Different versions of the Bill, first introduced almost five years ago, included provisions on these matters, but these should not change the functions of the ORR. Instead, they may emphasise its importance. The Committee will consider its options in the light of the actual provisions of any Bill.

The Committee discussed all these matters with Mr Banks, Dr Sheen and Ms Holmes and it is most grateful for the opportunity to explain its operations and to be briefed by an agency whose operations complement its own. Usually when officials of this seniority meet the Committee it is to explain some problem in a legislative instrument, but this was a more positive and welcome occasion.

Statement on the work of the Committee during the Autumn and Winter sittings Senator O'Chee, 30 June 1999, Senate Hansard, p. 6942

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

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

As usual, by the end of the sittings Ministers have given the Committee undertakings to amend many provisions in different instruments or enabling Acts to meet its

concerns, reflecting a continuing high level of cooperation from Ministers in its non-partisan operations. The Committee is grateful for this cooperation.

During the sittings the Committee scrutinised 964 instruments. Of these, 167 were statutory rules, which are generally better drafted and presented than other series of delegated legislation. The other 797 instruments were the usual heterogeneous collection of different series.

Each of the 964 instruments was scrutinised by the Committee under its four principles, or terms of reference, which are included in the Standing Orders. There were 104 prima facie defects or matters worthy of comment in those 964 instruments. The defects are described below under each of the four principles.

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

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

Validity

It is a fundamental requirement of legislative instruments that they should be validly made. Three instruments were expressed to commence before gazettal and were therefore invalid under the relevant statutory safeguards if they adversely affected any person other than the Commonwealth. Two of these instruments appeared to do this and in the third it was not apparent whether it did or not. Three other instruments appeared to exceed the statutory power under which they were made. One of them gave power to the CEO of an agency to make declarations in relation to two matters although the enabling Act expressly required these matters to be prescribed by regulation. Another instrument purported to exercise enabling powers to fix charges by providing merely that charges will cover costs. Another provided that the CEO may exempt in advance conduct which has not yet been declared to be subject to sanctions and in effect to amend the regulations.

Another general statutory safeguard provides that legislative instruments may only incorporate material apart from Acts and other instruments which is in existence at the time when the instrument comes into effect. This may have caused problems in relation to one instrument which provided for criteria established by the Prime Minister for performance bonuses for departmental secretaries. Another instrument provided for performance remuneration in accordance with criteria to be established by guidelines.

Parliamentary propriety

The Committee ensures that legislative instruments do not breach parliamentary propriety. A legislative instrument providing for radiation protection and nuclear safeguards provided for a number of important reports with no express requirement that these must be tabled in Parliament. The same instrument provided for declarations which were subject only to gazettal and not to tabling. Another instrument provided for material which should have been subject not only to tabling but also to disallowance.

The Explanatory Statement for one instrument advised that prior to the instrument certain international airline capacity was allocated de facto by the departmental secretary, which implied that it had been done without legislative authority. Another instrument reduced from six months to four the period within which certain superannuation funds must lodge annual returns. Three weeks later another instrument generally restored the six months period as a transitional measure. Later another instrument extended the transitional period for 12 months. The Committee questioned the need for this constant legislative change.

One instrument provided for the members of a statutory council and committee to be appointed for any period of no longer than three years. The Committee asked whether these relatively short spans of membership may be an impediment to independent advice being provided to the Minister. Another instrument provided not only for appointment of members to the Complementary Medicine Evaluation Council for any period of up to three years, no matter how short, but also for the Minister to nominate expert advisers to the CMEC. This latter power appeared to be undesirable because another provision permitted the CMEC itself to seek advice from any person. These measures may have affected the independence of the CMEC.

One set of regulations made by the Governor-General was printed with an error of 10 months in the making date. A proclamation by the Governor-General was notified in two separate gazettes. One instrument provided for people to be authorised to exercise significant functions but gave no indication of the qualifications or attributes which such people should possess. One instrument provided for the Secretary to delegate important powers to any officer of the department or any staff member of an agency, no matter how junior.

Seven principal regulations were amended on the same day by two, and in one case three, sets of amending regulations. The Committee asked about this apparently unnecessary legislative duplication. In a similar case a consolidating instrument was made less than three weeks after an amendment.

Delay

The Committee questions any apparent unjustified delay in making a legislative instrument. The enabling Act required Plans of Management for National Parks to be

gazetted as soon as practicable after they have come into operation, so that any interested person may inspect or purchase a copy of the Plan. The Plan for one Marine Park came into operation on 25 June 1996 but it was not gazetted until 31 March 1999, one year before it is to cease. The gazettal of a heritage protection declaration was delayed for seven weeks. One instrument was not made until eight months after an Act had come into effect although it appeared that it should have been made as soon as possible after that date.

The Explanatory Statement for one instrument advised that it replaced outdated instruments but it gave no indication of how long the earlier provisions had been outdated; research by the Committee indicated that this was 10 years. Another instrument corrected an anomaly which had existed for three years. Many instruments with beneficial provisions operate retrospectively, which is acceptable as long as there are justifiable reasons for the delay. The Committee questioned two instruments where there appeared to be no pressing reasons why they could not have been made at the earlier date.

One instrument prohibited the supply or possession of mobile telephone jammers. The Explanatory Statement advised that this was because such devices are likely to disrupt substantially and have serious adverse consequences for public mobile telephone services. The Committee asked the Minister about how long the authorities had known of these devices and whether there was any delay in making the instrument.

Drafting

The Committee believes that the quality of drafting of legislative instruments should not be less than that for Acts. The provisions of one instrument were at variance with their intention as expressed in the Explanatory Statement. Another instrument provided that something "should" be controlled, which is different to providing, as it was apparently intended, that it "is" controlled. Another instrument included mere drafting surplusage. The Committee questioned imprecise drafting in another instrument. Several instruments included cross-reference errors. A number of instruments did not provide unique numbering or citation. Several instruments were numbered out of order. The Committee did not write to the Minister about a reference in an instrument to 31 April 1999, because it only raises serious issues.

Explanatory material

Due to the efforts of the Committee it is now accepted that every legislative instrument should be accompanied by proper explanatory material. All instruments were in fact accompanied by an Explanatory Statement, but unfortunately some of these explained very little or were incomplete or inadequate in some way. One Explanatory Statement made statements which had no statutory basis. Another gave wrong references to provisions in the instrument. The Explanatory Statement for another was only a modified version of the Explanatory Memorandum for the Bill. The Explanatory Statement for an instrument providing for extradition with Estonia

gave a detailed summary of diplomatic relation with that country but neglected to mention that in the early 1970s Australia recognised de jure the annexation of Estonia by the Soviet Union.

Numbers of instruments include Notes, which are included in the body of the instrument itself but do not form part of it. The Committee questioned several inadequacies and inaccuracies in these Notes. The Regulation Impact Statement for one instrument advised that it was made because the previous arrangements were either invalid or at least open to challenge. The Explanatory Statement, however, did not mention this.

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

The Committee interprets this principle broadly, to include every aspect of personal rights. During the sittings the Committee noted the following possible defects in the legislative instruments which it scrutinised.

Protection of the rights of individuals

The Committee questions any instrument which gives powers to Ministers or officials which may be too broad or which does not include adequate safeguards for their exercise. One instrument provided for an official to decide whether to remove a person's name from a professional register after application from the person, although it was more appropriate for the person to decide this as of right. A similar instrument provided that an official "may" do something beneficial to a person, when "must" would have been the better formulation. Another instrument provided for an official to exercise power in relation to individuals with no criteria to limit its exercise and without appropriate safeguards. One instrument gave the Minister power to cancel the appointment of a member of an advisory panel without giving notice of intention or reasons or giving the person affected the opportunity to respond to any adverse material.

The Committee also writes to the Minister about any aspect of legislative instruments which may operate unfairly upon individuals. The Explanatory Statement for one instrument advised that medical insurance arrangements were being changed for local employees at an Australian embassy because of a marked deterioration in service by the previous insurer over the last 12 months. In this case, the Committee wished to be assured that no staff were out of pocket and that the agency had done everything possible to remedy or ameliorate this deterioration. Another instrument provided for trained volunteer staff operating in remote areas to be covered by the compensation provisions of the enabling Act; the Committee asked whether people carrying out volunteer services in the post were disadvantaged by not coming within the Act. One instrument included a discrepancy in allowance provisions for certain Commonwealth employees. Another instrument provided for a beneficial right in one clause but

appeared to take away this right in another. Another exempted discriminatory conduct from the ambit of the Act.

One instrument defined security officer as a member of a uniformed security force; such officers could exercise significant powers. There were no further criteria and the Committee asked why a member of these forces acquired special powers merely by donning a uniform. The same instrument also provided that a person who ceased to be an authorised officer must return his or her identity card, but there was no safeguard that this should be done as soon as possible.

Unreasonable burdens on business

The Committee ensures that legislative instruments which affect business include appropriate safeguards and operate fairly. One instrument did not provide for notification of possible sanctions for failure to comply with an official demand, while another did not provide for notification of a right of review. Another did not provide for notification that a person in a certain position had rights in relation to self-incrimination and to be assisted by a legal representative. One instrument did not make it clear that a person must comply with official demands only if they were reasonable and necessary. One instrument did not require reasons to be given for official action although this appeared appropriate to protect personal rights. Another instrument did not include the usual reasonability safeguard to limit and control actions of officials. One instrument gave a discretion to an agency to invite public comments and engage in other consultation, with no criteria to guide the exercise of this power. One instrument provided for an agency to give notice before it cancels a licence, but not to give notice if it varies a licence. Two instruments expressly provided for agencies to take into account subjective rather than objective criteria when making decisions.

Other instruments included unexplained provisions which could have affected business adversely. One provided for matters to which an agency must have regard before coming to a decision, with other matters to which the agency merely may have regard. Another provided for strict compliance with forms, with no explanation. Another exempted marine pilots from liability for the consequences of their negligence, thus placing all responsibility on the master and owner of the ship.

Fees and charges

Many legislative instruments provide for fees and charges and the Committee questions any aspect of these which appears unusual or unexpected. One instrument increased a levy by 82% in one case and by 58% in another, without explanation. The Explanatory Statement for another advised that it increased fees by 10% although the instrument itself increased a fee by 30%. One instrument provided what the Explanatory Statement described as complex arrangements for refunds of overpaid levy, but gave no indication of how many people were affected by the error in calculation or of the amounts of money involved, either as an average for each levy

payer or a total. The Explanatory Statement also did not advise whether the refund included interest or why it took more than a year for the error to be rectified. Another instrument provided for a change in measuring the length of a boat, which was the basis on which fees are set, with no explanation of the effect of the change. The same instrument set new fees but did not indicate either the amount or the percentage of the increase.

Offence provisions

The Committee ensures that offence provisions are fair and include the usual safeguards. One instrument provided for an administrative penalty notice to be imposed on a person up to 12 months after the alleged infringement. Two instruments included power for an official to determine subjectively whether matters relating to offences were relevant, without even a requirement that the official must act reasonably. One of these instruments did not provide for review of a decision to withdraw an infringement notice, even though withdrawal may expose the alleged offender to court prosecution and despite the fact that a decision to refuse to withdraw a notice is subject to review.

Privacy

The Committee ensures that legislative instruments do not breach the fundamental personal right to privacy. One instrument provided for an agency to distribute reports addressing sensitive matters to any person who asks for a copy, regardless of the privacy of any person mentioned in the report. One instrument which provided for the release in certain circumstances of personal information did not indicate that the Privacy Commissioner was consulted before it was made.

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

Legislative instruments often provide for public officials to exercise discretions. The Committee considers that such discretions should be as narrow as possible, include objective criteria to limit and control their exercise and be subject to review of the merits of decisions by an independent, external tribunal such as the Administrative Appeals Tribunal.

The Committee noted a number of instances of unreviewable discretions which could have considerable adverse effects on individual business operations. One provided for a discretion to permit the export of radioactive waste to countries in the Pacific. Another made for the purpose of medical charges and Medicare benefits gave a discretion to decide when certain equipment was first installed and used in Australia. Another discretion related to licences for radiation protection and nuclear safeguards. Another gave an agency the unfettered power to impose conditions on the surrender of a transmitter licence. One instrument provided for review of a decision to withdraw a

civil aviation grounding notice when review of a decision not to withdraw a notice may have been appropriate. Another instrument provided for an agency to determine its own costs and then charge for them. One instrument provided for numbers of discretions to be subject to review, but did not provide this for one other important discretion.

In a number of instruments it was unclear whether review provisions in the enabling Act covered decisions made under legislative instruments. In such cases the Committee asked the Minister to confirm that this was the case or to amend the instrument to provide expressly for review.

Two apparently unreviewable discretions related to recognition of qualifications essential to earn a livelihood in a particular area.

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

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

Other developments

During the sittings the Committee presented the following reports:

- 106th Report: Annual Report 1997-98 (10 March 1999)
- 107th Report: Report on scrutiny by the Committee of Orders made under the *Financial Management and Accountability Act 1997* (27 May 1999)

The Committee made the following special statements to the Senate on 28 June 1999:

(i) Scrutiny of Great Barrier Reef Marine Park Zoning Plans;
(ii) Regulation Impact Statements;
(iii) Ministerial undertakings.

The Committee agreed that it would present a paper entitled "Explanatory material for legislative instruments – the Commonwealth experience" to the Seventh Australasian and Pacific Conference on Delegated Legislation to be held in Sydney 21-23 July 1999.

The Committee secretary reviewed "Delegated Legislation in Australia" by Professor Dennis Pearce and Stephen Argument, Butterworths, Sydney, 1999, for the Australian Institute of Administrative Law Forum.

Copies of the Annual Report 1997-98 were mailed to 150 delegates to the Australian Institute of Administrative Law Conference 1999, Canberra, 29-30 April 1999.

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