Chapter 3

Work of the committee in the 42nd 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 44 private meetings during the 42nd Parliament, comprising:

- 11 meetings in 2007-08;
- 16 meetings in 2008-09; and
- 17 meetings in 2009-10.

3.3 The committee examined 8854 instruments, comprising:

- 2982 instruments in 2007-08;
- 3404 instruments in 2008-09; and
- 2468 instruments in 2009-10.

3.4 The relatively significant decline in the number of instruments examined in 2009-10 is attributable to a reduction in the number of airworthiness directives (ADs) made under the *Civil Aviation Act 1988* (708 in 2009-10 compared to 1755 in 2008-09 and 1206 in 2007-08). This followed a change (from 1 October 2009) whereby the Civil Aviation Safety Authority (CASA) is no longer required, as a matter of course, to re-issue ADs issued in a (foreign) State of Design as Australian ADs. Instead, operators must now comply with the AD as issued by the (foreign) State of Design.

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 36 periodical monitors, as well as the consolidated monitors for 2007, 2008 and 2009.

3.6 Appendix 1 provides a breakdown of the instruments made during the 42nd 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.

Instruments of concern and notices

3.7 Of the 8854 instruments examined by the committee, 455 were identified as raising a concern.[2]

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1 The 42nd Parliament was opened on 12 February 2008 and dissolved on 19 July 2010.

3.8 Sixty-one notices of motion for disallowance were given by the committee, all of which were ultimately withdrawn following receipt of satisfactory responses or undertakings from relevant instrument makers.[3] There were no unresolved notices (given by the committee) at the end of the 42nd Parliament.[4]

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 2: Instruments of concern and notices

Year	Instruments examined	Instruments of concern	Disallowance notices
2007-08	2982	170	29
2008-09	3404	123	27
2009-10	2468	162	5

Undertakings

3.10 During the 42nd Parliament:

- twenty-four undertakings to amend legislation were provided to address concerns raised by the committee (see tables 1 and 2 at appendix 3 for details); and
- twenty-six undertakings were implemented (see table 1 at appendix 3).

3.11 Nineteen undertakings remained outstanding at the dissolution of the 42nd Parliament (19 July 2010) (see table 2 at appendix 3). The committee continues to monitor the status of outstanding undertakings and, where necessary, to correspond with relevant ministers and instrument-makers regarding their implementation.

Review of the *Legislative Instruments Act 2003*

3.12 On 31 March 2008, the Attorney-General, the Hon Robert McClelland, established a committee to conduct a review of the LIA. The review was established

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2 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.

3 The 'Disallowance alert' (the alert) provides details of the 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.

4 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).

in accordance section 59 of the LIA, which required that a review be conducted within three years of its commencement, and that a report on all aspects of the operation of the LIA be provided to the Attorney-General within 15 months of the third anniversary of the commencement of the LIA. The final report, entitled *2008 review of the Legislative Instruments Act 2003*, was presented to the Attorney-General on 31 March 2009.[5]

3.13 The review of the LIA was conducted by the Legislative Instruments Act Review Committee (LIARC), according to the following terms of reference:[6]

- the extent to which the objectives of the LIA had been realised;
- whether any factors had limited the achievement of the LIA's objectives;
- the extent to which the LIA's objectives were still appropriate; and
- how the LIA's performance against its objectives might be improved.

3.14 The LIARC was also specifically required to consider:

- the recommendations contained in the committee's 2003 report on the Legislative Instruments Bill 2003;[7] and
- specific recommendations of the *Rethinking regulation* report (often referred to as the 'Banks report').[8]

Committee's submission to the LIA review

3.15 In its submission to the LIA review, the committee welcomed the introduction of the LIA, observing:

> …[the LIA has] brought about a noticeable improvement in the accessibility of legislative instruments made by the Commonwealth. The registration process has made instruments more available to members of the public…and made the content and commencement of those instruments easier to determine.

3.16 The committee's submission went on to comment on the following issues.

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5 The report may be accessed at Attorney-General's Department website, 'Legislative Instruments Act 2003,' http://www.ag.gov.au/lia-review.

6 The full terms of reference are set out in the LIARC's final report, which may be accessed at Attorney-General's Department website, Legislative Instruments Act 2003', *2008 Review of the Legislative Instruments Act 2003*, 31 March 2009, p.59.

7 Senate Standing Committee on Regulations and Ordinances, *Legislative Instruments Bill 2003; Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003* (111th Report), October 2003, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/reports.htm.

8 Taskforce on Reducing Regulatory Burdens on Business, *Rethinking regulation: report of the Taskforce on Reducing Regulatory Burdens on Business*, January 2006, available at http://www.regulationtaskforce.gov.au/.

General comments on disallowable instruments and exemptions

3.17 The committee noted that the LIA had effectively increased the number of sources of disallowance of instruments. This was because the *Acts Interpretation Act 1901* continued to provide for the disallowance of certain non-legislative instruments, as did a number of other Acts in which special provisions for tabling and disallowance had been preserved.

3.18 The committee noted that, in a similar way, the LIA had also led to multiple sources of exemption from disallowance.

3.19 In light of the above, the committee suggested that there may be some benefit in considering whether some rationalisation of sources of disallowance and exemption from the LIA could occur.[9]

Consultation and the content of explanatory statements

3.20 The committee referred to the findings in its interim report on consultation requirements under the LIA,[10] which outlined concerns in relation to the adequacy of information regarding consultation provided in explanatory statements (ESs). The committee offered a number of suggestions to improve the quality of ESs in this area, namely:

- that the requirement to provide information on consultation be given greater prominence by moving it from its current position in the definition section to Part 3 of the LIA, where the other requirements in relation to consultation are located;
- that the *Legislation handbook* be updated to include information on the requirements of the LIA in relation to consultation; and
- that, to reduce potential confusion, the LIA specify that the consultation requirements in the LIA are separate to the consultation requirements in relation to the preparation of Regulation Impact Statements (RISs).[11]

Commencement

3.21 The committee suggested that, to avoid the possibility that an instrument might commence prior to actual registration, the default approach should be to specify commencement on the day following registration.[12]

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9 Senate Standing Committee on Regulations and Ordinances, 'Submission to LIA review', 26 June 2008, p. 2.

10 Senate Standing Committee on Regulations and Ordinances, *Consultation under the Legislative Instruments Act 2003: interim report* (113th Report), June 2007, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/reports.htm.

11 Senate Standing Committee on Regulations and Ordinances, 'Submission to LIA review', 26 June 2008, pp 4-5.

12 Senate Standing Committee on Regulations and Ordinances, 'Submission to LIA review', 26 June 2008, pp 6-7.

Material incorporated by reference

3.22 The committee noted that information regarding how and/or where to access material incorporated by reference was frequently inadequate, and suggested that ESs should routinely include such information.

Classification of instruments

3.23 The committee noted the proliferation of types of legislative instruments, including, for example, regulations, ordinances, codes, declarations, determinations, directions et cetera, and suggested that consideration be given to reducing the number of types of legislative instruments to achieve greater uniformity in terms of presentation and publication on the Federal Register of Legislative Instruments (FRLI).

Australia-New Zealand Scrutiny of Legislation Conference

3.24 From 6 to 8 July 2009, the committee and the Senate Standing Committee for the Scrutiny of Bills hosted the Australia-New Zealand Scrutiny of Legislation Conference (ANZSLC). The ANZSLC is held every two years, and provides a forum for parliamentary scrutiny committees to discuss matters relevant to the work of legislative scrutiny.

3.25 The theme of the 2009 ANZSLC was 'Scrutiny and Accountability in the 21st Century'. This theme allowed for a broad range of issues to be canvassed, including:

- the role of scrutiny committees in promoting government accountability;
- the impact of a charter or bill of rights on the work of scrutiny committees;
- the impact of technology on the work of scrutiny committees; and
- the future role of scrutiny committees.

3.26 The 2009 ANZSLC was attended by 80 delegates, drawn from the Commonwealth, Australian states and territories, New Zealand and Canada. Conference papers may be obtained through the committee's website.[13]

Examples of instruments considered

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

3.27 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 *Legislative Instruments Act 2003* (the LIA) and the *Acts Interpretation Act 1901* (the AIA). The LIA, for example, imposes specific

13 Senate Standing Committee on Regulations and Ordinances website, 'Australia-New Zealand Scrutiny of Legislation Conference Scrutiny and Accountability in the 21st Century', http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=sl_conference/index.htm.

requirements relating to the provision and content of ESs,[14] the prohibiting of prejudicial retrospectivity,[15] and the incorporation of extrinsic material.[16]

Explanatory statements: describing consultation

3.28 In its interim report in 2007 on the consultation requirements under the LIA,[17] the committee identified a number of concerns regarding compliance with the need to describe the nature of consultation undertaken in relation to the making of an instrument or, alternatively, to explain why consultation was considered unnecessary or inappropriate.[18] Problems in this area persisted through the reporting period, with many ESs not addressing at all the matter of consultation, and many others being so brief and/or general that, in the committee's view, the requirements of the LIA had not been strictly met. Examples of this included the **Maritime Transport and Offshore Facilities Security Act 2003: Notice About How Incident Reports Are To Be Made (No. 3) [F2008C00578]** (October 2007), which stated only that 'key stakeholders' had been informed of the changes effected by that notice; and the **A New Tax System (Goods and Services Tax) Amendment Regulations 2009 (No. 1) [Select Legislative Instrument 2009 No. 29] [F2009L00679]** (February 2009), which noted only that 'public consultation was undertaken on the design and drafting' of the regulations. In all cases such as these, the committee wrote to the relevant minister seeking more information, and generally requested that the relevant ESs be updated with any such further information as was provided.

Retrospectivity

3.29 Delegated legislation not infrequently commences retrospectively, and the committee raised concerns about the retrospective operation of a number of instruments over the reporting period.[19] An example of this was the **Superannuation Industry (Supervision) Amendment Regulations 2007 (No. 5) [Select Legislative Instrument 2007 No. 343] [F2007L03906]** (October 2008), which implemented a range of measures to streamline and simplify prudential regulation. Despite a number of the new measures commencing retrospectively, the ES did not identify whether any person would be disadvantaged by its operation, prompting the committee to make

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

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

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

17 Senate Standing Committee on Regulations and Ordinances, *Consultation under the Legislative Instruments Act 2003* (113th Report), June 2007, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/reports.htm.

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

19 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. 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.

inquiries of the Minister for Superannuation and Corporate Law (the Superannuation Minister). The Superannuation Minister's response indicated that one of the measures did appear to impact adversely on any self managed superannuation funds (SMSFs) with an outstanding return for one or more prior years, as any such entity would be in breach of the new requirement to have appointed an auditor not less than 30 days before the date by which the auditor was required to provide reports to the trustees of the funds. Given this, the Superannuation Minister advised that the commencement date for the measure would be amended to ensure that such entities would not be affected in this way. The regulations were amended accordingly on 24 June 2008.

3.30 Retrospective commencement of instruments is quite often necessary where an instrument is made to correct a previous error, omission or ambiguity. In such cases, the operation of the instrument is frequently clearly beneficial—for example, in confirming an entitlement from the date it was originally intended to be implemented or available. The committee considered a number of such instruments in the reporting period, and in each case a key inquiry was whether steps had been taken to ensure that the full beneficial effect of the instrument was able to be realised by affected parties. An example of this arose in relation to the **Military Rehabilitation and Compensation (Pay-related Allowances) Determination 2008 [F2008L02355]** (July 2008), which amended an existing determination to allow the reserve service allowance (RSA) to be taken into account for members seeking compensation under the *Military Rehabilitation and Compensation Act 2004* (MRCA). As the instrument commenced retrospectively, the committee sought advice from the Minister for Defence Science and Personnel (the Defence Minister) as to how persons who had become retrospectively eligible for the allowance were or would be notified of their entitlement. In response to the committee's inquiry, the Defence Minister undertook to undertake an audit of claims made by reserve members and, where necessary, adjust the member's compensation entitlement accordingly.

Unclear terms and phrases

3.31 The committee frequently writes to ministers seeking clarification of terms and phrases that appear to be ambiguous or unclear, and which are not otherwise clarified or defined by the information provided in an instrument and its ES. An example of this arose in relation to the **Student Assistance (Public Interest Certificate Guidelines) Determination 2008 [F2008L01262]** (April 2008), which specified that the Secretary of the Department of Education, Employment and Workplace Relations could disclose certain information if it was in the public interest to do so. Paragraph 10(c) of the determination permitted relevant information to be disclosed to correct, inter alia, 'an incorrectly held opinion'. As the ES for the instrument provided no information about how the term was to be interpreted, the committee sought advice from the Minister for Education (the Education Minister) on the matter. The Education Minister advised that the term was intended to refer to a situation where an opinion was formed on the basis of misinformation or a lack of information. However, in considering the committee's concerns, she had formed the view that the term an 'incorrectly held opinion' was unnecessary and could be deleted, as the situation it was intended to address was sufficiently covered by the other terms

and definitions in the guidelines. The guidelines were amended to this effect on 13 January 2011.

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

3.32 Scrutiny principle (b) requires that instruments of delegated legislation must not trespass unduly on personal rights and liberties. The committee interprets this principle broadly such that it may encompass a range of matters, and a range of jurisdictional, technical and other factors may therefore be relevant to the framing of offences in delegated legislation. It is therefore important to ensure that ESs are drafted as stand-alone documents with sufficient context and detail to allow the committee to properly assess any offence provisions (particularly strict and vicarious liability offences), and that ESs clearly state the justification for the framing of offences, and their intended scope and operation.

Offences of strict and vicarious liability[20]

3.33 Given the limiting nature and potential consequences for individuals of strict and vicarious liability offence provisions, the committee generally requires a detailed justification for the inclusion of any such offences in delegated legislation. In a number of cases in the reporting period, the committee identified concerns in the framing of such offences.

3.34 An example of this was the **Offshore Petroleum (Safety) Regulations 2009 [Select Legislative Instrument 2009 No. 382] [F2009L04578]** (December 2009), which consolidated and updated a number of safety related regulations into one instrument. Subregulation 4.22(2) created a strict liability offence of appointing a diving supervisor who was not qualified as a supervisor and who was not competent to supervise a diving operation. The committee considered that the concept of competence was inherently vague and could lead to uncertainty in the scope and application of the offence, and accordingly wrote to the Minister for Resources and Energy (the Resources Minister) seeking advice on the matter. Acknowledging the committee's concerns, the Resources Minister undertook to amend the subregulation by separating the two elements into distinct offences: an offence relating to the lack of qualification, to which strict liability would be applied; and an offence relating to the lack of competency, which would not be a strict liability offence. The regulations were amended accordingly on 3 June 2010.

3.35 A second example arose in relation to the **National Trade Measurement Regulations 2009 [Select Legislative Instrument 2009 No. 233] [F2009L03479]** (September 2009), which specified arrangements for a national system of trade measurements. New regulations 3.25 and 3.27 specified certain strict liability offences

20 '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.

relating to specified conduct of a weighbridge operator which, in each case, attached liability vicariously to the weighbridge licensee, rather than the operator. The committee put the view to the Minister for Innovation, Industry, Science and Research (the Industry Minister) that the specific nature of the offences—for example, requiring that an operator exercise an 'appropriate degree of care' when making measurements or completing a measurement ticket—would render it difficult for an owner to ensure compliance unless physically present to supervise the conduct of operators. The committee suggested that the offences would be more appropriately framed if directed at, for example, requiring a licensee to take 'all reasonable steps' to ensure compliance by operators. In acknowledgment of the committee's concern, the Industry Minister caused the regulations to be amended to this effect on 27 November 2009.

Personal right to privacy

3.36 Delegated legislation frequently provides for the collection and/or use of personal information, and the committee regularly makes inquiries to clarify that sufficient justification and/or protections underpin any permitted used of personal information.

3.37 An example of this was the **Defence Force (Homes Loans Assistance) Amendment Regulations 2008 (No. 1) [Select Legislative Instrument 2008 No. 138] [F2008L02220]** (June 2008), which permitted the use and disclosure of personal information in connection with the administration of the Defence Force Home Ownership Assistance Scheme (the scheme). Given the relatively broad permitted disclosure, the committee wrote to the Minister for Defence Science and Personnel (the Defence Minister) to inquire as to whether the Privacy Commissioner had or should have been consulted in relation to the instrument. In response, the Defence Minister provided an assurance that the regulations did not go beyond the scope of the use and disclosure provisions of the *Privacy Act 1988*. Further, the Australian Government Solicitor (AGS) had prepared a report on privacy matters and compliance relevant to the scheme, which concluded that the scheme required the sharing of personal information only to the extent necessary for its proper operation. In response to the committee's inquiry, a copy of that report had been forwarded to the Privacy Commissioner, who had not identified any privacy concerns as such but had made some general recommendations on the development and implementation of good privacy practice in the handling of personal information (which would be reviewed and acted on accordingly).

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

3.38 Scrutiny principle (c) relates broadly to 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 relevant powers and discretions are appropriately framed with respect to such matters as providing objective criteria in relation to decision making, the availability of independent merits review of decisions and appropriate notification of decisions.

Objective criteria for decision making

3.39 An example of this arose in relation to the **Quarantine Service Fees Amendment Determination 2009 (No. 2) [F2009L02996]** (August 2009), which, inter alia, implemented a new fee structure to allow the Australian Quarantine Inspection Service (AQIS) to fully recover costs associated with the provision of post-entry animal quarantine services. Subsection 7C(5) of the determination provided the Secretary of the Department of Agriculture, Fisheries and Forestry with a discretion to return part of a deposit paid against fees for the management and maintenance of an animal at a quarantine station (which would otherwise have been forfeited). However, there were no criteria specified as to how the discretion should be exercised. In response to the committee's inquiry, the Minister for Agriculture, Fisheries and Forestry (the Agriculture Minister) advised that at the time the determination was drafted it was considered too difficult to objectively list the circumstances in which any such decision would be required to be made. However, in light of the committee's correspondence, the Agriculture Minister acknowledged the need for the discretion to be constrained by objective criteria, and undertook to amend the determination accordingly. The determination was subsequently amended on 8 December 2010.

Provision of reasons for decisions

3.40 A second example of the types of matters which may arise in connection with this scrutiny principle was the **Air Navigation Amendment Regulations 2009 (No. 1) [Select Legislative Instrument 2009 No. 23] [F2009L00564]** (March 2009), which made a number of amendments to the principal regulations intended to improve the Government's oversight of the international airline licences system. Regulation 18 provided that, where the Secretary of the Department of Infrastructure and Transport (the secretary) decided not to grant an applicant an international airline licence, he or she was not required to provide reasons for the decision to the licence applicant. In contrast, the secretary was required to issue reasons to licence holders in respect of proposed or actual variations, suspensions or cancellations of a licence, and the committee considered that the reason for a divergent approach was not clear on the face of the instrument and its ES. In response to the committee's inquiry, the Minister for Infrastructure, Transport, Regional Development and Local Government (the Transport Minister) advised that the omission of the requirement for the secretary to provide reasons for a decision to refuse an application for an international airline licence was a drafting oversight, and that the regulations would be amended accordingly. The regulations had not yet been amended at the end of the 42nd Parliament.

Timeframe for making a decision

3.41 In May 2008, the committee considered the **Southern Bluefin Tuna Fishery Management Plan Amendment 2008 (No. 1) [F2008L00617]** (February 2008), which made a number of amendments to the Southern Bluefin Tuna Fishery Management Plan 1995 (the plan). New clause 22CA permitted a holder of a statutory fishing right who had taken an overcatch of Southern Bluefin Tuna (SBT), and who had retained the living SBT in a grow cage, to apply to the Australian Fisheries Management Authority (AFMA) for permission to 'tow and release' part of the

overcatch. However, there was no requirement that AFMA consider any such application within a specified timeframe. Given the apparent potential for commercial losses arising from a failure to quickly decide an application (as any fish to die before or during the tow and release would be counted against a licence holder's quota), the committee wrote to the Minister for Agriculture, Fisheries and Forestry (the Fisheries Minister) seeking his advice on the matter. In response, the Fisheries Minister advised that, in practice, AFMA and all quota holders had agreed that there would be only a single tow and release event at the end of each catching season, and permissions would be sought with this understanding. That agreement aside, the majority of applications were responded to in fewer than seven days in accordance with AFMA's service charter. On the basis of the Fisheries Minister's advice, the committee concluded its interest in the matter.

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

3.42 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.

3.43 While concerns related to this principle are less commonly raised by the committee (or, at least, less commonly characterised in such terms), a specific example in the reporting period was the **Wool Services Privatisation (Research Body) Declaration 2008 [F2008L02725]** (July 2008), which declared Australian Wool Innovation Ltd (AWI) to be the research body for the purposes of the *Wool Services Privatisation Act 2000* (the Wool Act). The ES stated that, while AWI had been similarly declared to be the research body for the purposes of the Wool Act in December 2000, this had inadvertently lapsed in October 2006 when the declaration was repealed by the LIA. Given that the apparent intention of the declaration was to retrospectively validate funding received by AWI between 1 October 2006 and the making of the declaration, the committee inquired of the Agriculture Minister as to whether it may have been more appropriate to effect this through the primary legislation. In response, the Agriculture Minister advised that the declaration did not in fact operate to validate the funding received by AWI, because the declaration of a body for the purposes of the Wool Act was an administrative formality rather than a substantive requirement, and therefore the absence of such a declaration did not affect the Agriculture Minister's ability to contract with AWU in order for it to receive funds.

Instruments modifying Acts

3.44 A second example of the types of issues that may arise in connection with scrutiny principle (d) was **ASIC Class Order [CO 09/459] [F2009L02441]** (June 2009), which amended section 611 of the *Corporations Act 2001* (the Corporations Act) to specify conditional relief from the takeovers provisions in Chapter 6 of that Act for acquisitions of securities under accelerated rights issues. The order was intended to enable an investor in an accelerated rights issue for a company (where the institutional component of a rights issue is conducted before the retail component) to end up owning more than 20 per cent of the company. Given the

widespread support for the change, the committee questioned whether it should have been effected through an amendment to the Corporations Act itself, rather than through a class order, and accordingly wrote to the Minister for Financial Services, Superannuation and Corporate Law (the Corporate Law Minister), seeking advice on the matter. While the Corporate Law Minister acknowledged that such a change should normally be done through amendment of the principal legislation, he advised that poor market conditions in 2008 had seen an increased need for companies to be able to quickly raise capital. The change had therefore been effected through the class order, which was able to be made more quickly than an amendment to the Corporations Act. The Corporate Law Minister assured the committee that consideration of whether the Corporations Act should be amended to achieve the effect of the order would be part of the next review of the relevant part of that Act.

Senator Mark Furner

Chair