Chapter 3

Work of the committee in the 41st Parliament

3.1 This chapter discusses the committee's work and matters of note in the reporting period.[1] Some representative examples of instruments and issues considered by the committee are also provided.

Number of instruments considered

3.2 The committee held a total of 46 private meetings in the 41st Parliament, comprising:

- 13 meetings in 2004-05;
- 17 meetings in 2005-06; and
- 16 meetings in 2006-07.

3.3 The committee examined 7230 instruments, comprising:

- 2432 instruments in 2004-05;
- 2449 instruments in 2005-06; and
- 2349 instruments in 2006-07

3.4 The figures above show that the number of instruments of delegated legislation made was consistent for each year of the 41st Parliament. There was, however, a significant increase in the number of instruments made during this period compared to the 40th Parliament (4768 in total),[2] due to the commencement of the *Legislative Instruments Act 2003* (LIA) and its requirements regarding the registration and tabling of existing and new legislative instruments (see below).

3.5 Details of all instruments scrutinised by the committee were recorded in the committee publication, the *Delegated legislation monitor* (the monitor). The committee published 45 periodical monitors in the 41st Parliament, as well as the consolidated monitors for 2004, 2005 and 2006.

3.6 Appendix 1 provides a breakdown of the instruments made during the 41st Parliament by Act and instrument type. For further detail on specific instruments made in this period, the monitors for the relevant years should be consulted.

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1 The 41st Parliament was opened on 16 November 2004 and dissolved on 17 October 2007.

2 Comprising 1546 in 2001-02, 1661 in 2002-03 and 1561 in 2003-04.

Instruments of concern and notices

3.7 Of the 7230 instruments examined by the committee, 728 were identified as raising a concern.[3]

3.8 Eighty-three notices of motion for disallowance were given by the committee, 66 of which were ultimately withdrawn following receipt of satisfactory responses or undertakings from relevant instrument makers.[4] Seventeen notices (given by the committee) remained unresolved at the end of the 41st Parliament.[5]

3.9 Table 1 provides a breakdown by year of the number of instruments identified by the committee as raising a concern; and the number of notices of motion for disallowance given by the committee.

Table 1: instruments of concern and notices

Year	Instruments examined	Instruments of concern	Disallowance notices
2004-05	2432	268	13
2005-06	2449	252	45
2006-07	2349	208	25

Undertakings

3.10 During the 41st Parliament:

- thirty-four undertakings to amend legislation were provided to address concerns raised by the committee (see tables 1 and 2 at appendix 2 for details); and
- thirty-eight undertakings were implemented (see table 1 at appendix 2).

3.11 Twenty undertakings remained outstanding at the dissolution of the 41st Parliament (17 October 2007) (see table 2 at appendix 2). The committee continues to monitor the status of outstanding undertakings and, where necessary, to

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3 Details of these instruments may be found on the 'Scrutiny of disallowable instruments' webpage at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/scrutinyleginst2012.htm.

4 The 'Disallowance alert' (the alert) provides details of all notices of motion for disallowance given by the committee, as well as by individual senators and members of the House of Representatives. The alert may be accessed at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/alert2012.htm.

5 Subsection 42(3) of the LIA provides that any instruments subject to unresolved notices at the time the House of Representatives is dissolved or expires, or the Parliament is prorogued, are taken to have been tabled on the first sitting day following the dissolution or expiry of the House of Representatives, or proroguing of Parliament (effectively making the instrument subject to the disallowance process afresh).

correspond with relevant ministers and instrument-makers regarding their implementation.

Commencement of the *Legislative Instruments Act 2003*

3.12 A significant event in the reporting period was the commencement of the LIA on 1 January 2005. The explanatory memorandum to the Legislative Instruments Bill 2003 explained:

> This Bill establishes a comprehensive regime for the registration, tabling, scrutiny and sunsetting of Commonwealth legislative instruments. The Bill originated from a 1992 report of the Administrative Review Council, Rule Making by Commonwealth Agencies…[which] described the framework governing Commonwealth legislative instruments as "patchy, dated and obscure"…
>
> The Bill will introduce a consistent system for registering, tabling, scrutinising and sunsetting all Commonwealth legislative instruments [based around the establishment of] an authoritative, complete and accessible register of those instruments…[6]

3.13 The main elements of the LIA are set out in chapter 2. The committee notes that, on the whole, the transition to the LIA scheme was smooth, with most departments and agencies showing an adequate degree of preparedness, and a good understanding of the disallowance provisions and main requirements regarding the registration of new instruments on the Federal Register of Legislative Instruments (FRLI). However, in relation to the requirements of the LIA regarding consultation, the committee identified some need for improved understanding and consistency in application across departments (see paragraph 3.19).

3.14 The LIA also provided for the back-capture of legislative instruments previously in force.[7] Under section 29 of the LIA, instruments made up to five years before its commencement were required to be lodged for registration within 12 months of commencement. Instruments made more than five years before commencement were required to be lodged within three years.

3.15 The commencement of the LIA subjected a number of instruments to the potential disallowance and thus to the committee's scrutiny for the first time, due to the operation of the LIA's definition of 'legislative instrument'.[8]

3.16 A related matter of interest concerning the implementation of and transition to the LIA arose in connection with the committee's consideration of the **Legislative Instruments Amendment Regulations 2005 (No. 5) [Select Legislative Instrument**

6 Legislative Instruments Bill 2003, explanatory memorandum, p. 2.

7 See LIA, Division 3 and section 29.

8 See Chapter 2, paragraph 2.5.

2005 No. 300] [F2005L04094] (February 2006),[9] which exempted a number of instruments from the operation of the LIA. While the instruments in question were generally exempted on the basis that they were not regarded as being legislative in character, the committee noted that determinations under subsection 1084(1) or 1118B(2) of the *Social Security Act 1991* were being exempted on the basis that they were 'probably' not legislative instruments. As the committee had understood the legislative scheme of the LIA to be inclusive in cases where the character of an instrument was in doubt or mixed,[10] advice was sought from the Attorney-General as to the basis for this decision. In response, the Attorney-General advised that the following approach was applied to any request for exemption from the LIA scheme:

- a requesting agency must provide a copy of independent legal advice as to the proper characterisation of the instrument (that is, whether it is legislative or non-legislative in character);
- the agency must explain why the proposed exemption is needed and provide a strong argument as to why a departure from the general policy of the LIA is justified; and
- the agency's request must be supported in writing by the responsible minister.

3.17 The Attorney-General's advice provided the committee with a useful insight into the way in which the provisions of the LIA interact with the legislative policy approach in determining exemptions from the scheme of the LIA.

Interim report on consultation

3.18 Section 17 of the LIA directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The explanatory statement (ES) which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26).

3.19 On 21 June 2007, the committee tabled an interim report on consultation, titled *Consultation under the Legislative Instruments Act 2003* (the consultation report). The consultation report examined the operation of the consultation provisions of the LIA in the two years after its commencement.

3.20 The committee's consultation report may also be seen in the broader context of the development and evolution of the Legislative Instruments Bill 2003 and its earlier counterparts (the Legislative Instruments Bill 1994 and Legislative Instruments

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9 The full text of instruments and explanatory statements may be accessed through the Federal Register of Legislative Instruments (FRLI) by entering the relevant FRLI number into the FRLI search field (available at www.comlaw.gov.au). The FRLI number is a unique identifier, contained in square brackets following the first citation of an instrument in this report.

10 See for example LIA, section 5(4)

Bill 1996). In its report on the 2003 bill (the bill report),[11] the committee noted that the consultation requirements proposed in that bill (and ultimately enacted) were less rigorous than the mandatory and more defined requirements that had been earlier proposed. The bill report described the consultation requirements in the 2003 bill as being more general and less prescriptive in nature, noting that they sought to encourage 'appropriate consultation' before an instrument is made, particularly where that instrument is likely to have a direct or a substantial indirect effect on business or restrict competition.

3.21 While the consultation report made no recommendations as such, it highlighted the following issues:

Lack of information regarding consultation

3.22 The committee noted persistent failures to describe the nature of consultation undertaken in relation to the making of legislative instruments, or to provide an explanation of why consultation was considered unnecessary or inappropriate.[12]

Inadequate descriptions of consultation undertaken

3.23 The committee noted that in a significant number of cases overly bare or general descriptions of consultation had been inadequate to sufficiently describe the 'nature' of consultation as required by the LIA.

Inadequate explanations of why consultation was not undertaken

3.24 Similarly, the committee noted persistent shortcomings in relation to explanations as to why consultation had not been undertaken. These included:

- overly bare or general assertions that did not sufficiently explain why consultation was not undertaken;
- claims that an instrument was 'minor or machinery' in nature which did not appear justified with reference to the effect of the instrument;
- reliance on consultations into authorising or related legislation that did not specifically address the substantive provisions of an instrument; and
- statements that consultation was not undertaken because an instrument did not have a significant impact on business (which is not in itself necessarily a sufficient reason to forego consultation).

Australia-New Zealand Scrutiny of Legislation Conference

3.25 The Australia-New Zealand Scrutiny of Legislation Conference (ANZSLC) is held every two years, and provides a forum for parliamentary scrutiny committees to discuss matters relevant to the work of legislative scrutiny.

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11 Senate Regulations and Ordinances Committee, *Legislative Instruments Bill 2003 [and] Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003* (111th Report), October 2003, p. 7.

12 LIA, sections 17, 18 and 26 (previously LIA, section 4).

3.26 During the 41st Parliament the ANZSLC was held in Canberra in March 2005 and in Wellington, New Zealand, in July 2007.

3.27 The Canberra conference was hosted by the Australian Capital Territory Legislative Assembly and attended by 59 delegates from the Commonwealth, Australian states and territories and New Zealand. The theme of the conference was 'Legislative scrutiny in a time of rights awareness'. Issues canvassed at the conference included:

- fostering awareness of the role of the scrutiny committees in protecting individual rights;
- fostering constructive dialogue on the role of the scrutiny committees within the broader context of a human rights environment; and
- promoting broader access to delegated and primary legislation.

3.28 The Wellington conference was hosted by the New Zealand Parliament and was attended by 79 delegates from the Commonwealth, Australian states and territories, New Zealand, Kiribati and Samoa. The theme of the conference was 'Democracy in legislation: the role of scrutiny committees'. Issues canvassed at the conference included:

- fostering public participation in the making of delegated and primary legislation;
- maintaining legislative controls over delegated legislation; and
- fostering constructive dialogue between human rights institutions and legislative scrutiny committees.

Examples of instruments considered

Scrutiny principle (a): ensuring that delegated legislation is in accordance with statute

3.29 Scrutiny principle (a) requires that an instrument of delegated legislation be validly made, in accordance with both its authorising Act or instrument and any other relevant legislation, such as the LIA and the *Acts Interpretation Act 1901* (the AIA). The LIA, for example, imposes specific requirements relating to the provision and content of explanatory statements (ESs),[13] the prohibiting of prejudicial retrospectivity,[14] and the incorporation of extrinsic material.[15]

13 LIA, section 26 (previously LIA, section 4).

14 LIA, section 12(2) (prejudicial retrospectivity).

15 LIA, section 14 (incorporation of extrinsic legal and non-legal sources) and section 26 (previously LIA, section 4).

Explanatory statements: describing consultation

3.30 Since the commencement of the LIA on 1 January 2005, instruments of delegated legislation must be accompanied by an ES. As noted above, section 26 of the LIA prescribes certain information which an ES must contain,[16] and this includes a description of the nature of consultation undertaken or an explanation as to why consultation was considered unnecessary or inappropriate. During the reporting period, the committee identified a relatively large number of instruments that failed to meet the requirements of the LIA in this regard.

3.31 In 216 cases, ESs made no reference whatsoever to consultation as per the requirements of the LIA. Correspondence with relevant ministers generally indicated that this was due to administrative oversight in the preparation of explanatory material, rather than a lack of awareness about the requirements of the LIA. In all such cases, the committee requested from the rule-maker the relevant information regarding consultation, required that the ES for the instrument be updated and sought an assurance that future explanatory material would be prepared in accordance with the requirements of the LIA.

3.32 In another 57 cases, the committee identified concerns with the use of overly bare or general language to describe the nature of consultation undertaken, or to explain why consultation was considered inappropriate or unnecessary. While the committee does not usually interpret section 26 of the LIA as requiring a highly detailed description of consultation undertaken, it considers that a bare or very general statement of the fact that consultation has taken place is not sufficient to satisfy the requirement that an ES describe the nature of consultation undertaken. In all such cases in the reporting period, the committee sought a fuller description or explanation from the rule-maker, and generally required that the ES in question be amended to include such further information as was subsequently provided.

3.33 An example of this was **Instrument CASA 130/05 – Direction – Parachute operations in the vicinity of Barwon Heads aerodrome [F2005L00909]** (May 2005), which specified a restriction on parachute operations within the vicinity of Barwon Heads aerodrome. The ES stated only that 'the instrument has been made after consulting with persons likely to be affected', which prompted the committee to seek more information regarding the particular nature of the consultation, including how it was publicised, how many comments had been received and how any comments had been taken into consideration.

3.34 The committee has since produced, and now disseminates with relevant correspondence, a guidance note on consultation, 'Guideline for preparation of ESs: consultation' (reproduced at appendix 3).

16 LIA, section 26 (previously LIA section 4). See also sections 17 and 18 regarding consultation requirements.

Retrospectivity

3.35 Subsection 12(2) of the LIA provides that an instrument which commences retrospectively, and which would disadvantage or impose a liability on any person other than the Commonwealth, is of no effect.[17] Retrospective commencement is a relatively common feature of delegated legislation, and the committee identified concerns in a number of such cases in the reporting period.

3.36 An example which reveals the committee's approach to the question of retrospective operation was the **Crimes Amendment Regulations 2004 (No.1) [Statutory Rules 2004 No. 164]** [**F2004B00187]** (August 2004), which prescribed periodic detention orders under the Australian Capital Territory (ACT) and New South Wales (NSW) as sentencing alternatives for the purposes of subsection 20AB(1) of the *Crimes Act 1914*.[18] The amendments were expressed as commencing retrospectively from 1 September 1995 in the ACT and 3 April 2000 in NSW, to address concerns that, on a narrow reading of section 20AB(1), periodic detention orders may not have been authorised as a sentencing alternative. Notwithstanding an assurance in the ES that the instrument would not disadvantage any person (as the committee usually expects), the committee sought further advice from the Minister for Justice and Customs (the Justice Minister) as to how the instrument could be seen as beneficial to any persons subject to periodic detention orders in the relevant period. Subsequent advice from the Justice Minister and officers of the Attorney-General's Department suggested that the effect of the instrument could be characterised in this way because the alternative to periodic detention orders was generally full time custody, and this view was ultimately accepted by the committee.

Incorporation of extrinsic material by reference

3.37 Section 14 of the LIA provides that delegated legislation may incorporate extrinsic material by reference,[19] meaning that instruments may adopt the provisions of an Act or disallowable legislative instrument as in force at a particular time or as in force from time to time;[20] or may incorporate non-statutory material in any other instrument or in writing only as in force or existing at the time the incorporating instrument takes effect.[21]

3.38 The committee examined numerous instruments that incorporated extrinsic material in the reporting period. In a number of these cases, the ES accompanying the instrument did not include specific reference to or consideration of the LIA's

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17 However, subsection 12(3) of the LIA provides that the restriction on prejudicial retrospectivity may be overturned by any contrary provision in the Act under which the instrument is made.

18 Subsection 20AB(1) provides for the imposition of alternative sentences on federal offenders in state and territory courts, where such arrangements are ordinarily available as sentencing options for state offenders.

19 Material incorporated into instruments of delegated legislation may include, for example, technical, scientific and medical standards; policy guidelines; and legal definitions.

20 LIA, paragraph 14(1)(a).

21 LIA, paragraph 14(1)(b); subsection 14(2).

prescriptions regarding incorporated material, prompting the committee to make inquiries.

3.39 An interesting example of this arose in relation to the **Veterans' Entitlements (Special Disability Trust Beneficiary Requirements) Nomination of Agreement 2006 [F2006L03097]** (December 2006), which nominated an agreement for the purposes of qualifying as a special disability trust under subsection 52ZZZWA(3) of the *Veterans' Entitlements Act 1986*. As the instrument did not specify whether the agreement was nominated as in force from time to time or as at a particular date, and the ES made no reference to section 14 of the LIA, the committee sought clarification from the Minister for Veterans' Affairs (the Veterans' Minister). In response, the Veterans' Minister advised that the instrument did not in fact incorporate the agreement in question. Rather, the agreement was nominated in accordance with the power conferred under subsection 52ZZZWA(3), and hence the considerations around incorporation of extrinsic material in the LIA were not relevant in this case.

3.40 More generally in relation to incorporated material, the committee wrote to a number of ministers seeking further information on how incorporated material could be obtained or accessed, and noting that its usual expectation is that ESs contain enough information to ensure that all substantive elements of an instrument are readily available to stakeholders. An example of this was the **Occupational Health and Safety (Commonwealth Employment) (National Standards) Amendment Regulations 2005 (No. 1) [Select Legislative Instrument 2005 No. 30] [F2005L00543]** (March 2005), which incorporated the Hazardous Substances Information System (HSIS) as in force on 10 March 2005. While the ES provided a web address to access the HSIS, the committee sought and received an assurance from the Minister for Employment and Workplace Relations that the incorporated version would remain available online in the event that the HSIS was subsequently updated.

Unclear terms and phrases

3.41 The committee examines instruments of delegated legislation to ensure that the scope of their intended operation and application is clear. The committee wrote to a number of ministers during the reporting period seeking clarification of unclear terms and phrases.

3.42 An example of this arose in relation to the **Farm Household Support Amendment Regulations 2004 (No. 1) [Statutory Rules 2004 No. 206] [F2004B00221]** (August 2004), which, for the purposes of section 8B of the *Farm Household Support Act 1992*, defined a 'prescribed adviser' as a person with 'relevant financial qualifications'. As neither the regulations nor the ES provided any definition of what would be considered to be a relevant financial qualification, the committee sought clarification from the Minister for Agriculture, Fisheries and Forestry (the Agriculture Minister). In response, the Agriculture Minister advised that the relevant financial qualifications would be any that were obtained by completing a course conducted by a higher education institute or training organisation. Acknowledging the committee's preference for clearly defined terms, the Agriculture Minister undertook to amend the regulations to include this advice on how the term would be interpreted. The regulations were subsequently amended on 22 April 2005.

3.43 A second example is found in the committee's consideration of the **Export Control (Plants and Plant Products) Orders 2005 [F2005L00523]** (March 2005), which specified standards for equipment and facilities for sampling rooms in registered establishments. First, subparagraph 8.1(c)(i) of Schedule 2 provided that a sampling room must comply 'substantially' with relevant state, territory and Commonwealth occupational health and safety requirements. Second, suborder 10.1 in Part 4 prohibited the export of prescribed goods unless the trade description applied to those goods was 'adequate and accurate'. The committee considered that, without further guidance on how these qualifying terms would be interpreted, their intended application was unclear and could give rise to dispute. In response to the committee's inquiry, the Agriculture Minister acknowledged the committee's concern regarding the terms 'substantially' and 'adequate', and undertook to amend the instrument to remove them (the term 'accurate' was not considered to be problematic, as it was clearly determinable against descriptions that could be characterised as being false, deceptive or potentially misleading). The instrument was amended accordingly on 27 November 2006.

Scrutiny principle (b): ensuring that delegated legislation does not trespass unduly on personal rights and liberties

3.44 Scrutiny principle (b) requires that instruments of delegated legislation must not trespass unduly on personal rights and liberties.

Treatment of personal information

3.45 A number of issues in relation to treatment of personal information arose in connection with the committee's scrutiny of the **Australian Federal Police Amendment Regulations 2006 No. 1 [Select Legislative Instrument 2006 No. 326] [F2006L03972]** (February 2007), which prescribed matters to do with the suspension of Australian Federal Police (AFP) appointees and drug testing. The committee queried a provision setting out requirements for the keeping of records relating to breath tests, blood tests or prohibited drug tests, and specifically that records of a test that did not indicate the presence of alcohol or prohibited drugs (a negative test) were required to be kept for two years. As it was not clear to the committee why records of a negative test should be kept for such a significant period, and potentially for longer than records of a positive test, the committee sought advice from the Minister for Justice and Customs (the Justice Minister). In response, the Justice Minister advised that retention of clear sample records was necessary, inter alia, to permit subsequent testing where there was doubt about a result, or where facts emerged suggesting that re-testing might lead to a positive result. While the committee accepted the legitimate intent and procedural protections for the retention of clear samples for these purposes, it could not identify a legislative authority for such further testing, and so advised the Justice Minister. Subsequently, on the basis of advice from the Australian Government Solicitor (AGS) and the AFP, the Justice Minister undertook to amend the regulations to remove the power to retain and re-test clear samples. The regulations were amended accordingly on 6 September 2007.

Imposition of an obligation

3.46 Also under scrutiny principle (b), the committee wrote to a number of ministers seeking clarification about the scope and content of obligations imposed by delegated legislation. The committee is particularly careful to ensure that such obligations are clearly defined where penalties may be imposed for non-compliance.

3.47 An example of this arose in relation to the **Export Control (Meat and Meat Products) Amendment Orders 2006 (No. 1) [F2006L01737]** (June 2006), which prescribed conditions and restrictions on the export of meat and meat products, and made provision for such things as inspections, audits and registration of registered establishments. In the context of ensuring that any person managing or operating an export operation was 'fit and proper', new subclause 12.5 required any such person convicted of a serious offence to provide written notification to the department within seven days, with a failure to do so being an offence under the regulations. However, given that a 'serious offence' was defined to include an offence punishable by a period of imprisonment, the committee was prompted to inquire of the Agriculture Minister as to the potential for a person to commit the offence as a consequence of being impeded in their ability to notify the department due to being imprisoned. The Agriculture Minister acknowledged that such cases would be a potential concern, and undertook to amend the orders accordingly.

3.48 The committee also noted a requirement that the occupier of a registered establishment give the operations manager or controller written notice of the obligation to notify the department of any such conviction 'as soon as practicable'. As there was no qualification to the requirement to provide the notice 'as soon as practicable', the committee sought advice from the Agriculture Minister. The Agriculture Minister advised that it was intended that the obligation would arise at the time the amendments commenced, within a reasonable time after their commencement or, in the case of a person who later assumed management or control, within a reasonable time of their assuming control. As above, the Agriculture Minister undertook to amend the provision to clarify its application in line with this advice. The orders were amended accordingly on 13 October 2008.

Offences of strict and vicarious liability[22]

3.49 Given the limiting nature and potential consequences of strict and vicarious liability offence provisions for individuals, the committee generally requires a detailed justification for the inclusion of any such offences in delegated legislation, and seeks to ensure that they are framed as clearly and narrowly as possible.

22 'Strict liability' is a standard for liability in relation to both civil penalties and criminal offences, in which a person may be found legally responsible for, or guilty of, an act or omission regardless of culpability or fault. 'Vicarious liability' is a form of strict secondary liability in which a person may be found liable for an act or omission done by another person, such as in cases where an employer may be liable for the conduct of an employee.

3.50 An example of this was the **Environment Protection and Biodiversity Conservation Amendment Regulations 2006 (No. 1) [Select Legislative Instrument 2006 No. 131]** [**F2006L01832**] (June 2006) and the **Great Barrier Reef Marine Park Amendment Regulations 2006 (No. 1) [Select Legislative Instrument 2006 No. 132] [F2006L01809]** (June 2006), which, inter alia, introduced strict liability offences for a person operating a vessel failing to move away from a cetacean (a marine mammal) at 'a constant slow speed'. The committee considered this might be a potentially imprecise obligation, and sought advice from the Minister for the Environment and Heritage (the Environment Minister) as to whether the offences would apply more clearly if a particular speed or range of speeds were specified. In response, the Environment Minister noted that a decision had been taken not to impose a specific speed limit because safety considerations might require vessels to maintain higher speeds in certain conditions; and because not all vessels would necessarily have equipment to enable them to measure their speed. However, acknowledging the committee's concern about the potential for inadvertent breaches and inconsistent enforcement in cases of borderline infringements, the Environment Minister undertook to amend the instruments to require instead that vessels maintain a 'constant speed less than six knots', and to provide guidance by way of a note on rules of thumb for calculating a vessel's speed. The instruments were amended accordingly on 15 February 2007 and 1 March 2007.

Scrutiny principle (c): ensuring delegated legislation does not make rights unduly dependent on administrative decisions not subject to independent merits review

3.51 Scrutiny principle (c) relates broadly to decision making and the natural justice considerations which underpin the field of administrative law. Accordingly, where delegated legislation authorises the making of administrative decisions, the committee will seek to ensure that the framing of those powers is in accordance with the tenets of natural justice, such as objective criteria in relation to decision making, discretions appropriately defined and the availability of independent merits review of decisions.

Discretions appropriately defined

3.52 The committee's approach to issues of this kind is demonstrated by its consideration of the **Migration Amendment Regulations 2005 (No. 9) [Select Legislative Instrument 2005 No. 240] [F2005L03190]** (November 2005), which made numerous changes to the migration regulations in relation to visas. The committee noted that the Minister for Immigration and Multicultural and Indigenous Affairs (the Immigration Minister) was given a broad discretion to define the terms 'regional Australia' and 'seasonal work' for the purpose of determining eligibility for the grant of a further Working Holiday visa. In response to the committee's inquiry about whether the terms could be expressly defined, the Immigration Minister noted that the aim of the visa class in question was to assist regional employers by offering an incentive for holidaymakers to undertake seasonal work. In this context, the targeted areas and types of seasonal work would both be subject to regular and sometimes rapid change, depending on such factors as shifting demographics, industry change and availability of labour. Given this, the committee accepted that the

discretion allowed to the Immigration Minister was administratively necessary and appropriate.

Merits review

3.53 Scrutiny principle (c) underlines the availability of merits review for executive decisions authorised by delegated legislation as being of fundamental importance, and the committee regularly seeks clarification from ministers regarding the availability or operation of merits review in relation to particular decisions. An example of this arose in connection with the **Navigation (Coasting Trade) Regulations 2007 [Select Legislative Instrument 2007 No. 15] [F2007L00383]** (February 2007), which repealed and replaced previous regulations concerning coastal trade permits and licences. Regulations 7 and 14 of the new regulations stipulated processes governing decisions by the Minister for Transport and Regional Services (the Transport Minister) to refuse or grant a permit or licence. However, the committee was not able to discern on the face of the instrument and its supporting ES whether any such decision was amenable to review by the Administrative Appeals Tribunal (AAT). In response to the committee's inquiries, the Transport Minister advised that, while such decisions were subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, they were not subject to merits review by the AAT. The Transport Minister noted that the policy impetus for the making of the new regulation had been merely to redraft the previous regulation in a modern form. However, noting the committee's position that discretions affecting business operations should generally be subject to merits review, the Transport Minister advised that the committee's view would be given significant weight in any subsequent review or consideration of the *Navigation Act 1912*.

Scrutiny principle (d): ensuring delegated legislation does not contain matters more appropriate for parliamentary enactment

3.54 Scrutiny principle (d) reflects the view that delegated legislation should not deal with matters which should, by their nature, be subject to the full legislative processes of the Parliament.

3.55 While concerns related to this principle are less commonly raised by the committee (or, at least, less commonly characterised in such terms), the following matter provides an example of the types of concerns which may arise.

Henry VIII clauses

3.56 Provisions in delegated legislation which amend a primary Act or Acts are referred to as 'Henry VIII clauses', and the committee closely examines any such instruments to ensure that there is adequate justification for their use.

3.57 An example of such a case was the **Patents Amendment Regulations 2004 (No. 4) [Statutory Rules 2004 No. 395] [F2005B00016]** (February 2005), which made amendments to the *Patents Act 1990* and the Patents Regulations 1991 to streamline the processing of certain patent applications. Noting that two schedule items in the instrument had the effect of modifying the *Patents Act 1990*, the committee sought advice from the Minister for Industry, Tourism and Resources (the Industry Minister) as to why the amendments were not being made to the *Patents Act*

1990 directly. In response, the Industry Minister advised that the amendments arose from a need to clarify the process for preliminary examination of patents under the Patent Convention Treaty (PCT). As Australia was one of only 12 Preliminary Examining Authorities of the 126 PCT members, it was important that Australia was able to respond quickly to frequent amendments to the PCT rules by amending its domestic patent legislation. The *Patents Act 1990* in fact recognised the necessity of rapidly incorporating changes to the international patent system into domestic processes, by explicitly providing for the regulations to modify the operation of the Act to give effect to the PCT (paragraphs 228(1)(e) and 228(2)(t)). Notwithstanding the clear intent of the *Patents Act 1990* in this regard, the Industry Minister acknowledged the importance of legislative transparency, and indicated that he would therefore consider amending the *Patents Act 1990*, when next reviewed, to reflect the modifications brought about by the amending regulations.

Senator Mark Furner

Chair