The Senate

Regulations and Ordinances Committee

Legislative Instruments Bill 2003

Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003

111th Report

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Summary of Recommendations

Chapter 3 – The Legislative Instruments Bills 2003

The Committee recommends that the principal regulations implementing the proposed Legislative Instruments Bill 2003 should stand referred to the Committee in the same terms as the bill. (page 14)

Chapter 4 ─ Exemptions

The Committee recommends that, where a court quashes or sets aside a certificate issued by the Attorney-General under clause 10, and the Attorney-General issues a replacement certificate under subclauses 11(5) or 11(6) which confirms the Attorney's original decision, the certificate should also be reviewable by a court. (page 17)

The Committee recommends that the Explanatory Memorandum accompanying each bill introduced into the Parliament which establishes or amends a national scheme of legislation should include a statement noting whether any legislative instruments that may be made under the bill will or will not be disallowable. Any Parliamentary amendments which make these instruments disallowable should be considered when the Bill is reviewed after three years. (page 19)

Chapter 5 – The Quality and Transparency of Legislative Instruments

The Committee recommends that the operation of the consultation provisions and the regulatory impact statement process be included in the review of the Act in three years time. (page 30)

The Committee recommends that, where the Register is rectified under clause 23, the Register should make clear that rectification has taken place, the time that the rectification took place, and the nature of the matter rectified. (page 32)

The Committee recommends that the Bill be amended to impose on the Secretary a general obligation to ensure public accessibility to the database of legislative instruments. (page 34)

Chapter 6 – Parliamentary Scrutiny

The Committee recommends that provisions dealing with the seconding of a motion in the Legislative Instruments Bill 2003 be amended to reflect the practice in both Houses of the Parliament. (page 37)

The Committee recommends that the deferral provision in clause 43 be deleted from the Legislative Instruments Bill 2003. (page 40)

The Committee recommends that the Attorney-General's Department should not make provision for the electronic lodgement of legislative instruments for tabling in the Parliament. (page 41)

The Committee recommends that the Government give consideration to clarifying the meaning of the term 'provision' in the disallowance provisions in the Legislative Instruments Bill 2003. (page 44)

Chapter 8 – Other Issues

The Committee recommends that where a legislative instrument ceases for a period between its commencement and registration because it was determined to adversely affect persons other than the Commonwealth:

(a) the Register should include a statement with the instrument informing users that it ceased to have effect for a specified period; and

(b) the Attorney-General should inform the Parliament that the instrument had ceased for a specified period. (page 50)

To ensure the openness of the backcapturing process, the Committee recommends:

(a) departments and agencies provide a list to the Parliament of those existing instruments they will not be registering, effectively repealing them; and

(b) the Attorney-General's Department monitor the backcapturing of existing legislative instruments and provide interim reports to the Parliament on the process. (page 51)

The Committee recommends that appropriate ways in which incorporated material might be made accessible be considered when the Act is reviewed in three years time. (page 52)

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Chapter 1

Introduction

Reference

1.1 On 13 August 2003 the Senate referred the provisions of the Legislative Instruments Bill 2003 and the Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003 to the Committee for inquiry and report by 3 October 2003. The reporting date was subsequently extended to 16 October 2003.[1]

1.2 During its inquiry into the bills, the Committee was asked to give particular consideration to the following issues:

(a) the scope of the exemptions contained in the bills;

(b) the mechanisms contained in the bills to improve the quality and transparency of legislative instruments; and

(c) parliamentary scrutiny of legislative instruments and the impact of the bills on the work of the committee.[2]

Conduct of the inquiry

1.3 The Committee invited various Departments, government agencies, academics and other interested individuals to make submissions to the inquiry.

1.4 The Committee received seven submissions relating to the bills and these are listed in Annex 1 and may be accessed on the Committee's website at http://www.aph.gov.au/Senate/committee/regord_ctte/index.htm.

1.5 The Committee also held two public hearings in Canberra on 10 and 17 September 2003. Details of these hearings are shown in Annex 2. The transcripts of proceedings may also be accessed on the Committee's website.

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1 Australia, Senate, *Journals,* No.99, 16 September 2003, p.2394.

2 Australia, Senate, *Journals,* No.88, 13 August 2003, p.2111.

Chapter 2

History of the Legislative Instruments Proposal

The ARC Report

2.1 The Commonwealth's rule making processes were the subject of a major review by the Administrative Review Council (ARC) in 1992.[3] The ARC identified the following inadequacies with the current regime and recommended a major reform of the Commonwealth's rule making processes:

- there was no clear view of the distinction between matter appropriate for delegated and that for primary legislation;
- there was no explanation for the use of different forms of instruments of delegated legislation;
- unlike primary legislation (at least in theory) delegated legislation received little public exposure and was often inaccessible;
- there was no consistency in the application of the tabling and disallowance procedures of Parliament to delegated legislative instruments which were not statutory rules; and
- instruments existed that were not being treated as either legislative or executive in character.[4]

2.2 The ARC recommended that the Commonwealth adopt a regime which encompassed all legislative instruments, and which provided for consultation on primary legislative instruments, increased accessibility through a federal register of instruments, enhanced parliamentary scrutiny and the general review and 'repeal' of outdated legislation after it had been in force for ten years ('sunsetting'). The ARC anticipated that its Report would be the 'basis for an efficient rule-making regime with enhanced public participation in the making of rules, quality drafting, effective scrutiny, and easy access'.[5]

2.3 The proposal to implement the ARC's recommendations has faced a lengthy passage through the Parliament. It has been almost ten years since the

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3 Administrative Review Council, *Rule Making by Commonwealth Agencies*, Report No. 35, Australian Government Publishing Service, Canberra, 1992.

4 ibid, pp. 8-9. Similar concerns were raised by the Senate Standing Committee on Regulations and Ordinances in Report No.83 of April 1988, p.25 (Parliamentary Paper No.377 of 1988).

5 ibid, p. ix.

first bill was introduced in 1994. That bill and two subsequent bills failed to pass both Houses. The 2003 bills will be the fourth time the Parliament has considered this proposal.

The 1994 Bill

2.4 The Legislative Instruments Bill 1994 was introduced into the Senate on 30 June 1994. The bill to a large extent responded to the recommendations of the ARC. It established an electronic register of existing and future legislative instruments, required consultation where changes to legislative instruments affected business and provided for a comprehensive regime for parliamentary scrutiny. The bill did not adopt the ARC's recommendation for the establishment of a sunsetting regime and, contrary to the ARC's Report,[6] included a definition of a legislative instrument – the government considering its inclusion would clarify the position for rule-makers and remove some of the confusion that exists under the present scheme.[7] The bill also provided for the backcapturing of all existing legislative instruments instead of the progressive repeal and sunsetting of instruments recommended by the ARC.

2.5 The bill was the subject of two parliamentary committee inquiries[8] and was still awaiting passage when the Parliament was prorogued prior to the 1996 federal election.

The 1996 Bills

2.6 The Legislative Instruments Bill 1996 was introduced into the Senate on 8 October 1996. The bill essentially provided for the same matters contained in the 1994 bill. Although both bills provided for mandatory consultation for legislative instruments that directly or substantially indirectly affect business, the 1996 bill introduced a more lengthy and prescriptive consultation process. This required a legislative instruments proposal and a consultation statement whereas the 1994 bill required a post development consultative process.

2.7 The 1996 bill also picked up the ARC's recommendation that legislative instruments be sunsetted. Provision was made for an automatic five-year

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6 ibid, p.23. ARC Recommendation 3(2): 'The definition of "legislative" should not be set out in the Act.'

7 The Hon Daryl Williams, Parliamentary Debates Representatives, Vol HoR 217, 27 October – 20 November 1997, House of Representatives, Canberra, 1997, p. 10511.

8 Senate Standing Committee on Regulations and Ordinances, *Legislative Instruments Bill 1994*, Ninety-Ninth Report, Canberra, October 1994 and the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Legislative Instruments Bill 1994*, Canberra, February 1995.

sunsetting regime for all legislative instruments with exceptions for instruments with specified long-term effect and quarantine proclamations.

2.8 The 1996 bill was the subject of lengthy debate in the Senate which agreed to 54 amendments (18 government and 36 non-government amendments). The House of Representatives did not accept the non-government amendments and returned the bill to the Senate with a further six government amendments. The Senate insisted on its 36 non-government amendments and accepted four of the six government amendments. On 5 December 1997 the House of Representatives laid the bill aside after refusing to accept the Senate amendments and insisting on the two disagreed amendments.

2.9 The Legislative Instruments Bill 1996[2] was reintroduced in the Senate on 23 March 1998 in the same form as the 1996 bill. Although there was bipartisan support for the principle of changing the Commonwealth's rule-making processes, the Parliament could not agree on certain aspects of the proposal ─ Attorney-General's certificates as to whether or not an instrument was legislative in character, the effect of non-compliance with consultation requirements and the sunsetting process ─ and the bill was laid aside when the Parliament was prorogued for the 1998 federal election.

Chapter 3

The Legislative Instruments Bills 2003

Introduction

3.1 On 26 June 2003, the Government introduced the Legislative Instruments Bill 2003 and the Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003. The House of Representatives passed the bills on 8 September 2003 and they were subsequently introduced into the Senate on 9 September 2003.

3.2 The passage of time since the proposal was last considered in 1998 has seen a number of changes in the new bills. These changes address previous Senate amendments as well as changes in the law and technology. The following are the most noticeable changes to the bills.

- The Legislative Instruments Bill 2003 is less prescriptive. It provides for regulations to prescribe procedures covering such matters as the registration of legislative instruments and the tabling of documents in the Parliament. It also allows regulations to extend the lists of instruments exempt from registration (clause 7), disallowance (clause 44) and sunsetting (clause 54).
- The consultation regime has been simplified. The 2003 bill contains general provisions encouraging consultation. In comparison, the 1996 bill provided for a prescriptive mandatory consultation regime in which a legislative instrument proposal and a consultation statement were required.
- The sunsetting period has been increased from the five year period in the 1996 bill. The 2003 bill provides for a ten-year period and the Parliament has been given the opportunity to determine whether instruments should continue beyond sunsetting.

Legislative Instruments Bill 2003

3.3 The bill establishes a comprehensive regime for the registration, tabling, scrutiny and sunsetting of Commonwealth legislative instruments. In particular, it:

(a) defines a legislative instrument;

(b) establishes a Federal Register of Legislative Instruments;

(c) encourages high standards in the drafting of legislative instruments to promote their legal effectiveness, clarity and intelligibility;

(d) encourages rule-makers to undertake appropriate consultation;

(e) improves public accessibility;

(f) enhances parliamentary scrutiny; and

(g) establishes a ten-year sunsetting regime.

A 'legislative instrument'

3.4 Clause 5 of the bill defines a legislative instrument as an instrument in writing:

(a) that is of a legislative character; and

(b) that is or was made in the exercise of a power delegated by the Parliament.

3.5 The bill adds two additional subclauses to clarify the definition. In effect, all instruments registered will be legislative instruments (subclause 5(3)) and where an instrument has both legislative and administrative characteristics, it will be deemed to be legislative (subclause 5(4)).

3.6 The definition will, in effect, capture all instruments that are legislative in character with the following exceptions.

- Clause 7 lists those instruments that are declared not to be legislative and exempts them from registration, tabling and disallowance. This list has changed since the bill was last before the Parliament. The scope of these exemptions will be discussed in Chapter 4.

- The Attorney-General may also certify that an instrument is not legislative in character (clause 10). These certificates, which are subject to judicial review, are discussed further in Chapter 4.

- Rules of Court, under clause 9, are not considered to be legislative instruments for the purposes of the bill but are made subject to parliamentary scrutiny in their own enabling legislation by the Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003.

3.7 This definition is 'one of the most significant features' of the bill as the registration, tabling and disallowance 'operates on the basis of what an

instrument does, not on the basis of what it is called.'[9] The adoption of this definition will place the Commonwealth at the forefront of rule-making in Australia. Comparable Australian jurisdictions still base their publication, tabling and parliamentary scrutiny regimes on the name of the instrument. For example, Victoria restricts its regime to instruments that are cited as a statutory rule. Similar restrictions apply to New South Wales, Queensland and Tasmania.

Drafting Standards

3.8 A specific object of the bill is to encourage a high standard of drafting of legislative instruments. Clause 16 sets out measures to achieve these standards. The Secretary of the Attorney-General's Department must cause steps to be taken to promote the legal effectiveness, clarity and intelligibility to anticipated users of legislative instruments. The measures in subclause 16(2) would see the Attorney-General's Department more actively involved in the drafting, training and oversight of the drafting of legislative instruments. These provisions are the same as those contained in the 1996 bill.

3.9 A new provision has been added at subclause 16(3) which requires the Secretary to take steps to prevent the inappropriate use of gender-specific language. This provision addresses concerns raised in the Senate during debate on the 1996 bill.

Consultation

3.10 The bill has general provisions encouraging rule-makers to undertake appropriate consultation before making an instrument particularly where the instrument is likely to have a direct or a substantial indirect effect on business or restrict competition. Rule-makers will be required to provide advice on the consultation process used, or reasons for not undertaking consultation, in the Explanatory Statement that accompanies the instrument. These consultation provisions differ markedly from those in the 1996 bills which proposed mandatory consultation for legislative instruments directly affecting, or having a substantial indirect effect, on business. Rule-makers were required to prepare a legislative instrument proposal and a consultation statement.

3.11 The bill has also adopted a different approach to exemptions from consultation. Where the 1996 bill set out circumstances in which consultation

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[9] Regulations and Ordinances Committee, *Hansard*, 17 September 2003, p.2. (Mr Stephen Argument)

was not required, clause 18 of the 2003 bill prescribes circumstances in which consultation may not be necessary or appropriate. The new provision is discretionary and subclause 18(2) lists examples of instruments of a nature such that the rule-maker may be satisfied that consultation is unnecessary or inappropriate. These examples include instruments that:

(a) are machinery in nature,
(b) are required urgently,
(c) give effect to Budget decisions,
(d) concern national security,
(e) concern an instrument for which appropriate consultation has been undertaken by someone other than the rule-maker,
(f) relate to employment matters, or
(g) relate to the management of, or to the service of, members of the Australian Defence Force.

3.12 Failure to consult does not affect the validity or enforceability of an instrument (clause 19).

The Federal Register of Legislative Instruments

3.13 The bill provides for the establishment and operation of a Federal Register of Legislative Instruments. This will be an 'on-line register of all Commonwealth legislative instruments, all explanatory statements in relation to legislative instruments made on or after the commencing day, and all compilations in relation to legislative instruments, that have been registered under the Bill.'[10] Under this proposal no legislative instrument will be enforceable unless it is registered (clause 31). This provision will impose a discipline on the rule-makers to ensure that their instruments are validly made.

3.14 Regulations will determine the manner in which the Register will be created and how it will operate.

3.15 For evidentiary purposes the Register will be taken to be the authoritative record of an instrument (clause 22).

3.16 The bill also provides for the 'backcapturing' of instruments made before the Act commences (clauses 28 to 30). Under these provisions, instruments made five years before the commencement day must be lodged for registration 12 months after the Act commences. Instruments made more than

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[10] Explanatory Memorandum to the Legislative Instruments Bill 2003, p.12.

five years before the commencement day must be lodged within three years. An instrument that is not lodged within the specified time is taken to have been repealed (clause 32). The Committee expressed its concern that an existing legislative instrument may be inadvertently repealed. See Chapter 8 for further discussion on this matter.

Parliamentary Scrutiny

3.17 The bill sets out a new tabling regime to facilitate parliamentary scrutiny of registered legislative instruments. All registered instruments will be subject to tabling in the Parliament including instruments that are exempt from disallowance. Instruments must be tabled in both Houses of the Parliament within six sitting days of being registered.

3.18 Part 5 of the bill also provides for the disallowance of legislative instruments. A senator or member may give a notice of motion to disallow a legislative instrument within 15 sitting days after it has been tabled. If a motion of disallowance is unresolved at the end of 15 sitting days after the notice has been given, the instrument is deemed to be disallowed. These provisions continue the existing regime under the *Acts Interpretation Act 1901*.

3.19 Clause 43 of the bill makes provision for the deferral of a notice of disallowance for up to six months to allow a legislative instrument to be remade or amended. These provisions have been changed from those provided for in the 1994 and 1996 bills and now require another notice of disallowance to be given if a matter is not resolved at the end of the deferral period (subclause 43(2)). The implications of this change are discussed in Chapter 6.

3.20 Clause 44 sets out a list of legislative instruments that will not be subject to disallowance by either House of the Parliament. The scope of these exemptions is discussed in Chapter 4.

3.21 A new provision has been included in this bill providing for regulations to determine the manner in which legislative instruments will be laid before the Parliament, including by electronic means (clause 40). The Clerks of both the Senate and the House of Representatives expressed concern with this provision and this matter is discussed further in Chapter 6.

Sunsetting of instruments

3.22 The 1996 bills provided for a five-year sunsetting regime. The Senate raised concerns with the short duration of the sunsetting period and

Parliament's inability to oversee the instruments being sunsetted. The Senate agreed to amend the 1996 bill on 14 May 1998 to require the Parliamentary Counsel to provide periodic lists to the Parliament of instruments that were due for sunsetting in the next 12 months.[11]

3.23 The bill takes account of the Senate's concerns by extending the sunsetting period to 10 years (clause 50) and introducing a requirement for the Attorney-General to table in both Houses of the Parliament a list of instruments due for sunsetting within 18 months before their sunsetting date (clause 52). Once a list has been tabled either House has six months to resolve that a legislative instrument or a provision of a legislative instrument should continue in force (section 53). Where a House of the Parliament resolves that an instrument should continue in force, the instrument or provision of the instrument will be taken to be remade on the date that it would have ceased to have effect if the resolution had not been passed (subclause 53(2)).

3.24 Clause 54 sets out a list of legislative instruments that will not be subject to sunsetting. The scope of these exemptions is discussed in Chapter 4.

Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003

3.25 This bill makes consequential amendments to 20 Acts (including the *Acts Interpretation Act 1901*). The bill applies the proposed *Legislative Instruments Act 2003* to Rules of Court. The Parliament previously accepted the exclusion of the Rules of Court from the Act to recognise judicial independence from the legislature. Disallowable non-legislative instruments will be subject to parliamentary scrutiny under a new section 46B of the *Acts Interpretation Act 1901*. The bill also repeals the *Statutory Rules Publication Act 1903*. The statutory rules series of instruments will cease upon the commencement of the Act.

Senate amendments to the 1996 bill

3.26 On 14 May 1998, the Senate agreed to a number of amendments to the 1996[2] bill.[12] These amendments were awaiting consideration by the House of Representatives when the Parliament was prorogued for a federal election in October of that year. The table below sets out those amendments and indicates whether they have been addressed in the 2003 bill.

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11 Australia, Senate, *Journals,* No.176, 14 May 1998, pp.3795-6.

12 ibid, pp. 3792-96.

Senate amendments	**Addressed in the 2003 Bill**
Legislative instruments should not contain gender specific language unless it is necessary to identify persons by their sex.	Yes ─ see clause 16
The Attorney-General's certificate as to whether an instrument is legislative should be subject to disallowance by the Parliament.	No The certificate is required to be tabled, is reviewable by the courts, but is not disallowable (clause 10).
Circumstances in which consultation is not required should include: instruments made for reasons of urgency related to prudential supervision or insurance, banking or superannuation or the regulation of financial markets; notice of the content of the instrument would enable individuals to gain an advantage over other persons without that notice; or proclamation of the commencement of legislation.	Yes ─ clause 18 lists examples of circumstances where consultation may be unnecessary or inappropriate. With the exception of the proclamations, the remaining circumstances have been included in the provision.
Instruments that are exempted from consultation for reasons of urgency should only have a 12 month period of operation.	No
Instruments that give effect to intergovernmental agreements or schemes should be subject to disallowance.	No Still exempted from disallowance under clause 44
Parliament to be given a role in determining whether an instrument should continue beyond sunsetting	Yes ─ see clauses 51 to 53 Attorney-General required to table a list of those instruments due for sunsetting in 18 months. Either House has six months to resolve whether instruments should continue beyond sunsetting date.
Modify exemption from sunsetting provisions to include instruments giving effect to international obligations or conferring heads of power on a self-governing territory.	Yes ─ see clause 54

General support for the bills

3.27 All those who provided evidence to the Committee expressed general support for the bills. For example, Mr Stephen Argument and Professor Dennis Pearce expressed 'wholehearted support' for the reforms proposed and suggested that the primary bill's advantages 'so outweigh the present situation that our position is that it should be enacted and, if it is found to be wanting, it can be finetuned in the future'.[13] And Ms Jennifer Burn stated that the bill 'contains significant improvements to the current scheme for making delegated legislation'.[14]

3.28 The Committee considers that rule-making in the Commonwealth will be greatly improved with the passing of the bills. It is particularly pleased that a number of the Senate's concerns have now been addressed in this bill. A number of comparatively minor concerns are raised elsewhere in this Report.

3.29 Many of the reforms proposed in the bill ─ in particular the establishment and operation of the Legislative Instruments Register ─ will be implemented through regulations. At the date of the preparation of this Report, those regulations were not available to the Committee.

3.30 The Committee will scrutinise these regulations against its terms of reference after they are tabled. However, to properly finalise this inquiry, the Committee considers that the regulations should be examined in general terms in a similar manner to the provisions of the bill.

The Committee recommends that the principal regulations implementing the proposed Legislative Instruments Bill 2003 should stand referred to the Committee in the same terms as the bill.

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13 Submission No 2, p 1, Regulations and Ordinances Committee, *Hansard*, 17 September 2003, p R&O 1.

14 Submission No 7, p 1.

Chapter 4

Exemptions

Introduction

4.1 Under the current provisions, legislative instruments are subject to tabling and parliamentary scrutiny only if they are specifically made so. Part XII of the *Acts Interpretation Act 1901* provides for the tabling and parliamentary scrutiny of regulations. Other legislative instruments may be made subject to these provisions but only if the Act that gives rise to them expressly provides for this.[15] As a result of this approach 'an undetermined number of instruments exist that are subject to no consistent or logical scheme as to their preparation, [and] whether or not they should be subject to tabling and/or disallowance ...' [16]

4.2 In response to this situation, the ARC proposed that all delegated instruments of a legislative character be automatically covered by a tabling and disallowance scheme unless specifically excluded by statute.[17] The ARC saw the major advantages of this approach as its 'comprehensive coverage' and its consequent 'simplicity'.

The approach taken in the bill

4.3 In broad terms, the bill adopts the approach recommended by the ARC. As noted in Chapter 3 it is intended to apply to all 'legislative instruments' (as defined). However certain instruments are exempted from the bill (ie are declared not to be legislative instruments);[18] and certain legislative instruments are exempted from the disallowance regime[19] and the sunsetting regime[20] established by the bill. These exemptions are discussed in further detail below.

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15 See *Acts Interpretation Act 1901* s 46A.

16 Submission No 2, p 2 (Mr Stephen Argument and Professor Dennis Pearce).

17 Administrative Review Council, *Rule making by Commonwealth Agencies,* Report No 35, (1992) (AGPS), p 22.

18 Legislative Instruments Bill 2003 cl 7.

19 Legislative Instruments Bill 2003 cl 44(2).

20 Legislative Instruments Bill 2003 cl 54(2).

Exemptions from the bill: non legislative instruments

4.4 Clause 7 of the bill provides that an instrument is not a legislative instrument if it is declared not to be so, either in its parent legislation or in the Table in clause 7. That Table lists 23 types of instruments which have been excluded from the operation of the bill:

- to confirm that those instruments are not in fact legislative instruments, where there is some prospect of doubt; and
- to recognise certain strong countervailing policy considerations that make registration undesirable or inappropriate, even though the instruments are legislative (eg, the need to avoid publicising the content of certain instruments, the need to avoid fettering employment arrangements and the need to avoid applying the bill to certain applied laws).[21]

4.5 None of the instruments listed in the Table are currently subject to disallowance as a legislative instrument. Additional instruments may be included in the Table by regulation.

4.6 Clause 9 provides a specific exemption for the rules of the federal courts, which are characterised as non-legislative instruments. However various provisions in the Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003 ensure that court rules will continue to be treated as though they were legislative instruments.

Attorney-General's conclusive certificates

4.7 Where there is doubt about the character of an existing or proposed instrument, clause 10 empowers the Attorney-General to issue a certificate as to whether the instrument is or is not legislative. This certificate is itself a legislative instrument and must be included on the Register. However it is not disallowable,[22] and subclause 10(5) provides that a certificate is conclusive, though it may be reviewed by the Federal Court or the Federal Magistrates Court under the *Administrative Decisions (Judicial Review) Act 1977*, or by the Federal Court under section 39B of the *Judiciary Act 1903*, or by the High Court under paragraph 75(v) of the *Constitution*.[23] This right of review addresses reservations about a similar clause expressed by the Committee in its

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21 Legislative Instruments Bill 2003, Explanatory Memorandum, p 7.

22 See Legislative Instruments Bill 2003, cl 44, Table, item 43.

23 Legislative Instruments Bill 2003 cl 11.

Report on the 1994 bill and by the Senate Scrutiny of Bills Committee in its *Alert Digest* on the 1994 bill.[24]

4.8 The Committee notes that the Senate, in its consideration of the 1996 bill, sought to amend this provision to make these certificates disallowable. This issue remained unresolved at the time the 1996 bill was laid aside. The Committee also notes the comments of the Attorney-General that his certificate 'is actually a legal opinion' and that parliamentary disallowance of a legal opinion 'is a somewhat odd concept'.[25] The Committee notes the comments of some witnesses that the process of judicial review is complex, costly and time-consuming,[26] but considers that these provisions provide a sufficient safeguard. Making these certificates disallowable, in addition, is unnecessary at this time.

4.9 Where a court orders that the Attorney-General's decision be quashed or set aside, the Attorney-General must reconsider the matter and issue a replacement certificate. However, the original certificate remains effective until it is replaced.[27] The Clerk of the Senate considered that, in these circumstances, there should be no need to involve the Attorney-General in any further decision-making. The Clerk suggested that, where a court determined that an instrument had been mistakenly classified, 'appropriate provision can be made for the subsequent treatment of that instrument' without the Attorney's further intervention.[28]

4.10 A replacement certificate may either reverse or confirm the Attorney-General's original decision. Neither the bill nor the Explanatory Memorandum makes clear whether a replacement certificate which confirms an original decision may again be challenged in court, and how such a certificate, which expresses the Attorney-General's legal opinion, can be reconciled with the contrary decision of a court on the same law.

The Committee recommends that, where a court quashes or sets aside a certificate issued by the Attorney-General under clause 10, and the Attorney-General issues a replacement certificate under subclauses 11(5) or 11(6) which confirms the Attorney's original decision, the certificate should also be reviewable by a court.

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24 Senate Standing Committee on Regulations and Ordinances, Ninety-Ninth Report, *Legislative Instruments Bill 1994,* October 1994, pp 3-4; Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 12/94*, pp 43-45.

25 House of Representatives, *Hansard*, 21 August 2003, p 18854.

26 Submission No 7, p 2 (Ms J Burn).

27 Legislative Instruments Bill 2003 cl 11(2).

28 Submission No 1, p 2.

Exemptions from the disallowance provisions in the bill

4.11 In addition to the exemptions from the definition of 'legislative instrument' set out in clause 7, clause 44 of the bill excludes certain legislative instruments from the disallowance provisions in the bill.

National scheme legislation

4.12 Subclause 44(1) provides that the disallowance provisions do not apply to any provision of a new legislative instrument if the enabling legislation for that instrument 'facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more of the States, and authorises the instrument to be made by the body or for the purposes of the body or scheme' unless the enabling legislation specifically declares that the instrument is disallowable.

4.13 The Explanatory Memorandum seeks to justify this provision by arguing that 'the Commonwealth Parliament should not, as part of a legislative instruments regime, unilaterally disallow instruments that are part of a multilateral scheme'. However, it goes to note that the Parliament, in creating the relevant enabling legislation, 'would be in a position to determine that such instruments should be disallowable'.[29] This places an obligation on the Parliament to expressly declare in each case that such instruments should be disallowable.

4.14 The Committee raised this issue with officers of the Attorney-General's Department and was told:

> If there is an intergovernmental scheme currently in place which enables instruments to be made under it and those instruments were not declared to be disallowable by the enabling legislation, then this exemption is simply maintaining the status quo of what Parliament has already decided. If enabling legislation does have the effect of making the instrument disallowable then, notwithstanding that they are part of an intergovernmental or multijurisdictional scheme, they will continue to be subject to disallowance.[30]

4.15 In view of the exemption for national scheme legislation, the ARC queried why instruments made under international agreements (such as

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29 Legislative Instruments Bill 2003, Explanatory Memorandum, p 23.

30 Regulations and Ordinances Committee, *Hansard*, R&O 7.

instruments made by bodies established under the Trans Tasman Mutual Recognition Agreement) should not also be exempt from disallowance.

4.16 In raising the issue, the Council noted that its Report advocated that, where possible, the procedures recommended for making, publication and review of delegated legislation should apply to legislative instruments made under intergovernmental agreements or schemes. Where this was not possible, the Council recommended minimum standards which did not include disallowance by Parliament (Recommendation 31).

4.17 The Committee considered a similar exemption in the 1996 bill. The then Chair of the Committee, Senator O'Chee, stated:

> Secondly, the Bill generally excludes instruments which provide for national schemes of legislation from parliamentary disallowance. These schemes, which involve the Commonwealth and the States and Territories, are likely to become more important and it would seem to be quite fundamental that Parliament should scrutinise this legislation. To exclude it from parliamentary control would not seem to be compatible with the stated aim of the Bill to give Parliament a greater scrutiny role. The Committee believes that Parliament should have the same options over such instruments as it has over other legislation, much of which is of far less consequence than national schemes. It is incongruous that the national parliament should not have control over national legislation.[31]

4.18 The Committee reiterates these views and notes that the Clerk of the Senate considered the exclusion of national schemes of legislation to be 'a potentially enormous problem.'[32] However, the issue of the disallowability of instruments which give effect to national schemes of legislation is ultimately a matter for the Parliament to determine, either as a general rule or on a case-by-case basis. At the very least, Parliament should be told whether proposed instruments will or will not be disallowable.

The Committee recommends that the Explanatory Memorandum accompanying each bill introduced into the Parliament which establishes or amends a national scheme of legislation should include a statement noting whether any legislative instruments that may be made under the bill will or will not be disallowable. Any Parliamentary amendments which make these instruments disallowable should be considered when the Bill is reviewed after three years.

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31 Australia, Senate, *Hansard*, 21 November 1996, p 5744 (Senator O'Chee).

32 Regulations and Ordinances Committee, *Hansard*, p R&O 12.

Excluded instruments

4.19 Subclause 44(2) provides that a legislative instrument is not subject to the disallowance provisions of the bill if it is included in the accompanying Table. This Table lists 43 types of instrument which have been excluded for reasons such as:

- there may be an alternate parliamentary role in relation to that type of instrument (eg certain broadcasting standards can be directly amended by the Parliament under the *Broadcasting Services Act 1992*);
- there may be a need to depoliticise the rule-making process (eg, certain instruments made under the *Quarantine Act 1908* may only be justifiable in the international trade context if they are removed from the political process);
- an instrument may be an internal Government management tool (eg, instruments made under the *Public Service Act 1999* which relate to the classification of Government employees);
- the exposure of some instruments to potential disallowance might cause commercial delay or uncertainty (eg, instruments made under the *Radiocommunications Act 1992* which relate to the procedures for allocating spectrum licences);
- Executive control is intended (eg, various Ministerial directions).

4.20 Additional instruments may be included in the Table by regulation.

4.21 While the list of instruments in clause 44(2) is significantly larger than the equivalent provision in the 1996 bill, the Committee notes the Attorney-General's assurance that no instruments that are currently subject to disallowance will be exempted from disallowance under the bill.[33]

Proclamations under the Quarantine Act 1908

4.22 In examining the 1996 bill, the Committee expressed some concern at the exclusion from disallowance of various proclamations under the *Quarantine Act 1908*. The then Committee Chair, Senator O'Chee, said:

> Thirdly the Bill excludes Quarantine Act proclamations from disallowance, although not from tabling. This exemption was not originally provided for in the present Bill, but was introduced as a government amendment. The supplementary Explanatory Statement

[33] Second Reading Speech; Regulations and Ordinances Committee, *Hansard*, 10 September 2003, p R&O 2.

> gives no explanation at all for the exclusion of disallowance, which appears to be another unnecessary limit on parliamentary control. Breaches of these proclamations incur various penalties of up to 10 years imprisonment and a fine of $100,000. It is inappropriate that legislation resulting in such penalties should not be subject to disallowance.[34]

4.23 A Senate amendment was proposed to remove this exemption and make quarantine proclamations disallowable, but was rejected by the House of Representatives on the basis that quarantine proclamations provide specific control mechanisms to prevent the entry into, and the spread of disease and pests affecting humans, animals and plants in Australia, and they 'have never been subject to disallowance by the Parliament'.[35]

4.24 The Committee notes the observation in the Explanatory Memorandum that such proclamations should be seen to be 'depoliticised' and considers that the operation of this exemption should be monitored and reviewed after three years.

Exemptions from the sunsetting regime

4.25 The bill establishes a comprehensive 'sunsetting' regime to ensure that all legislative instruments are reviewed regularly and retained only where needed. Clause 54 lists 50 instruments that will not be subject to sunsetting. Instruments are exempted from the sunsetting regime:

- where the rule-maker has been given a statutory role independent of Government, or is operating in competition with the private sector (eg employment instruments and instruments made under the *Australian Postal Corporation Act 1989* relating to terms and conditions);
- where the instrument is clearly designed to be enduring and not subject to regular review (eg, instruments establishing flags under the *Flags Act 1953* or proclaiming national parks, and instruments that relate to safety or national security);
- where commercial certainty would be undermined by sunsetting (eg plans of management made under the *Fisheries Management Act 1991* where people make substantial investments in reliance on the fact that a plan will remain in force for 30 years); and

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34 Australia, Senate, *Hansard*, 21 November 1996, p 5744 (Senator O'Chee).

35 House of Representatives, *Votes and Proceedings*, No 126, 17 November 1997 at Senate Amendment 30.

- where instruments are part of a scheme involving legislation in two or more jurisdictions and where the Commonwealth is only one party (eg, the Commonwealth/State/Territory/New Zealand scheme for food standards).[36]

4.26 The Attorney-General's Department described the general policy consideration underlying the exempting of instruments from the sunsetting provisions as the intention that those instruments be 'enduring'. As a matter of practice, such instruments should be reviewed, and most agencies did undertake periodic reviews of them, but an 'imposed review regime' such as sunsetting was thought not to be appropriate.[37]

4.27 Echoing its comments in relation to clause 44, the ARC queried the exclusion from sunsetting of instruments made in relation to intergovernmental bodies or schemes. The Explanatory Memorandum sought to rationalise this exemption by contending that instruments should not be subject to a sunsetting process which would cause them to cease to exist in only one of the jurisdictions that were party to the agreement. Given this rationale, the ARC again queried why there was not also an exemption for the instruments of bodies established under international agreements.[38]

> Exceptions to sunsetting were not addressed by the Council in its Report (recommendation 23). As a general proposition the Council considers that exceptions to both disallowance and sunsetting should be based on transparent and consistent grounds and should be subject to Parliamentary scrutiny and accountability.[39]

4.28 The Committee sees merit in these observations of the ARC and makes no further comment in relation to the exemptions from sunsetting.

Adding exemptions by regulation

4.29 A number of submissions raised concerns about the possibility of amendments being made to the Table of exempt instruments and the Table of instruments exempt from disallowance in the Principal Act by regulation. Such clauses, where subordinate legislation takes precedence over the primary legislation which creates it, are known as 'Henry VIII clauses' and are of concern to the Senate Scrutiny of Bills Committee which regularly draws the Senate's attention to them.

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36 Explanatory Memorandum p 27; Submission No 4, p 7 (Attorney-General's Department).
37 Regulations and Ordinances Committee, *Hansard*, 10 September 2003, p R&O 8.
38 Submission No 5, p 7.
39 ibid, p 7.

4.30 On this issue, the Explanatory Memorandum to the bill notes:

> As excluding the instrument from the operation of the Bill will only be via an Act or a disallowable instrument (including regulations), Parliament will be able to determine the appropriateness of the exclusion at the time the Act is debated or the instrument is scrutinised. This ensures the integrity of the regime established by the Bill.[40]

4.31 On this issue, Ms Jennifer Burn stated that the Henry VIII clauses were 'problematic':

> It is questionable whether this power should be delegated by the Parliament, even though there would appear to be some protection as the instrument amending the table would be a regulation itself and therefore subject to disallowance. While legislative instruments are subject to tabling and potential disallowance, there is always the potential that the time delay that can accompany the tabling requirements and parliamentary scrutiny can be detrimental to the parliamentary review process. Amendments to the table are potentially so significant that they should be made by the Parliament.[41]

4.32 Mr Stephen Argument and Professor Dennis Pearce also drew attention to this provision, pointing out that it was, as a matter of principle, 'an inappropriate delegation of legislative power, contrary to paragraph (iv) of the terms of reference of the Senate Standing Committee for the Scrutiny of Bills'. However, as a practical matter:

> if you have a provision that allows you to amend primary legislation by delegated legislation, the simple fact is that this committee has the chance to scrutinise it and the Senate has the chance to disallow the regulation. So in that sense, while Henry VIII clauses are a bad thing, it is not as though they are absolutely uncontrollable. There is still that capacity to scrutinise and disallow them.[42]

4.33 The Attorney-General's Department concluded:

> At the moment you are considering whether the exemptions are appropriate in terms of the primary legislation. The regulations will allow exemptions in new situations as they arise. Those regulations will then be subject to the normal scrutiny that is occurring for regulations. In working with the Office of Parliamentary Counsel we are envisaging that in new enabling legislation the nature of the instrument and whether it

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40 Explanatory Memorandum, p 6.

41 Submission No 7, p 3.

42 Regulations and Ordinances Committee, *Hansard*, 17 September 2003, p R&O 5.

> should be a legislative instrument for the purpose of this bill or exempt from disallowance or exempt from sunsetting will be addressed at the time of the enabling legislation. We are aiming to make it such that in future it will be primary legislation that will focus on the nature of the instrument. These regulation-making powers are almost to catch those just in case. That was something we were working out with the Office of Parliamentary Counsel now. So in fact exemptions will be added by primary legislation in the new situations.[43]

4.34 In view of the assurance given by the Department that amendments to the Tables of exempt instruments will be made 'by primary legislation in new situations,' and given the scrutiny role of the Committee and the disallowance powers of the Parliament if the Tables are amended by regulation, the Committee makes no further comment on the Henry VIII clauses.

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[43] Regulations and Ordinances Committee, *Hansard*, 10 September 2003, p R&O 7.

Chapter 5

The Quality and Transparency of Legislative Instruments

Introduction

5.1 The quality of legislative instruments has been a matter for comment from a number of sources. In its 1992 report the ARC was of the view that 'instruments that are of a legislative kind must meet high drafting standards in presentation, expression and consistency' and should be drafted 'so that they are clear, concise and unambiguous'. The ARC undertook a survey of instruments from various agencies which revealed that the standard of drafting varied markedly from agency to agency. The ARC concluded that the standard of delegated legislative instruments should not be less than that for Acts of Parliament.[44]

5.2 Quality has also been a matter on which this Committee has commented. For example, in its *1999-2000 Annual Report* the Committee observed that:

> Many of the defects it finds in instruments should be detected before the instruments are tabled in the Senate. The frequency of these defects prompts the Committee to conclude that quality control procedures in some instrument-making agencies may be inadequate.[45]

5.3 And quality was an issue raised in evidence during the Committee's inquiry. For example, Mr Richard Griffiths proposed that 'standards of intelligibility' be prescribed for instruments,[46] and Mr Stephen Argument and Professor Dennis Pearce referred to poor quality in the drafting of some instruments.

> We stress that any comments about the poor quality of drafting should not be seen as a criticism of those who draft the vast bulk of instruments that are covered by the Statutory Rules Publication Act, that is, the Office of Legislative Drafting ("OLD"). Rather, it is a reflection of the fact that, since the kinds of instruments that are involved fall outside OLD's

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44 Administrative Review Council, Report No 35, *Rule Making by Commonwealth Agencies*, (AGPS) (1992) pp 25-6.

45 Regulations and Ordinances Committee 109th Report, *Annual Report 1999-2000*, p 12.

46 Submission No 3, p 3.

jurisdiction, they tend to be drafted by "ordinary" public servants, rather than by professional drafters.[47]

Quality

5.4 Clause 16 of the bill is intended to address these concerns by encouraging 'high standards' in the drafting of legislative instruments. It requires the Secretary to 'cause steps to be taken to promote the legal effectiveness, clarity and intelligibility to anticipated users, of legislative instruments.' These steps may include:

- undertaking or supervising the drafting of legislative instruments;
- scrutinising preliminary drafts of legislative instruments;
- providing advice concerning the drafting of legislative instruments;
- providing training to Departments and agencies in drafting and matters related to drafting;
- arranging the temporary secondment to other Departments or agencies of employees performing duties in the Department; and
- providing drafting precedents to officers and employees of other Departments and agencies.[48]

5.5 Under subclause 16(3), the Secretary is also required to cause steps to be taken:

- to prevent the inappropriate use of gender-specific language in instruments;
- to advise rule-makers of existing instruments that make inappropriate use of such language; and
- to notify the Parliament about any occasion where a rule-maker has been so advised.

5.6 In imposing this responsibility on the Secretary, the bill has dispensed with the newly created position of Principal Legislative Counsel which had been proposed and given these functions in the earlier bills. The bill has also dispensed with a requirement set out in the 1996 bill that Explanatory Statements should contain a statement explaining how an instrument was drafted and describing any steps taken under the drafting standards to ensure that the instrument would be of a high standard.[49]

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47 Submission No 2, p 1.

48 Legislative Instruments Bill 2003, cl 16(2).

49 Regulations and Ordinances Committee, *Hansard*, 10 September 2003, p R&O 12.

5.7 The Attorney-General's Department indicated that, in practice, the function of ensuring quality would be undertaken by the Office of Legislative Drafting (OLD) which currently drafts most of the instruments in the Statutory Rules series (regulations) as well as proclamations, rules of court, laws of the non-self governing territories and a great variety of other legislative and administrative instruments such as determinations, declarations, guidelines, appointments and delegations.[50]

5.8 No-one expressed reservations about the inclusion in the bill of the obligations set out in clause 16 though the point was made that 'the obligations will only be able to be properly met if sufficient resources are provided to carry them out'.[51] OLD indicated to the Committee that it expected that additional resources would be made available to it following the passage of the bill.[52]

Transparency

5.9 In his Second Reading Speech on the bill, the Attorney-General observed that, as the bill was concerned with laws made under a power delegated by Parliament, 'it is important for the integrity of those laws that there be transparency in their making and that they be publicly available'.[53] In this section of the Report, the Committee looks at issues of transparency involved in the making of instruments, and in the making of them publicly available.

5.10 The major transparency issue involved in the making of legislative instruments is consultation. The major transparency issues involved in the 'publishing' of legislative instruments are the integrity of the Register and the accessibility of the information it provides.

Consultation

5.11 In its 1992 Report, the ARC recommended that there be mandatory public consultation before any legislative instrument was made subject to certain exceptions (eg, where an instrument provided for a change in fee levels, or was of a minor machinery nature, or where advance notice of an instrument would enable some individuals to gain an advantage, or where the Attorney-General tabled a certificate that consultation should not occur in the public

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50 Submission No 4, p 5. This adopts the recommendation originally made by the Administrative Review Council in 1992.

51 Submission No 2, p 5 (Mr S Argument and Prof D Pearce).

52 Attorney-General's Department, Answers to Questions on Notice p 3.

53 Australia, House of Representatives, *Hansard*, 26 June 2003, p. 16453.

interest).[54] The ARC noted that submissions from agencies argued against the establishment of formal consultation arrangements in this form:

> It was claimed that the present arrangements for consultation were sufficient. Agencies argued that because of current informal practices, general consultation requirements enshrined in statute would be counterproductive. Any formal requirements to consult would be resource intensive and the benefits of consultation would not outweigh the costs.[55]

5.12 The ARC recommendation was adopted in the 1996 bill. However, in contrast, the 2003 bill adopts an essentially discretionary approach to consultation. Where a proposed instrument is likely to have a significant effect on business or restrict competition, the rule-maker must be satisfied that any consultation that he or she considers appropriate, and that is reasonably practicable to undertake, has been undertaken.[56]

5.13 This approach allows a rule-maker to consult on any proposed instrument and to cover issues beyond business and competition. For example, if the rule-maker considers it appropriate consultation could include issues such as civil liberties and environmental factors.[57] Rule-makers also have a discretion to determine whether there are circumstances in which consultation is unnecessary or inappropriate. The scope of this provision is discussed at paragraph 3.11.

5.14 It is arguable that the consultation provisions in the bill provide for limited accountability.[58] The only avenue by which the Parliament or other interested parties may test the veracity of the process is the consultation statement included in the explanatory statement of the instrument. Because rule-makers are being encouraged (rather than required) to consult, the bill makes no provision for a body to monitor the process and provide advice on whether consultation is appropriate in the circumstances. Professor Dennis Pearce noted that the consultation processes were now 'more constrained' than in the earlier version of the bill, and Ms Jennifer Burn argued that the community would be better served if the bill contained stronger measures to ensure consultation was carried out.[59] The Committee also notes the comments

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54 Administrative Review Council, op cit, pp 38-39.

55 Administrative Review Council, op cit, p 36.

56 Legislative Instruments Bill 2003, cl 17.

57 *Proof Hansard*, 10 September 2003, p.24. (Attorney-General's Department)

58 This view was supported by Ms Jennifer Burn, *Submission*, No.7, p.5.

59 Regulations and Ordinances Committee, *Hansard*, (17 September 2003) p R&O 5 (Professor Pearce); Submission No 7, p.5 (Ms Burn).

of the Clerk of the Senate that the consultation process had now been diluted 'to the equivalent of dishwater'.[60]

5.15 The consultation process set out in the bill will operate alongside the existing (non-statutory) regulatory impact statement (RIS) process introduced by Cabinet directive in 1997.

5.16 Under the RIS process rule-makers are required to prepare a regulatory impact statement where an instrument directly affects or substantially indirectly affects business. These statements are included with the instruments when they are tabled in the Parliament. The Office of Regulation Review monitors and provides advice to agencies on this process. The Attorney-General's Department responded to a question on notice in the following terms:

> The 2003 Bill is consistent with the Government's Regulation Impact Statement (RIS) requirements set out in "A Guide to Regulation". The 2003 Bill is aimed at strengthening the Government's commitments to the promotion of regulatory best practice and procedure, and complements the RIS requirements. The Government's regulatory best practice policy requires consultation early in the policy development process on both regulatory options and the need for regulation. If a regulatory proposal fulfils the RIS requirements ─ including community consultation and engagement ─ it is likely to fulfil the requirements for consultation under the 2003 Bill.[61]

5.17 The Committee has also examined the consultation regimes in comparable jurisdictions in Australia ─ New South Wales, Queensland and Victoria. These jurisdictions have adopted regimes through legislation that require ministers to consult if certain conditions exist with limited exemptions specified in the legislation. The state jurisdictions also give legislative authority to the preparation of regulatory impact statements. Although the Commonwealth's regime would not have the same level of legislative authority, it mirrors the regimes in those jurisdictions. The Commonwealth's regime has the potential to extend beyond the other jurisdictions as those jurisdictions are limited to consultation on statutory rules or other named instruments. The 2003 bill also enables consultation to be carried out (in theory) on any legislative instrument.

5.18 The Committee has considered the evidence and is of the view that accountability under the new scheme is weaker than that provided for in the 1996 bill. Under the 2003 bill, Parliament will be left to determine whether the

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60 Submission No 1, p 2.

61 Answer to a question on notice, 30 September 2003.

consultation undertaken by a rule-maker was appropriate to ensure the legislative instrument met the needs of the community. This decision will often occur after an instrument is in force, leaving the Parliament in the position of having to disallow the instrument if it considered the consultation was inappropriate.

5.19 The Committee considers that, at this stage in the development of the bill, the consultation process as set out should be given an opportunity to work. The Committee adopts the views of the ARC in its submission to the inquiry:

> On balance, the Council is of the view that the consultation process provided for in the Bill, though tempered, is broadly consistent with the principles of procedural fairness and accountability underlying the recommendations made by the Council in its Report. Importantly also, the process represents an approach which might be anticipated to be supported rather than resisted by rule-making agencies.[62]

5.20 The Committee considers that the bill would also be strengthened with the inclusion of provisions specifically acknowledging the preparation of regulatory impact statements. However, the Committee considers that the complementary operation of the informal consultation and RIS processes should be allowed to operate for a trial period, with their effectiveness monitored and evaluated when the bill is reviewed in three years time.

The Committee recommends that the operation of the consultation provisions and the regulatory impact statement process be included in the review of the Act in three years time.

Transparency and the Register

5.21 Part 4 of the bill establishes a Federal Register of Legislative Instruments. The Register comprises a database of all legislative instruments, all explanatory statements in relation to 'new' legislative instruments, and all compilations in relation to legislative instruments that have been registered.[63]

5.22 The bill provides that the Register is, for all purposes, to be taken to be a complete and accurate record of all legislative instruments included on it.[64] Compilations are to be taken, unless the contrary is proved, to be a complete

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62 Submission No 5, p 3.
63 Legislative Instruments Bill 2003, cl 20(2).
64 Legislative Instruments Bill 2003 cl 22 (1).

and accurate record of a relevant legislative instrument as amended as in force at the date specified in the compilation.[65]

5.23 Given that the Register is invested with an authoritative status, this begs the question of the consequences where there are errors on its face. Where the error is in the instrument as made, the legal position is unchanged ─ the rule-maker can only correct such an error by issuing a new instrument. However, where the error occurs in entering the instrument on the Register, clause 23 of the bill permits the Register to be rectified.

5.24 Under subclause 23(1), where the Secretary becomes aware of an error on the Register, and that error lies in the text, in electronic form, of an instrument (rather than in the original instrument itself) then the Secretary 'must arrange for the Register to be altered to rectify the error as soon as possible'. Similar provision is made where, as a result of an error in the electronic text of a compilation, the text does not represent the state of the law that it purports to represent.

5.25 Subclause 23(2) provides that any such alteration of the Register 'does not affect any right or privilege that was acquired or accrued by reason of reliance on the content of the Register before that alteration was made', and 'does not impose or increase any obligation or liability that was incurred before that alteration was made'.[66]

5.26 The Committee heard concerns about the integrity of some instruments contained on existing electronic databases. For example, Mr Richard Griffiths from Capital Monitor provided a print out from the Register showing that the Family Law Amendment Rules 2003 (No 3) purportedly were made on 15 July 2003. He stated that they were, in fact, gazetted and commenced on 14 July 2003.

5.27 He also provided a print out of an Explanatory Statement (ES) accompanying the Industrial Chemicals (Notification and Assessment) Amendment Regulations 2003 (No 9), Statutory Rules 2003 No 192. This ES contained the following statement: 'The purpose of the regulations is to increase the registration charges that are applicable under Part 3A of the Act and introduce a late renewal penaltyThe Regs don't seem to do this. There seem to be no technical amendments, other than those consequential to the main provisions. No need to mention technicals in that case.' The underlined words no longer appear in the electronic version of the ES.

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65 Legislative Instruments Bill 2003, cl 22 (2).

66 See also Regulations and Ordinances Committee, *Hansard*, 10 September 2003, p R&O 11.

5.28 Mr Griffiths concludes:

> It is probably a relatively simple matter at present to amend the current FRLI html web page to correct that error. When FRLI becomes the sole, authoritative register, it would be an equally simple matter to change the law of the land eg to legitimise, retrospectively, an illegal act. The FRLI record will need to be automated, to ensure precision and accuracy, and made tamper-proof or, at least, provided with a secure, verifiable 'audit trail'.[67]

5.29 The Clerk of the Senate provided a further example from the *Parliamentary Privileges Act 1987*.

> One part of the statute said: 'If ABCD, then WXYZ' ─ the usual sort of provision. In the electronic generation of the statute, the last phrase of the 'then WXYZ' was tacked onto the end of paragraph D. So it looked as if it was only a qualification on paragraph D, not a qualification on 'ABCD', which changed the meaning in the statute. It was some years before we picked that up, but it was purely one of those electronic errors: the computer not recognising a return and running something on that was not intended to run on. I can see a situation where courts and lawyers are reading the Parliamentary Privileges Act, and they have this electronic version or printed copies generated from the electronic version, they think that that is what it says because of this error in it, and they make errors. [68]

5.30 The Attorney-General's Department was of the view that 'the number of times that an electronic version of an instrument will differ from the original has to be few and far between.'[69] The Committee is not quite as optimistic. Where an error occurs in placing an instrument on the Register, and a person acts in reliance on the erroneous instrument, the Committee agrees that that person should suffer no damage or disadvantage. The difficulty will be in providing proof of the contents of the Register as it was when that person acted in reliance on it, before it has been rectified.

The Committee recommends that, where the Register is rectified under clause 23, the Register should make clear that rectification has taken place, the time that the rectification took place, and the nature of the matter rectified.

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67 Submission No 3, p 5.

68 Regulations and Ordinances Committee, *Hansard* (17 September 2003) pp R&O 14-15.

69 Regulations and Ordinances Committee, *Hansard*, 10 September 2003, p R&O 12 (Ms S Sellick).

Accessibility

5.31 In its 1992 report, the ARC noted that many delegated legislative instruments were difficult to obtain. They were not always physically available and, where they were, access was often difficult because they were not kept in any systematic series.[70]

5.32 Professor Dennis Pearce gave the Committee an example of this inaccessibility which arose in an inquiry for the Department of Transport.

> Buried deep in one of their files was the essential legislation on which the whole scheme that we were looking at was based. There were ministerial determinations. There they were duly spiked and stamped and folio numbered. I do not think anybody would have ever found them again if it came to a test. They were just simply buried in the departmental files. Their significance had not really been recognised.[71]

5.33 Under the bill, instruments such as these will have to be registered and so will become much more accessible. This is one of the most significant benefits of the bill. However moving towards an electronically accessible database presupposes that electronic access will be available somewhere. It may also disadvantage some people who are not computer literate.

5.34 The 1996 bill specifically provided for public access to the Register at the office of the Principal Legislative Counsel. That access was to be through a terminal. The 2003 bill does not make similar provision because 'these days there are so many terminals around that special access to computer terminals to view the database is not necessary.'[72]

5.35 The Committee notes that section 22 of the *Legislation Act 2001* (ACT) imposes an obligation on the ACT Parliamentary Counsel to ensure, as far as practicable, that access to the contents of the ACT's electronic register of legislation 'is accessible at all times on an approved website,' and that 'access is to be provided without charge by the Territory.'

5.36 The Legislative Instruments Bill imposes a general obligation on the Secretary to ensure the quality of legislative instruments. It should impose a similar general obligation on the Secretary to ensure their accessibility ─

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70 Administrative Review Council, *Rule Making by Government Agencies*, Report No 35 (AGPS) (1992), p 61.

71 Regulations and Ordinances Committee, *Hansard* , 17 September 2003, pp R&O 1.

72 Regulations and Ordinances Committee, *Hansard*, 10 September 2003, p R&O 15 (Mr Graham).

whether that be through terminals located in public libraries, law access points, or some other means. The Committee endorses the observation of Mr Stephen Argument that it is important not only that the legal profession or government administrators have access to the new legislative instruments database, but that the general public should be able to have access to it as well, particularly those living in non-metropolitan areas.[73]

The Committee recommends that the Bill be amended to impose on the Secretary a general obligation to ensure public accessibility to the database of legislative instruments.

Access to legislation in printed form

5.37 A related issue is the continuing availability of legislative instruments in printed form for those people who prefer them in that form. The Attorney-General's Department informed the Committee that, after the passage of the bill, it expected that formal printing of many instruments would continue.

> Certainly we expect to be making printed copies available of anything that is required, but we do not expect the demand to be particularly high for a very large number of instruments because people will be able to get them very readily over the Internet. Any residual demand is something that we expect to be able to meet without trouble.[74]

5.38 This issue has become somewhat more acute following the decision to close the network of government bookshops, which previously provided a convenient access point to legislation.

5.39 The Department told the Committee that, if the bill were enacted this year, it was expected to commence on 1 January 2005. The Government Bookshop network was due to close in October 2003. Negotiations were taking to place with a view to providing replacement outlets in each State and Territory at which *Gazettes* and legislation will be sold. The existing subscription and telephone ordering services would also continue.[75]

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73 Regulations and Ordinances Committee, *Hansard*, 10 September 2003, p R&O 5.

74 Regulations and Ordinances Committee, *Hansard*, 10 September 2003, p R&O 15 (Mr Graham).

75 Answers to questions on notice (1 October 2003), p 3.

Chapter 6

Parliamentary Scrutiny

Current regime

6.1 The current disallowance regime requires enabling Acts to provide for a regulation making power, or to specify that an instrument is subject to the *Acts Interpretation Act 1901*, before an instrument is disallowable. A regulation is subject to disallowance under Part XII of the Act. Other legislative instruments are made subject to the same disallowance regime under section 46A of the Act.

6.2 Part XII of the Acts Interpretation Act provides a set of safeguards for the tabling and disallowance of legislative instruments. The Act provides that:

- an instrument must be tabled within 15 sitting days of being made,
- a motion to disallow an instrument must be given within 15 sitting days of the instrument being tabled, and
- an instrument is deemed to be disallowed if a notice is not withdrawn or resolved within 15 sitting days.

6.3 The Committee has identified eighteen Acts of the Parliament that provide for tabling and disallowance regimes that vary from that contained in the Acts Interpretation Act. For example, a notice to disallow determinations made under subsections 20(1) and (2) of the *Financial Management and Accountability Act 1997* must be given within five sitting days after tabling and there is no deemed disallowance if the motion is not resolved within that period. Such different regimes will continue with the commencement of the Legislative Instruments Bill.

The 2003 Bill

6.4 The bill heralds a major change in the approach to parliamentary scrutiny of legislative instruments. Under the bill, a legislative instrument will be subject to tabling and disallowance unless it is exempted either in clause 44

of the bill or in other enabling legislation. This approach will increase the number of instruments subject to parliamentary scrutiny. [76]

6.5 The disallowance regime in the bill primarily adopts Part XII of the Acts Interpretation Act. The periods for the giving of a notice of motion to disallow a legislative instrument, and the duration of that notice, remain unchanged. However, two changes have been made to the regime. First, legislative instruments will be required to be tabled within six sitting days of being registered. This is a welcome initiative as legislative instruments will be in force for a shorter period of time before they are tabled in the Parliament.

6.6 Secondly, provision has been made for a notice of disallowance to be deferred for up to six months to allow a legislative instrument to be remade or amended.

6.7 Submissions and evidence presented to the Committee highlight difficulties with the seconding and deferral of motions and the possible electronic lodgement of legislative instruments for tabling in the Parliament. The Committee also considered the width of the disallowance power during the inquiry. These issues are discussed below.

Seconding of motions

6.8 The bill requires the moving and seconding of motions that have been called on (subparagraphs 42(2)(b)(ii) and (3)(b)(ii), 43(2)(b)(ii) and (3)(c)(ii)). The Senate abolished the practice of seconding motions more than twenty years ago.[77] The provisions as drafted in the bill are based on the existing disallowance provisions in subsections 48(5) and (5A) of the Acts Interpretation Act. These provisions have not been amended since the Senate changed its procedures. The Attorney-General's Department is of the option that the provisions in the bill do not require motions to be seconded but describe a point reached by either House in its consideration of the motion. However, the Department undertook to review the provisions to ensure they accurately reflected the practice in both the Senate and the House of Representatives.[78]

6.9 The Committee considers the bill provides an opportunity to amend these provisions to reflect the current practice of the Senate.

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76 The Attorney-General's Department reiterated that it was unaware of the number of additional instruments that would become subject to parliamentary scrutiny under the Bill.

77 Submission No.1, p.2. (Mr Harry Evans)

78 Attorney-General's Department, Answer to a question taken on notice at the public hearing of 10 September 2003.

The Committee recommends that provisions dealing with the seconding of a motion in the Legislative Instruments Bill 2003 be amended to reflect the practice in both Houses of the Parliament.

Deferral of a disallowance motion

6.10 As noted in paragraph 6.2, the current disallowance provisions require notice of a disallowance motion to be given within 15 sitting days after an instrument has been tabled, and require that notice to be withdrawn or resolved in some way within 15 sitting days after it is given. No provision is made for a notice of disallowance to be deferred.

6.11 The ability to defer a notice of disallowance was first recommended by the ARC in its 1992 report. The ARC proposed this as a way of ensuring ministers met their undertakings to amend legislation, particularly those undertakings given to this Committee. The ARC recommended that the bill should permit the effect of a disallowance motion to be deferred for a maximum period of six months to allow an objectionable provision to be corrected.[79] Professor Dennis Pearce assumed that such a provision would allow the Regulations and Ordinances Committee to 'keep pressure on ministers to honour their undertakings'.[80]

Ministerial undertakings to amend legislation

6.12 It is the practice of the Committee to work with ministers to ensure that instruments do not infringe its terms of reference. This results in a number of undertakings being given each year to amend legislative instruments to either remove an offending provision or to provide for safeguards. Ministers undertake to amend legislation either when they initially respond to the Committee or as a result of a motion of disallowance that the Committee has placed on the instrument. Once the Committee has withdrawn its motion of disallowance it has to rely on the good faith of the minister to ensure there is timely amendment of the legislation. The only avenue open to the Committee to pursue an undertaking is through its annual report.

6.13 As at 30 June 2002, the Committee had 25 outstanding ministerial undertakings to amend legislation. Nine of those undertakings had been

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79 Administrative Review Council, *Rule Making by Government Agencies*, Report No 35 (AGPS) (1992), p 53.

80 ibid, p.4

implemented by the end of 2002. The period taken to amend an instrument from the time the ministers' undertakings were given exceeded the proposed six-month deferral period in all instances ─ one undertaking was implemented within seven months; two within 10 months; five within approximately two years and one within three and a half years. Of the remaining outstanding undertakings six had been outstanding for more than three years due to the necessity to amend primary legislation, or to review the legislation or because there had been a change in portfolio responsibility.

6.14 These statistics highlight the fact that a lengthy period of time is elapsing before most legislation is being amended to meet the Committee's concerns. This is disappointing as the Parliament delegates its legislation-making power to the executive to enable it to respond quickly to demands. It is a matter of concern that offending provisions remain on the statute book and safeguards are not being introduced long after an undertaking has been given to the Committee that the necessary amendments will be made. Given this, the proposed deferral provision may provide a means by which the Committee can ensure amendments are made to legislative instruments within a relatively short period of time.

6.15 However, the reasons for the lengthy delay in implementing some of the undertakings also expose a potential difficulty with the deferral provision. It would appear that this provision is more suitable for a proposed amendment that requires no consultation to assess its impact. The Senate may experience difficulty when a minister is required to amend primary legislation or to review legislation and that review takes more than six months. The provision does not allow for an extension of the deferral period in such instances.

Operation of the deferral provision: the 1994 and 1996 Bills

6.16 The 1994 and 1996 bills provided for each House of the Parliament to pass a resolution deferring consideration of a disallowance motion for a maximum period of six months. Such a resolution would explicitly provide that consideration had been deferred "to enable the remaking or the amendment of the instrument within the deferral period to achieve an objective specified in the resolution".[81] Where such a deferral resolution was passed then, at the end of the first sitting day after the deferral period, the instrument was deemed to have been disallowed unless the notice was withdrawn or called on and debated or otherwise disposed of. This approach places the onus on the Minister who has undertaken to amend an instrument to fulfill that undertaking.

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[81] Legislative Instruments Bill 1994 cl 48(4); Legislative Instruments Bill 1996 cl 61(4).

Operation of the deferral provision: the 2003 Bill

6.17 Clause 43 of the current Bill changes the procedure set out in the earlier versions of the bill. Under the proposed new provision, where a House passes a resolution deferring consideration of a disallowance motion then a further notice of motion to disallow must be given before the end of the first sitting day after the end of the deferral period if the Minister has not fulfilled an undertaking to amend, or if the House is not satisfied with the amendment proposed. This approach transfers the onus from the Minister and places it on the House to again move for disallowance where it is dissatisfied.

6.18 The Clerk of the Senate, Mr Harry Evans, argued that a deferral provision was 'positively dangerous' and was more likely to favour the executive who might use it to avert disallowance.[82] He also observed that the new deferral provision had two further serious problems:

> The serious problem is that only one sitting day is provided for a notice of motion to be given after the expiration of a deferral period. If this provision were effective, it would unduly and unnecessarily restrict the scope for disallowance, and raise the possibility of the opportunity for disallowance being accidentally missed for one reason or another (for example, the absence of a senator who wishes to give notice, a sitting cut short by lack of a quorum etc)
>
> This defect, however, is submerged by the more serious problem. There is no provision for the disposition of an original disallowance motion after a deferral period. The problem may be illustrated as follows. A notice of motion is given within the 15 sitting day period to disallow an instrument. A resolution to defer consideration of the motion is passed. Either nothing is done in the deferral period to replace or amend the instrument in question, or what is one does not satisfy the senator concerned. There is then one sitting day to give a new notice to disallow the instrument. There is then a further 15 sitting days within which that notice must be resolved, or the instrument is disallowed. There is, incidentally, no provision that passage of the new motion has the effect of disallowing the instrument. There is also, however, no provision for what happens to the original disallowance motion. Presumably it could remain on the Senate Notice Paper indefinitely, and then be passed, perhaps years after the original notice was given, and the original instrument would then be disallowed.[83]

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82 Submission No.1, p.3 (Mr Harry Evans) Australia, Senate, *Hansard*, 17 September 2003, p.4.

83 Submission No 1, p 3.

6.19 As a result, the Clerk favoured the continuation of the current disallowance regime as it allowed for a faster resolution of negotiations for the amendment of an instrument, particularly if the minister is faced with the possibility of losing it.[84] Professor Pearce broadly supported the Clerk's concerns and suggested that the bill was 'probably better off without this provision altogether',[85] though this might perpetuate the current difficulties with the enforceability of undertakings.

6.20 The Attorney-General's Department advised that the deferral provision had been redrafted and restructured to improve its clarity and remove a redundant provision that dealt with the interaction between mandatory consultation and the remade instrument.[86] However, the Department noted that the provision 'will be reviewed to ensure that the restructuring has not created any unintended consequences identified by the procedural concerns'.

6.21 For the reasons given above by both the Clerk of the Senate and Professor Pearce, the Committee considers that the deferral provision creates more difficulties than the benefits it may provide. Although the provision might provide a means by which the Senate and this Committee could ensure the quick implementation of undertakings, the Committee believes that the provision may be difficult to put into practice where there is a requirement to make complex amendments, particularly those requiring consultation. In such instances, the current disallowance regime may be more suitable for resolving such matters.

6.22 The provision as drafted in the current bill will also create problems with the resolution of deferral motions. There is likely to be uncertainty about the continued operation of an instrument where an existing motion of disallowance remains on the Senate Notice Paper and might be called on at a later date. Given these difficulties, the Committee believes that, on balance, the deferral provision should be omitted from the Bill.

The Committee recommends that the deferral provision in clause 43 be deleted from the Legislative Instruments Bill 2003.

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84 Submission No.1, p 3.

85 Regulations and Ordinances Committee, 17 September 2003, p.R&O 4 (Professor Pearce)

86 Answer to question of notice from the public hearing of 17 September 2003.

Tabling of legislative instruments

6.23 Clause 40 of the bill provides that regulations may specify the manner by which documents required to be laid before a House of the Parliament may be delivered, including by an electronic means. This is a new provision that seems to anticipate a move to electronic lodgement of documents for tabling. The Clerks of the Senate and the House of Representatives have each expressed concern with this provision.

6.24 Mr Evans identified the following potential problems with this provision:

- it is a necessity that a document be tabled in hard copy,
- it is not feasible to preserve a document in electronic form,
- certainty of content and future reference to the document requires a hard copy,
- it is more efficient for senators and the staff who support them to consult legislative documents in hard copy, and
- the responsibility for errors is transferred from the executive government to the legislature.[87]

6.25 The Clerk of the House of Representatives, Mr Ian Harris, raised similar concerns, stating that, while that House 'supports in principle electronic modes of delivery and communication, we do not agree at this stage to receipt of electronic copies of documents for tabling purposes. This is because of issues of validating the integrity of the document, potential document corruption issues, the integrity of House records in the longer term and so forth.'[88]

6.26 The Senate receives thousands of legislative instruments each year. If these were to be forwarded electronically they would have to be printed by the Senate, with some inconvenience, delay and expense, and the possibility of error in printing. The cost of printing these instruments would also be transferred to the Parliament placing an additional burden on its budget.

The Committee recommends that the Attorney-General's Department should not make provision for the electronic lodgement of legislative instruments for tabling in the Parliament.

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87 Submission No.1, p.3.

88 Submission No.6, p.2

Width of the disallowance power: 'partial disallowance'

Width of the current disallowance power

6.27 The current provisions authorising the disallowance of regulations are set out in subsection 48(4) of the *Acts Interpretation Act 1901*. Under that subsection, where 'regulations' have been laid before a House of the Parliament, that House may, within 15 sitting days, pass a resolution 'disallowing any of those regulations'.

6.28 Section 46A of the Act, among other things, applies this disallowance provision to instruments other than regulations. In effect, it authorises a House to pass a resolution disallowing any 'provision' of an instrument.

6.29 The scope of subsection 48(4) was discussed by the Federal Court in *Borthwick v Kerin.*[89] In that case, Jenkinson J considered that the word 'regulations' meant a plurality of one of the serially numbered collocations of words into which subordinate legislation is divided. Although he did not express any concluded opinion, he considered there was room for argument that the word 'regulation' meant 'a grammatically complete expression of a single legislative provision'.

6.30 In *Borthwick v Kerin*, the court upheld the Senate's power to disallow two individual Export Control Orders. Since that case the Senate has used its existing disallowance powers to disallow whole instruments (Retirement Savings Accounts Amendment Regulations 2003 (No.2), Statutory Rules 2003 No.195), individual clauses in instruments (Regulations 7.9.10 and 7.9.11 of the Corporations Amendment Regulations 2002 (No.4), Statutory Rules 2001 No.319) and an item in a schedule to amending regulations (item [3] of Schedule 1 to the Parliamentary Entitlements Amendment Regulations 2003 (No.1), Statutory Rules 2003 No.149). However the Senate has not disallowed subclauses or parts of clauses or individual words in a clause. Arguably such words or phrases are not 'grammatically complete expressions of a single legislative provision'. To permit their disallowance might render the resulting instrument meaningless.

Width of the disallowance power in the Bill

6.31 Subclause 42(1) of the bill picks up the terminology in the *Acts Interpretation Act 1901*, and provides for the disallowance of 'a legislative

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89 *Thomas Borthwick and Sons (Pacific) Ltd v Kerin and Others*, (1989) 87 ALR 527.

instrument or a provision of a legislative instrument'. The scope and width of the term 'provision' was raised during the inquiry.

6.32 The Attorney-General's Department stated that its understanding was that the bill simply reflected the current law.[90] In response to a question on notice, the Department advised that it did not consider the bill to be the 'appropriate vehicle to alter the scope of the disallowance powers'.[91]

6.33 Professor Dennis Pearce was strongly in favour of the idea of disallowing a provision, and thought that the use of this word was 'probably as good a neutral word as you can get':

> While we are familiar with regulations, you could have said that a regulation can be disallowed, but when you get into other forms of instruments, they take all sort of funny forms. 'Provision' is probably as convenient a breakdown word as one could use. I am not quite sure what else you could say. If you use the word 'part' it may be constrained to something that is called a part, because lots of legislation is, of course, divided formally into Part 1, Part 2, Part 3, and it might be misconstrued.[92]

6.34 The Clerk of the Senate pointed out that '[given] the enormous range of types of instruments and the way they are framed' it may be difficult to define the term 'so that it would apply with precision to all kinds of instruments.'[93] However, Mr Evans considered that the use of the word 'provision' was 'as much precision as you can get as it is referring to a reasonably self-contained item in a piece of delegated legislation. Beyond that … you are getting into the realm of amendment.'

The Committee's view

6.35 Legislative instruments are made under a power delegated by the Parliament and in the Parliament's name. Therefore, the Parliament should have the widest possible power to disallow legislation made in its name with which it does not agree. However, this power does not include a power to amend, and emphatically should not be used to render legislative instruments ambiguous, incomprehensible or contrary to the original intent.

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90 Answer to question on notice from the public hearing of 10 September 2003.

91 Answers to questions on notice, 10 September 2003.

92 Submission No 1, p 3.

93 Regulations and Ordinances Committee, *Hansard*, 17 September 2003, pp.R&O 12-13

6.36 In this context, and to enable Parliament to scrutinise legislation made in its name, the Committee considers that the bill should be as clear as possible on what may or may not be disallowed. This is not a matter that should be left up to the courts to determine each time a disallowance motion is moved.

6.37 The term 'provision' as it applies to the wide range of legislative instruments made by the Commonwealth may result in different disallowance outcomes depending on how the instrument is drafted. For example, in recent years there has been a tendency towards an increased use of lists and tables in these instruments. It is not clear from the use of the word 'provision' whether it would permit the disallowance of a discrete item in a list or table, or whether it would require the disallowance of the entire list or table.

6.38 The Committee believes that subclause 42(1) does not reduce the disallowance powers of the Senate. However, it may not be wide enough to define those powers given the variety of instruments currently produced ─ particularly those including lists or tables. Therefore the Committee recommends that consideration be given to further clarifying the term 'provision'.

The Committee recommends that the Government give consideration to clarifying the meaning of the term 'provision' in the disallowance provisions in the Legislative Instruments Bill 2003.

Chapter 7

Impact on the work of the Committee

7.1 There are a number of matters arising out of the bill that will impact on the work and function of the Committee. These matters include an increase in the number of legislative instruments considered by the Committee, the tabling of the instruments and their explanatory statements and the introduction of consultation statements.

Increase in legislative instruments

7.2 The increase in government activity over the years has been reflected in the growth of legislative instruments. In 1982-83 the executive made 553 regulations and 150 other disallowable legislative instruments.[94] Over the last decade, the number of disallowable instruments examined by the Committee has remained fairly constant, usually 1600 to 1800 each financial year. In 2002-2003, the Committee considered 351 regulations and 1310 other disallowable legislative instruments.

7.3 In evidence given to the Committee by the Attorney-General's Department, it became apparent that no one was able to state with certainty the number and types of legislative instruments that were currently being made by the executive.[95] This is a clear indictment against the accessibility of the current rule-making regime. The Committee would expect rule-makers to conduct a survey of their legislation during the development stage of this proposal to identify these instruments to ensure all existing legislation is registered at the commencement of the scheme.

7.4 The Committee expects the number of legislative instruments subject to its scrutiny to increase significantly. This will also increase the number of concerns its raises as many areas of government activity will become subject to parliamentary scrutiny for the first time. This can only help to improve the accountability of rule-makers both to the Parliament and the community.

7.5 Although there will be an increase in the Committee's workload, it will be greatly assisted in its deliberations by the consistency of the proposed

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94 Senate Standing Committee on Regulations and Ordinances, Annual Report 1982-83, Australian Government Publishing Service, Canberra, 1983. Because of the difficulty in identifying the number of instruments made by the Executive, the only reliable figures are the disallowable instruments tabled in the Parliament.

95 Regulations and Ordinances Committee, *Hansard*, 10 September 2003, p. R&O 19.

regime, the improved accessibility of all legislative instruments (both individual and consolidated) and the supervisory role of the Secretary of the Attorney-General's Department in improving the drafting of these instruments.

7.6 The Committee considers that it may need to adjust some of its practices with the introduction of this proposal and that it would be beneficial if it was briefed by the Attorney-General's Department during the developmental stage of the Register.

7.7 The Committee will also monitor the impact of the increase in instruments to ensure it has sufficient resources to meet its commitment to the Senate.

Tabling of instruments

7.8 A positive aspect of this proposal is the requirement for the Office of Legislative Drafting to table instruments within six sitting days after they have been registered. This will reduce the time between making and tabling and coordinate the process across the executive to help overcome possible invalidity because an instrument was not tabled in time.

7.9 The Committee expects that instruments will be forwarded for tabling as soon as they are registered, particularly when the Parliament is in recess. Receiving a large volume before the beginning of the new session would have a detrimental impact on the Committee's ability to fulfill its scrutiny function for the Senate.

7.10 To enable it to undertake its work efficiently, the Committee requires that legislative instruments be sent to Parliament as soon as they have been registered whether it be a sitting or non-sitting week. This is even more important when the Parliament is in recess.

Presentation of explanatory statements

7.11 The bill provides for explanatory statements to be included with a legislative instrument when it is forwarded to the Office of Legislative Drafting for registration. If an explanatory statement is not provided at that time, the rule-maker is required as soon as possible to table it in the Parliament together with a statement explaining why it was not provided with the instrument. A delay in presenting an explanatory statement to the Parliament will affect the Committee's ability to effectively scrutinise the legislative instruments.

7.12 The Committee expressed concern during the inquiry with the implications of receiving legislative instruments without their explanatory statements. It currently insists on receiving explanatory statements at the same time as an instrument as it examines instruments each week regardless of whether the Parliament is sitting. If an explanatory statement were not available it would delay its consideration of that instrument. These statements are vital to the work of the Committee. They explain the effect and operation of instruments that often contain amending provisions whose effect is not apparent without recourse to a consolidation of the principal instrument. Consolidations are not currently available for many legislative instruments.

7.13 The Attorney-General's Department advise that they expect an explanatory statement would accompany an instrument when it was lodged for tabling and rule-makers would be made aware of this requirement in a new handbook they are developing.[96]

7.14 The Committee takes this opportunity to state that it requires explanatory statements to accompany instruments when they are sent to the Office of Legislative Drafting for registration.

7.15 The Committee will monitor the use of clause 39 to ensure that its work is not affected by its inability to access an explanatory statement at the time it is considering an instrument.

Consultation statements

7.16 Rule-makers will be required to include a statement in the explanatory statements explaining the consultation process undertaken (if any) before making the instrument or give reasons why consultation was not undertaken. The introduction of this requirement raises issues for the functioning of the Committee. First, it is not clear who will determine whether the information about consultation is sufficient to determine that it was appropriate for the instrument. Secondly, there may be a requirement to determine whether the reason for not consulting is reasonable.

7.17 These issues fall into a grey area between technical scrutiny and scrutiny of policy. For example, the Committee may be able to determine that a reason not to consult fulfils one of the circumstances cited in clause 19 but the discretionary nature of that clause leaves it open to the rule-maker to cite other circumstances. It may then become difficult for the Committee to determine technically whether the circumstance has any statutory basis. The Committee

will need to develop its role in scrutinising consultation statements to ensure that it does not go beyond its terms of reference.

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[96] Regulations and Ordinances Committee, *Hansard*, 10 September 2003, p.21.

Chapter 8

Other issues

8.1 During the course of the inquiry a number of issues were identified in addition to those specifically referred to the Committee. The issues relate to the prejudicial retrospective commencement of legislative instruments, the possible repeal of existing instruments if they are not registered within a specific period, and the incorporation of extrinsic material in instruments.

Prejudicial retrospective commencement

8.2 The 1996 bill (and the current provisions in the *Acts Interpretation Act 1901*) result in the cessation of the operation of an instrument that commences before it is notified in the *Gazette* if it has an adverse impact on any person (other than the Commonwealth). Such instruments are required to be remade.

8.3 Under subclause 12(2) of the 2003 bill, such legislative instruments that commence before registration are taken to be of no effect but only in respect of the period before they are registered. The instrument is not required to be remade. The Attorney-General's Department advised the Committee that the provision in the bill repeated subsection 48(2) of the *Acts Interpretation Act 1901* but is redrafted to modernise the drafting style.

8.4 However, the Committee is concerned that under the new provision the community and the Parliament may not be aware that a legislative instrument has ceased to have effect for a particular period of time and that a person may have a right to seek a remedy.

8.5 The Attorney-General's Department indicated that it would review the revised provision to ensure that it operates as intended and, in particular, does not limit the protection currently provided by subsection 48(2) of the Acts Interpretation Act.[97] The Committee accepts this undertaking but considers that administrative actions should be taken to inform both the community and the Parliament that an instrument has ceased for a period of time.

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97 Answer to question on notice from the public hearing of 10 September 2003.

The Committee recommends that where a legislative instrument ceases for a period between its commencement and registration because it was determined to adversely affect persons other than the Commonwealth:

(c) the Register should include a statement with the instrument informing users that it ceased to have effect for a specified period; and

(d) the Attorney-General should inform the Parliament that the instrument had ceased for a specified period.

Backcapturing of existing legislative instruments

8.6 Clause 29 of the bill provides for the registration of legislative instruments made before the commencement of the Act. Instruments that are not lodged within a specified period will be taken to have been repealed.

8.7 The Register will be the authoritative source for all the legislative instruments made by the executive. As noted in Chapter 5, the Committee is of the opinion that it is vital that the integrity of the Register is assured.

8.8 The Committee is concerned that there is no way of identifying the current status of many legislative instruments. The Attorney-General's Department advised that they did not know what instruments are currently being made by the executive.[98] If there is uncertainty about the existing status of legislative instruments, then there is the possibility that instruments may inadvertently cease if they are not identified and backcaptured. In paragraph 5.32 Professor Pearce provided the Committee with an example of an instrument that had been left in a departmental file and may not have been backcaptured under this bill. It is not clear how many other similar instruments are sitting in departmental files.

8.9 The Attorney-General's Department advised the Committee that, before the bill commences, it would hold a series of communications programs to ensure departments and agencies were fully aware of their statutory obligations under the bill:

> These programs will include advice on the best way to manage the lodgement process. This will include agencies using the existing mechanisms for repealing any existing legislative instruments that are no longer required. Agencies will also be encouraged to repeal and remake

98 Regulations and Ordinances Committee, *Hansard*, 10 September 2003, p R&O 17.

> as new instruments those instruments which have become unwieldy over time and which would benefit from being remade as one official legislative instrument.[99]

8.10 The Committee acknowledges the Department's commitment to ensuring that existing legislative instruments are registered.

To ensure the openness of the backcapturing process, the Committee recommends that:

(a) departments and agencies provide a list to the Parliament of those existing instruments they will not be registering, effectively repealing them; and

(b) the Attorney-General's Department monitor the backcapturing of existing legislative instruments and provide interim reports to the Parliament on the process.

Incorporated material

8.11 The bill makes no provision for incorporated extrinsic material to be included on the register or to be tabled in the Parliament. Clause 41 provides that the Parliament may request copies of incorporated material. This may create a problem if the incorporated material is germane to the interpretation of the instrument and it is not readily available. Mr Harry Evans, Professor Pearce and Mr Stephen Argument all raised similar concerns.[100]

8.12 The Committee was reassured that the defence in the Criminal Code will continue to protect persons who are unable to access or can prove that they are unable to access incorporated material.[101]

8.13 The Attorney-General's Department advised that, in practice, they would be publishing most of the incorporated material.[102] The Committee considers that all legislative material should be easily accessible and suggests that the Department might like to review the possibility of providing a link from the Register to any incorporated extrinsic material that is too voluminous to publish with an instrument.

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99 Answer to question on notice from the public hearing of 10 September 2003.

100 Submission Nos.1 and 2

101 Regulations and Ordinances Committee, *Hansard*, 10 September 2003, p. R&O 16.

102 ibid, 10 September 2003, p. R&O 16.

The Committee recommends that appropriate ways in which incorporated material might be made accessible be considered when the Act is reviewed in three years time.

Tsebin Tchen
Chairman

Additional Comments by Senator Andrew Bartlett

I concur with most of the recommendations made by the Committee in its report, but I wish to also make the following comments:

Consultation

I am concerned by the changes that have been made to the consultation requirements in this bill, when compared to the 1996 bill.

The Committee notes that the Administrative Review Council's 1992 Report included a recommendation that there be mandatory public consultation before any legislative instrument was made, subject to certain exceptions. The Australian Democrats welcomed the inclusion of mandatory consultation requirements in the 1996 bill, however the current bill abandons a mandatory regime in favour of a discretionary approach.

The Government argues that these changes are justified because they will greatly simplify the bill. There is no doubt that the new consultation provisions are simpler than the more prescriptive regime contained in the 1996 bill. However, I take the view that simplification should not come at the expense of proper accountability mechanisms, and I believe that the Government's attempt to simplify the bill could compromise the underlying purpose of the consultation provisions. In this respect, I note the view expressed by the Clerk of the Senate that the consultation provisions in the bill have been diluted "to the equivalent of dishwater"[103].

I also note the submission of Ms Jennifer Burn, who argued that:

> The consultation provisions in the Bill fail to ensure sufficient accountability. Rather than mere encouragement of consultation and the preparation of an explanatory statement, the community would be better served by stronger measures to guarantee a higher level of scrutiny.[104]

I see merit in Ms Burn's suggestion that the Government should give consideration to the consultation provisions in comparative State legislation,

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[103] Mr Harry Evans, Clerk of the Senate, Submission No 1, p 2.
[104] Ms Jennifer Burn, Lecturer, Faculty of Law, University of Technology Sydney, Submission No 7, p5.

such as the New South Wales' *Subordinate Legislation Act 1989*, which incorporates a mandatory consultation regime.

Not only does the bill abandon a mandatory approach to consultation, but it also waters down the range of circumstances in which consultation is to be conducted. As the Committee notes, the bill requires that a rule maker must undertake any consultation which he or she considers appropriate, if a proposed instrument is likely to have a significant effect on business or to restrict competition. While the Committee is correct in saying that this approach will allow a rule maker to undertake consultation in additional circumstances – for example, where a proposed instrument is likely to have a significant effect on human rights or the environment – there is no *obligation* on the rule maker to consult in such circumstances.

I believe it would be desirable for the obligation to conduct appropriate consultation to be extended to instruments that are likely to have a significant effect on any sector of the community or on the natural, Aboriginal, cultural or built environment, or on human rights or civil liberties.

Finally, I consider that simply obliging a rule maker to table reasons in circumstances where no consultation has been undertaken is an inadequate means of ensuring accountability. In my view, instruments that have not been the subject of consultation, due to reasons of urgency, should automatically sunset after 12 months.

With these concerns in mind, I make the following recommendations:

Recommendation 1:

That the Bill be amended to incorporate a mandatory consultation regime and that, in formulating such amendments, consideration be given to mandatory consultation provisions in comparable State legislation, such as the New South Wales' *Subordinate Legislation Act 1989*.

Recommendation 2:

That the Bill be amended to ensure that consultation is required in relation to all instruments which are likely to restrict competition, or have a direct, or a substantial indirect, effect on:

- **any sector of the community;**
- **the natural, Aboriginal, cultural or built environment; or**
- **human rights or civil liberties.**

Recommendation 3:

That the Bill be amended to provide that where a rule maker indicates that no consultation has been undertaken for reasons of urgency, the instrument in question should cease to operate after a period of 12 months.

Whether or not the Bill is amended in accordance with these recommendations, I concur with the Committee's recommendation that the operation of the consultation provisions and the regulatory impact statement process should be included in the review of the Act to be conducted three years after its enactment.

"Henry VIII" Clauses:

I agree with Mr Stephen Argument and Professor Dennis Pearce that the so-called "Henry VIII" clauses in the bill represent an "inappropriate delegation of legislative power, contrary to paragraph (iv) of the terms of reference of the Senate Standing Committee for the Scrutiny of Bills"[105]. I also note the concerns expressed by Ms Jennifer Burn regarding these clauses and, in particular, her observation that:

> While legislative instruments are subject to tabling and disallowance, there is always the potential that the time delay that can accompany the tabling requirements and parliamentary scrutiny can be detrimental to the parliamentary review process. Amendments to the table are potentially so significant that they should be made by the Parliament.[106]

[105] Mr Stephen Argument and Professor Dennis Pearce, Submission No 2, p 2.
[106] Submission No 7, p 3.

There are three "Henry VIII" clauses in the bill. Firstly, proposed section 7 provides that regulations may be made in order to prescribe an instrument which is not a legislative instrument for the purpose of the Act. Secondly, proposed section 44 provides that regulations may be made to prescribe an instrument which is not subject to disallowance under the Act. Thirdly, proposed section 54 provides that regulations may be made to prescribe an instrument which is not subject to sunsetting under the Act. My concerns apply equally to each of these clauses and, accordingly, I make the following recommendation.

Recommendation 4:

That item 24 of the Table contained in proposed subsection 7(1), together with item 44 of the Table contained in proposed subsection 44(2) and item 51 of the Table contained in proposed subsection 54(2), be omitted from the bill.

Intergovernmental Agreements:

I agree with the views expressed by the Committee regarding the exclusion of instruments that give effect to intergovernmental agreements from the disallowance regime in the bill. However, I do not believe the Committee's recommendation goes far enough.

Similarly, I oppose the exemption of intergovernmental agreements from the sunsetting regime in the bill.

In view of the concerns regarding the exemption of such instruments from both the disallowance and sunsetting provisions, I make the following recommendation.

Recommendation 5:

That instruments which give effect to, or are in any way associated with, an intergovernmental agreement should be subject to proper Parliamentary scrutiny and should not be exempt from either the disallowance or sunset provisions within the bill.

In the event that this recommendation is not accepted, I concur with the recommendation of the Committee that the Explanatory Memorandum accompanying each bill which establishes or amends an intergovernmental

scheme should include a statement noting whether any legislative instruments that may be made under the bill will or will not be disallowable.

Proclamations under the Quarantine Act 1908

I note the concerns expressed in relation to the 1996 bill, by the then Committee Chair, Senator O'Chee, regarding the exemption of quarantine proclamations from the disallowance regime. On the other hand, I note that such proclamations have never been subject to disallowance and that the Government argues it is important for these instruments to be depoliticised.

I would like to reserve my position on the exemption of quarantine proclamations from disallowance pending further consultation.

Concluding Comments:

I welcome the reintroduction of this bill and congratulate the Government on its willingness to make significant improvements to the drafting and accessibility of legislative instruments, and their scrutiny by the Parliament. I support the vast bulk of the measures contained in this bill and, subject to the concerns I have outlined, I support the bill being passed.

Annex 1

Submissions received by the Committee

1. Mr Harry Evans, Clerk of the Senate
2. Professor Dennis Pearce and Mr Stephen Argument
3. Mr Richard Griffiths, Capital Monitor
4. Attorney-General's Department
5. Administrative Review Council
6. Mr Ian Harris, Clerk of the House of Representatives
7. Ms Jennifer Burn, University of Technology Sydney

Annex 2

Public Hearings

A public hearing was held on the Bills on 10 September 2003 in Senate Committee Room 2S1, Parliament House, Canberra.

Committee members in attendance

Senator Tchen (Chairman)
Senator Bartlett
Senator Marshall
Senator Moore

Witnesses

Attorney-General's Department
Mr Noel Bugeia, Director, Legislative Services and Publications, Office of Legislative Drafting
Mr James Graham, Acting Principal Legislative Counsel, Office of Legislative Drafting
Ms Suesan Sellick, Acting Assistant Secretary, Civil Justice Division
Ms Jane Selwood, Acting Principal Legal Office, Civil Justice Division

A public hearing was held on the Bills on 17 September 2003 in Senate Committee Room 1S4, Parliament House, Canberra.

Committee members in attendance

Senator Tchen (Chairman)
Senator Bartlett
Senator Marshall
Senator Mason
Senator Moore

Witnesses

Professor Dennis Pearce
Mr Stephen Argument
Mr Richard Griffiths, Capital Monitor
Mr Harry Evans, Clerk of the Senate