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Parliamentary Scrutiny of
Quasi-legislation

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Note

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Contents

	Page
Chapter 1 Introduction	1
Chapter 2 Legislation and Quasi-legislation	3
• Legislation	3
• 'Quasi-legislation'	4
• Summary	7
Chapter 3 Quasi-legislation — Some Examples	9
• Rules of court	9
• Income Taxation Rulings	10
• Instruments issued pursuant to the <i>National Health Act 1953</i>	13
• Some further examples — a closer analysis	15
• Codes of practice under clause 70 of the Occupational Health and Safety (Commonwealth Employment) Bill 1990	15
• Directions issued pursuant to subsection 251(1B) of the <i>Social Security Act 1947</i>	17
• Summary	19
Chapter 4 Problems Posed by Quasi-legislation	21
• Proliferation of quasi-legislative instrument	21
• Quality of drafting	24
• Accessibility	26
• 'Secret' legislation	27
• 'The Rule of Law and Lore of Rules'	29
• Summary	31
Chapter 5 Parliamentary Scrutiny of Legislation	33
• Parliamentary scrutiny of bills	33
• The Senate Standing Committee for Scrutiny of Bills	33
• Reference of bills to Senate legislative and general purpose standing committees	35
• Parliamentary scrutiny of delegated legislation	37
• The Senate Standing Committee on Regulations and Ordinances	38
• Disallowable instruments — section 46A of the <i>Acts Interpretation Act 1901</i>	39
• Summary	41
Chapter 6 Parliamentary Scrutiny of Quasi-legislation	43
• The role of the Senate Standing Committee	

	for the Scrutiny of Bills	43
	• The role of the Senate Standing Committee on Regulations and Ordinances	46
	• Delegated Legislation Monitor	48
	• The significance of tabling in the Parliament	49
	• Limitations on parliamentary scrutiny of quasi-legislation	49
	• The importance of parliamentary scrutiny	53
	• 'Appropriate' parliamentary scrutiny	55
	• Summary	56
Chapter 7	Some Possibilities and Some Promising Developments	57
	• Administrative Review Council project on rule making	57
	• Office of Legislative Drafting	58
	• Consultation	58
	• Publication	60
	• Summary	62
Chapter 8	Conclusions	63
Bibliography		65

Chapter 1

Introduction

Not long ago, practitioners could live with reasonable comfort and safety in a world bounded by Acts of Parliament, Statutory Rules and Orders and judicial decisions. One of the tendencies of recent years is for this world to become an expanding universe. Decisions of administrative tribunals are comparatively well-known additions to the lawyer's burden. A more interesting and perhaps less well-known accretion consists of what may be called administrative quasi-legislation.¹

The most important area of concern to the Committee at present ... is the increasing use of new legislative and administrative techniques outside the usual experience of legislative scrutiny. The conceptual framework of delegated legislation is straightforward; an Act of Parliament will set out the broad scheme of a policy or program within a fairly detailed framework, with executive law-making confined to matters too technical, trivial, detailed or changing to justify the procedural solemnity and rigor of an Act of Parliament.

These new techniques of 'quasi-legislation', however, turn the established theory on its head.²

Though expressing essentially the same sentiments, these statements are actually separated by more than forty five years. If quasi-legislation posed problems in 1944, when R E Megarry (who made the first statement) gave his seminal warning against the expansion of the legislative universe, then it is unlikely that there has been any improvement over the following 46 years. Indeed, the expansion is now more correctly described as an explosion.

This paper deals with the difficulties presented by quasi-legislation and the means available to address those difficulties. In particular, the paper considers the position of the Parliament in relation to quasi-legislation and the options open to Parliament as a means of controlling the use and content of quasi-legislation. The contents of the remaining chapters are as follows.

Chapter 2 sets out a rudimentary definition of what is meant by 'quasi-legislation', with reference to what is understood by the term 'legislation'.

Chapter 3 contains some examples of quasi-legislation promulgated under Commonwealth law.

¹ Megarry, RE, 'Administrative quasi-legislation', (1944) 60 *Law Quarterly Review* 125, at pp 125-6.

² *Commonwealth Parliamentary Debates* (Senate), 15 June 1989, p 4129 (Senator Collins).

Chapter 4 discusses in greater detail the kinds of problems posed by the increasing use of quasi-legislation. These problems go beyond mere expansion of the legislation universe. They also involve deficiencies in drafting, lack of accessibility and an undermining of the power of the Parliament. The discussion refers, where relevant, to the examples given in Chapter 3.

The parliamentary scrutiny which is applied to conventional forms of legislation is discussed in Chapter 5. The extent to which quasi-legislation receives this kind of scrutiny and the possible advantages of applying such scrutiny to quasi-legislation on a more uniform basis are considered in Chapter 6.

Other possible alternatives, including some discussion of different approaches adopted in other jurisdictions, are discussed in Chapter 7.

Chapter 8 contains the conclusions to be drawn from the material presented and arguments set out in the preceding chapters.

The illustrations and the analysis presented in this paper are all drawn from and based on the occurrence of quasi-legislation under Commonwealth law and as dealt with by the Commonwealth Parliament. Quasi-legislation raises the same basic problems in all relevant jurisdictions. However, the experience of other jurisdictions is referred to in Chapter 7 only, insofar as that experience offers possible guidance for dealing with quasi-legislation.

Chapter 2

Legislation and *Quasi*-legislation

It is necessary at the outset to define what is meant by the term 'quasi-legislation'. In doing so, it is useful to reflect initially on what is understood by the term 'legislation'.

'Legislation'

The Macquarie Dictionary defines 'legislation' as

- n. 1. the act of making or enacting laws.
2. a law or a body of laws enacted.³

Similarly, in 1932, the United Kingdom Parliament's Committee on Ministers' Powers (the Donoughmore Committee) stated:

The word 'legislation' has grammatically two meanings - the operation or function of legislating; and the laws which result therefrom.⁴

For the purposes of this paper, it is the latter definition (in each case) that is relevant.

Another helpful definition can be derived from a comment made by Professor Dennis Pearce, in his book entitled *Delegated Legislation in Australia and New Zealand*⁵. Professor Pearce observed that:

[l]egislation cannot be made by a body other than the parliament without the authority of the parliament.⁶

Extrapolating from this definition, 'legislation' refers to the sum total of those laws made by a parliament itself, and those laws made on behalf of (and with the express authority of) that parliament. It is the sum total of the Acts of a parliament (which are generally categorised as being 'primary' legislation) and the delegated or subordinate legislation promulgated by authority of those manifold Acts.

The Donoughmore Committee made a distinction between 'legislative' and 'executive' activity. Legislative action was defined as the process by which general rules of conduct are laid down, without reference to individuals or particular cases. Executive action was regarded as the application of those general rules to particular cases.⁷ This distinction is not pursued in the context of this paper, which focuses on the distinction between legislation (as defined above) and quasi-legislation.

At this point it is also acknowledged that, in this area of the law, it is not unusual for writers and commentators to struggle to define what they mean by 'delegated' or

³ *Macquarie Dictionary* (Second revision)(1987, The Macquarie Library Pty Ltd, Sydney), p 991.

⁴ *Report*, 1932, Cmd 4060 (1932, HMSO, London), p 15, para 2.

⁵ (1977, Butterworths Pty Limited, Sydney).

⁶ Pearce, DC, *Delegated Legislation in Australia and New Zealand* (1977, Butterworths Pty Limited Sydney), p 1.

⁷ Committee on Ministers' Powers, *Report*, 1932, Cmd 4060 (1932, HMSO, London), pp 5-6. See also Pearce, DC, *Delegated Legislation in Australia and New Zealand* (1977, Butterworths Pty Limited, Sydney), pp 1-2.

'subordinate' legislation. They have similar difficulties in assessing the justifications for an instrument appearing as delegated rather than primary legislation. It is not necessary to traverse these questions for the purposes of this paper.

Simply put, delegated legislation consists of the second part of Professor Pearce's definition quoted above. It consists of legislation made by persons and bodies other than a parliament who have been given the authority to make such legislation by an Act of that parliament. In Professor Pearce's words,

one can define delegated legislation as instruments that lay down general rules of conduct affecting the community at large which have been made by a body expressly authorised so to act by an Act of parliament.⁸

'Quasi-legislation'

It appears that the term 'quasi-legislation' was first used in 1944, in an article by RE Megarry entitled 'Administrative quasi-legislation'⁹. In that article, Mr Megarry (as he then was) referred to an 'interesting ... accretion' that could be called 'administrative quasi-legislation'.¹⁰ By way of elaboration, Mr Megarry said:

This falls into two categories. First, there is the State-and-subject type, consisting of announcements by administrative bodies of the course which it is proposed to take in the administration of particular statutes.¹¹

As examples of this first category, Mr Megarry referred to 'Practice Notes' issued to indicate how certain provisions of the war damage legislation would be interpreted and announcements by the United Kingdom's Inland Revenue authorities concerning tax concessions.

The second category of administrative quasi-legislation is the subject-and-subject type, consisting of arrangements made by administrative bodies which affect the operation of the law between one subject and another.¹²

In relation to this second category, Mr Megarry cited an agreement which the Home Office had negotiated with private insurance companies, pursuant to which the companies agreed that they would not raise a particular defence in workers' compensation proceedings.¹³

Mr Megarry's seminal categorisation has been cited with approval recently in a book by Professor Gabriele Ganz, entitled *Quasi-legislation: Recent developments in secondary legislation*.¹⁴ In that book, Professor Ganz suggested that quasi-legislation

8 Pearce, DC, *Delegated Legislation in Australia and New Zealand* (1977, Butterworths Pty Limited, Sydney), pp 1-2.

9 (1944) 60 *The Law Quarterly Review* 125.

10 Megarry, R E, 'Administrative quasi-legislation', (1944) 60 *Law Quarterly Review* 125, at p 126.

11 *ibid.*

12 Megarry, RE, 'Administrative quasi-legislation', (1944) 60 *Law Quarterly Review* 125, at p 126.

13 *ibid.*, at pp 126-127.

14 2nd edition (1987, Sweet and Maxwell, London).

was 'problematical because it is not a term of art'.¹⁵ However, she drew attention to an 'exponential growth of statutory and extra-statutory rules in a plethora of forms', citing as examples:

Codes of practice, guidance, guidance notes, guidelines, circulars, White Papers, development control policy notes, development briefs, practice statements, tax concessions, Health Service Notices, Family Practitioner Notices, codes of conduct, codes of ethics and conventions are just some of the guises in which the rules appear.¹⁶

Professor Ganz re-stated this list in 1989, in the course of proceedings at the Third Commonwealth Conference on Delegated Legislation.¹⁷ At that conference, Professor Ganz went on to say that quasi-legislative instruments:

may be contained in circulars, White Papers, annual reports, manuals, statements in the House of Commons, and even press releases, or they may appear under their own label. They may even be set out in a statutory instrument.¹⁸

At that same conference, Senator Patricia Giles, then a member and now Chair of the Senate Standing Committee on Regulations and Ordinances, presented a paper on the scrutiny of quasi-legislation in Australia.¹⁹ In that document, and in the course of her oral presentation to the conference,²⁰ Senator Giles referred to quasi-legislative instruments as being documents which, typically, empowered persons or authorities to "direct", "determine", "notify", "order", "instruct", "declare", "issue" or "publish", etc.²¹

Summary

'Quasi-legislation is not a term of art. It can be applied to a wide variety of instruments. Examples of the kinds of instrument issued pursuant to Federal legislation to which the definition of quasi-legislation can be applied are discussed in more detail in Chapter 3 below. However, in concluding these introductory comments, it is salutary to return to the Macquarie Dictionary for a definition of quasi-legislation. Bearing in mind the definition of 'legislation' as 'a law or body of laws enacted', the Macquarie Dictionary defines 'quasi' as follows:

- adj.* 1. resembling; as it were. -*adv.*
2. seemingly, but not actually.²²

Putting the two definitions together, quasi-legislation may be regarded as something *resembling* a law or which is *seemingly* a law. More importantly, however, on the

¹⁵ Ganz, G, *Quasi-Legislation: Recent Developments in Secondary Legislation* (2nd edition) (1987, Sweet and Maxwell Limited, London), p 1.

¹⁶ *Ibid*, pp 1-2.

¹⁷ *Record of Proceedings* (1990, HMSO, London), p 20.

¹⁸ Third Commonwealth Conference on Delegated Legislation, *Record of Proceedings* (1990, HMSO, London), p 20.

¹⁹ Giles, P, 'Scrutiny of Federal quasi-legislation in Australia', reproduced in Third Commonwealth Conference on Delegated Legislation, *Record of Proceedings* (1990, HMSO, London), Appendix 5, p 123.

²⁰ Third Commonwealth Conference on Delegated Legislation, *Record of Proceedings* (1990, HMSO, London), p 25.

²¹ Giles, P, 'Scrutiny of Federal quasi-legislation in Australia', reproduced in third Commonwealth Conference on Delegated Legislation, *Record of Proceedings* (1990, HMSO, London), Appendix 5, at p 123.

²² *Macquarie Dictionary* (Second Revision) (1987, The Macquarie Library Pty Ltd, Sydney), p 1390.

basis of this dictionary definition, it should be remembered that quasi-legislation is not *actually* legislation. This point will be dealt with in greater detail in Chapter 4.

Chapter 3

Quasi-legislation - Some Examples

In order to better understand the problems posed by quasi-legislation, it is helpful to set out some examples of the kinds of instruments which might be regarded as coming within the definition. Given the difficulty of defining what is meant by quasi-legislation, the examples given are diverse. The examples given do not *all* involve the kinds of problems posed by quasi-legislation (and which are discussed in greater detail in Chapter 4). Those which do not are presented merely as examples of quasi-legislation and the forms which it can take.

Rules of Court

One of the longest-standing examples of quasi-legislation in the Commonwealth sphere is the body of rules which regulate the practice and procedure of Commonwealth courts. Those rules are intended to regulate the manner in which the business of the courts is conducted, covering such matters as forms, time limits, attendance of parties and witnesses, appeals and costs, as well as more difficult matters such as the means by which certain facts may be proved.

In the late 1970s, the Senate Standing Committee on Constitutional and Legal Affairs (as it then was) conducted an inquiry into rules of court. The Committee presented its report to the Senate in March of 1979.²³ In its report, the Committee observed that

[a]lthough the rules regulate only the practice and procedure of the court, they can affect the exercise of significant rights. Indeed, in an extreme case, a right conferred by a statute or the common law may be effectively negated by rules of court which make it impossible for a person to exercise that right effectively. For example, an action may be struck out for want of conformity with pleadings.²⁴

The Committee observed that, generally speaking, the rules of the various Commonwealth courts were made by the judges of those courts.²⁵

Given their potential to impact significantly on individual rights and on the operation of duly enacted laws of the Commonwealth Parliament, this could be regarded as presenting something of a problem to the Parliament in its capacity as the supreme law-making institution. However, as the Committee detailed in its report, the rules made by the various courts are not immune from parliamentary scrutiny. By virtue of a range of provisions contained in the various constating Acts, the rules of the several Commonwealth courts are required to be tabled in each House of the Parliament and are subject to disallowance by either House.²⁶ Nevertheless, as the Senate Standing

²³ *Journals of the Senate*, No 91, 21 March 1979, p 638.

²⁴ Senate Standing Committee on Constitutional and Legal Affairs, *Report on Parliamentary Scrutiny of Rules of Court*, Parliamentary Paper No 288 of 1979, p 3.

²⁵ See, generally, Senate Standing Committee on Constitutional and Legal Affairs, *Report on Parliamentary Scrutiny of Rules of Court*, Parliamentary Paper No 288 of 1979, especially at p 3.

²⁶ See *Judiciary Act 1903*, ss 86 and 87; *Federal Court of Australia Act 1976*, s 59; *Family Court Act 1975*, s 123.

Committee on the Scrutiny of Bills has observed, the power to disallow is a somewhat blunt instrument of control.²⁷

Income Taxation Rulings

Possibly the largest and most visible body of quasi-legislation exists in the form of the Taxation Rulings issued by the Commissioner for Taxation. They are promulgated pursuant to an initiative which was put into effect in 1982, at least in part as a result of obligations created by the *Freedom of Information Act 1982*. In particular, they are intended to fulfil the Commissioner's obligation under that Act to make available for public scrutiny copies of documents used by his or her officers in making decisions.²⁸ To date, in excess of 2600 rulings have been issued, covering a wide variety of issues and situations.²⁹

The first ruling issued set out the rationale behind the new system:

A Taxation Ruling will issue in respect of any decision which satisfies the following criteria;

- (a) provides an interpretation, guideline precedent, practice or procedure to be followed in making a decision that affects the rights or liabilities of taxpayers; and
- (b) establishes a new or revised interpretation of our administration of the tax laws; and
- (c) affects all taxpayers or a section of the tax-paying community, ie, not simply an individual instance.

Taxation rulings will replace memoranda and other forms of advice from Head Office relating to new or revised interpretations of the taxation law.³⁰

The Commissioner reiterated and expanded on this statement of intention in 1988, in Taxation Ruling IT 2500, which states that rulings

are issued on a regular basis and provide guidance for both the public and staff of the Australian Taxation Office on matters of policy, procedural instruction and interpretation of tax law. The majority of Taxation Rulings cover the interpretation of the income tax law and, where appropriate, detail guidelines, precedents, practices or procedures that affect the taxation rights or liabilities of the general public. Rulings are also an appropriate vehicle for the Australian Taxation Office to clarify administrative developments arising from new or revised interpretations of income tax law.³¹

²⁷ See, eg. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 3 of 1991 (Journals of the Senate, No 70, 6 March 1991, p 815)*, pp 8, 10, 12-3.

²⁸ See *Taxation Ruling No. 1*, p 1, reproduced in *Australian Income Tax: Australian Taxation Office Rulings and Guidelines, Volume 1* (1985, Butterworths Pty Limited, North Ryde), p 2101.

²⁹ See, generally, *Australian Income Tax: Australian Taxation Office Rulings and Guidelines, Volume 1* (1985, Butterworths Pty Limited, North Ryde) and *Volume 2* (1987, Butterworths Pty Limited, North Ryde).

³⁰ *Australian Income Tax: Australian Taxation Office Rulings and Guidelines, Volume 1* (1985, Butterworths Pty Limited, North Ryde), p 2101.

³¹ *Australian Income Tax: Australian Taxation Office Rulings and Guidelines, Volume 2* (1987, Butterworths Pty Limited, North Ryde), p 3955.

It is clear that such rulings have at least the potential to operate as law. Indeed, in a submission to the Senate Standing Committee on Legal and Constitutional Affairs in 1987, the Commonwealth Ombudsman advised that, in his experience in dealing with officers of the Australian Taxation Office, officers at many levels of that Office regarded them as binding on decision makers.³² Indeed, the Institute of Affiliate Accountants submitted to the Committee that some rulings were

couched in such a way as to have the effect of encouraging Taxation Office employees to treat such rulings as if they have the force of law.³³

The Ombudsman submitted to the Committee that some tax agents appeared to treat them on the same basis.³⁴

Though the concerns cited above were no doubt genuine, it should be noted that the Australian Taxation Office has consistently maintained that this is neither the effect nor the intent of such rulings. Taxation Ruling No. 1 states:

In using Taxation Rulings it should be recognised that they cannot supplant the terms of the law.³⁵

Similarly, and more expansively, Taxation Ruling IT 2500 states:

It is important to recognise that Taxation Rulings do not have the force of law and that each decision affecting the taxation liability of a taxpayer can only be made in the light of the established facts of particular transactions.³⁶

That ruling goes on to say:

Moreover, no conduct of the Taxation Office can operate as an estoppel against the operation of taxation legislation (see *FCT v Wade* (1951) 84 CLR 105 at 116-7; 5 AITR 214 at 224; 9 ATD 337 at 344, per Kitto J).³⁷

While it referred to the views of the various organisations who had made submissions about the actual effect of rulings, the Legal and Constitutional Affairs Committee expressed no view on the suggestions that they were treated as law. The Committee did, however, recommend that each ruling should contain a caveat to the effect that the ruling does not have the force of law and that each case would be considered on

³² Senate Standing Committee on Legal and Constitutional Affairs, *Income Tax Rulings*, Parliamentary Paper No 217 of 1987, p 22, referring to a submission from the Commonwealth Ombudsman, at p 2.

³³ Senate Standing Committee on Legal and Constitutional Affairs, *Income Tax Rulings*, Parliamentary Paper No 217 of 1987, p 22, referring to a submission from the Institute of Affiliate Accountants, at p 1.

³⁴ Senate Standing Committee on Legal and Constitutional Affairs, *Income Tax Rulings*, Parliamentary Paper No 217 of 1987, p 22.

³⁵ *Australian Income Tax: Australian Taxation Office Rulings and Guidelines, Volume 1* (1985, Butterworths Pty Limited, North Ryde), p 2101.

³⁶ *Australian Income Tax: Australian Taxation Office Rulings and Guidelines, Volume 2* (1987, Butterworths Pty Limited, North Ryde), p 3955.

³⁷ *Ibid.*

its merits.³⁸ In the Government response to the report, the Commissioner for Taxation indicated that this recommendation (and, indeed, the other recommendations contained in the report) would be 'fully and promptly adopted'.³⁹

Instruments Issued Pursuant to the *National Health Act 1953*

As a case study in the forms which quasi-legislation can take, the *National Health Act 1953* provides a wealth of material. First, it contains numerous clauses providing for the relevant Minister to make 'determinations',⁴⁰ 'declarations'⁴¹ and 'rules'⁴² and to formulate 'principles'⁴³ under various powers contained in that Act and in relation to the exercise of those powers. The instruments issued in exercise of these powers are subject to disallowance by either House of the Parliament, pursuant to a) provisions set out in detail in the relevant clauses, b) reference to the disallowance provisions of the *Acts Interpretation Act 1901* or c) as a result of being designated a 'disallowable instrument' for the purposes of the *Acts Interpretation Act*. The relevance of disallowance is discussed in greater detail in Chapters 6 and 7 below.

In addition to the instruments which are disallowable, the *National Health Act* contains an even greater number of provisions allowing the Minister (or, in some cases, the Secretary of the relevant Department) to 'appoint',⁴⁴ 'authorise',⁴⁵ 'certify',⁴⁶ 'declare',⁴⁷ 'determine',⁴⁸ 'direct',⁴⁹ 'exempt',⁵⁰ 'impose conditions',⁵¹ 'require'⁵² or 'specify'⁵³ in relation to various matters relevant to the administration of the Act. These powers relate to such diverse and important matters as the meaning of certain important definitions for the purposes of the Act (section 39), the level of standard fees (subsection 40AG(2)), additional contributions to be paid by approved nursing home patients (subsection 40AI(1)), the qualifications applicable to nurses from various external territories (section 58D), the non-payment of benefits (section 59), the keeping of records (section 61), the conditions governing the registration of organisations (sections 73, 73A and 73B), the appointment of an inspector to investigate an organisation (subsection 82R(4)), the supply of pharmaceutical benefits (sections 88 and 93) and the divulgence or not of information (section 135A). The exercise of these powers can affect large numbers of individuals.

38 Senate Standing Committee on Legal and Constitutional Affairs, *Income Tax Rulings*, Parliamentary Paper No 217 of 1987, recommendation 1, p 23.

39 Government response, p 2. Tabled in the Senate on 18 December 1987 (see *Journals of the Senate*, No 42, 18 December 1987, pp 463-4).

40 See the following provisions: 4(1) (in relation to the definitions of 'basic private table' and 'basic table'), 40AA(6)(ce), 40AFA(3), 40AFB(3), 40AH, 45D, 47(2B) and 49.

41 See the following provisions: 4(1) (in relation to definitions of 'nursing home for disabled people'), 85(2) and (2AA).

42 See the following provisions: 99AAA(4) and 99AAB(3).

43 See subsection 40AG(9).

44 See subsection 82R(4).

45 See paragraph 135A(6)(j).

46 See the following provisions: ss 135A(7) and 139A.

47 See the following provisions: ss 40AC(1) and 45E(1).

48 See the following provisions: ss 39, 40AA, 40AD(1)-(1C), 40AGA(2) and (3), 40AI(1), 40AGA(2) and (3), 48A(4), 58(1), 59(1), 68A(a) and (c), 73BAB(1)(c) and (d), 73BB(7), 73BC(5D), 73G(5), 84(3), 84C(4A), 84AH(1), 84(3), 85A(1) and (2), 85B(1), 88(1A), 93(1) and (2), 98B(2), 98C(1), 98E(1) and 138.

49 See the following provisions: ss 58GA(2) and (7), 60A, 73BH and 73D(1).

50 See subsections 73BAC(1) and (2).

51 See the following provisions: ss 73, 73A, 73B.

52 See subsection 82R(1).

53 See section 39AA.

All of the various non-disallowable provisions referred to above essentially involve the exercise of powers contained in the Act. Most, but by no means all, are explicitly required to be exercised in writing. A smaller proportion of these 'instruments in writing' are required to be published in the *Gazette*.⁵⁴ There is no apparent logic as to why some powers are to be exercised in writing and some are not or as to why some are required to be published in the *Gazette* and some are not. Similarly, there is no discernible method in the designation of some instruments as being subject to disallowance while many others are not.

Some Further Examples - A Closer Analysis

While the above account of the quasi-legislative elements of the *National Health Act 1953* gives a useful indication of the kinds of instruments with which this paper is concerned, in order to illustrate the kinds of problems involved it is useful to examine in greater detail some further examples of this type of instrument and how they operate. This will also lead into the conceptual analysis contained in Chapter 4.

Codes of Practice Under Clause 70 of the *Occupational Health and Safety (Commonwealth Employment) Bill 1990*

On 18 October 1990, the Occupational Health and Safety Bill 1990 was introduced into the House of Representatives. The Bill proposed to provide for the protection of the health and safety of Commonwealth employees at work. It proposed to do so by imposing a general duty of care on employers, manufacturers and suppliers of plant and substances and installers of plant, as well as on employees themselves.

Clause 70 of the Bill provided for the preparation of codes of practice '[f]or the purpose of providing practical guidance to employers'. These codes of practice would be prepared by the Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees and be approved by the Minister. The Minister was also to have the power to amend or revoke such codes (subclause 70(1)).

Subclause 70(5) contained a requirement that where the Minister approved, amended or revoked a code of practice, a notice of the approval, amendment or revocation be published in the *Gazette*. In addition, paragraph 70(5)(b) required the Minister to cause a document setting out the code of practice as approved (or the amendment or revocation, as the case may be) to be laid before each House of the Parliament within 15 sitting days of the notice being published in the *Gazette*.

Subclause 70(7) of the Bill provided that a person would not be liable to any civil or criminal proceedings by reason only that they had failed to observe a provision of a code of practice. However, clause 71 then went on to set out in detail provisions governing the use of codes of practice in proceedings under the Act. It provided as follows:

Where in any proceedings under this Act it is alleged that a person contravened a provision of this Act or the regulations in relation to which an approved code of practice was in effect at the time of the alleged contravention or failure:

⁵⁴ See the following provisions: ss 39AA, 40AGA(7), 40AI(1), 68(a) and (c), 84C(4A), 84HA(1), 85(8), 85A(4), 85B(1), 88(1A) and 93(2A).

- (a) the approved code of practice is admissible in evidence in proceedings; and
- (b) if the court is satisfied, in relation to any matter which it is necessary for the prosecution to prove in order to establish the alleged contravention, that:
 - (i) any provision of the approved code of practice is relevant to that matter; and
 - (ii) the person failed at any material time to observe that provision of the code of practice;that matter is taken to be proved unless the court is satisfied that in respect of that matter the person complied with that provision of this Act or the regulations otherwise than by way of observance of that provision of the approved code of practice.

This provision of the Bill attracted unfavourable comment from the Senate Standing Committee for the Scrutiny of Bills.⁵⁵ After noting that the codes of practice were to be admissible in court proceedings, the Committee went on to say:

Clause 71 ... contemplates action being taken for 'failure to observe' a provision of a code of practice. If this is the case, then the code of practice appears to have an effect which approaches that of a piece of legislation.⁵⁶

The role of the Scrutiny of Bills Committee is discussed in greater detail in Chapter 5 below. The Committee's role in relation to this particular clause and to similar provisions in other bills is discussed in Chapter 7.

For present purposes, it is important to note the grounds on which the Committee commented on the clause. Noting the fact that (a) the codes of practice were intended to be accorded a certain status in court proceedings and that (b) the clause contemplated breaches of a code (as opposed to provisions of the legislation) being relevant in court proceedings, the Committee suggested that the code appeared to be intended to have something close to a legislative effect. As is discussed in Chapter 4, this concern is central to the problems which such instruments generally create: they operate as law (or something close to it) without being subject to the same parliamentary scrutiny as is applied to a law.

Directions Issued Pursuant to Subsection 251(1B) of the *Social Security Act 1947*

Section 251 of the *Social Security Act 1947* gives the Secretary of the Department of Social Security the power to write-off or waive debts owed by social welfare recipients to the Commonwealth under that Act. These debts generally arise as a result of overpayment, whether as a result of mistake or fraud on the part of the recipient.⁵⁷

⁵⁵ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny of Bills Alert Digest No 9 of 1990 (Journals of the Senate, No 38, 7 November 1990, p 390)*.

⁵⁶ *Ibid*, at p 18.

⁵⁷ See, generally, Senate Standing Committee on Legal and Constitutional Affairs, *Debt recovery under the Social Security Act and the Veterans' Entitlements Act (Journals of the Senate, No 20, 22 August 1990, p 228)* especially at pp 10-11.

In October 1988, a Bill was introduced to amend the *Social Security Act*. That Bill, the Social Security Legislation Amendment Bill 1988, proposed to amend section 251 of the Act.⁵⁸ Proposed new subsection (1A) required the Secretary, in exercising his/her discretion to waive or write-off debts, to act in accordance with any relevant directions issued by the Minister for Social Security pursuant to proposed new subsection (1B). Pursuant to proposed new subsection (1C), the Minister was to be required to table any such directions in both Houses of the Parliament within 15 sitting days of their having been made. However, there was no power for the Parliament to disallow such directions.

The directions were to be formally binding on the Secretary, who was to be required to act 'in accordance with' any such directions. They were also to be binding on a body reviewing a decision by the Secretary under the provision as, in reviewing such a decision, the review body (in this case, the Social Security Appeals Tribunal or the Administrative Appeals Tribunal) would be required as a general principle of administrative law to put itself in the shoes of the original decision-maker.⁵⁹ However, in addition to this general principle, the Explanatory Memorandum to the Bill stated that, in exercising the power of the Secretary (by way of review), the Social Security Appeals Tribunal and the Administrative Appeals Tribunal were to act in accordance with any ministerial directions issued pursuant to proposed new subsection 251(1B).⁶⁰

The Senate Standing Committee for the Scrutiny of Bills drew the provision to the attention of the Senate.⁶¹ In particular, the Committee referred to the extent to which the directions would be binding and on whom. In its report, the Committee said:

In view of the binding effect of [directions] issued by the Minister pursuant to proposed subsection 251(1B), it may be more appropriate to make such [directions] disallowable instruments for the purposes of the *Acts Interpretation Act 1901*.⁶²

The then Minister for Social Security did not agree. In his response to the Committee he said:

It is necessary that the directions issued by the Minister [pursuant to this provision] ... are of a binding nature to obviate the difficulties encountered by the Department when faced with trying to reconcile decisions made by the Administrative Appeals Tribunal and the departmental policy on effective debt management and control.⁶³

Despite the Committee's concerns, the provision passed into law and the new subsections were duly inserted into the *Social Security Act*.⁶⁴ They were subsequently

⁵⁸ Clause 57.

⁵⁹ Aronson, M and Franklin, N, *Review of Administrative Action* (1987, The Law Book Company Limited, North Ryde), p 238, referring to s43 of the *Administrative Appeals Tribunal Act 1975*.

⁶⁰ Explanatory Memorandum, p 79.

⁶¹ Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 1988*, Parliamentary Paper No 402 of 1988, pp 264-6.

⁶² Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 1988*, Parliamentary Paper No 402 of 1988, p 265.

⁶³ Senate Standing Committee for the Scrutiny of Bills, *Second Report of 1989*, Parliamentary Paper No 466 of 1989, p 36.

⁶⁴ Act No 133 of 1988. It should be noted, however, that attempts were made in the Senate to amend the legislation in accordance with the Committee's concerns (see Senate, *Hansard*, 13 December 1988, p 4070).

considered in the course of a wider inquiry into the debt recovery procedures of the *Social Security Act* by the Senate Standing Committee on Legal and Constitutional Affairs, which also recommended that the directions should be subject to disallowance.⁶⁵ In reaching this conclusion, the Committee referred to a submission from the Senate Standing Committee on Regulations and Ordinances which stated that the directions were 'clearly legislative' because they were binding on the Social Security Appeals Tribunal and the Administrative Appeals Tribunal.⁶⁶ In view of this fact, the Regulations and Ordinances Committee said that the directions should be subject not only to tabling but also disallowance.⁶⁷

On 14 February 1991, the Government response to the Legal and Constitutional Affairs Committee's report was tabled.⁶⁸ The recommendation concerning disallowance was not accepted.⁶⁹

Summary

It should be clear from these illustrations that quasi-legislation takes a variety of forms and goes by an assortment of names. Quasi-legislative instruments are subject to a range of different forms of what might loosely be termed 'scrutiny', from no scrutiny at all to tabling and disallowance. They also vary in their effect and the extent to which their effect approaches that of legislation. What they have in common is that they have an effect which approximates that of a law. What they also have in common is that they are not *actually* laws and should never be regarded as such.

⁶⁵ Senate Standing Committee on Legal and Constitutional Affairs, *Debt recovery under the Social Security Act and the Veterans' Entitlements Act* (*Journals of the Senate*, No 20, 22 August 1990, p 228), recommendation 17, pp 62-3.

⁶⁶ Submission, p 2, referred to in Senate Standing Committee on Legal and Constitutional Affairs, *Debt recovery under the Social Security Act and the Veterans' Entitlements Act* (*Journals of the Senate*, No 20, 22 August 1990, p 228), p 62.

⁶⁷ Submission, p 1, referred to in Senate Standing Committee on Legal and Constitutional Affairs, *Debt recovery under the Social Security Act and the Veterans' Entitlements Act* (*Journals of the Senate*, No 20, 22 August 1990, p 228), p 62.

⁶⁸ *Journals of the Senate*, No 64, 14 February 1991, p 745.

⁶⁹ Government's Response (*Journals of the Senate*, No 64, 14 February 1991, p 745), p 17.

Chapter 4

Problems Posed by Quasi-legislation

The problems posed by quasi-legislation are two-fold. First, there are practical difficulties, originating from the fact that the kinds of instruments to which the term can be applied are proliferating in terms of both variety and volume. A subsidiary practical problem is that instruments are promulgated without any apparent regard to the need for them to be accessible and intelligible.

Second, there is the more serious problem of legitimacy. The inaccessibility of such instruments, in turn, involves questions as to their legal effect. In addition, as the effect of these instruments approaches that of legislation, significant questions are raised in the context of the Parliament's role as the supreme law-maker.

Proliferation of Quasi-legislative Instruments

It is worth recalling at this stage the prophetic words of RE Megarry which were cited in the Introduction to this paper. Writing in 1944, Mr Megarry said:

Not long ago, practitioners could live with reasonable comfort and safety in a world bounded by Acts of Parliament, Statutory Rules and Orders and judicial decisions. One of the tendencies of recent years is for this to become an expanding universe.⁷⁰

If this was a concern to Mr Megarry in 1944, it would surely be a matter which would cause him some anxiety today.

Emeritus Professor Douglas Whalan, who is the legal adviser to the Senate Standing Committee on Regulations and Ordinances, has been attempting in recent years to map the 'expanding universe' referred to by Mr Megarry and to measure its growth. Professor Whalan has done so by reference to the reports of the Regulations and Ordinances Committee (which has a particular role in relation to delegated legislation and which is discussed in greater detail in Chapter 5 below). In 1989, in an address to an Administrative Review Council conference on rule-making,⁷¹ Professor Whalan referred to figures which he had extracted from the Regulations and Ordinances Committee's *Seventh Report*, which was tabled on 26 October 1949. He noted that, according to that report, the Committee examined a total of 192 instruments in the course of the year. Of those 192 instruments, 142 were Statutory Rules (the relevance of which is discussed below) and 50 were Ordinances or regulations made under Ordinances.⁷² Professor Whalan noted that the figures for the following year were

⁷⁰ Megarry, RE, 'Administrative quasi-legislation', (1944) 60 *Law Quarterly Review* 125, at pp 125-6.

⁷¹ Whalan, DJ, 'The features of the Commonwealth system for parliamentary scrutiny of delegated legislation', address to Administrative Review Council conference on rule making, held in Canberra on 31 August 1989 (unpublished).

⁷² Senate Standing Committee on Regulations and Ordinances, *Seventh Report* (reproduced in *Journals of the Senate*, Session 1951-52-53, pp 421-6).

much the same, with a total of 210 instruments comprising 166 Statutory Rules and 44 Ordinances or Regulations made under Ordinances.⁷³

Moving ahead to the Committee's *Thirty-eighth Report*,⁷⁴ which gave the relevant figures for 1971, Professor Whalan noted that the total of 284 instruments considered by the Committee was made up of 214 Statutory Rules and 70 Ordinances or regulations made under Ordinances.⁷⁵ He also referred to a comment made by the Committee in 1974, in its *Fiftieth Report*.⁷⁶ In that report the Committee said:

An important feature of Federal delegated legislation in Australia is that there has not been a proliferation of different types of instruments as there has been in some countries.⁷⁷

By the late 1980s, this situation had changed dramatically. In its *Eighty-sixth Report*,⁷⁸ the Committee set out the following figures in relation to the total number of instruments scrutinised by the Committee over the three previous years:⁷⁹

1986-87	832
1987-88	1032
1988-89	1352

While the sheer volume of these instruments is telling in itself, the Committee also provided details on the nature of the instruments examined in 1988-89:⁸⁰

Statutory rules	398
Public service and defence legislation determinations	386
ACT and other territory ordinances, regulations and other instruments	265
Civil aviation orders	120
Primary industry plans, notices, orders and other instruments	52
Health legislation determinations, declarations, approvals, principles and notices	35
Statutory authority by-laws	23

⁷³ Senate Standing Committee on Regulations and Ordinances, *Eighth Report* (reproduced in *Journals of the Senate*, Session 1948-49, pp 199-207).

⁷⁴ Parliamentary Paper No 100 of 1971.

⁷⁵ Senate Standing Committee on Regulations and Ordinances, *Thirty-eighth Report*, Parliamentary Paper No 100 of 1971, p 1.

⁷⁶ Parliamentary Paper No 271 of 1974.

⁷⁷ Senate Standing Committee on Regulations and Ordinances, *Fiftieth Report*, Parliamentary Paper No 271 of 1974, p 15.

⁷⁸ Senate Standing Committee on Regulations and Ordinances, *Eighty-sixth Report*, Parliamentary Paper No 93 of 1990.

⁷⁹ *Ibid*, at p 3.

⁸⁰ *Ibid*.

Of the 1352 instruments examined, the 398 Statutory Rules represent less than one third. The remaining instruments were promulgated pursuant to a myriad of provisions contained in scores of Acts.

As great a concern as the number of instruments is the bewildering array of different types of instrument. Professor Whalan recently wrote:

Only 3 sorts of instruments were listed in the early 1970s whereas I now have 72 different kinds of instruments separately listed in my filing index. The earlier figure may be slightly misleading, ... but the increase in variety is startling. ... I have noticed a tremendous move away from the more formal instruments.⁸¹

Though this proliferation, in volume and variety, of instruments need not be a problem of itself, it presents significant difficulties for the Regulations and Ordinances Committee (whose role is discussed in greater detail in Chapters 5 and 6). It also illustrates the increasing use of forms of legislative instruments which do not easily fit within the existing processes and procedures for scrutiny. Finally, it underlines the concern expressed by Mr Megarry in his plaintive 1944 submission on behalf of the practitioner (legal or otherwise) who is attempting to come to grips with the rules which govern a particular area. As the Committee on Ministers' Powers observed in 1932, even '[t]he most scientific explorer cannot make a map of a jungle'.⁸²

Quality of Drafting

Professor Whalan, in his capacity as legal adviser to the Regulations and Ordinances Committee, has also been a trenchant critic of the variable drafting which has become evident in the increasing number of quasi-legislative instruments which fall outside the regime of the Statutory Rules series. Statutory Rules are provided for by the *Statutory Rules Publication Act 1903*, which requires that

[a]ll statutory rules shall forthwith after they are made be sent to the Government Printer, and shall, in manner prescribed, be numbered, and (save as prescribed) be printed and sold by him.⁸³

The Act defines 'Statutory rules' as

rules, regulations, or by-laws, made under any Act, which:

⁸¹ Letter from Professor Whalan to the author (in his capacity as Secretary to the Senate Standing Committee for the Scrutiny of Bills) dated 2 December 1990 (unpublished), p 3.

⁸² Committee on Ministers' Powers, *Report*, Cmd 4060 (1932, HMSO, London), p 27.

⁸³ *Statutory Rules Publication Act 1903*, s 5(1).

- (a) relate to any Court within the Commonwealth, or to the procedure, practice, or costs therein, or to any fees or matters applying generally throughout the Commonwealth or any part of the Commonwealth; or
- (b) are made by the Governor-General, or any Minister, or the Inter-State Commission, or any Government department.⁸⁴

Subsection 5(2) of the Act sets out additional requirements concerning the dating and numbering of such rules.

It is generally agreed that being subject to what the (then) Chairman of the Regulations and Ordinances Committee called 'the presentational discipline of the *Statutory Rules Publication Act*⁸⁵ is a factor which enhances instruments produced pursuant to that regime and detracts from those that are not subject to that discipline. Instruments which are subject to the *Statutory Rules Publication Act* also benefit from being 'professionally drafted exclusively by legal specialists in the Attorney-General's Department'.⁸⁶ In addition to producing a professional product, centralised drafting also promotes consistency in the instruments produced.

The kinds of instruments which are issued, say, pursuant to the *National Health Act 1953* (discussed in Chapter 3 above), are not covered by the provisions of the *Statutory Rules Publication Act*.⁸⁷ Those instruments which are designated as disallowable instruments are specifically exempted from the operation of these provisions.⁸⁸ The non-disallowable instruments simply do not come within the definitions on which the *Statutory Rules Publication Act* operates.

Instruments such as those identified in the *National Health Act* (even disallowable instruments) are generally drafted within the departments involved, which means that there is no consistency in the form or drafting style of such instruments. Comparing this situation with the regime applied to Statutory Rules, Professor Whalan had this to say:

There is relatively easy access to statutes, regulations and, indeed, ordinances. Not only are they drafted by specialist professionals, but they are properly published in a series in print that can be read without the aid of a microscope. In contrast, some disallowable instruments have turned up on rather scrappy bits of paper, with the drafting in them of poor standard and with an indecipherable signature.⁸⁹

Accessibility

⁸⁴ *Statutory Rules Publication Act 1903*, s 2.

⁸⁵ Senate, *Hansard*, 15 June 1989, p 4129 (also reproduced in Senate Standing Committee on Regulations and Ordinances, *Eighty-sixth Report*, Parliamentary Paper No 93 of 1990, p 15).

⁸⁶ Giles, P, 'Scrutiny of Federal quasi-legislation in Australia', reproduced in Third Commonwealth Conference on Delegated Legislation, *Record of Proceedings* (1990, HMSO, London), Appendix 5, at p 124.

⁸⁷ Though this is disputed by some - see discussion in Chapter 7.

⁸⁸ *Acts Interpretation Act 1901*, s46A(1)(c).

⁸⁹ Whalan, DJ, 'The final accolade: Approval by the committees scrutinizing delegated legislation', paper given to seminar conducted by the (Commonwealth) Attorney-General's Department, entitled 'Changing attitudes to delegated legislation', held in Canberra on 23 July 1990, at p 9.

As alluded to in the quote from Professor Whalan above, a subsidiary problem arising out of quasi-legislative instruments falling outside the ambit of the *Statutory Rules Publication Act* is that they are hard to gain access to. Following on from the passage reproduced above, Professor Whalan said:

So it is difficult to know who made the law or why and, even if one did know, it is even more difficult than usual to know what the law actually is.

Furthermore, a member of the public would have great difficulty finding out the current state of the law, as much of this law is not properly published.⁹⁰

This point was also raised in the context of the Senate Standing Committee on Legal and Constitutional Affairs' inquiry into debt recovery under the Social Security Act and the Veterans' Entitlements Act (which is discussed in Chapter 3 above). In the course of that inquiry, that Committee considered provisions contained in section 251 of the *Social Security Act* which allowed the relevant Minister to issue 'directions' in relation to the write-off and waiver of debts. Those directions operate formally to bind the Secretary of the Department of Social Security when making decisions as to whether or not to write-off or waive debts owed to the Commonwealth by welfare recipients. However, despite their binding effect of directions on recipients, administrators, legal advisers and adjudicative bodies alike, there is no guarantee that any of these individuals or bodies can gain easy access to such directions.⁹¹

Mr Julian Disney, then Co-ordinator of the Welfare Rights Centre and a witness before the Legal and Constitutional Affairs Committee said:

One of the problems is, of course, public access to the rules. It is hard enough to get access to regulations, but if there are to be new categories of statutory instruments like ministerial directions under section 251 of the Social Security Act, will people be able to get access to them readily enough? There is no regular series, there is no easy way of finding them, even for those people who are broadly familiar with searching for statutory instruments.⁹²

Inaccessibility of legislation is not simply a problem of practicalities. As is discussed below, it also arguably detracts from the legitimacy of the legislation.

'Secret' Legislation

A more cynical view of the inaccessible nature of quasi-legislation is that it is 'secret' legislation. At a 1990 seminar conducted by the Commonwealth Attorney-General's Department, entitled 'Changing attitudes to delegated legislation', it was suggested that all subordinate legislation was, in effect, 'secret' or 'hidden' legislation because it

⁹⁰ Whalan, DJ, 'The final accolade: Approval by the committees scrutinizing delegated legislation', paper given to seminar conducted by the (Commonwealth) Attorney-General's Department, entitled 'Changing attitudes to delegated legislation', held in Canberra on 23 July 1990, p 9.

⁹¹ Though, of course, the provisions of the *Freedom of Information Act 1982* could be of assistance in this regard, if the existence of the directions is disclosed or known.

⁹² Senate Standing Committee on Legal and Constitutional Affairs, *Debt recovery under the Social Security Act and the Veterans' Entitlements Act, Evidence*, p 596.

does not usually reach the public eye until after it has become operative.⁹³ If this is the case, the kinds of quasi-legislation found in, say, the *National Health Act* are positively invisible, as some need never reach the public eye.

It has been suggested that the increased use of quasi-legislative instruments is part of a deliberate plan to avoid the unwelcome attention of the Parliament. As early as 1972, the then Chairman of the Senate Standing Committee on Regulations and Ordinances, Senator Ian Wood, warned the Senate about 'instruments in writing' being used in preference to regulations or ordinances, in order to evade his Committee's scrutiny.⁹⁴ More recently, Mr Robert Wiese MLA, a member of the Western Australian Parliament's Joint Standing Committee on Delegated Legislation, said:

[I]t is a matter for real concern that government departments will knowingly seek to reduce a parliamentary committee's jurisdiction by adopting forms of statutory instrument that are not caught by the definition "regulation" in the empowering Act.⁹⁵

Mr Peter O'Keeffe, a Clerk Assistant in the Senate and a former Secretary of the Standing Committee on Regulations and Ordinances, has been more blunt:

These imaginative names and classifications serve only one purpose - to create the pretence that the species of legislative or quasi-legislative instrument in question is different in kind from a statutory rule and therefore warrants different treatment by way of drafting, presentation and promulgation under the complete control of the relevant policy department.⁹⁶

Similarly, in 1947, in *Blackpool Corporation v Locker*,⁹⁷ Lord Justice Scott (who had been a member of the Donoughmore Committee on Ministers' Powers), made the following comment in relation to Ministry of Health 'circulars':

I am tempted to wonder whether someone in the Ministry of Health thought the name 'circulars' would save them from recognition as delegated legislation!⁹⁸

Instruments such as these are a prime example of what Lord Hewart called 'departmental legislation'⁹⁹ or, to put it another way,

law made by administrators, for administrators [and] known only to administrators.¹⁰⁰

⁹³ Burgess, V, 'Experts advise on "secret" legislation', *The Canberra Times*, 24 July 1990, p 3 and (by the same author) 'Inside the secret rule book by which we live', *The Canberra Times*, 29 July 1990, p 9.

⁹⁴ Senate, *Hansard*, 29 February 1972, p 265.

⁹⁵ 'A regulation by any other name', paper presented to Third Conference of Australian Delegated Legislation Committees, Perth, 22 May 1991, p 1.

⁹⁶ O'Keeffe, P, 'Who is Watching the Regulators', *Business Council Bulletin*, (58) October 1989, 32, at p 35.

⁹⁷ [1948] 1 KB 349.

⁹⁸ *Blackpool Corporation v Locker* [1948] 1 KB 349, at p 368.

⁹⁹ Lord Hewart of Bury, *The New Despotism* (1929, Ernest Benn Limited, London), p 59.

¹⁰⁰ O'Keeffe, P, 'Who is Watching the Regulators?', *Business Council Bulletin*, (58) October 1989, 32, at p 33.

It is not possible to reach any sort of conclusion as to the reasons, if any, behind what is clearly a pronounced trend toward this less formal law-making. Indeed, it is not necessary for the purposes of this paper to even try. What is relevant, however, is that there is a level of law-making which is increasingly the province of bureaucrats and into which the Parliament often cannot intrude.

If, as is suggested in relation to some of the examples referred to in Chapter 3 above, the instruments in question are actually legislative in character, it points to two significant problems. One is the effect that such a devolution of legislative power has on the supremacy of Parliament. The other is the effect that such quasi-law can legitimately have, given the absence of parliamentary input into its formulation.

'The Rule of Law and the Lore of Rules'¹⁰¹

A subsidiary but perhaps more serious aspect of the difficulty encountered by the general public in gaining access to the vast body of quasi-legislative instruments promulgated under various Acts is the effect that this has on the legitimacy of such instruments. In *Blackpool Corporation v Locker*,¹⁰² Lord Justice Scott said:

[T]here is one quite general question affecting all ... sub-delegated legislation, and of supreme importance to the continuation of the rule of law under the British constitution, namely the right of the public affected to know what the law is.¹⁰³

This passage was cited with approval by Justice Stephen of the High Court in the leading Australian case of *Watson v Lee*.¹⁰⁴

After noting the obligations which existed under British law (as they do in Australia) to publish Acts of Parliament and statutory instruments, Lord Justice Scott went on to say:

On the other hand, if the power delegated to the minister is to make sub-delegated legislation and he exercises it, there is no duty on him, either at statute or common law, to publish his sub-delegated legislation: and John Citizen may remain in complete ignorance of what rights over him and his have been secretly conferred by the minister on some authority or other, and what residual rights have been left to himself.¹⁰⁵

His Honour went on to say that, if this was the case, then

[f]or practical purposes, the rule of law, of which the nation is so justly proud, breaks down because the aggrieved subject's legal remedy is gravely impaired.¹⁰⁶

101 This is the title of an article by Professor Dennis Pearce, which appears in *Legislative Studies*, Vol 4, No 2, Spring 1989, 3.

102 [1948] 1 KB 349.

103 *Blackpool Corporation v Locker* [1948] 1 KB 349, at p 361.

104 (1979) 144 CLR 374, at 394.

105 *Ibid*, at 362.

106 *Ibid*.

In the course of his decision, Lord Justice Scott also referred to the maxim that ignorance of the law is not a defence.¹⁰⁷ This point was made in a similar context by Professor Dennis Pearce in 1989, in the course of his address to an Administrative Review Council conference on rule-making.¹⁰⁸ Professor Pearce suggested to the conference that

the possibility arises that a court might hold that there is an obligation to publish legislation if the presumption that a person is presumed to know the law is to be maintained.¹⁰⁹

These points are well made. The fact that what is not law can be nevertheless applied as law is a problem in itself. However, the fact that the individuals to whom such quasi-laws apply often have no way of even being aware of these laws surely brings such applications into serious doubt.

Summary

It has been asserted that the new techniques of quasi-legislation 'stand ... established theory on its head'.¹¹⁰ Certainly, quasi-legislation involves serious difficulties of both a practical and a conceptual nature. The fact that it is generally badly drafted, hard to understand and almost impossible to locate makes it an undesirable and potentially dangerous addition to the legislative framework. These problems, in turn, raise serious questions not only about the use of quasi-legislation but also its validity.

¹⁰⁷ *Ibid*, at 361.

¹⁰⁸ Held in Canberra on 31 August 1989. Discussed further in Chapter 7.

¹⁰⁹ Pearce, DC, 'The Rule of Law and the Lore of Rules', *Legislative Studies*, Vol 4, No 2, Spring 1989, 3, at p 4.

¹¹⁰ Senate, *Hansard*, 15 June 1989, p 4126, at p 4129 (Senator Collins).

Chapter 5

Parliamentary Scrutiny of Legislation

In order to understand fully the relevance of parliamentary scrutiny to the issues raised by quasi-legislation, it is useful to review and consider the scrutiny processes which are currently applied to the conventional varieties of legislation.

Parliamentary Scrutiny of Bills

An Act passed by the Commonwealth Parliament is, necessarily, subject to the most comprehensive parliamentary scrutiny. Pursuant to section 1 of the *Constitution*, the legislative power of the Commonwealth is vested in the 'Federal Parliament', consisting of the Queen, the House of Representatives and the Senate. Commonwealth Acts, which are the most obvious and potent exercise of this legislative power, must be passed by both Houses of the Parliament and then assented to by the Queen or, as happens in most cases, her representative in Australia, the Governor-General. Bills for such Acts are generally debated in both Houses of the Parliament prior to passage. The opportunity for such debate is the primary avenue through which parliamentary scrutiny is exercised.

The Senate Standing Committee for the Scrutiny of Bills

Bills introduced into the Parliament are subject to scrutiny in the Senate which goes beyond the requirements of the *Constitution*. First, there are the processes of the Senate Standing Committee for the Scrutiny of Bills. Initially formed in 1981, this Committee examines all bills introduced into the Parliament¹ against five principles which are set out in the Senate's Standing Orders and which operate as its terms of reference. The Committee is required to report on whether bills introduced into the Senate, by express words or otherwise,

- (i) trespass unduly on personal rights and liberties;

¹ It should be noted that the Committee is formally empowered to report only on bills introduced in the Senate. However, the Committee has relied on paragraph 24(1)(b) of the Senate Standing Orders (which allows it to consider any 'proposed' law, notwithstanding that the relevant bill has not been introduced in the Senate) as authority for its practice of examining bills as they are introduced in the House of Representatives. Given that 70-80% of bills originate in the House, the Committee therefore has the opportunity to examine and then provide its initial views on most bills prior to their introduction in the Senate. The Committee is also able to consider clauses in Acts. For further background on the history and operation of the Committee see, generally, Senate Standing Committee for the Scrutiny of Bills, *The Operation of the Senate Standing Committee for the Scrutiny of Bills, 1981-1985*, Parliamentary Paper No 317 of 1985.

- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.²

These scrutiny criteria fall into two basic categories. Principles (i) to (iii) are essentially concerned with protecting personal rights and liberties. Principles (iv) and (v) are aimed at protecting and preserving the legislative power of the Parliament. Interestingly, it is under principle (v), which requires the Committee to draw attention to provisions in bills which inappropriately delegate legislative power, that many examples of quasi-legislation have been identified by the Committee.³

The scrutiny carried out by the Scrutiny of Bills Committee is very much a technical examination. In its consideration of bills, the Committee actively avoids the policy and political elements of those bills. Indeed, this is an integral part of the operation of the Committee and contributes in no small measure to the bipartisan and apolitical manner in which the Committee operates.⁴

² Senate Standing Order 24(1)(a).

³ See Senate Standing Committee for the Scrutiny of Bills, *Annual Report 1988-1989 (Journals of the Senate*, No 59, 21 December 1990, p 688), pp 41-2.

⁴ See Senate Standing Committee for the Scrutiny of Bills, *The Operation of the Senate Standing Committee for the Scrutiny of Bills, 1981-1985*, Parliamentary Paper No 317 of 1985, pp 1-2.

Reference of Bills to Senate Legislative and General Purpose Standing Committees

Though the Scrutiny of Bills Committee steadfastly avoids the political element of bills, a recent innovation in the Senate has introduced a further form of scrutiny which is not so constrained. When the 36th Parliament commenced, on 8 May 1990, the Senate adopted a series of procedures which were intended to facilitate the detailed examination of bills by the Senate's legislative and general purpose standing committees.⁵ The new procedures were adopted following recommendations contained in the Report of the Senate Select Committee on Legislation Procedures,⁶ which was tabled in the Senate on 1 December 1988.⁷

Such examination by the legislative and general purpose standing committees was (and, indeed, still is) always possible under the existing procedures. Indeed, committees such as the Senate Standing Committee on Legal and Constitutional Affairs (and its predecessor in title, the Senate Standing Committee on Constitutional and Legal Affairs) have conducted numerous, detailed inquiries into bills referred to them by the Senate for examination and report.⁸ Prior to the new procedures, however, a formal motion and a resolution of the Senate was required to refer a bill to a committee.⁹ Compared to the number of bills passing through the Senate, this happened relatively rarely. In its Report, the Senate Select Committee on Legislation Procedures listed 34 bills which had been referred to committees in the 18 years prior to that report.¹⁰

Under the new procedures, which were explicitly intended to increase the frequency of such referrals,¹¹ bills are referred on the recommendation of a Selection of Bills Committee, which reports to

⁵ See *Journals of the Senate*, No 212, 5 December 1989, pp 2303-5. For the full text of the procedures, see *The Senate, Standing and other Orders*, pp 133-43.

⁶ Parliamentary Paper No 398 of 1988.

⁷ *Journals of the Senate*, No 119, 1 December 1988, p 1225.

⁸ See, eg, Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information: Report on the Freedom of Information Bill 1978 and aspects of the Archives Bill 1978* (Parliamentary Paper No 272 of 1979); Senate Standing Committee on Education and the Arts, *Report on the Archives Bill 1978* (Parliamentary Paper No 219 of 1979) and *Report on Broadcasting and Television Amendment Bill 1980* (Parliamentary Paper No 132 of 1980); Senate Standing Committee on Constitutional and Legal Affairs, *The National Crime Authority Bill 1983* (Parliamentary Paper No 30 of 1984); Senate Standing Committee on National Resources, *Plant Variety Rights* (Parliamentary Paper No 63 of 1984); Senate Select Committee on Television Equalisation, *Television Equalisation: Report of the Senate Select Committee* (Parliamentary Paper No 106 of 1987); Senate Standing Committee on Legal and Constitutional Affairs, *Administrative Decisions (Judicial Review) Amendment Bill 1987* (Parliamentary Paper No 212 of 1987), *The Operation and Administration of the Freedom of Information Legislation* (Parliamentary Paper No 441 of 1987), *Matters relating to the War Crimes Amendment Bill 1987* (Parliamentary Paper No 394 of 1988), *Cash Transaction Reports Bill 1987* (Parliamentary Paper No 395 of 1988), *Matters relating to the Defence Service Homes Amendment Bill 1988* (Parliamentary Paper No 479 of 1989).

⁹ While a motion and vote is still required under the new procedures (a motion to accept the recommendations of the Selection of Bills Committee), the recommendations of the Selection of Bills Committee have generally been adopted by the Senate as a matter of course.

¹⁰ See Senate Select Committee on Legislation Procedures, *Report*, Parliamentary Paper No. 398 of 1988, Appendix 1. See also McNaughton, B, 'The Senate's committee system and new procedures for reviewing legislation', *Australian Institute of Administrative Law Newsletter*, No 2 1990, 5, at p 6.

¹¹ *Ibid.*, at p 26 (Conclusion (a)).

the Senate weekly during the sittings of the Senate. In its report, that Committee recommends in respect of each bill introduced that it should or should not be referred to a relevant legislative and general purpose standing committee.

Between August¹² and December 1990, the Selection of Bills Committee considered a total of 94 bills. It recommended that 27 of those bills be referred to committees. Of those 27 bills, 22 were actually referred, in whole or in part, to committees.¹³ Clearly, the number of bills referred represents a significant proportion of those introduced into the Senate during the relevant period. The proportion of bills referred, in turn, represents a significant increase compared to previous experience. In that respect, it would appear that the new procedures are having the desired effect.

As to the nature and value of the scrutiny which has been brought to bear under the new procedures, it is probably too early to draw any firm conclusions. The examination conducted by the several committees which have had bills referred has been varied. Similarly, the committee inquiries have yielded a range of results and an assortment of quite different reports.¹⁴ However, it has been asserted that the legislative process has been generally enhanced by this innovation.¹⁵ In any event, it is my firm view (and, indeed, a central tenet of this paper) that legislation (in all of its various forms) can only benefit from being subject to additional scrutiny such as this.

As far as parliamentary scrutiny is concerned, it is clear that bills (which then become Acts) are subject to the most comprehensive and detailed scrutiny. Given the potential effect of such bills, which become laws of the land, it is only appropriate that this level of scrutiny be directed at them.

Parliamentary Scrutiny of Delegated Legislation

Delegated or 'subordinate' legislation is subject to a quite different form of parliamentary scrutiny which is, in some respects, more exacting than that directed at bills. The key to this scrutiny is Part XII of the *Acts Interpretation Act 1901*, which sets out fairly detailed conditions governing the validity of regulations. For example, paragraph 48(1)(a) requires that all regulations be notified in the

¹² When the Senate resumed on 8 May 1990, it was agreed that the commencement of the new procedures should be deferred until the first sitting day in August (see *Journals of the Senate*, No 1, 8 May 1990, p 29).

¹³ See *Business of the Senate* for the period of 1 January to 31 December 1990, pp 42-6.

¹⁴ See, eg, Senate Standing Committee on Finance and Public Administration, *Report on the Petroleum Resource Rent Legislation Amendment Bill 1991, Petroleum (Submerged Lands) Amendment Bill 1991, Petroleum (Submerged Lands) (Royalty) Amendment Bill 1991* (see *Journals of the Senate*, No 95, 5 June 1991, pp 1129-30); Senate Standing Committee on Legal and Constitutional Affairs, *The Proposed Tax File Number Provisions and Data-Matching Program* (see *Journals of the Senate*, No 52, 11 December 1990, p 542); Senate Standing Committee on Industry, Science and Technology, *Report on the consideration of the Patents Bill 1990* (see *Journals of the Senate*, No 24, 13 September 1990, p 265).

¹⁵ See, generally, Evans, H, 'Consideration of legislation by committees', *The Table*, Vol. LVII, 1990, p 16 and, by the same author, 'Reference of Bills to Senate Committees', *The House Magazine*, 12 December 1990, p 5.

Gazette. Paragraph 48(1)(b) provides that, unless otherwise specified in the document itself, a regulation takes effect from the date of its notification. Subsection 48(2) then sets out stringent criteria in relation to regulations expressed to take effect prior to notification.

However, while these clauses are important, from a scrutiny point of view the most significant provisions contained in Part XII are probably those requiring the tabling of regulations in both Houses of the Parliament and the ensuing provisions which set out the procedures governing disallowance of a regulation by either House. Those provisions are contained in section 48.

Briefly, paragraph 48(1)(c) requires that all regulations be tabled in each House of the Parliament within 15 sitting days of being made. Failure to observe this requirement results in the regulations ceasing to have effect (subsection 48(3)). Subsection 48(4) provides:

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

Subsection 48(5) provides that if a notice of motion given within the 15 days after a regulation has been tabled has not been dealt with within a further 15 sitting days of the notice having been given, then the regulation is deemed to have been disallowed. This is intended to ensure that a motion of disallowance cannot be adjourned indefinitely and facilitates the form of disallowance commonly referred to as 'disallowance by effluxion of time'.¹⁶ Further provisions deal with the effect of the dissolution etc of the House of Representatives on such a motion (subsection 48(5A)), the effect of disallowance (subsections 48(6) and (7) and section 50) and restrict the re-making of disallowed regulations (sections 48A, 48B, 49). In the context of parliamentary scrutiny, however, it is those provisions dealing with tabling and disallowance that are the most significant.

The Senate Standing Committee on Regulations and Ordinances

Since 1931, the Senate has been assisted in its scrutiny of delegated legislation by the Senate Standing Committee on Regulations and Ordinances. Like the Scrutiny of Bills Committee, the Regulations and Ordinances Committee operates pursuant to terms of reference set out in Senate Standing Orders. Standing Order 23(2) states:

All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are legislative in character, stand referred to the [Regulations and

¹⁶ See, generally, Senate Standing Committee on Regulations and Ordinances, *Seventy-ninth Report*, Parliamentary Paper No 170 of 1986.

Ordinances] Committee for consideration and, if necessary, report.

Pursuant to Standing Order 23(3), the Committee is required to scrutinise each instrument so referred to ensure:

- (a) that it is in accordance with the statute;
- (b) that it does not trespass unduly on personal rights and liberties;
- (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- (d) that it does not contain matter more appropriate for parliamentary enactment.

As does the Scrutiny of Bills Committee, the Regulations and Ordinances Committee carries out a strictly technical scrutiny of the instruments referred and operates in a bipartisan and apolitical manner. If the Committee moves a motion of disallowance, as provided for by subsection 48(4) of the *Acts Interpretation Act*, that motion, unless withdrawn by the Committee, invariably results in the disallowance of the instrument in question. This is considered to be a reflection of both the expertise of the Committee in this area and also the esteem in which its recommendations are held by the Senate. It also acknowledges, at least informally, the gravity of the Committee moving such a motion, as the Committee goes through a series of consultative steps (principally involving correspondence between the Committee and the relevant Minister) before doing so and uses the motion for disallowance only as a last resort.¹⁷

Disallowable Instruments - Section 46A of the *Acts Interpretation Act 1901*

The final category of legislative instrument which needs to be discussed is the so-called 'disallowable instrument'. In 1987, the *Acts Interpretation Act 1901* was amended by the *Statute Law (Miscellaneous Provisions) Act 1987*.¹⁸ Those amendments inserted a new section 46A, which provides:

Disallowable instruments

46A. (1) Where a provision (in this subsection called the "enabling provision") of a law confers power to make an instrument (however described) and expressly provides that

¹⁷ For further background on the history and operation of the Senate Standing Committee on Regulations and Ordinances see, eg, its *Eightieth Report* (Parliamentary Paper No 241 of 1986) or any of the Committee's annual reports.

¹⁸ Act No 141 of 1987. See, in particular, Schedule 1.

the instrument is a disallowable instrument for the purposes of this section, then, except so far as the law otherwise provides:

- (a) sections 48, 48A, 48B, 49 and 50 [of the *Acts Interpretation Act 1901*] apply as if:
- (i) references to regulations were references to the instrument;
 - (ii) references to a regulation were references to a provision of the instrument;
 - (iii) references to repeal were references to revocation;
 - (iiia) references in subsection 48(7) to another regulation included references to a provision of another instrument made under the enabling provision; and
 - (iv) where the enabling provision is a provision of regulations - references to an Act were references to regulations;
- (b) section 49A applies to the instrument as if:
- (i) the instrument were regulations under an Act; and
 - (ii) the reference in paragraph (1)(a) to regulations included a reference to other instruments made under the enabling provision;
- (c) the instrument shall not to be taken to be a statutory rule within the meaning of the *Statutory Rules Publication Act 1903*, but subsections 5(3) to (3C) (inclusive) of that Act apply as they apply in relation to statutory rules;
- (d) for the purposes of the application of subsection 5(3B) of that Act under paragraph (c) of this subsection, the reference to the Minister specified in that subsection shall be read as a reference to a Minister administering the enabling provision;
- (e) if the instrument is not an order made under the authority of a Minister, section 5 of the *Evidence Act 1905* applies in relation to the instrument as it applies in relation to such an order; and
- (f) if the enabling provision is a provision of regulations, the instrument shall be deemed to be an enactment for the purposes of the *Administrative Appeals Tribunal Act 1975*.
- (2) A reference in subsection (1) to a law is a reference to an Act or to regulations.¹⁹

The principal effect of section 46A is that it subjects certain instruments to the same tabling requirements and parliamentary disallowance procedures as apply to regulations pursuant to section 48. Prior to the insertion of section 46A, if an instrument was to be subject to these requirements and procedures, it was necessary to set this out in the legislation which authorised the making of the instrument. As the Explanatory Memorandum to the Statute Law (Miscellaneous Provisions) Bill 1987 points out, '[t]he standard

¹⁹ Section 46A was subsequently amended by the *Statutory Instruments (Tabling and Disallowance) Legislation Amendment Act 1988* (Act No. 99 of 1988) which, *inter alia*, inserted subparagraph (iiia).

provision consists of four subsections that are always identical'.²⁰ As a result of the insertion of section 46A, it is only necessary to state that an instrument as a 'disallowable instrument' for the purposes of section 46A.²¹

As a result of the application of the tabling and disallowance provisions of the *Acts Interpretation Act*, in conjunction with Senate Standing Order 23(2), disallowable instruments come under the scrutiny of the Senate Standing Committee on Regulations and Ordinances. They are subject to the same level of scrutiny and, ultimately, the same sanctions as regulations.

It is worthwhile at this stage to note also the effect of paragraph 46(1)(c). This paragraph exempts any instrument which is designated as a 'disallowable instrument' from the publication requirements of the *Statutory Rules Publication Act 1903*. The relevance of this provision is considered in greater detail in Chapter 6 below.

Summary

The Commonwealth Parliament has mechanisms in place to deal with three basic levels of conventional legislative instrument. At one end of the spectrum, bills receive the greatest scrutiny. At the other, disallowable instruments receive somewhat less. It is suggested that, in each case, the legislative instruments involved are generally subject to the level of scrutiny which is *appropriate*.

²⁰ Explanatory Memorandum, p 7. A good example of a pre-s46A disallowance mechanism is contained in the *Environment Protection (Impact of Proposals) Act 1974*, ss 7-7C.

²¹ For a good example of a post-s46A disallowance provision, see s45 of the *Superannuation Act 1990*.

Chapter 6

Parliamentary Scrutiny of Quasi-legislation

It would be wrong to assume that existing forms of quasi-legislation completely escape scrutiny by the Commonwealth Parliament. Equally, it would be wrong to assume that parliamentary scrutiny is the complete answer to all of the problems which quasi-legislation poses. This chapter identifies and discusses the ways in which the Commonwealth Parliament currently deals with quasi-legislation and then, in the light of this discussion, highlights the advantages that parliamentary scrutiny has to offer.

The Role of the Senate Standing Committee for the Scrutiny of Bills

In considering the role of the Commonwealth Parliament in relation to quasi-legislation, it should be remembered that the provisions under which all of the examples of quasi-legislation identified in Chapter 3 were promulgated were, themselves, passed by the Parliament. Equally, it should be remembered that it is quite conceivable that Parliament explicitly desires that these sorts of provisions be enacted. Emeritus Professor Douglas Whalan (in his capacity as legal adviser to the Senate Standing Committee on Regulations and Ordinances) has observed that

[t]he first opportunity to consider and, if needs be, curb delegation is during the passage of primary legislation through the Parliament. The Parliament can, in theory, authorise virtually any degree of delegation that it wishes in an Act.²²

Similarly, the Parliament can enact provisions which authorise the making of whatever instruments it wants. However, whether the Parliament intends that such provisions should be enacted or not, it is the role of the Senate Standing Committee for the Scrutiny of Bills to draw attention to such provisions if the Committee considers that they infringe its terms of reference. As noted in Chapter 5 above, Senate Standing Order 24(1)(a)(iv) requires the Committee to draw attention to provisions which 'inappropriately delegate legislative power'. Indeed, as noted in Chapters 2 and 3 above, the Committee does regularly draw attention pursuant to this principle to provisions which, if enacted, would authorise the making of instruments such as those with which this paper is concerned.²³ In that sense, the

²² Senate Standing Committee on Regulations and Ordinances, *Eighty-seventh Report (Journals of the Senate*, No 47, 29 November 1990, p 494).

²³ See Senate Standing Committee for the Scrutiny of Bills, *Annual Report 1988-89 (Journals of the Senate*, No 59, 21 December 1990, p 688).

Committee has a very important role. It acts as what Professor Whalan has called 'the first bulwark' against such instruments.²⁴

However, unlike its sister committee, the Senate Standing Committee on Regulations and Ordinances, the Scrutiny of Bills Committee has limited power to exercise in relation to such provisions. The Scrutiny of Bills Committee can do no more than draw attention to provisions which, in its view, inappropriately delegate legislative power. It is then up to the Senate and to individual Senators to act upon the Committee's concerns.

To illustrate the limits on the Committee's ability to influence the enactment or not of provisions which cause it concern, it is useful to refer to some of the examples set out in Chapter 3. As noted in that chapter, in 1988 the Committee drew the Senate's attention to provisions in the Social Security Legislation Amendment Bill 1988 which proposed to insert certain new provisions into the *Social Security Act 1947*. The Committee drew attention to a provision which, if enacted, would allow the relevant Minister to issue directions which would govern the exercise of the Secretary's discretion to waive or write-off debts. In particular, the Committee was concerned that not only would the Secretary be bound by those directions but so would the Social Security Appeals Tribunal and the Administrative Appeals Tribunal in reviewing the Secretary's decisions.²⁵

Having drawn attention to the provisions, it was up to the Senate to decide whether or not it wished to enact them in that form. In the Committee stage of the Bill, Senator Janet Powell of the Australian Democrats (and a member of the Scrutiny of Bills Committee) moved an amendment that took in the Scrutiny of Bills Committee's concerns. That amendment was defeated.²⁶ As a result, the Bill passed into law with the provisions intact.²⁷

Conversely, in 1990 the Scrutiny of Bills Committee raised some concerns in relation to the Occupational Health and Safety (Commonwealth Employment) Bill 1990. As noted in Chapter 3

²⁴ Senate Standing Committee on Regulations and Ordinances, *Eighty-seventh Report (Journals of the Senate*, No 47, 29 November 1990, p 494).

²⁵ See, generally, Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 1988*, Parliamentary Paper No 402 of 1988, pp 264-6, 289-91.

²⁶ See Senate, *Hansard*, 13 December 1988, p 4070.

²⁷ However, in June 1991, the Senate considered the Social Security Legislation Amendment Bill 1991, which proposed certain amendments to the *Social Security Act 1947*. On 5 June 1991, Senator Lees, on behalf of the Australian Democrats, moved an amendment to the bill which had the effect of amending 251 of the 1947 Act, to make determinations made pursuant to 251(1B) disallowable instruments for the purposes of 46A of the *Acts Interpretation Act 1901*. The amendment was passed (see *Journals of the Senate*, No 95, 5 June 1991, at p 1137). The House of Representatives accepted the Senate's amendment.

It should also be noted that, earlier in 1991, the Parliament passed the *Social Security Act 1991*. That Act, which commenced on 1 July 1991, replaces the *Social Security Act 1947*. Section 1237 of the 1991 Act is in identical terms to section 251 of the 1947 Act (without the amendment of 5 June). However, on 19 June 1991, the Senate passed an amendment to the Social Security Legislation Amendment Bill (No 2) 1991, which had the effect of amending s1237 of the 1991 Act to make determinations pursuant to that section disallowable instruments (see *Journals of the Senate*, No 99, 19 June 1991, at p 1233). The House of Representatives accepted the Senate's amendment.

above, the Committee indicated that it was concerned about the use to which certain codes of practice which were to be authorised by the Bill could be put in court proceedings.²⁸

In accordance with its usual procedures, the Committee drew its concerns to the attention of the Minister responsible for the Bill, Senator Cook. Senator Cook responded to the Committee in writing. He indicated that, while he did not share the Committee's concerns about the provisions identified, he was prepared to amend the Bill to make the codes of practice subject to disallowance if the Committee adhered to its original view.²⁹

In its *Eleventh Report of 1990*, the Scrutiny of Bills Committee indicated that, having considered the Minister's response, it remained of the view that the codes of practice should be disallowable, given the use that the codes could be put in court proceedings.³⁰ In the Committee stage of the Bill, the Minister duly moved an amendment to the Bill to make the codes of practice disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*.³¹ In moving the amendment, the Minister acknowledged the role of the Scrutiny of Bills Committee in its conception. He went on to say:

The fact that the Government has accepted this amendment indicates yet again the value and utility of the Scrutiny of Bills Committee and the role of that Committee in the Senate.³²

While this vote of confidence from the Minister may have made the Committee's success in this matter a little sweeter, it should not be allowed to cloud the realities of the Committee's role in these matters. The Committee has its victories but it also has more than its share of defeats. Success or failure often depends on whether or not Opposition, Australian Democrat or Independent senators pick up the Committee's concerns. As a scrutineer of quasi-legislation the Committee can do little more than identify new provisions which would serve to that form of legislation and to draw such provisions to the attention of the Senate.

The Role of the Senate Standing Committee on Regulations and Ordinances

As was noted above, the Commonwealth Parliament essentially can (subject to certain constitutional limitations) delegate whatever it wishes. Professor Whalan has observed that

²⁸ See, generally, Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 1990 (Journals of the Senate, No 38, 7 November 1990, p 390)*, pp 16-8.

²⁹ See, generally, letter from Minister for Industrial Relations to Chairman of the Committee, dated 5 December 1990 (reproduced in Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 1990 (12 December 1990)*, pp 230-2), especially at p 3.

³⁰ Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 1990 (Journals of the Senate, No 53, 12 December 1990, p 555)*, p 218.

³¹ Senate, *Hansard*, 18 February 1991, p 723.

³² *Ibid.*

[o]nce that has happened the Regulations and Ordinances Committee is not in a very strong position to do a great deal, if the delegation or subdelegation is technically valid.³³

If the Scrutiny of Bills Committee has failed to prevent the passage of what it regards to be an inappropriate delegation of legislative power, there is little that the Regulations and Ordinances Committee can do beyond ensuring that any instrument promulgated pursuant to such a provision accords with any formalities contained in the enabling provision, such as, in the case of disallowable instruments, tabling requirements.

Despite this apparent impotence, in 1990 the Committee took what, on reflection, appears to be an innovative and courageous step. The Committee's attention had been drawn to a determination issued pursuant to paragraph 98C(1)(b) of the *National Health Act 1953*, which related to computerised accounting systems to be installed in pharmacies in accordance with requirements of the Act and in connection with the supply of pharmaceutical benefits. After observing that the determination did not 'appear' to be subject to tabling and disallowance (in fact, it clearly *is not*), the Committee said:

However, it is clearly a legislative instrument, affecting as it does the rights and obligations of classes of persons. The Committee decided that it would scrutinise the instrument in the same way it does other delegated legislation, although it may not be possible to give a protective motion of disallowance.³⁴

The Committee went on to say that it had decided on this course of action

because it [had] often expressed the view that such instruments should be subject to tabling and disallowance. Also, the Committee receives such a high level of cooperation from Ministers that it is appropriate to raise possible defects in such instruments.³⁵

In other words, relying on its record and its high standing with Ministers, the Committee was chancing its arm.

Having invited itself to scrutinise the instrument in question, the Committee noted that the copy which it had received was neither signed nor dated. The instrument referred to Schedules 2, 3, 4 and 5,

³³ Senate Standing Committee on Regulations and Ordinances, *Eighty-seventh Report (Journals of the Senate*, No 47, 29 November 1990, p 494).

³⁴ Senate, *Hansard*, 4 December 1990, p 4884.

³⁵ *Ibid.*

none of which were attached to the copy which had been provided to the Committee. With these matters in mind, the Committee suggested that

[i]f the original instrument is purported to be made in this fashion it may be invalid. If the original was validly made then defective copies should not be circulated to the public.³⁶

The Committee went on to point out several other defects and possible defects in the instrument.³⁷ For present purposes, it is not necessary to identify them all. The importance of this example is that not only does it provide a further illustration of the kinds of problems which these instruments can involve but also indicates that the Parliament and its committees are not necessarily prevented from directing their attention at such instruments merely because they are under no formal duty to do so.³⁸

Delegated Legislation Monitor

In October 1989, the Procedure Office of the Senate published a document which it called the 'Delegated Legislation Monitor'. The first issue indicated that it would be the pilot of a regular series of Monitors which would 'bring together details of all disallowable instruments of delegated legislation tabled in the Senate'.³⁹ It stated that its object was

to record the numbers, variety and purpose of instruments of delegated legislation which are made under the authority of Acts of the Parliament.⁴⁰

The Monitor acknowledged that these instruments are, of course, listed in the Journals of the Senate. However, they are not necessarily easy to find and, in any event, in order to keep track of such instruments access and attention to the Journals is required. The Monitor set out to provide

quick access in one series to such instruments and supply other information including a brief summary of the effect of each instrument. It is understood that the executive does not keep a similar monitor listing all the legislation it, and its agents make with the permission and authority of the Parliament.⁴¹

³⁶ Senate, *Hansard*, 4 December 1990, p 4884.

³⁷ *Ibid.*

³⁸ At the time of submission, the Regulations and Ordinances Committee had written a letter to the relevant Minister, drawing his attention to the matters which they had raised, and had received (but not made public) a reply.

³⁹ Department of the Senate, *Delegated Legislation Monitor No 1 of 1989*, 3-6 October 1989, p 1.

⁴⁰ *Ibid.*

⁴¹ Department of the Senate, *Delegated Legislation Monitor No 1 of 1989*, 3-6 October 1989, p 1.

The introduction to the first Monitor concludes with this statement:

Delegated legislation made by the executive in accordance with provisions of Acts of the Parliament is not much less significant in the rights and obligations it creates than rights and obligations imposed under the parent Acts which authorise such delegated legislation in the first place. The Houses of the Parliament have a duty to supervise executive law making as part of their general broader supervision and control of the executive. This Monitor will help them to perform that role.⁴²

The Delegated Legislation Monitor has, as foreshadowed in the first issue, continued to list, on a weekly basis, disallowable instruments tabled in the Senate. As such, it is a useful tool in keeping track of such instruments and a worthwhile innovation.

The Significance of Tabling in the Parliament

It is useful at this point to make a brief comment about the consequences of quasi-legislative or other instruments being tabled in the Parliament. Tabling does not, of itself, give an instrument a characteristic or effect which the instrument would not otherwise have. However, tabling is relevant as a means of ensuring that documents are made public, in the first instance, and are then available for examination by the Parliament.

Limitations on Parliamentary Scrutiny of Quasi-legislation

The two legislative scrutiny committees of the Senate (ie the Standing Committee for the Scrutiny of Bills and the Standing Committee on Regulations and Ordinances) are, because of their expertise in such matters and their access to legal advice, probably best equipped to fulfil the role of parliamentary scrutineer of quasi-legislation. However, as noted above, their powers in this area are limited. The Scrutiny of Bills Committee requires the support of the Senate if it is to prevent the enactment of provisions which cause it concern. The Regulations and Ordinances Committee relies, to a large extent, on the Scrutiny of Bills Committee, as there is little that the Regulations and Ordinances Committee can do once a provision which enables the promulgation of an instrument has been enacted.

Both Committees are also limited in what they can do by their terms of reference. Since the terms of reference of both Committees are quite deliberately limited to matters of technical scrutiny, so too is the scrutiny which those Committees are able to apply to such instruments. Policy aspects of such instruments are expressly out of bounds. Even if the Scrutiny of Bills Committee has been successful in ensuring that an instrument is disallowable and, therefore, accessible

⁴² *Ibid.*

to the scrutiny of its sister committee, that Committee cannot examine the policy elements of such instruments. This is, clearly, a significant limitation on such scrutiny.

Another limitation is the capacity of Parliament to make a constructive contribution to such instruments. In its *Report on Parliamentary Scrutiny of Rules of Court*,⁴³ which is discussed in Chapter 3 above, the Senate Standing Committee on Constitutional and Legal Affairs (as it then was) was cautious about the role that the Parliament could take in relation to such rules. The Committee said that it was

concerned to ensure that Parliament's role in respect of rules of court is a constructive one. In the past, Parliament has exercised its power of disallowance [in relation to rules of court] only rarely because it, and its committees, have lacked the expertise to embark on the task of effectively examining the rules of court.⁴⁴

In other words, it is all very well for the Parliament or its committees to have the power to look at instruments and even for them to be in a position to recommend disallowance, but they must also be in a position to exercise those powers constructively.

The issue of the volume of these instruments has already been raised in Chapters 2, 3 and 4. In assessing the capacity of the Parliament to scrutinise such instruments their number is, clearly, a limiting factor.

Two British academics, Robert Baldwin and John Houghton, have painted a similarly pessimistic picture of the capacity of the United Kingdom Parliament to deal with these sorts of instruments, giving two reasons:

First, there is a lack of parliamentary time so acute that even the present system of scrutiny of statutory instruments is overloaded and unsatisfactory. Massively to increase such a workload would be to indulge in little more than a presentational exercise. Second, one may point to the other deficiencies of the existing system: the *de facto* executive control of the legislature, the lack of information about the substance of a rule in advance of parliamentary scrutiny, the restrictions on debate, and the low priority that Members of Parliament give to technical or substantive scrutiny.⁴⁵

All of these observations are equally applicable to the Australian Parliament. Indeed, two of the principal arguments referred to by Professor Pearce as operating to justify the use of delegated (as

⁴³ Parliamentary Paper No 288 of 1979.

⁴⁴ Senate Standing Committee on Constitutional and Legal Affairs, *Report on Parliamentary Scrutiny of Rules of Court*, Parliamentary Paper No 288 of 1979, p 13.

⁴⁵ Baldwin, R and Houghton, J, 'Circular arguments: The status and legitimacy of administrative rules', (1986) *Public Law* 239, at p 270.

opposed to primary) legislation are that a) it decreases the pressure on parliamentary time and b) it can be used to accommodate material which is too technical or detailed to be suitable for parliamentary consideration.⁴⁶

By way of a colourful illustration of their point about the low priority which Members of Parliament give to the technical or substantive scrutiny of instruments, Messrs Baldwin and Houghton gave the following example:

Norman Tebbit commented that his task of laying a code of practice before Parliament was like being 'a head waiter asked to serve a bottle of Coca-Cola.'⁴⁷

The authors are left to conclude that the addition of informal rules to the parliamentary scrutiny workload would only magnify the problems that already exist in relation to Parliament's ability to deal with the more conventional forms of legislation.⁴⁸ Once again, this is a factor which would similarly limit the effectiveness of such scrutiny by the Australian Parliament.

One final limitation, which may or may not be a reflection of the sheer volume of instruments with which it has to deal, is the possibility that the Parliament will make mistakes. It is foolish to assume that scrutiny by the Parliament or by its specialist committees is foolproof or that it can prevent all possible abuses.

A good example of the parliamentary scrutiny processes failing to cope with what, on its face, represents a lamentable denial of the authority of the Parliament occurred in 1990, in the context of the election rules promulgated pursuant to the *Aboriginal and Torres Strait Islander Commission Act 1989* (the *ATSIC Act*). Section 113 of that Act empowers the relevant Minister to make election rules to govern elections to be held for Regional Councils established under the Act. Pursuant to subsection 113(8), those rules are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*. As has already been discussed in Chapter 5 above, the effect of this is to subject such rules to essentially the same regime of tabling and disallowance as applies to regulations.

The rules applying to the first Regional Council elections were tabled in the House of Representatives within the relevant time but (apparently as a result of a bureaucratic oversight) not in the Senate. On the basis of subsection 46A(3) of the *Acts Interpretation Act*, the rules thereby ceased to have effect. However, as a result of the peculiar combination of subsection 104(3) (which required that the

⁴⁶ Pearce, DC, *Delegated Legislation* (1977, Butterworths Pty Ltd, Sydney), pp 5-6.

⁴⁷ Baldwin, R and Houghton, J, 'Circular arguments: The status and legitimacy of administrative rules', (1986) *Public Law* 239, at p 270 - Norman Tebbit is a prominent British politician and was, at the time, a Minister.

⁴⁸ Baldwin, R and Houghton, J, 'Circular arguments: The status and legitimacy of administrative rules', (1986) *Public Law* 239, at p 270.

first elections take place by a certain date) and paragraph 100 (a) (which stated that the rules to apply to a first election were those in force at the beginning of the election period) of the *ATSIC Act*, the rules were found to be valid, despite this defect.

Subsection 104(3) was relevant because it imposed an irresistible urgency on both the holding of the elections and a finding (by the Court) that the rules were valid. Paragraph 100(a) was relevant because at the start of the election period (as defined in the *ATSIC Act*) the relevant provisions of the *Acts Interpretation Act* had not operated to make the rules cease to have effect.

In the Federal Court, Justice Pincus held that, for the reasons outlined above, the rules were valid and could operate in relation to the elections which were, by that stage, pressing.⁴⁹ The matter went on appeal to the Full Court. In the course of his judgment, Justice Northrop said:

There is no material before the Court explaining why the Regional Council election rules were not laid before the Senate in conformity with the requirements of s 48 of the *Acts Interpretation Act*. Nevertheless, this failure illustrates an arrogance by the Executive which borders on contempt for the Parliament. The failure is very serious. It is to be condemned. It cannot be condoned.⁵⁰

In spite of these strong words, Justice Northrop, like his two brother judges, found that the election rules were valid insofar as they applied to the first elections.

Apart from indicating the kinds of serious problems which quasi-legislative instruments can involve, this example also provides a salutary illustration of another limit on parliamentary scrutiny. In this case, the election rules were quite properly designated as a disallowable instrument, thereby avoiding adverse comment from the Senate Standing Committee for the Scrutiny of Bills. They had not come to the attention of the Regulations and Ordinances Committee as they had not been tabled. Indeed, in the absence of the Regulations and Ordinances Committee taking some sort of pre-emptive action to ensure that they *were* tabled in accordance with the relevant provisions, there was no scope for that Committee to become involved. As a result of this, a serious defect slipped through the Senate's (and, in effect, the Parliament's) scrutiny net. Clearly, the system is not infallible.

The Importance of Parliamentary Scrutiny

⁴⁹ *Glenda Rose Thorpe v The Honourable Robert Tickner, Minister for Aboriginal Affairs and Ors*, VG 311 of 1990, decision handed down on 30 October 1990 (unreported).

⁵⁰ *Glenda Rose Thorpe v Minister for Aboriginal Affairs and Others*, VG319 of 1990, decision handed down on 11 December 1990 (unreported), p 12.

Whatever its drawbacks, it is imperative that the authority of Parliament in relation to quasi-legislation (and, indeed, in relation to *all* legislation) be recognised and protected. The Parliament is, after all, the supreme law-making body. As Mr Ian Thynne and Professor Jack Goldring have observed,

[i]n Westminster systems, parliaments traditionally have been viewed as the ultimate instrument of the people's will for ensuring the accountability and control of all aspects of governmental activity.⁵¹

In a similar vein, Senator Bob McMullan has suggested that

[a]ccountability of the executive and administrative arms of government to Parliament, and through it to the people, is vital in a democracy. But as the structure of modern government evolves the existing structures and processes might not provide the guarantees for which they were originally intended.⁵²

In its issues paper on rulemaking, the Administrative Review Council observed that

[w]hile the Parliament might not wish to make all the laws, it nonetheless does desire to have a chance to review and express its opinion of laws made by the executive.⁵³

It is arguable that the very opportunity for parliamentary review may offer at least a partial solution to the problems of quasi-legislation. As suggested above, a requirement that a document be tabled in the Parliament ensures that it is at least published to the Parliament. It may also cause a bureaucrat drafting such an instrument to take additional care with that drafting.⁵⁴ Making an instrument subject to disallowance may cause the bureaucrat to take particular care. The problem with this approach, however, is in deciding which instruments should be tabled and which should be subject to disallowance. It is a matter of deciding what is the appropriate form of scrutiny.

⁵¹ Thynne, I and Goldring, J, *Accountability and Control: Government Officials and the Exercise of Power* (1987, The Law Book Company Limited, Sydney), p 236. It should be noted, however, that the authors go on to say that the actual workings of most parliaments suggest that this view 'has long been unrealistic'.

⁵² McMullan, B, 'Constitution review: guarantee reforms', *The Canberra Times*, 31 March 1991, p 9.

⁵³ Administrative Review Council, *Rule making by Commonwealth agencies: Issues paper* (30 June 1990, Canberra), at p 8.

⁵⁴ Though the experience of the Regulations and Ordinances Committee with such instruments (discussed in Chapter 4 above) cannot be ignored.

'Appropriate' Parliamentary Scrutiny

Quasi-legislative instruments cause problems because of the difficulty involved in developing a form (or forms) of scrutiny that, on the one hand, preserves the supremacy of Parliament and, on the other, does not require the Parliament to divert an excessive amount of its time and resources to that scrutiny. At the heart of this difficulty is the need to account for the wide variety of instruments involved and the desirability of developing a scrutiny mechanism which ensures that each instrument receives the appropriate scrutiny.

In its issues paper on rule-making, the Administrative Review Council suggested that

[s]ome part of the responsibility for ensuring that appropriate instruments are laid before the Parliament was seen to lie with the Senate Scrutiny of Bills Committee.⁵⁵

In its response to the issues paper, the Scrutiny of Bills Committee went one step further, stating that it was its responsibility

to ensure that such instruments receive the *appropriate* scrutiny.⁵⁶

In making this statement, the Committee indicated that it had not formulated any specific guidelines as to the basis on which it could be decided whether an instrument should be subject to, say, tabling and disallowance as opposed to tabling only.⁵⁷ However, the Committee said that, in its view,

a key element in determining the appropriate form of scrutiny in each case is the effect of the instrument in question. The degree to which the instrument is binding on a decisionmaker and the extent to which the instrument is subsequently binding on review bodies are two important factors to be considered in assessing the effect of an instrument.⁵⁸

The Committee concluded by saying:

The more binding an instrument is, the closer it comes to having a legislative effect and the greater is the need for parliamentary scrutiny.⁵⁹

⁵⁵ Administrative Review Council, *Rule making by Commonwealth agencies: Issues paper* (30 June 1990, Canberra), p 8.

⁵⁶ Letter from Chairman of the Senate Standing Committee for the Scrutiny of Bills to President of the Administrative Review Council, dated 14 September 1990 (unpublished), p 3.

⁵⁷ *Ibid.*

⁵⁸ Letter from Chairman of Senate Standing Committee for the Scrutiny of Bills to President of Administrative Review Council, dated 14 September 1990 (unpublished), p 4.

⁵⁹ Letter from Chairman of Senate Standing Committee for the Scrutiny of Bills to President of Administrative Review Council, dated 14 September 1990 (unpublished), p 4.

Summary

Parliamentary scrutiny is by no means a cure-all for the problems caused by quasi-legislative instruments. In some respects, increased parliamentary scrutiny is a two-edged sword. While many types of instruments clearly *should* receive greater scrutiny by the Parliament, the proliferation of such instruments lessens the Parliament's capacity to deal with them properly. In addition, Parliament has, to date, demonstrated an inability to come to grips with such instruments. The Senate Standing Committee for the Scrutiny of Bills continues to draw attention to provisions which, in its view, derogate from the primacy of the Commonwealth Parliament as the supreme law-maker. Those concerns have not always been taken up by the Senate.

The Committee will no doubt continue to draw the Senate's attention to these types of provisions. If the growth and use of quasi-legislative instruments is to be controlled it is incumbent on the Parliament to pay attention to the Committee's comments, to share its concerns and to act on its recommendations. However, from a practical standpoint, the capacity of the Parliament to adequately deal with an increased volume of legislative and quasi-legislative instruments must also be addressed.

Chapter 7

Some Possibilities and Some Promising Developments

Clearly, parliamentary scrutiny, even if it were possible to apply it to all relevant legislative and quasi-legislative instruments, is by no means a panacea. Nor is it the only possible answer. Several other suggestions have been put forward as likely improvements on the situation that currently exists. In addition, two recent developments offer some hope.

Administrative Review Council Project on Rule Making

The Administrative Review Council is currently engaged in an important project on rule making by Commonwealth agencies. Many of the kinds of instruments which the project is dealing with can be described as quasi-legislative. Several of the problems which the project addresses are problems which have been identified in this paper.

The project is significant for two reasons. First it serves to focus some much-needed attention on this area, which can only serve to heighten awareness of what is going on. Second, the Administrative Review Council has asked all Commonwealth departments and agencies to identify their current practices in relation to instruments. Departments and agencies have been asked to supply details of the types, numbers and nomenclature of the instruments which they make as well as details of if and where they are published and how the general public can obtain copies.⁶⁰

If the various departments co-operate with the inquiry, it should, at the very least, result in a comprehensive stock-take of quasi-legislative law-making in the Commonwealth. The results are likely to shock those people who are not aware of what has been going on in this area. Perhaps they will also stir into action those people who have the power to do something about it.

⁶⁰ See, generally, Administrative Review Council, *Rule making by Commonwealth agencies* (30 June 1990, Canberra) 'Report on submissions and preliminary proposals', paper presented at the Australian Institute of Administrative Law/Royal Australian Institute of Public Administration '1991 administrative law forum', held in Canberra on 29-30 April 1991, proposal 17, p 15. The Administrative Review Council's final report was tabled in the Parliament on 7 May 1992.

Office of Legislative Drafting

Another promising development is the establishment within the Commonwealth Attorney-General's Department of the Office of Legislative Drafting. The establishment of that Office, which represents a significant advance in status and resources compared to what was previously available for drafting, is apparently part of an attempt to centralise legislative drafting in the Commonwealth sphere. According to its brochure, in addition to drafting regulations, ordinances, proclamations, etc, the Office offers advice and assistance on a wide variety of other instruments, including ministerial orders, all other ministerial instruments and 'documents generally'.⁶¹ This can only be an improvement on the current situation, which allows departments to draft a great deal of their own instruments and which is, in turn, at least part of the problem posed by the proliferation of quasi-legislative instruments.

Consultation

In its issues paper on rule making, the Administrative Review Council said that one of the issues which arose at its conference on rule making was the absence of mechanisms for consultation with parties affected by legislative instruments.⁶² The Administrative Review Council said:

It was pointed out that Acts receive a great deal of publicity and of course are debated in the Parliament. It was also noted that administrative decisions are now subject to the rules of natural justice whereby a person affected has a right to put his or her side of the case before the decision is taken. Fitting as it were, between these two, is delegated legislation where consultation, if any, is left to the discretion of the making agency.⁶³

It is implied that the introduction of consultative procedures may offer some benefit. Similarly, with reference to quasi-legislative instruments, Professor Roman Tomasic has argued that

there seems to be no reason why draft guidelines should not be formulated in consultation with interested parties.⁶⁴

Indeed, Professor Tomasic suggests that the implementation of 'notice and comment' procedures as a 'formal component' of the rule making process is worthy of serious consideration.⁶⁵

⁶¹ Office of Legislative Drafting, Attorney-General's Department, brochure entitled 'Drafting Services' (undated).

⁶² Administrative Review Council, *Rule making by Commonwealth Agencies: Issues paper* (30 June 1990, Canberra), p 12.

⁶³ Administrative Review Council, *Rule making by Commonwealth Agencies: Issues paper* (30 June 1990, Canberra), p 12.

⁶⁴ Tomasic, R, 'Formalised Consultation, Delegated Legislation and Guidelines : "New" directions in Australian administrative law', *Canberra Journal of Public Administration*, No 58, April 1989, 158, at p 164.

In support of his arguments, Professor Tomasic points to procedures which currently exist in the United States, under the *Administrative Procedure Act*, to require publication of all proposed regulations at least 30 days before they are intended to come into force. He notes that

[t]he notice must state time, place and nature of any public rule-making proceeding, refer to the legal authority under which the rule is proposed and, finally, set down the substance of the proposed rules or else describe the issues or subjects that it involves. Following this, interested persons must be allowed the opportunity to participate in the rule-making process by submitting written evidence or views so that all relevant concerns are able to be considered by the agency proposing to make administrative rules.⁶⁶

A paper which appears as an appendix to the Administrative Review Council's issues paper points to broadly similar procedures which have been established in Victoria, pursuant to the *Subordinate Legislation Act 1962*. Those procedures provide that where a statutory rule is likely to impose any appreciable burden, cost or disadvantage to any sector of industry, commerce, consumers, members of public or the State, consultation commensurate with the impact of the rule shall take place with appropriate representatives of the sector concerned.⁶⁷

Broadly similar requirements were introduced in New South Wales by the *Subordinate Legislation Act 1989*, which introduced requirements for Regulatory Impact Statements to be prepared in relation to delegated legislation.⁶⁸ In her book on quasi-legislation, Professor Ganz refers to equivalent requirements that exist under United Kingdom legislation, though in relation to specific Acts and instruments.⁶⁹

At the risk of being dismissive, to suggest that consultation or regulatory impact statements hold the key to the quasi-legislative puzzle is to miss the point (or, at least, a fundamental point of this paper). Though consultation might offer many benefits to the people affected by a proposed rule or guideline and while several of the provisions referred to involve a collateral benefit in ensuring wider publication, they do nothing toward redressing the problem of proper

⁶⁵ *Ibid.*

⁶⁶ Tomasic, R, 'Formalised Consultation, Delegated Legislation and Guidelines : "New" directions in Australian administrative law', *Canberra Journal of Public Administration*, No 58, April 1989, 158, at p 162.

⁶⁷ Craven, G, 'The making of delegated legislation under the Victorian Subordinate Legislation Act', in Administrative Review Council, *Rule making by Commonwealth agencies*, (30 June 1990), Appendix 3, at p 23. The relevant provisions are s11(5) and Schedule 2 of the *Subordinate Legislation Act 1962*.

⁶⁸ See, Administrative Review Council, *Rule making by Commonwealth agencies: Issues paper* (30 June 1990, Canberra), p 14. The relevant provisions are ss4 and 5 and Schedules 1 and 2 of the *Subordinate Legislation Act 1989*.

⁶⁹ Ganz, G, *Quasi-Legislation : Recent Developments in Secondary Legislation* (Second edition) (1987, Sweet and Maxwell Limited, London), pp 37-8.

accountability to the Parliament and the further problems which that lack of accountability involves. The executive arm of government still ends up making the laws (or the quasi-laws) instead of the Parliament. In any event, consultation matters little unless those doing the consulting actually listen to and act on the responses that they receive.

Publication

As has been discussed in Chapter 4 above, the inaccessibility of quasi-legislative instruments is a fundamental problem, both in practical and conceptual terms. Instruments that are tabled in the Parliament are published to the Parliament and become public documents as a result. Instruments which are subject to disallowance by the Parliament are, in addition, scrutinised by the Senate Standing Committee on Regulations and Ordinances, which may be considered as a form of enhanced publication. Instruments that are subject to neither requirement need be published to no-one. Anything that can be done to ensure the publication of such instruments can only assist.

It has been suggested that one way of achieving this would be to make *all* such instruments Statutory Rules. In a paper delivered to the Third Commonwealth Conference on Delegated Legislation, Senator Patricia Giles, then a member and now Chair of the Senate Standing Committee on Regulations and Ordinances, said:

There are no compelling reasons why all delegated legislative instruments should not be treated similarly to Statutory Rules.⁷⁰

Mr Peter Bayne has also plaintively argued that, as a matter of law, many such instruments should, because they are legislative in character, be published as Statutory Rules.⁷¹ His arguments rely on the intersection of certain provisions of the *Statutory Rules Publication Act 1903* and the Rules Publication Regulations 1913. Mr Bayne also put these arguments to the Senate Standing Committee on Legal and Constitutional Affairs in the context of its inquiry into debt recovery under the *Social Security Act 1847* and the *Veterans' Entitlements Act 1986*.⁷² The Committee showed an interest in Mr Bayne's arguments, though it did not take them up.⁷³

The first thing to note about Mr Bayne's suggestion is that 'disallowable instruments' for the purposes of the *Acts Interpretation Act 1901* are specifically exempted from the relevant provisions of the

⁷⁰ Giles, P, 'Scrutiny of Federal quasi-legislation in Australia', in Third Commonwealth Conference on Delegated Legislation, *Record of Proceedings* (1990, HMSO, London), Appendix 5, at p 124.

⁷¹ Bayne, P, 'The publication of delegated legislation', (1989) *Australian Law Journal* Volume 63, p 355, at pp 357-8.

⁷² Senate Standing Committee on Legal and Constitutional Affairs, *Debt recovery under the Social Security and the Veterans' Entitlements Act* (*Journals of the Senate*, No 20, 22 August 1990, p 228), pp 67-8. See also *Evidence* at pp 337-8.

⁷³ Senate Standing Committee on Legal and Constitutional Affairs, *Debt recovery under the Social Security and the Veterans' Entitlements Act* (*Journals of the Senate*, No 20, 22 August 1990, p 228), pp 67-8.

Statutory Rules Publication Act.⁷⁴ Second, though the publication of all such instruments as Statutory Rules would no doubt be an improvement, it would no doubt cause what the bureaucracy would regard as 'unacceptable' delays and cost a great deal of money. As such, it is likely to be vigorously opposed by the bureaucracy. Nevertheless, though the suggestion does not address *all* the problems caused by quasi-legislation, it is worthy of further consideration.

Similarly, the establishment of an Australian equivalent of the *Federal Register* might offer some hope. The United States *Administration Procedure Act* also provides for the creation of a central register of the rules in relation to which it imposes publication requirements. Those rules are actually published in the Federal Register. Though the Senate Procedure Office's *Delegated Legislation Monitor* fulfils a similar purpose, the formal establishment of a register similar to that which exists in the United States has some merit. Indeed, one of the preliminary proposals arising out of the Administrative Review Council's rule making project is that such a register be established in Australia.⁷⁵

Summary

All of the possible innovations touched on above all involve at least some degree of improvement on the current situation. They all address aspects or symptoms of the problem, which is that legislative and quasi-legislative instruments should receive appropriate scrutiny. While none of the options or developments discussed can be regarded as a complete solution, incremental improvements may, in the final analysis, offer the only practical possibility of progress.

⁷⁴ *Acts Interpretation Act 1901*, s46A(1)(c).

⁷⁵ Administrative Review Council Secretariat, 'Report on submissions and preliminary proposals', paper presented at Australian Institute of Administrative Law/Royal Australian Institute of Public Administration '1991 administrative law forum', held in Canberra on 29-30 April 1991.

Chapter 8

Conclusions

Despite having been a matter causing concern for over 40 years, quasi-legislative instruments continue to flourish. What is more, they flourish largely unchecked.

By far the majority of quasi-legislative instruments are issued with the express authority of Acts passed by the Parliament. Committees such as the Senate Standing Committee for the Scrutiny of Bills will continue to draw Parliament's attention to provisions which encroach on the power of the Parliament and which interfere with the rights of individual citizens. On this basis, the Scrutiny of Bills Committee has often drawn attention to provisions which allow for promulgation of quasi-legislative instruments.

However, as things stand, the Scrutiny of Bills Committee can do little more than draw attention to such provisions. If the use of quasi-legislative instruments continues to increase, it does so because the Parliament allows it to happen. Unless there is a fairly dramatic change in the attitude that the Parliament, in particular, has adopted in relation to these instruments, parliamentary scrutiny has little to offer as a means of controlling the use of quasi-legislation.

In addition, doubts have been expressed about the capacity of the Parliament to cope with ever-increasing volumes of legislative and quasi-legislative instruments. Ultimately, the burden is placed on committees such as the Senate Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances. Therefore, if the Parliament adopts a more rigorous approach to quasi-legislation it must also re-evaluate its own processes for dealing with quasi-legislation.

The bottom line must be that *all* instruments, whether they be legislative or quasi-legislative, must receive the *appropriate* scrutiny by Parliament. Anything less involves a derogation of the power of the Commonwealth Parliament as the supreme law making body in Australia.

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