



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE ON REGULATIONS AND
ORDINANCES

Reference: Legislative Instruments Bill 2003

WEDNESDAY, 17 SEPTEMBER 2003

CANBERRA

BY AUTHORITY OF THE SENATE

SENATE
STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Wednesday, 17 September 2003

Members: Senator Tchen (*Chairman*), Senators Bartlett, Marshall, Mason, Moore and Santoro

Senators in attendance: Senators Bartlett, Marshall, Mason, Moore and Tchen

Legal Adviser: Professor Stephen Bottomley

Terms of reference for the inquiry:

That the provisions of the Legislative Instruments Bill 2003 and the Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003 be referred to the Standing Committee on Regulations and Ordinances for inquiry and report by 3 October 2003, with particular reference to:

- (a) the scope of the exemptions contained in the bills;
- (b) the mechanisms contained in the bills to improve the quality and transparency of legislative instruments; and
- (c) parliamentary scrutiny of legislative instruments and the impact of the bills on the work of the committee.

WITNESSES

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Committee met at 3.31 p.m.**ARGUMENT, Mr Stephen, Clayton Utz, Canberra****PEARCE, Professor Dennis Charles, Australian National University, Canberra**

CHAIR—Welcome. I declare open this meeting of the Senate Standing Committee on Regulations and Ordinances. This is the committee's second public hearing on the provisions of the Legislative Instruments Bill 2003. I remind witnesses that the evidence given to the committee is protected by parliamentary privilege. I also remind witnesses that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. If at any stage a witness wishes to give part of their evidence in camera, they should make their request to me as chair and the committee will consider that request. Should a witness expect to give evidence which reflects adversely on a person, they should consider giving their evidence in camera. I now invite you to make a short statement which summarises your views on the bill. At the conclusion of your remarks, I will invite members to put some questions to you.

Prof. Pearce—I will speak briefly on behalf of myself and Mr Argument, then we would be very happy to answer any questions that you put. Whether we can provide you with the answers is another question, but we will do our best to tell you the way in which we think this bill should be operating or may operate. We are both very strongly supportive of the enactment of this legislation. We think that it is one of the essential steps that needs to be taken to enable legislation to become more readily available to the people at large. We think that the procedures that are established by the bill cannot but help to present a better package of delegated legislation than exists at present. Much of what we say and what we see in the bill should be looked at in comparison with what exists now. While it may be thought that there could be other things put in the bill, if you weigh them against the present situation, it is very much our view that this is so much better than what exists now that it should be given a very sympathetic hearing.

I will just deal with what I see as the three primary areas with which the bill deals. First of all, there is the register of legislative instruments, which we see as the key element of the operation of the bill. We think that that is an important step forward in making legislation available both to the public and—as is not often mentioned—to the government because, very frequently, governments themselves, or all areas of government, are not familiar with the total range of legislative instruments that are in existence.

To give you an example of that, I had to do an inquiry for the department of transport which involved searching through a number of files. Buried deep in one of their files was the essential legislation on which the whole scheme that we were looking at was based. There were the ministerial determinations. There they were duly spiked and stamped and folio numbered. I do not think anybody would have ever found them again if it came to a test. They were just simply buried in the departmental files. Their significance had not really been recognised. They would, under this legislation, have had to have been put on the register. That is where they should have been. I just wonder in how many other files scattered throughout government departments there is like legislation that has just got tucked away. So we think that the establishment of the register will impose a discipline on public servants who are involved in legislation which currently is lacking and which really does need to be there if legislation is to be given its rightful place. That is the first element of the bill which, as I say, we strongly support.

We think that the broadening of the range of instruments that is given parliamentary oversight, which will come through this legislation, is highly desirable. At the moment it is a catch-as-catch-can exercise. While the position is not as bad as it used to be when only regulations were looked at by the committee, now of course there is a very substantial range of instruments that are examined; but they are chosen almost, it appears, at random and you certainly do not get the opportunity to scrutinise the full range of instruments that are relevant to and having effect on the community. So we think that is a highly desirable change.

The third major change is in relation to sunseting. We think too that that, as an issue of principle, is something that should be endorsed and that the proposal that is included in the bill is a satisfactory way to do it. The bill may not be perfect in the eyes of everyone; we would readily concede that. There are bits and pieces that, if one had the chance, would be cast into maybe a different form. But, as I said at the beginning, its advantages so outweigh the present situation that our position is that it should be enacted and, if it is found to be wanting, it can be finetuned in the future. This is of course the fourth foray into this area. It would be a great shame if the opportunity were lost for the imposition of this new regime at the Commonwealth level. That is all I wanted to say. Mr Argument, did you want to add anything?

Mr Argument—No, I have nothing to add.

CHAIR—Thank you. Perhaps I could ask you a couple of questions first about some of the issues which I came across in your written submission—which the committee thanks you for making. You stated in your written submission that you support the general reforms, as you just noted, but you further stated specifically that:

... the Commonwealth currently lags behind the majority of Australian jurisdictions in relation to the key issues that the Bill seeks to address.

In my limited experience, in talking to many state colleagues, I generally get the impression—I am not sure whether I was being flattered—that the Commonwealth, in terms of transparency in legislation and also in the scrutiny of legislation process, is generally ahead of most state parliaments. That could be a wrong impression. I wonder whether you can give us a quick run-down on the situation in Australian states and territories?

Prof. Pearce—Mr Argument wrote the submission and I am duly grateful to him for having done an enormous amount of work in putting it together. It is probably best that he should speak in relation to the matters that you raise. I will mention at the outset that I think there is a world of difference between the scrutiny processes and the other issues that are dealt with in the bill. Whilst I think you have been not improperly flattered as being at the forefront or near the forefront in relation to scrutiny, in the other matters—that is, presentation, sunseting and so forth—I think the Commonwealth is far behind. But Stephen is the person to talk about that.

Mr Argument—There are several parts to the answer. The first issue is that, as Dennis said, the capacity for regulatory impact statements, however they are named, exists only in the ACT, New South Wales, Queensland, Tasmania and Victoria. It does not exist at the Commonwealth level. The Commonwealth will be quick to point out that the Office of Regulation Review conducts regulatory impact processes, but that has no statutory basis and parliament does not really have a role in it. The second issue is sunseting. Currently, sunseting occurs only in New South Wales, Queensland, South Australia, Tasmania and Victoria. I think we put in the submission the figures from New South Wales about the effect of sunseting in that jurisdiction on the volume and number of statutory rules that are promulgated in that state.

There are two further issues. The first of those is the issue of an electronic register of instruments. As far as I can tell, the only other jurisdiction that has such a register is the ACT. I am quite happy to talk about it more as we progress, but that jurisdiction might well offer you some insights into how an electronic register works and to what extent that actually gives you better or worse access to legislation.

The last difference is one that I would say is a positive one for the Commonwealth sphere in the sense that, in my view, one of the most significant features of this version of the Legislative Instruments Bill in particular is that the regime of publication, tabling, disallowance and so on that this bill would apply operates on the basis of what an instrument does, not on the basis of what it is called. So, if an instrument is legislative in effect, the regime applies. That, in my view, is unique as against all the jurisdictions. As the committee is probably aware, the Victorian parliament's Scrutiny of Acts and Regulations Committee recently did a comprehensive inquiry into their legislation. The fundamental defect of that regime, in my view, is that it still only operates in relation to something that is called a statutory rule. However, what is proposed in the Legislative Instruments Bill is that it will operate in relation to the effect of an instrument, not what it is called. So, in that sense, if this legislation were enacted, the Commonwealth would certainly be leading the way in that respect.

CHAIR—That is a very good reason! Professor Pearce said that there are three particular areas in which you think the bill is quite important. The first is that it broadens the scope of where the regime actually applies. However, one of the issues that the committee and some others have some concern about is the exemption situation. Clause 7 exempts a number of instruments from the bills. Can you perhaps take us through the approach to exemption in the 1996 bill, which I understand you are probably familiar with? Do you have a view on whether all of the categories of instrument to be exempted in this bill are appropriate? Do you think that it is appropriate that the Attorney-General should be able to add instruments to the exemption list by regulation?

Prof. Pearce—Again, I will ask Mr Argument to speak to that, because he did the hard work of identifying all of them and making comments about them. By way of preliminary comment—I always have to have my two bob's worth before he gets a chance—I was one of the principal authors of the 1992 rule-making report by the Administrative Review Council, and we recommended that there be no exemptions. I think that is an ideal position. I can see that arguments can be put that there should be some exemptions, particularly when they

operate on the internal workings of the Public Service, the Defence Force or something like that. As I say, Stephen has done the hard work, so I will refer the question to him.

Mr Argument—The answer to your question is basically that, in formulating the submission, while I have had a look at all the provisions identified in the bill to see what instruments are provided for, given the volume of exemptions and given that some of these instruments relate to very specific and technical areas of the law, I have not been able to form a view about whether the particular exemptions are justified in all cases. In our submission, we have said that, if the committee or anyone else have concerns about the scope of the exemptions, it is really up to the proponents of the bill and the agencies involved in making the exempt instruments to put the case for the exemptions.

I would like to stress, as Dennis said at the outset, that one of the beauties of this bill is that it is going to capture a whole lot of instruments that currently are not subject to any sorts of publication requirements, tabling or disallowance. Secondly, I would like to stress that by exempting instruments specifically, by definition the particular instruments that will not be subject to the various regimes will be identified to you. In a sense, that identifies the problem. I am not saying that it is a problem, but it identifies where the problem areas might be. I think that is a great advantage, but I cannot give you an instrument-by-instrument analysis of whether or not that is appropriate.

CHAIR—I am not seeking that. Thank you. I welcome to the inquiry Professor Stephen Bottomley, the legal adviser of the committee. I invite my colleagues to ask some questions.

Senator MARSHALL—Professor Pearce and Mr Argument, you are both obviously very qualified to make the submission; but what I have missed, if you will excuse my ignorance, is what your interest in this area is.

Prof. Pearce—In a way, it goes back forever.

Mr Argument—Not in my case!

Prof. Pearce—It does—ever since I taught you! I was a parliamentary drafter before I was anything else—a very junior parliamentary drafter—and I taught courses that involved delegated legislation. I then wrote a book on it. That was the first edition, and Mr Argument joined me on the second edition, so it is now a joint production. I was the initial adviser to the Senate Standing Committee for the Scrutiny of Bills. A long time ago, I also filled in for 12 months or thereabouts as an adviser to the Senate Standing Committee on Regulations and Ordinances. So I guess that I have been around delegated legislation for so long that I hardly know how to live without it—which is why I want this legislation.

Senator MARSHALL—So you have followed all the proposed bills from 1992 up until now?

Prof. Pearce—Yes. As I said, in a sense I wrote the report on which the first bill was initially based.

Senator MARSHALL—This bill does not provide for the disallowance of part of an instrument. Do you think it should?

Prof. Pearce—It does not? I thought it did.

Senator MARSHALL—No.

Prof. Pearce—Can we have a look? I was rather pleased when I thought I saw it there.

Senator MARSHALL—Your 1992 report—and I did not know it was yours—says that it should.

Mr Argument—Clause 42(1) of the bill seems to be a provision that allows partial disallowance, in the sense that it allows for motions that disallow a legislative instrument or a provision of a legislative instrument. I thought the same as you, Senator, but when I was looking at this again today I thought, ‘Isn’t that what partial disallowance is?’

Senator MARSHALL—Do you think that needs to be made clearer or, in your view, is it satisfactory?

Prof. Pearce—I thought ‘provision’ was probably being used as a very neutral, broad term. While we are familiar with regulations, you could have said that a regulation can be disallowed, but when you get into the other forms of instruments, they take all sorts of funny forms. ‘Provision’ is probably as convenient a breakdown word as one could use. I am not quite sure what else you could say. If you use the word ‘part’ it may be constrained to something that is called a part, because lots of legislation is, of course, divided formally into part 1, part 2, part 3, and it might be misconstrued. I think ‘provision’ is probably as good a neutral word as you can get. And I am strongly in favour of the idea of disallowance of a provision.

Senator MARSHALL—Clause 43 of the bill enables a disallowance motion to be deferred for six months to enable an instrument to be amended or remade. You might be aware that the Clerk of the Senate, Mr Harry Evans, has described this provision as positively dangerous and suggests that the current disallowance provision should be retained. What is your view on that?

Prof. Pearce—I saw what the Clerk said. When we did the initial report, we thought the approach could be to not defer the disallowance provision but defer the regulations so they could be rethought through and brought back again after a lapse of time. That is not the direction in which this has gone. I assume that the thinking underlying this provision is to allow the committee to keep pressure on ministers to honour their undertakings, which, of course, has been a significant issue in terms of whether they do give effect to their undertakings.

CHAIR—We do that by giving notice of disallowance.

Prof. Pearce—Yes, and I would have thought that was enough. That has you operating within a 15 sitting days period. I assume, and certainly in the past that 15 sitting days has not been regarded as long enough for the minister to attend to the matter, and so the committee has agreed to allow it to be dealt with the next time the regulations are being amended, which might be in six months or 12 months time. The committee has been content to accept that approach. I assume that, under this provision, the advantage was seen to be that it kept the pressure on the minister to do something, as the disallowance motion is only deferred not withdrawn. The matter, as a matter of course, will come back into the fray. I agree with the Clerk that the reference in clause 43(2) to the renewal motion having to be made at the end of the first sitting day after the deferral period is over is questionable for the reasons he gives—there could be all sorts of reasons why it might be difficult to adhere to that.

I think we are probably better off without this provision altogether. But that does leave the possibility that a minister may give an undertaking leading to the withdrawal of the notice of motion, and then the undertaking will not be honoured. This, at least, enables the committee to keep pressure on a minister who is not acting within a reasonable—and it is now quite a substantial—length of time to honour an undertaking. That is the good side to it. The downside to it is that it has this first sitting day limitation.

Senator MOORE—I turn to the issue of the resources needed. Your submission, Mr Argument, particularly raised a point that is of interest to me:

We wholeheartedly endorse the sentiments behind the imposition of these obligations on the Secretary. Clearly, however, the obligations will only be able to be properly met if sufficient resources are provided to carry them out.

That is such a significant point in terms of the whole process. Have you turned your mind to the volume of resources that would be required to implement this particular change?

Mr Argument—Other than being aware that obviously a significant volume of resources would have to be made available, not really; no. I think that that is really something for the Attorney-General's Department. Clearly, it would be significant, if the bill is to be given its full effect in that respect.

Senator MOORE—Also, there is the ongoing maintenance.

Mr Argument—Indeed.

Senator MOORE—We had considerable discussion last week about the maintenance element to this. There is the threshold, inaugural work of getting the register up, and from then on there is the maintenance process. Professor Pearce, I am interested in the point you made about finding the piece of legislation on the file. I have a gut feeling that that is happening all over the Commonwealth, particularly in some departments which I will not name.

Mr Argument—I will give another practical example. I worked for six or seven years in what is now called the Department of Family and Community Services. That is a department where there is a great system, because a particular person looks after these sorts of instruments. They are all kept and properly looked after; you could find an instrument if you were looking for it—and if you knew which person to go to, of course. My suspicion, from having dealings with other Commonwealth departments, is that the Department of Family and Community Services is the exception and not the rule. So I think that your gut feeling is right.

Senator MOORE—In terms of the workload, just getting the inaugural register accurate is something in the three-year period that will involve going back and—there is a verb they use which I have lost—gathering all the old legislation. The other point we discussed was that, as we live in a national system, we are now getting the register put together for the federal legislation and historically making that accurate. I asked a

question about the ability to cross-reference state databases. That is not in the current thought; it is not in the current work plan. I would be interested, as you are both working in this field, to know whether you have any views on that. In a perfect world, should there be an ability to trace legislation and assess how it would cooperate on issues with state legislation?

Mr Argument—Again speaking from experience in the Department of Family and Community Services, that department has put in place a system for their legislation where the electronic version of the social security legislation has electronic links to it. Where a provision involves a power of delegation, you can click on it, and it will take you to the instrument of delegation so that you can work out who has been delegated power. Another link will take you to the history of the provision; another link will take you to the case law on a particular provision. So, clearly, the sort of system that you are talking about is possible. I know that the system operating in FACS is very expensive, labour-intensive and so on, and I imagine that what you are proposing would be enormously expensive and enormously labour-intensive. There is no reason, given the work that is being done on electronic access to legislation now, that you could not do something like that. But it would be a big job.

Senator MOORE—I would think that your example is particularly relevant in terms of cross-referencing of COAG arrangements. Particularly in the area of family services, so much state legislation is involved with decisions that come from the federal area. But it is a long-term thing. Another thing we talked about last week—and I need to have this reinforced because I am grappling with it—is the Henry VIII provision. Your submission mentions that in three or four different places and I am still having trouble working my way through that. You actually point out that it concerns you in the process of this legislation, so if we could get some information on that it would be useful.

Mr Argument—Professor Pearce and I did talk about this yesterday again. Fundamentally, for committees such as this, Henry VIII clauses are a bad thing. But the point that Dennis made to me was that, if you have a provision that allows you to amend primary legislation by delegated legislation, the simple fact is that this committee has the chance to scrutinise it and the Senate has the chance to disallow the regulation. So in that sense, while Henry VIII clauses are a bad thing, it is not as though they are absolutely uncontrollable. There is still that capacity to scrutinise and disallow them.

Senator MOORE—So it is a professional view more than anything else that you are not happy with it?

Mr Argument—No; it is almost like an in-principle objection.

Senator MARSHALL—You come through very strongly with your support for the bill both verbally today and in writing, but you did say, Professor, that if you had the opportunity you may cast some elements in a different form, or words to that effect. If you had that opportunity, what would those elements be?

Senator MOORE—He might like another think about that.

Prof. Pearce—I do not think I should mention them! The consultation processes are more constrained than they were in the very first version and than were recommended in the report. I think that is probably the most obvious item. I will refresh my memory on the bill itself. Probably the one thing that pleases me most of all is the very good side of the legislation, the fact that it back-captures, it picks up old legislation and brings that onto the register. There was always a worry that that would not happen; that it would only be a forward-reaching register and, if that had been the case, it would have lost a lot of its value. But that is certainly there. I think it is only on consultation that it has departed quite substantially from earlier versions.

Senator MARSHALL—Mr Argument, what would you change if you had the opportunity?

Mr Argument—Consistent with what Professor Pearce has said, I am reluctant to point to anything in this bill that might possibly hold it up. But one thing I would point to is that I think the provisions dealing with public access to the register and the explanatory material accompanying the bill that deals with public access to the register are much less. Not that there was much detail in relation to the previous versions, but there is less detail in relation to public access than there was in the previous versions of the bill. Obviously, our concerns about the problems that this bill would address are not just about people like us getting access to legislation. We think the general public needs to be able to have access to it too, so the public access point is a very significant one. As I indicated at the outset, I do recommend to the committee that it looks at the Legislation Act 2001 of the Australian Capital Territory to see how that deals with public access. That legislation is also fairly brief about public access, but in talking to the ACT parliamentary counsel, John Leahy, he explained to me in some detail the mechanisms they have in place to ensure that the general public are not disadvantaged and that the public have access to legislation by electronic means, not by paper. Indeed,

in my discussions with Mr Leahy yesterday, he pointed out some real advantages in making the legislation available in this way that possibly one would not think of at the outset.

Prof. Pearce—I do recall the other one that troubled me. It was clause 41, which relates to incorporated material. I have always been strongly of the view that, if an instrument incorporates non-tabled material, it should be tabled with the instrument. When we were dealing with that as an initial concept, we were told that there could be occasions when the incorporated material might fill this room, particularly in the area of air navigation material—

Senator MOORE—More than likely.

Prof. Pearce—Yes, because it relates to manuals for how to build planes and things like that. But it seems to me at the end of the day that clause 41 is a bit of a tail-wagging-the-dog result. Because there are a few oddities where the material to be incorporated is of such an unwieldy kind that you would not want to see it, you end up with a provision effectively saying that no incorporated material needs to accompany the instrument. I would have preferred it to be the other way around and that, if they were special cases, they would be concluded in the relevant legislation—that is, you would have an amendment to the Civil Aviation Act which says the tabling provisions relating to regulations that incorporate material do not apply to civil aviation regulations or individual ones. What you have here is a reaction to the difficult case dominating the normal case. Having said that, I would not want you to say clause 41 should not be and send it back to the House of Representatives seeking a change. I would have thought that is something that should be looked at in the future when the bill is being considered.

Senator MARSHALL—We are going to have to amend it. That is our role.

CHAIR—Thank you, Professor Pearce. Do you have any last word, Mr Argument?

Mr Argument—No, thank you.

CHAIR—Thank you both for your evidence today and for your previous submission.

[4.08 p.m.]

GRIFFITHS, Mr Richard David, Managing Director and Head of Bureau, Capital Monitor Pty Ltd

CHAIR—Welcome. You have previously made a submission; thank you for that. I would like to remind you that the evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. If at any stage you wish to give all or part of your evidence in camera, you can make the request to the committee and we will consider it. If you wish to give evidence that might reflect adversely on a person, you should consider giving that evidence in camera. I now invite you to make a short statement in addition to your submission, which might summarise your views on the bill, at the conclusion of which the committee might ask you additional questions.

Mr Griffiths—My letter to the committee was not initially intended to be a submission on the bill as a whole; it was really addressing a number of ongoing issues regarding gazettal et cetera. I do, however, have some general views on the bill which I might put to the committee. The first one is the issue of sunseting that is addressed in the bill. Our company, which is a media organisation, also looks at New South Wales material—among other material—and we find that the value of sunseting as a regular procedure is questionable.

The natural response of any prudent or cautious public servant will be to seek to renew any instrument, anyway, and I doubt that anybody would be prepared to deny them that. The New South Wales government uses sunseting, and the result is that every September we see enormous *Gazettes* come out where they promptly republish all the instruments that were due for sunseting. I know there has been a series of cullings going on in New South Wales, but I would suggest that that is where the true sunseting occurs—that they brought this process into force and had to keep looking at it after the legislation came into force.

We have that in the bill here: there will be a period for registration. That will provide the natural culling of legislation but, after that, I would suggest that very few public servants would want to sunset any of the regulations or power that they have. I would expect to see sunseting occurring within the text of instruments—that if an instrument is only intended to apply for a particular period then it would have a termination date somewhere within the instrument. The disadvantage, of course, of sunseting is that you can have regulations and other instruments accidentally going off the statute books due to an error within the department.

I felt another major point was the drafting issue. The normal wording of amendments that we see are such things as ‘ss123(b): delete \$429, insert \$431’, and quite frankly that belongs to the age of vellum, quill pens and pen knives, where you would scratch out the ‘29’ and write in the ‘31’, or to the days of Morse code, when you were trying to send tiny little bits of information which would turn an entire battle fleet the other way. We could just as easily publish by putting out complete replacement instruments every time. You would just need to have the changes highlighted and linked to any explanatory material, and each replacement would automatically replace its predecessor. I do not think that is being looked at, at this stage. It is unfortunate, I think; it has missed the opportunity provided by electronic publication.

The third point that I would make is on publication media. The bill, as far as I can see, actually adds another level of complexity in publication. First of all, we have to look in the register for legislative instruments. We still need to look in the various gazettes for non-registrable instruments, plus, somewhere—presumably on web sites—we have to look for instruments that have attracted an Attorney-General’s conclusive certificate that are not required to be actually gazetted. Then we still have to look back in the *Gazette* again in case a legislative instrument was made when the Federal Register of Legislative Instruments was down, because there is a provision that when the register is down they can gazette an instrument.

The bill, as drafted, does not make it clear where anything will be published—there are places where it might be published, but it does not say where it has to be published, except for the actual legislative instruments themselves—so first of all the public would need to know or interpret what they are looking for and then they would need to know the system as to where it might be put. In my letter, I was addressing in some detail the gazettal system. I do not know whether you want me to talk about it now or whether you would prefer to bring it up in questions?

CHAIR—I think perhaps we will bring it up in questions because your previous letter raising issues with us did pique the committee’s interest in this matter. If that is your opening statement—

Mr Griffiths—Yes.

CHAIR—then perhaps I can have my colleagues ask you questions.

Senator MASON—Mr Griffiths, I note you are from Capital Monitor. What sparked your interest in this debate?

Mr Griffiths—This is our business. We are looking through these, as well as everything that you senators say—

Senator MASON—I am glad someone does!

Mr Griffiths—and providing that to our subscribers, so our subscribers are obviously very keen on knowing when, say, superannuation industry supervision regulations are amended et cetera.

Senator MASON—So you are a specialist and involved commercially in the provision of information regarding legislative instruments?

Mr Griffiths—Yes.

Senator MASON—In some cases you found it difficult to monitor them and to track down when legislative instruments were being passed?

Mr Griffiths—Not so much legislative instruments. Statutory rules were fairly easily covered and we were across those. It is the other varied sorts of instruments. Having all been published initially in one government gazette, they gradually started to spread out and appeared in different gazettes. It was not until I saw the Attorney-General's letter, which the committee has seen, that I realised this. They never actually told anybody that they were authorising various departments and agencies to publish their own gazettes.

CHAIR—Professor Pearce said earlier that one of the three great things about this bill is the register and that the scope has been broadened to capture a lot of things that you are concerned about. We will have a short break, because there is a division in the Senate.

Proceedings suspended from 4.16 p.m. to 4.25 p.m.

CHAIR—We will resume the hearing.

Senator MASON—To summarise: you are an expert in the techniques of tracking this material down. Your clients demand it and you are involved in a commercial enterprise. Yet in fact you had difficulty in fulfilling all their commercial wishes.

Mr Griffiths—We do with the present system, yes.

Senator MASON—You mentioned before that with electronic publication you could reproduce the entire legislation or the statutory rules or whatever each time there was an amendment and you could highlight the amendment—

Mr Griffiths—That was my thought. That would make things very much simpler for everybody and that would be the instrument.

Senator MASON—Okay. But you are not suggesting that be done on hard copy—

Mr Griffiths—People will still print it in hard copy. Right now people are taking amendments, which they receive in soft copy, and printing out hard copies or trying to make electronic amendments with whatever version they have got. Normally they end up having to do a print job and then scribbling out and making the amendments in pen script and then checking what that means for them. That is what has been going on.

Senator MASON—So the cost, in a sense, of reproducing the material electronically is nil really, isn't it?

Mr Griffiths—Approximately, yes.

Senator MASON—Finally, you mentioned in your opening remarks about when the register is down. Just remind me, what is the process there? If the register is down—

Mr Griffiths—In the bill somewhere it says that if it is down they will still publish a notice in the *Gazette*, or I think they will actually publish the instrument in the *Gazette*. That will then form the instrument. That will provide the date of its making and therefore you still need to be able to watch the *Gazette* even for legislative instruments.

Senator MASON—Do you have a better suggestion than that?

Mr Griffiths—My suggestion would have been that the making of all instruments needs to be gazetted—legislative ones as well. In other words, the *Gazette* should show the whole lot and obtaining copies then becomes a somewhat simpler process. It is a more easily verifiable process.

Senator MOORE—A couple of points that you raised were taken up with Attorney-General's and there was ongoing discussion. In terms of amendments I have always found it frustrating as well getting one of those unintelligible one-liners that you were supposed to work through. Can you give us a practical example of the situation you described in terms of the frustration of gazettes and legislation? You talked about the processes and the steps you had to go through to try to find something. Have you got a real example that you can tell us about so we can see how it works?

Mr Griffiths—In the current system?

Senator MOORE—Yes.

Mr Griffiths—I suppose the business I referred to was—

Senator MOORE—It is just useful for the record to have a real experience that you had to work through.

Mr Griffiths—to deal with the ASIC class orders. I am not sure whether the committee is aware of the background, but when Tony Hartnell became the head of ASIC, or formed ASIC, he decided that they were not going to rely on the *Gazette* because he considered the gazette process of putting out their policies too slow and cumbersome. So he contracted to a private legal publisher to actually do their ASIC *Digest*, and this was to be the principal point of publication. They were therefore required by the act to nevertheless gazette their instruments, but they were using the *Digest*.

Senator MASON—Privately?

Mr Griffiths—They were privately funded. I do not know whether they were sharing the money, but I think that initially they were effectively subsidising the publisher to produce it. The publisher then turned it into a good commercial activity and that became the principal way of publishing. We take the ASIC *Gazette*, break it all up and put it on our system so we can look for documents and search it and such like. We then found that we could not identify class orders. We started to make further inquiries as to why we were not able to identify class orders in the ASIC *Gazette* and it turned out that they were not being designated as such in the *Gazette* notices. We then had further discussions with ASIC and there was an exchange of fairly heated emails.

Senator MOORE—The ones you have given us?

Mr Griffiths—Yes, and as I indicated to the committee in my letter, a class order published in ASIC's *Gazette* does not look anything like a class order in ASIC's main *Digest*. Coincidentally, yesterday ASIC simultaneously published a further amendment to that particular class order, both in the *Gazette* and on the web site, linked back to their legal publisher. I was very interested to note that, despite Ms O'Reilly's heated objections to what I was saying, they have at least on their web site version—I can provide this to the committee—now indicated when it was gazetted, which is a brand new initiative as of yesterday. So at least we have some indication of when the particular class order was gazetted, although the *Gazette* notice is still as opaque as ever.

CHAIR—Do you wish to table that document?

Mr Griffiths—Yes.

Senator MOORE—Is it your understanding that those class orders will now go onto the federal register?

Mr Griffiths—I must say that the legislation is less than clear to me. It seems to be double negative about class orders. In section 7, on page 9 of the bill, when it refers to instruments that are not legislative instruments for the purposes of the act, it talks about instruments—other than regulations and other instruments that, immediately before the commencing day are disallowable—that are made under the Corporations Act in relation to a specified person, and then it talks about a person specified by membership of a class. My reading of that is that if, therefore, it is a membership of a class then these provisions do not apply, which suggests to me that maybe they do need to be registered. I would hope they do, because they are quite significant documents and they are certainly a major exercise of legislative power by ASIC.

Senator MOORE—We will take that up with the Attorney-General's Department. The other issue is the last point in your submission: how is the accuracy and integrity of the FRLI to be guaranteed? It was our understanding after discussion with the department last week that the register is the authoritative document, so that the expectation will be that if it is on the register it is the authority. It is only if it can be absolutely proven

not to be that there is any question about it. That was one of the really strong positives of this particular bill—that there was going to be a given authority on that basis. How do you feel about that?

Mr Griffith—I understand the theory and I understand that it is good objective, but it is the mechanics of how it is going to be done. For instance, we run a web site. It is part of our business and provides a library to our subscribers and when material goes onto the system, it automatically indicates on the system when it went on. We would need to virtually re-index the whole system and change the whole system before that could be changed.

As I indicated in my letter to the committee, there was a recent occasion, in July, when a regulation went up on the FRLI register which had a wrong date—I think, because it is manually controlled. I realise that the legislation says that the Office of Legislative Drafting is required to maintain it and the secretary of the Attorney-General's is responsible for the integrity et cetera, but I am still very concerned as a private citizen, having seen some of the things that have been happening with some of the regulations, particularly regarding terrorism, that it could be convenient to somebody to say that this was on the register at a certain date or time. That could be done manually and there is no proof that it has actually happened. The register could be made automatic. It could be made quite secure. A document gets loaded in, it gets a time stamp put on it, and that could be the register. I think that would be much more positive than having a manually controlled and edited system.

CHAIR—The department told us that they have not got all the details of the register worked out yet. I think they are still in the process of planning it. Maybe that is something they can take into account. Thank you very much, Mr Griffiths, for your evidence.

[4.37 p.m.]

EVANS, Mr Harry, Clerk of the Senate, Department of the Senate

CHAIR—Good afternoon, Mr Evans. I welcome you to this inquiry. The committee has your written submission, and I thank you for that. I would simply remind you that the evidence given to the committee is protected by parliamentary privilege and I also remind you that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. If at any stage you have a wish to give any part of your evidence in camera, you can put the request to the committee and the committee will consider it. If any evidence reflects adversely on an individual, you should consider giving evidence in camera. I now invite you to make a short statement summarising your view of the bill and after that perhaps you can answer some questions.

Mr Evans—I am happy just to proceed on the basis of the written submission that I lodged, Mr Chairman.

Senator MARSHALL—You are not impressed with the new procedure for consultation before an instrument is made. Professor Pearce also indicated that he thought that was a weakness in the bill but he did not go into any details on how to fix it. I was just wondering whether you would like to expand on the matter.

Mr Evans—I think we are going backwards on consultation. As it is in the bill now I think it is entirely discretionary but if there is no consultation reasons have to be tabled. The previous procedure under the earlier bill was much more elaborate. I think there has been a giving-up on consultation by the look of things in this bill and the people responsible for the bill have just said, ‘Let’s just make it entirely discretionary and table the reasons. It is much easier.’

Senator MARSHALL—I was wondering why you think they have actually come to that conclusion. This bill has got a long history—certainly long before I was here—but I imagine those issues have been fairly well canvassed from 1992 through until now. I am just wondering why they have ignored it to such an extent.

Mr Evans—As you say, the bill has been around for a long time and has been the subject of a great deal of consultation. I think everybody is getting tired of it. I detect that behind this draft of the bill there is a feeling that it is all too difficult and we should choose easy ways out on things like consultation.

Senator MARSHALL—In your submission you also conclude that the provisions that allow a disallowance motion to be deferred for six months were ‘positively dangerous’. I think you used those words. You have indicated you would like those provisions to be removed. Do you think that issue can be fixed through redrafting or should it simply be removed?

Mr Evans—The big problem with the drafting in this new bill that was not present in the previous bill is that there is a fresh notice of motion after the deferral period and nothing is said about what happens to the old notice of motion. That is a large drafting hole in the current bill. All that is necessary to fix that is to go back to the original bill where there is the much simpler mechanism of prolonging the life of the original notice of motion. So that problem can be overcome by going back to the way it was drafted before but, as I said in my submission back in 1994 and have reiterated in this submission, I think the deferral provisions are unfavourable to parliamentary control, simply because it will always be very persuasive for the rulemaking authority to say, ‘We can’t fix this up in the 15 sitting days available; let’s put in a deferral motion, which is very easy.’ It then gets deferred and they come back after six months and say, ‘It’s all been too hard; we can’t fix up the problems. It has been in operation and we do not know of any problems. You can’t go changing it now; it is too late.’ As I think I said in my first submission, the Senate will have to be very resolute to resist that sort of approach. I think it will be used as a stalling mechanism to stall on trying to fix up problems in delegated legislation and, ultimately, escape from the threat of disallowance at the end of that period.

CHAIR—Surely, Mr Evans, you mean ‘it could be used’ rather than ‘it will be used’.

Mr Evans—I think I can pretty confidently predict that it will be used in that way. The 15 sitting days period varies. That could give you six months to negotiate a solution to the problem but, even at its shortest, 15 sitting days is a long time. It is much more salutary to have that deadline where the problem has to be fixed rather than allow it to be strung out for another six months.

Senator MARSHALL—I think it was the initial view of the committee that the disallowance of part of an instrument was not provided for by this bill. Professor Pearce and Mr Argument have a different view and suggest that section 42, subsection 1 does in fact do that. Do you have a view on that?

Mr Evans—This is the current bill?

Senator MARSHALL—Yes.

Mr Evans—The original 1994 bill said an instrument could be disallowed and then there was a government amendment to that to convert that to a provision of an instrument. I think this one now says ‘a provision of an instrument’, which gets over the problem of only being able to disallow whole instruments. It does leave the question of what a provision is. Given the enormous range of types of instruments and the way they are framed, I do not think it is possible to define it with any greater precision so that it would apply with precision to all kinds of instruments. We have always taken a provision to mean some reasonably self-contained provision that makes provision for something. I do not know that it is possible to be more precise than that.

Senator MARSHALL—Generally, I think you were critical that all the issues that have been raised as problems over the history of this bill have not been addressed in this bill. Have you got a view on why not? Are you of the original view that it is just too hard?

Mr Evans—As I said, I think people are getting tired of this bill. I do not know. I allowed myself to express some annoyance in the submission that simple little things that were raised long ago have not been fixed up, and I do not know why that is. Certainly, most of the problems that have been raised over the period have not been fixed up, including those raised in the committee’s last report on the ‘96 bill. If, for instance, there is a deliberate government policy decision that government does not want instruments arising from Commonwealth-state agreements to be subject to disallowance, that should be clearly stated and that can be tested in the Senate. That needs to be clear. In other words, if the government as a policy matter has rejected that particular point raised by the committee, that needs to be stated and that can be tested in the Senate when the bill is dealt with. Why some of the other problems have not been attended to, I do not know.

Senator MARSHALL—Professor Pearce and Mr Argument indicated very strongly that on balance they would still support this bill passing through, even though, if they had the opportunity, they might change some things. Is that your view as well?

Mr Evans—I still strongly suggest that the deferral provisions are dangerous and, as I say, they will be a charter for stalling. I would strongly recommend to the committee that those provisions not be adopted. The problem I have just mentioned of instruments arising from Commonwealth-state agreements is, I think, a potentially enormous problem. I do not believe those instruments should be free of disallowance. It means that they escape parliamentary scrutiny in every jurisdiction. They are imposed on every jurisdiction but escape parliamentary scrutiny in every jurisdiction, which is a worse situation than an instrument in one jurisdiction escaping scrutiny. I think that is an example of a problem that I would not want to see left in the bill.

Senator BARTLETT—Have you seen the submission from the Clerk of the House of Representatives?

CHAIR—No, it has not been published yet.

Senator BARTLETT—I hope you have not seen it, then! I was going to ask you to comment on it.

CHAIR—You can state the comments, Senator Bartlett.

Senator BARTLETT—I guess there seemed to be less concern in it than was expressed in yours, Mr Evans. It is a bit hard for you to comment without having seen the specifics of it. The other aspect from the Senate point of view, I presume, is that we tend to give more scrutiny, either through this committee or through occasional disallowances, than the House of Representatives does.

Mr Evans—That is perfectly true. I think it is a bit cheeky for a submission to be lodged by the House of Representatives, actually, because the history of the matter over many, many years is that the House of Representatives has not paid very much attention to delegated legislation at all. The attention paid to delegated legislation has been almost entirely in the Senate since the 1930s.

CHAIR—That is the nature of legislation, because the House of Representatives usually do not actually scrutinise subordinate legislation. Is that right?

Mr Evans—That is certainly true, yes. That is part of the situation I am referring to.

Senator BARTLETT—Have you got much knowledge of arrangements to do with delegated legislation and some of the issues contained in this bill in comparative overseas jurisdictions?

Mr Evans—I can certainly say that at the federal level in Australia we have the strongest arrangements for parliamentary scrutiny and control of delegated legislation. When last I looked at the matter, I do not believe any other jurisdiction had as strong a level of control over delegated legislation. That is not saying much. The systems in other countries have been historically very weak and my counterparts from other countries concede

that. They concede that delegated legislation is an area where legislation has escaped parliamentary control to a large extent in comparable jurisdictions.

Senator BARTLETT—It is fair to say that the number of instruments has increased fairly significantly in the last 10 years or so compared to—

Mr Evans—Yes, certainly. There has been a long-term trend upwards in the number of instruments.

Senator BARTLETT—Are there any extra resources to this committee as a consequence?

Mr Evans—The committee has not had extra resources for a long time.

Senator BARTLETT—It probably is a small issue in the scheme of things, but there was a suggestion in your submission that replacing the tabling of paper documents with electronic tabling would be a cost shifting exercise on to the Senate. Given my understanding of the stress of the Senate budget, that would probably not be overly desirable. There is that aspect and also, just in terms of the changes that are intended by the bill as a whole, whether it is likely to have implications in terms of the workload either of this committee or senators more broadly. Is it likely to make it easier for us, harder for us, more labour intensive or more resource intensive?

Mr Evans—I do not know that it will make it more difficult for the committee as such. It will make things more complex and costly for the Senate department in making sure that the legislation is there for the committee to look at. The example that I mentioned in the submission is one. If things are going to be sent electronically for tabling, we will have to print them out. Back in 1994 we were rather more optimistic about having things tabled in electronic form and keeping them in electronic form. We now know that that is not satisfactory. We are told by the experts that we should not allow records to be presented and kept in electronic form because in a number of years they will be unreadable. You have got to have proper preservation and, for reference purposes, you have to have hard copy. So, if things are sent electronically, we will be printing off multiple copies.

Senator BARTLETT—Are there other aspects in terms of the regime the legislation sets up that may have impacts in terms of resources or ease of scrutiny?

Mr Evans—Broadly speaking, the major aspect is that we will spend more time pursuing copies of these things.

Senator BARTLETT—Apart from some of the issues that you particularly pointed out, such as deferral and consultation, is it correct that you are generally supportive of the legislation?

Mr Evans—Yes, certainly. If it goes through, with the provisions which I regard as unfavourable being left out, it would certainly be a great improvement.

Senator BARTLETT—I am not totally familiar with a lot of the debates on previous versions of the bill, but there is the issue of partial disallowance, which has always been a source of interest to me in terms of how to remove unfavourable provisions without pulling out favourable ones. Without getting too much into specific instances, there was a recent regulation that government officials have specifically admitted was deliberately drafted in a way that made it impossible to separate out the good from the bad. Is there any prohibition on trying to enable delegated legislation to be amended in a word for word sort of sense?

Mr Evans—I think what you will have here will be more favourable than the current situation, where it refers to a provision of an instrument. At the moment, there is often difficulty in identifying exactly how small a part you can disallow. As I said before, the use of the word ‘provision’ is about as much precision as you can get. It is referring to a reasonably self-contained item in a piece of delegated legislation. Beyond that I think you are getting into the realm of amendment.

It has been suggested from time to time that there should be a power to amend delegated legislation, but people will object to that and say, ‘Well, it would have to be amended by both houses. You couldn’t have just one house substituting its preference for the legislation as made by the government; it would have to go through both houses,’ which would have difficulties. So, unless you go down the road of amendment in some way, I think you are always going to have that difficulty. However you attempt to define the bits that can be disallowed, I think you are always going to run into that difficulty and, undoubtedly, cunning drafters will always be trying to mix things up to make it more difficult for you. But I take a robust view of this and think that senators should more often simply say, ‘Well, you’ve made it impossible for me to separate out the bit that is objectionable. I’ll just move to disallow the whole thing and it’s up to the executive to fix the problem.’

Senator MOORE—My understanding from reading the act is that there is the provision for review within a short period of time. You discussed your concern about the deferral aspects. Using the review process could well be a mechanism—if, in fact, what you have described as a danger has occurred—to enforce the change, rather than holding the legislation at the moment, because there seems to be almost an aura of desperation about getting it through this time. Goodwill has been surpassed by desperation to get it up. Given that, how do you feel about using the review mechanism as a methodology to pick up the issues?

Mr Evans—Once you allow some of these provisions through onto the statute book, it then takes a bill through both houses to change them. Once you get them on the statute book it is very difficult to change them. If the deferral provisions are a charter for stalling, as I predict they will be, then that makes it even less likely that you will get them changed. If they become very useful for rule-making bodies to stall and outwit the disallowance process, then that makes it all the more certain that they will stay on the statute book and you will never get them changed. It is always very unwise to pass something that is unsatisfactory on the basis that it can be fixed up later.

CHAIR—This is probably an appropriate question to come from the chair. Mr Evans, the Administrative Review Council's 1992 report, which first recommended a legislative instruments bill, noted that passing it would involve making changes to the terms of reference of the Senate Standing Committee on Regulations and Ordinances—for example, the committee was going to be asked to look at the adequacy of consultation. Do you have any views on the implications of the bill for this committee and its terms of reference?

Mr Evans—I would be very wary of changing the terms of reference of the committee. If this bill were to pass, I think it would be wiser to leave the terms of reference as they are and see if any problems turn up. I think changes to the terms of reference of this committee should be very carefully considered and not made on the run.

CHAIR—Thank you. Professor Bottomley is the legal adviser to the committee. Professor, do you have any questions to raise?

Prof. Bottomley—I turn to the concern in your submission about incorporation of material. This is a concern that has been raised by other submissions. I just wondered what the concerns are from your perspective.

Mr Evans—There is a provision in here that states that either house can send for something that is incorporated by reference, but I am sure that you will get the answer that whatever it is exists only in electronic form. They will say, 'It's far too big to give it to you. It changes too often to give it to you in hard copy. We can send it to you electronically, but it's very big and you won't understand it. The people in the field understand it, but'—et cetera. I think that you are getting into the realm there of something that has legal effect not being accessible, understandable and available. That should be resisted.

You always run the risk here of appearing to be an antitechnological troglodyte by saying these sorts of things and not accepting that having something in electronic form somewhere is a perfect substitute for other access to it. But you have to be wary of technology being used to make legal documents more obscure and less accessible. There is the problem that they can be readily changed and can change more frequently. As I said in the submission, you get problems with accuracy and correctness. I am quite sure of this: if we have things sent to us electronically for tabling, there will be problems with printing them out in an accurate form and problems with errors occurring between composition, dispatch and printing. You will get disputes like: 'That's what the printed version the senator was looking at said, but that's not what's actually in the electronic version'—and so on. There are great problems there which have not really been thought through.

Senator MOORE—Do you have errors now with the printed version? When they are tabled in a printed form is there an error rate?

Mr Evans—We do not really know that, because in effect what is tabled is the instrument. If there is a dispute about what the instrument actually said, that is easily settled: 'Here is the tabled copy; that is the instrument. That is what it says.' But with going from electronic copy to hard copy there are very often errors. There was an amusing one in of all things the Parliamentary Privileges Act 1987, which is a very important statute for us around here. One part of the statute said: 'If ABCD, then WXYZ'—the usual sort of provision. In the electronic generation of the statute, the last phrase of the 'then WXYZ' was tacked onto the end of paragraph D. So it looked as if it was only a qualification on paragraph D, not a qualification on 'ABCD', which changed the meaning in the statute. It was some years before we picked that up, but it was purely one of those electronic errors: the computer not recognising a return and running something on that was not intended

to run on. I can see a situation where courts and lawyers are reading the Parliamentary Privileges Act, and they have this electronic version or printed copies generated from the electronic version, they think that that is what it says because of this error in it, and they make errors.

CHAIR—Do you mean to say that for years it has made no difference to the running of this place?

Mr Evans—The people who administer it, who have to know what is in it, knew what it said. I was still getting around with my old-fashioned printed copy and had never noticed that the versions which had been generated from the electronic copy were wrong.

Senator MOORE—Doesn't the bill particularly respond to that, in terms of the clause that says that, should an error be discovered in much the same way as that one was finally discovered, the Attorney-General is responsible for determining which is the authoritative version, and then any action that has been taken on the basis of an incorrect reading—as could have happened with that provision—would not then be considered criminal? They have actually addressed that in the bill itself.

Mr Evans—That is a partial solution to the problem.

Senator MOORE—Yes.

Mr Evans—But, if you spent a few years in jail—

Senator MOORE—That is true. If you had been subject to it—

Mr Evans—and you discovered that you were convicted by a misreading of the instrument—

Senator MOORE—Sorry!

Mr Evans—it would be very awkward. I do not want to labour the point but, with the old-fashioned, printed versions, you could be sure that they were all the same. Now you have an electronic version, and from that you generate lots of hard copy versions, so it is much more difficult to ensure that all those hard copy versions are error free.

Senator MOORE—And it can be done with greater speed, too. You can spread it much more quickly than you could.

CHAIR—Thank you, Mr Evans. Those were all the questions the committee had for you. The committee thanks you for your attendance today. In my case, one additional reason for that is that I had a chance to call you 'Mr Evans' without drawing the inevitable rejoinder of 'Call me Harry.'

Mr Evans—Thank you, senators, and Mr Chairman.

CHAIR—The committee has two other matters to deal with. The committee has received two late submissions, one from Mr Ian Harris and one from the Administrative Review Council, and it is resolved that those submissions be published. The second thing is that I understand that some members of the committee have some additional questions they would like to put to the Attorney-General's Department. Perhaps we could do that in writing, and the secretary can probably deal with that.

Senator MOORE—Now that we have heard the evidence from a range of people, there are some things I would like to clarify with the sponsoring department.

CHAIR—The secretary will deal with that. I adjourn this meeting. I thank all the witnesses, Hansard and the secretariat.

Committee adjourned at 5.07 p.m.