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All inquiries should be made to:

The Director of Research
Procedure Office
Senate Department
Parliament House
CANBERRA ACT 2600

Telephone: (06) 277 3057

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DEREGULATION, MERITS REVIEW AND THE WITHERING OF PARLIAMENTARY SOVEREIGNTY

Peter O'Keeffe

To defend the supremacy of Parliament so as to safeguard the sovereignty of the people is most assuredly a parliamentarian's first responsibility.¹

The Regulatory Environment

The modern technocratic state is, to lawyer, entrepreneur and citizen alike, a rulebound environment of intimidating complexity and sophistication. The myriad of decisions and interactions occurring daily in such a state give rise to problems and conflicts which are sometimes both intensified by, and also as often solved by a powerful and pervasive system of law-making. The constant flow of legislation, including legislation made outside Parliament, is designed to delineate or update modes of behaviour and response in order to stem every variety of social chaos by controlling, ordering and making predictable the actions of individuals and conglomerates. As a consequence, the socio-economic life of most modern states is supported by thousands of rules and regulations, some of which can be barriers to necessary change, innovation and growth. Today, a reaction has set in and the idea of a regulatory *status quo* is under its most serious scrutiny since Lord Donoughmore's Committee on Ministers' Powers reported more than 50 years ago.

1. Report of the Standing Committee on Parliamentary Control of Delegated Legislation, National Assembly of Quebec, Canada, July 1983, page 191

There was a time when the idea of subjecting extensive areas of the economic life of the community to the legislative outpourings of both the Parliament and the Executive, was an unquestioned one, offering a proper means of governing for the material well-being of all in society. The utilitarian influence behind regulatory initiatives cannot be obscured by less orthodox revisions which attribute merely ideological motives of power and control. In 1932 it was a recognition of this which prompted a former British cabinet minister to state:

I feel that, in the conditions of the modern state, which not only has to undertake immense new social services, but which before long may be responsible for the greater part of the industrial and commercial activities of the country, the practice of Parliament delegating legislation and the power to make regulations, instead of being grudgingly conceded, ought to be widely extended, and new ways devised to facilitate the process.²

This era of legislation is still with us.³ Estimates of the volume of legislation, both primary and secondary, vary but all agree that it is very considerable in historically relative terms. It has been suggested that in the first 14 years after the retirement of Robert Menzies, Australian Parliaments collectively passed over 12,500 Acts and Governments promulgated almost 26,000 sets of Regulations.⁴ In round figures, the Federal Government made over 7,000 Statutory Rules in the period 1957 to 1985: 2,400 in the period 1957-72, and 4,600 in the period 1972-85. A Canadian ministerial task force has warned that:

The impenetrability of the regulatory system and lack of policy guidance on specific regulatory procedures ensure that there cannot be effective bureaucratic or political accountability for individual regulatory activities. Parliament, and its committees, are not effective in exercising oversight and ensuring public accountability for the regulatory activities of the federal government.⁵

That task force pointed out that there was no real “system” of regulatory law but rather a “bewildering array of legal requirements, procedures and administrative practices varying from

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2. Miss Ellen Wilkinson in Cmnd. 4070 (1932) p 137, quoted in H.W.R. Wade, *Administrative Law*, Oxford 1977, page 699
 3. Dennis Pearce, *The Limits of Review*, a paper delivered to the Inaugural Conference of Australian Subordinate Legislation Committees, Brisbane, 4-6 June 1986, in *Report of the Proceedings*, Parliament House, Brisbane, page 106
 4. David Kemp in, *The Sir Robert Menzies Lecture*; quoted by Sir Walter Campbell, in a paper delivered to the Inaugural Conference of Australian Subordinate Legislation Committees, Brisbane, 4-6 June 1986, *op.cit.*, page 3
 5. *Report of the Study Team on Regulatory Programs, Canada*, March 1986, page 646 (Ministerial Task Force on Program Review)

one department or agency to the next”.⁶ The result was as paradoxical as it was inevitable in that the lack of a system actually hindered the government’s ability to assess its own regulatory performance and ensure that objectives were being achieved efficiently and effectively. Thus:

Ultimately, the lack of a simple, understandable and easily accessible regulatory system shelters regulatory activity from public and parliamentary scrutiny to the long term disadvantage of good government.⁷

Deregulation and the Economy

With this environment in mind, the object of this paper is to study whether there is a realistic role for parliamentary review and supervision of the substance and merits of the regulatory activities of government, and to discover whether, in the absence of such a review, a vital aspect of parliamentary sovereignty has been allowed to wither on the bough. The omens are not good. Modern democratic government is based on the idea of government by consent of the people through the people’s representatives in Parliament. The element of consent is present, albeit in a fluctuating and diluted sense, but the effective control by Parliament has atrophied. *Pace* Crick, parliamentary control means more than mere influence or mere advice. It means having a decisive say in the formulation of laws and the policies that lie behind them. There are barriers in the way of that goal. As Professor Gillies said in his evidence to a Canadian parliamentary committee:

Once power and influence was transferred to the central agencies – central agencies did not want to talk to people or hear from people about ideas about policy. They said their job was to run the machinery of government, not to make policy. That is simply not true. It may have been the perception, but the reality is that those who control the agenda certainly have a lot to do with what the policy is going to be.⁸

The late Senator Alan Missen (Liberal, Victoria) also railed against the power of the bureaucracy to set too large a part of the political agenda by making almost all of the secondary

6. op. cit. page 640. The *Eightieth* Report of the Senate Standing Committee on Regulations and Ordinances identified 86 varieties of delegated legislative instruments in Australia. (Parliamentary Paper No. 241/1986).

7. op. cit. page 641

8. Evidence of Professor J.W. Gillies to the Special Committee on the Reform of the House of Commons (McGrath Committee) Canada, Wednesday 17 April 1985, House of Commons Evidence Issue No. 11. In, *The Reform of Parliament*, London 1986, Bernard Crick Wrote, at page 80:

... the phrase ‘Parliamentary control’, and talk about the ‘decline of Parliamentary control’, should not mislead anyone into asking for a situation in which governments can have their legislation changed or defeated, or their life terminated ... Control means influence, not direct power; advice, not command; criticism, not obstruction; scrutiny, not initiation; and publicity, not secrecy.

policy choices which regulations embody. He was vocal in his criticism of the lack of any systematic work by the Parliament in supervising the activities of regulators and the content of regulations. Senator Missen's involvement with several Senate committees, including the legislative scrutiny committees, had alerted him to this particular gap in the Parliament's committee system. He argued that there was "a general lack of *administrative* accountability to Parliament".⁹ He pointed out that, in Australia, it was necessary to put in place:

... methods whereby regulatory activity is brought firmly under Parliamentary control, assisted by expert opinion and subject to regular review.¹⁰

He also lamented that:

The problems of the cost of regulatory activity and investigation of alternative courses of action have slipped from the control of Parliament.¹¹

The consequences for Australian society and the economy are not merely that the Executive and the bureaucracy has succeeded in putting one over on an interfering Senate. Andrew Shonfield has theorised that a nation which is unable to establish effective democratic control over the processes of modern government faces one of two alternatives:

Either it must accept that the liberties of its citizens will be diminished or it must forego the great material benefits which can be made to flow from the operations of the active interventionist state of today. In practice what this means for those countries which have a firmly established system of representative institutions is that the full potentialities of the new economic systems will not be exploited unless fresh political techniques to secure effective control of enlarged governmental powers are brought into being. Political invention is therefore in this sense part of the equipment required for economic growth.¹²

His, then novel, view that a vibrant economy was encouraged, not handicapped, by the existence of parliamentary control has come of age in the 1980's movement for parliamentary controlled deregulation where this is necessary to promote efficiency without sacrificing safety and welfare. In 1965, his prescriptions were threefold. Firstly, there should be delegation of administrative discretion to the bureaucracy in a way which, while allowing it initiative and judgement, also ensured accountability before the courts (or, in Australia, before the Administrative Appeals Tribunal). Secondly, he wrote that:

9. Senator Alan Missen, *Attacking Excessive Regulation*, Institute of Public Affairs Review, Vol. 38(3), Spring 1984, page 135-138. (emphasis added)

10. *op. cit.* page 136

11. *op. cit.* page 138

12. Andrew Schonfield, *Modern Capitalism*, Oxford 1965, page 387-8

.... if Parliament is to exercise an effective supervision over the great range of work which is or ought to be done by a modern administration, it must re-equip itself for this highly technical and exacting task. The plenary session culminating in a vote taken along party lines has limited relevance to the problem. The obvious alternative is the small specialist committee, developing over a period of time a considerable degree of expertise, and supported by professional staff of its own sufficiently knowledgeable to talk to the professional civil servants on equal terms.¹³

Finally, public dialogue between public authorities and private interest groups could produce consensus and equilibrium. For a country like Britain, however, he did not anticipate that change of this nature could be introduced easily. His disappointment found an echo in the heart of a parliamentary officer who wrote:

In Britain the parliamentarians treat it as an axiom that the country ought to have a strong Executive. The rules of the game allow the government to be endlessly teased, but not to be seriously incommoded in the conduct of its ordinary work the British Parliament today continues to be excessively preoccupied with the problem of allowing the Executive to be strong, at a time when the latter's strength has in fact become overwhelming.¹⁴

Notwithstanding a certain element of traditional independence, the Australian Senate has achieved little more in this regard than other Parliaments. However, the seeds of change have been planted and have begun to sprout.

Virtually every federal bill introduced into the Australian Parliament contains a standard-form clause delegating power to the Governor-General to make regulations, not inconsistent with the Act, prescribing all matters required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act. The width and significance of these delegations had gone virtually unchallenged by all but a very few constitutional and administrative lawyers until about 1980. In that year the Confederation of Australian Industry published its *Report on Government Regulation in Australia*, described as "the first work in recent times which sought systematically to analyse and assess the effects of business regulations in Australia".¹⁵ The Confederation defined regulatory activity to mean:

13. op. cit. page 388

14. op. cit. page 392

15. Review of Business Regulations, Information Paper No. 1, January 1986, page 1 (Business Regulation Review Unit). See also the First Report of the Review of Queensland Business Regulations, December 1985

... actions taken by governments, whether under the authority of statute or as a result of administrative practice, which have the effect of controlling prices, entry into or exit from the market place, product standards and patterns of distribution and other significant aspects of activity in the market place.

In response to the widening debate on deregulation the federal Business Regulation Review Unit was established by the Labor Government in May 1985 to support the Industry Committee of Cabinet in assessing the impact of business regulations on industry and the economy. The Industry Committee now scrutinises proposals for new business regulations and examines current regulations. Priority areas have been identified for the review of existing regulations and sun-set clauses are to be included in future legislation. Perhaps the most important initiative of all is the present requirement for a “regulation impact statement” to demonstrate that benefits exceed costs and that the least-cost option has been chosen. In practice, however, sun-set clauses and publicly available impact statements have yet to appear.

Even by the time these reforms had begun to be spoken about the deregulation stakes had become very high indeed. In its Information Paper No. 1, January 1986, the Business Regulation Review Unit had guesstimated that some 16,400 Commonwealth personnel, or with different computation standards, possibly even twice that number, were “engaged, or supporting those engaged, in business regulatory activities under one of its many possible definitions.”¹⁶ When the Unit issued its Information Paper No. 2 in May 1986, the assessed implications of federal regulatory activity had been further refined.¹⁷ The paper speculated that “the total number of State and Commonwealth government officials engaged in business regulation falls within the range of between 40,000 and 80,000. Based on Commonwealth costs, the total annual cost to Australian governments would be between \$1.8 billion and \$3.6 billion.”¹⁸ Using modified versions of techniques originally employed in the United States, the paper-burden cost of Australian regulations was put in the range \$3.6 billion to \$7.2 billion. Business compliance costs were set between \$36 billion and \$72 billion. Aggregation brought “the estimated overall cost of business regulations to between \$40 billion and \$80 billion – equivalent to 15% - 30% of Australia’s \$250 billion gross domestic product.”¹⁹ The Paper concluded that:

... on the basis of an outlandish view (sic) that no business regulation is necessary, a business sector which is fully deregulated could, at no cost to current consumption, double the economy’s annual level of investment and in the process perhaps double its growth rate. To continue this somewhat fanciful analysis, a doubling of the growth rate from, say 4% to 8%, would result in a net increase in living standards by one third within six years. Although this is based

16. op. cit. page 4

17. Review of Business Regulations, Information Paper No. 2, May 1986, page 3

18. op. cit.

19. op. cit. page 5

on an extreme premise that business regulations confer no benefits, it does demonstrate that massive costs are associated with unwarranted regulations and vast gains possible with their removal.²⁰

The “outlandish view”, the fanciful analysis and the “extreme premise” caught the headlines. However, Senator Missen had already spoken of the importance of separating the areas in which regulation is desirable from those in which it can be avoided. He had warned that:

It is necessary to face up to conflicts between different regulatory policies, for example, between environmental protection and energy conservation, and to realise that these aims are not necessarily in conflict.²¹

The significance of the potential financial impact of regulatory activity and the nature of the conflicting value judgements which can arise in determining what is and what is not desirable, should make Parliament’s abstention from this area a matter of serious anxiety to many parliamentarians. The nature of the fundamental choices which lie behind decisions to regulate, not regulate, deregulate or reregulate have been written about extensively in the United States where the deregulation debate commenced in earnest in the early 1970’s. A Victorian parliamentary committee which investigated the question of parliamentary control of delegated legislation commented:

Neither side of the argument is clear cut. In the United States those favouring *review* of regulation and regulatory procedures are not all free marketeers. Those in favour of regulation for health, safety, environmental and consumer protection reasons are often opposed to regulations conferring benefits upon business (often to the detriment of the community as a whole) and farmer producers (again without recognising the detriment that may thereby be imposed upon the general community). The “deregulators” are not wholly opposed to regulation; rather, they favour deregulation in some areas, and cling to the value of regulations in others - where regulation is perceived as “enhancing” the growth of the economy rather than impeding economic progress.²²

It is important, therefore, that both sides of politics resist the impulsive rush to regulate or deregulate. A blind deregulation stampede would be more damaging to society as a whole than retention of the *status quo*. Nineteenth century liberal economics, on which much deregulation sentiment is based, are one hundred years out of date. The issues and implications in the twentieth century are too important to be left either to “neutral” bureaucrats, or committed

20. op. cit.

21. Senator Alan Missen, loc. cit. page 136. See also similar sentiments expressed by Professor J. R. Mallory, *Can Parliament Control the Regulatory Process*, *Canadian Parliamentary Review*, Autumn 1983, page 8

22. A Report to Parliament on the Subordinate Legislation (Deregulation) Bill, Victoria, September 1984, (Legal and Constitutional Committee of the Parliament of Victoria)

ideologues of the right or the left. However, a somnolent Australian Parliament is awakening and the collective wisdom of the people is likely to clip the wings of those who might fly too far from the facts of Australian social, political and economic life in the 1980s and 1990s. It is likely that parliamentary involvement, once in its stride, will produce a pragmatic philosophy of scrutiny. The reality is, as Robert Castles has pointed out, that governments:

.... will intervene to correct market failures where there is political advantage in doing so, irrespective of their political and philosophical views of the size and role of governments.²³

Castles cites a variety of examples where this has been the case, including consumer protection, health and safety, environmental protection and equal employment opportunity measures. Thus, he argues that “the theoretical case for deregulation needs to be balanced by a consideration of the actual circumstances of industries and the economy.”²⁴ He eschews the label “age of deregulation” and considers it more likely that “the age of unquestioned regulation is finished and both deregulation and new forms of regulation will evolve as governments attempt to achieve their economic and political objectives in an era of economic uncertainty”.²⁵

Proposals for scrutiny by the House of Representatives

For parliaments the most important consequence of this debate has been the rediscovery of a forgotten fact spelt out in the Canadian federal regulatory policy:

Regulation is legislation and, as such, will be brought more fully under the control of elected government representatives and subjected to more effective review by Parliament.²⁶

Once the intrinsically legislative nature of regulatory activities is recognised it becomes possible to bring home responsibility for mistakes and excesses to the institutions which ultimately have allowed them to arise and which can prevent them recurring, namely parliaments. Since it has always been the prerogative of a parliamentary opposition to advance the claims of the parliamentary institution against the governing Executive, it is easier for opposition parties to take the initiative in suggesting parliamentary reforms and controls. Thus, in their *Policy on Regulation, Deregulation and Regulation Reform*, the Australian federal opposition parties, the Liberal/National coalition, have set out to highlight the inadequate scrutiny which the Executive government and the Parliament give to the diaspora of delegated legislation made under the

23. Robert Castles, *The Deregulation Debate*, Current Affairs Bulletin, Vol. 63, No. 2, July 1986

24. op. cit.

25. op. cit.

26. Principle 6 of the Federal Regulatory Policy in the Federal Regulatory Reform Strategy, Canada, 13 February 1986 (emphasis added)

authority of Acts which have been through the parliamentary scrutiny process. The policy document makes frequent reference to the need for “real and effective parliamentary scrutiny of regulations and regular review mechanisms”. Even scrutiny of government departments’ and agencies’ annual reports is seen to offer an avenue for parliamentary examination of regulatory activities. The lack of merits or policy scrutiny is to be remedied by the appointment of advisory committees reporting to a regulatory review committee of the House of Representatives. This committee is to work in association with an improved committee system in the House to review and examine proposed regulations, the regulatory process and deregulatory policies. Departmental task forces are to have “the objective of removing all unnecessary restrictions by government on private activity and to co-operate with parliamentary committees”. The signal distinction between what the opposition propose and what the government is already attempting appears to be the emphasis placed on parliamentary oversight, by the lower house, of the regulatory and deregulatory process.

It may be, however, that effective committee scrutiny will face serious difficulties in the politically charged and partisan atmosphere of the House of Representatives. In a chamber where almost every vote is traditionally seen as a vote of confidence in the government, it may be too herculean a challenge to political patience to work constructively on the delicate task of scrutinising regulations on their merits, policy and substance without incessantly provoking re-runs of the second reading and committee stages of the relevant enabling legislation.

As long ago as 1930 the then President of the Senate, Senator Walter Kingsmill, referred to the depth of parliamentary disinterest in regulations:

Regulations framed under various Acts of Parliament are laid on the table in great profusion, but generally little notice is taken of them by ordinary members. While such regulations may not be *ultra vires*, they may develop legislation in a direction which a majority of the members of the public do not consider to be in the best interests of the country.²⁷

In evidence to a Senate select committee, Maurice Blackburn M.P., a Labor member of the House of Representatives, of redoubtable independence and rebelliousness, had advised that the House might not be a suitable forum for such sensitive review functions. He told the Committee:

The Commonwealth Parliament makes provision for the disallowance of statutory regulations by the vote of either house (Acts Interpretation Act) The House of Representatives is not likely to do that work well or in fact to do it at all. Upon its vote turns the fate of the ministry. The regulation is made by the ministry, and a proposal for its disallowance would certainly be treated as a vote of want of confidence, and would be tested on party lines. No ministry depends

27. Evidence of Senator Walter Kingsmill to the Senate Select Committee on Standing Committees of the Senate, Journals of the Senate, 1929-1931, page 549

upon the vote of the Senate, and it is quite likely that in that chamber a regulation would be considered on its merits. It is a very dangerous thing that in Australia, as well as in England so much of our legislation is done by regulations for which Parliament does not take responsibility and which are in a great degree inaccessible to the people. The scrutiny of those regulations would be a very useful function for the Senate to discharge, one that could be done better by the Upper than by the Lower House.²⁸

It would be surprising if attitudes have changed much since then. At the Second Commonwealth Conference of Delegated Legislation Committees in Ottawa, 1983, it was said that “most Commonwealth governments are unwilling to countenance disallowance of a regulation by Parliament ”. The Report of the Conference went on to state that:

Most governments feel or purport to believe, quite unnecessarily and erroneously that their life, or at least their standing, is at stake. Delegates expressed their realisation that parliamentarians are being thwarted by a twisted representation of the doctrine of responsible government. It is no part of that doctrine that a government must win every vote on every issue in both Houses. The loss of a vote on a motion in one House, or even in a uni-cameral Parliament, to disallow a regulation, or to refuse to affirm it, can very, very rarely amount to a question of confidence in the Ministry.²⁹

These views were reported in the context of a conference of delegated legislation committees involved in the technical scrutiny of legislation in accordance with certain bipartisan principles

28. Evidence of Maurice Blackburn M.L.A., op. cit. page 571

29. Report of the Second conference of Delegated Legislation Committees, Ottawa 1983, page 9. this comment was endorsed by the Senate Regulations and Ordinances Committee in its *Seventy-Fourth* Report (March 1984) Chapter 4, Parliamentary paper No. 32/1984. It is worth noting the comment made by Harry Evans, then Clerk-Assistant, Australian Senate, at page 128 of the Transcript of Proceedings of the Second Conference:

... one of the crucial barriers to any sort of effective parliamentary work at all, [is], the view which is taken by both governments and members of Parliament that every vote in the lower house is a confidence vote, and that any defeat of a government must mean a resignation or an election. Apart from the question of whether that is a good or bad thing, it is quite unhistorical. It has no foundation in British constitutional history in so far as there is an enormous number of precedents for governments being defeated in the lower house and not resigning or going to an election. Until you get rid of the unhistorical and ill-founded notion it will provide a very grave barrier to effective parliamentary action.

See also remarks by Ronald Bell M.P. while debating the motion to establish the British Merits Committee, House of Commons Hansard, Vol. 853, 13-30 March 1973, page 693:

It is a great abuse that in practice Governments cannot be defeated on the floor of the House ... it is the final triumph of the executive in its mastery of the House of Commons.

of parliamentary propriety and personal liberty, not touching on the merits, policy or substance of the instruments. Ironically, it may be that the activities and successes of technical scrutiny committees, particularly the Australian Senate Standing Committee on Regulations and Ordinances, has, to some extent, masked the potential scope which exists for parliamentary review of the merits of regulatory activity. It may be that, although these committees repeatedly qualify their reports by reference to the restricted and technical nature of their inquiries into regulatory infringements of personal rights, their scrutiny actually creates a false sense of parliamentary security about the substance, content and policy of delegated legislation.

Nevertheless, the achievements of these committees in conducting bipartisan reviews suggests that a committee could successfully review the merits of regulations and advise whether, in terms of the objectives and policies of the enabling legislation, the minister's chosen regulatory prescriptions were the correct and preferable means of implementing those policies. Without a strong tradition of bipartisan scrutiny of legislation, a regulatory review committee in the House of Representatives would face considerable initial difficulties in discharging its responsibilities which would necessitate at least a theoretical or token agreement with the objectives and policy of the parent Act. This token acquiescence has never presented any problem to technical scrutiny committees in the Senate because the legislation subject to review is seen to represent a *prima facie* lawful expression of Parliament's delegated power and the issues under scrutiny are issues of principle and legislative propriety.

Current machinery for parliamentary disallowance

Authority to legislate emanates from Parliament but a sovereign Parliament can and does delegate the exercise of legislative power to subordinate bodies, not as agents of the Parliament, but as delegates, law-makers in their own right and of their own initiative within the ambit of the parent Act. The absence of an agency relationship as such, has complicated the attempts by Parliament to claim back some of its legislative sovereignty through the introduction of mechanisms for administrative accountability. However, when the Regulations and Ordinances Committee was established in 1932 it was not set up as a bulwark against the use of delegated powers. There was a recognition of the practical need for delegated legislation to provide detailed legislative answers to the myriad of questions which the effective implementation of even a quite detailed Act of Parliament would produce over its useful lifespan. There was also a recognition of the ultimate responsibility of Parliament for laws made under its authority. This existed because, by the late 1920's, there was in Australia a well entrenched tradition that only the possession of a power of disallowance of delegated legislation could restore to a House something akin to the legislative power it originally possessed over the enabling Act itself when it was a bill. In 1903, the Senate had sought to reserve to itself "the right to say that regulations framed by the Executive under an Act of Parliament are such as we did not contemplate and that we therefore desire to negative".³⁰

30. Senator Sir Richard Baker, Senate *Hansard*, 21 October 1903, page 6320; quoted in Robert Walsh and John Uhr, Parliamentary Disallowance of Delegated Legislation: A History of the Basic Provisions in the Acts Interpretation Act, Legislative Studies Newsletter, No. 10, 5 November 1985, page 14

Eventually a full power of disallowance by either House was achieved in the Acts Interpretation Act. However, it was not until 1932 that the Senate sought to systematise the scrutiny of delegated legislation when its Select Committee on Standing Committees recommended the appointment of the Regulations and Ordinances Committee. This Committee would be:

... charged with the responsibility of seeing that the clause of each bill conferring a regulation making power does not confer a legislative power which ought to be exercised by Parliament itself. It would be required to scrutinise regulations to ascertain:

- (a) that they are in accord with the Statute;
- (b) that they do not trespass unduly on personal rights and liberties;
- (c) that they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon Judicial decisions;
- (d) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.³¹

The Report went on to add:

It is conceivable that occasions might arise in which it would be desirable for a Standing Committee to direct the attention of Parliament to the merits of a certain Regulation but, as a general rule, it should be recognised that the Standing Committee would lose prestige if it set itself up as a critic of governmental policy or departmental practice apart from the tests outlined above.³²

Thus, there was in existence by 1932 a scrutiny committee, equipped with potent principles of review which, interpreted responsibly, could involve it in an assessment of at least the reasonableness of regulations from the point of view of parliamentary sovereignty, the objectives of the enabling Act and the regulatory implications for personal rights and civil liberties.³³ There were also on the statute book, in the Acts Interpretation Act, what were then and are still probably the most powerful parliamentary disallowance provisions in the

31. loc. cit. page x. (n. 27)

32. op. cit. page xi

33. The Principles were adopted by the Senate when it ordered the Committee's *Fourth* Report (1938) to be printed. (See Parliamentary Paper 1969 No. 188, page 25 of which contains the *Fourth* Report).

Commonwealth world, provisions which, although in no sense perfect and not always adequate to the complexity of the task of even technical regulatory review, are to this day the envy of most Commonwealth Parliaments. The provisions of that Act, often incorporated into other Acts which confer delegated law-making power, provide that regulations must be gazetted; generally, are only effective from the date of gazettal; must be laid before each House within 15 sitting days of being made; and shall not be expressed to take effect retrospectively if this prejudices individuals. A motion of disallowance can be moved in either House, provided notice of it has been given within 15 sitting days after tabling. A tactical decision by the government not to bring on a disallowance debate within 15 sitting days after the giving of notice merely results in the automatic disallowance of the regulations. No regulation the same in substance as one disallowed can be made within 6 months of the passing of a disallowance motion unless the disallowing House has, by resolution, rescinded its motion or approved the making of a new regulation.³⁴ Disallowance of a repealing or amending regulation will not cause an intimidating hiatus – it merely revives into force the regulations as they stood before repeal or amendment. Senate Standing Orders gave the Regulations and Ordinances Committee a wide jurisdiction to consider and report on “All regulations, ordinances and other instruments made under Acts ... which are subject to disallowance ... and which are of a legislative character.” (Standing Order 36A) All such instruments “stand referred to the Committee”.

The most remarkable feature of the statutory disallowance machinery was that it was open to any Member or Senator to give notice of disallowance of the disallowable instrument for any reason including reasons of principle, merits, policy, substance or politics, regardless of the views, activities or even the existence of the Senate Regulations and Ordinances Committee. Obviously, in the Senate the attitude of that Committee would be an important determinant of the response of other Senators³⁵ but once it was established that a disallowance challenge concerned policy and merits the Committee would cease to have a view. Thus, individual private Members and Senators, or groups of them, or entire parties, were at liberty to target, scrutinise and seek to have disallowed for policy reasons any regulation or other disallowable instrument.

With this kind of an armoury some observers might be forgiven for asking why the Australian Parliament appears to have lost control of regulatory law-making by the Executive. The reality of politics in the House of Representatives and the rigidity of party discipline in the House, however, has meant that in 87 years there have been no more than two or three successful motions of disallowance.³⁶ Paradoxically parliamentary perceptions, real and imagined, of the

34. This is one of the very few examples in Australia of an affirmative resolution procedure.

35. Walsh and Uhr, loc. cit. 19

36. See, for example, John E. Kersell, *Parliamentary Supervision of Delegated Legislation*, Stevens 1960, pages 67, 107-8. See, also, disallowance, without division, of the Spirits Regulations (Statutory Rules 1980, No. 384, House of Representatives *Hansard*, 5 May 1981, pages 1966-1973. See also disallowance by effluxion of time of the Telecommunications (General) By-law Amendment No. 20, notice of motion recorded in the House of Representatives, Notice Paper, 8 March 1979. see also the debate on the motion for disallowance of Regulations made under the A.C.T. *Leases Ordinance 1955*, House of Representatives

Senate's oldest and most successful non-domestic committee, the Regulations and Ordinances Committee, may be responsible for creating in the Australian upper house a false sense of security about delegated legislation.

The Work of the Regulations and Ordinances Committee

In its Report on the 50th anniversary of its appointment the Committee stated:

.... the Committee has always been concerned to ensure that the policy aspects of delegated legislation do not intrude upon its primary task of protecting the individual the Committee's evaluation of delegated legislation has never touched on the merits of the parent legislation The Committee's continuing concern is to achieve a balance between necessary executive functions and the individual rights and liberties of citizens Throughout its history, therefore, the Committee has concentrated on those provisions which have given administrators discretionary, unacceptable control over the day-to-day concerns of the people or which have attempted to remove personal liberties ³⁷

It was always clear, of course, that the Committee was not permitted to examine the politically controversial aspects of the policy which delegated instruments were designed to implement. A review or questioning by the Committee of policy or the substantial merits of the legislation was never intended. Admittedly in its *Fourteenth* Report the Committee did attempt to criticise the terms of a regulation-making provision in a bill then before the Senate. It did this, firstly, on the basis that the Senate Select Committee in its 1929 Report, and the Senate itself through its adoption of the Committee's Principles, empowered the Committee to scrutinise such provisions in bills, and secondly, on the basis that the clause in question "does not concern itself with power to make regulations dealing with administrative detail but gives power to enact regulations which amount to substantive legislation appropriate to Parliament".³⁸ The motion to print the Report was ruled out of order by the President of the Senate as being beyond the proper responsibility of the Committee. However, most Senators who spoke to it considered the Committee was acting within its powers.³⁹ The Senate had to wait twenty more years before the

Hansard, 22 March 1956, pages 1029-1046. In the course of his speech, Mr Whitlam, later Prime Minister, said:

The onus does not lie on ... any member of the Opposition to show that the regulation is not justified. Surely the onus lies on the Government, as it does in any other normal statute, to show that it is justified.

The motion concerned an A.C.T. Ordinance which Mr Whitlam likened to a State Act.

37. *Seventy-First* Report, March 1982, Parliamentary Paper 47/1982, para. 7

38. *Fourteenth* Report, March 1959 (See Parliamentary Paper 1969 No. 188, page 149)

39. Senate *Hansard*, 18 March 1959, pages 434-44

Scrutiny of Bills Committee was established and empowered formally to examine and assess, the provisions of bills which delegated law-making powers.

Professor Dennis Pearce may have partially explained why Parliament's review of the policy and substance of regulations has really been a failure. Firstly, when a challenge is mounted to the policy to which regulations give effect, the very existence of any regulation promoting that policy is called into question and judgement is passed on the wisdom and political viability of a government responsible for such a policy. Paradoxically, technical scrutiny which criticises delegated legislation on the grounds that it interferes with the fundamental rights and liberties of the citizen is somehow more palatable because the regulation can later be amended by the government to reduce or eliminate the trespass without deflecting the overall thrust of the policy objective.⁴⁰ Secondly, the nature of the parliamentary institution is often seen to lie in its essential function: the provision of a ministry and the passage of legislation. Pearce notes that:

Machinery for review of delegated legislation finds little place in the parliamentary institution for two main reasons. First, it usually lacks political impact. Secondly, the quantity of delegated legislation and the technical matters with which it is concerned do not lend themselves readily to review in the parliamentary chamber.⁴¹

Thus, the existence, longevity and success of the Regulations and Ordinances Committee is a misleading high point on a very flat plain from which observers, lacking perspective, thought it a more potent symbol of parliamentary sovereignty and scrutiny than it was ever intended to be in fact. Within the constraints of its technical principles and bipartisan ethos, the Committee has laboured to maximise the impact of its scrutiny and demonstrate that delegated legislation can be the subject of effective and constructive parliamentary review. The Committee's reports contain many examples. Three recent cases illustrate this.

In its *Seventy-Sixth Report* (December 1985) the Committee described its scrutiny of the *A.C.T. New South Wales Acts Application Ordinance 1985* which repealed a great number of old New South Wales Acts as they applied in the Territory. The old Acts were not listed in any schedule or otherwise identified in the Ordinance, thus making it impossible for any Senator to give a precise notice of motion to prevent the repeal of any particular Act which he or she considered worth preserving whether for reasons of principle or policy. The Committee gave notice of motion of disallowance of the entire Ordinance and requested the Attorney-General to undertake to amend the Ordinance to add an appropriate schedule. When the motion was not called on for debate by the 15th sitting day thereafter, the Ordinance was disallowed by effluxion of time. This was the first such automatic disallowance in the history of the Senate and the Committee reported the matter to the Chamber. The Committee considered that the Ordinance infringed Principle (d) of its terms of reference because by making an instrument to achieve an extensive

40. See D.C. Pearce, *Delegated Legislation in Australia and New Zealand*, Butterworth, 1977, page 29

41. *op. cit.* page 30

repeal of laws without identifying what was repealed and thus making it impossible for the Senate to prevent a particular repeal, the Attorney-General had made delegated legislation which was not in accordance with the spirit of the enabling Act, the <si>Seat of Government (Administration) Act 1910<res>. This Act expressly provided for parliamentary disallowance of all or even part of an Ordinance made under its authority.

In its *Seventy-Ninth* Report (April 1986) the Committee reported on a second disallowance by effluxion of time arising from the Minister for Health's agreement not to oppose the Committee's motion for disallowance of certain Health Insurance Regulations. The enabling Act provided that all information collected by the Health Insurance Commission was secret. Criminal sanctions could be imposed on those who revealed any information outside the terms of the Act. The Minister however, could make regulations prescribing persons to whom information could be given. The Commission was the repository of computer-coded data on the physical and mental health of every Australian who, since the early 1970s, had made a health insurance claim for medical treatment under the virtually compulsory insurance scheme. The Minister made regulations prescribing the Secretary of the Department of Social Security as a person to whom any Commission information could be given. The intention was to release identification data to assist that Department with the detection of social security fraud. The Committee objected because the legal effect was to authorise release to the largest federal department involved with many aspects of the personal lives of many vulnerable people, of not merely the requested identity data, but *all* computer-coded confidential medical records on several million Australians. When the Minister for Social Security objected that the Committee was acting beyond its remit by examining government policy on the release of identification data the Committee replied that it was concerned with a fundamental issue of principle concerning the privacy of the confidential medical records of virtually the entire nation.⁴²

In interpreting the Committee's approach in this case, Professor Pearce has hypothesised that:

.... if a regulation transgresses one of the principles of review, it will not be sufficient answer to the Committee to say that it is the policy of the Government that the principle of review should be transgressed. This is as it should be otherwise the Committee's review power would be rendered impotent by the Government simply asserting in relation to any objection that the Regulation represented Government policy and that was the end of the matter. It therefore cannot be in this sense that the various commentators are saying that Committees should not review the policy underlying legislation.⁴³

In its *Seventy-Eighth* Report (April 1986) the Committee considered the A.C.T. *Artificial Conception Ordinance 1986* which was designed to provide rules to determine definitively the

42. See also P. O'Keeffe, How Secret is Your Medical History, *The House Magazine*, 30 April 1986, page 5

43. D. C. Pearce, *The Limits of Review*, page 8, a paper presented to the Inaugural Conference of Australian Subordinate Legislation Committees, loc. cit. n. 3

legal paternity and maternity of children born as a result of artificial conception procedures. The Committee expressly reported that it did not recommend disallowance of the Ordinance because, on its face, the solutions it offered to the vexed legal question of parentage were not unreasonable. The Committee's concern was that the Ordinance was inadequate because it did not address vital ancillary issues such as recording the identity of donors of genetic material; the child's access to data about its biological parents; questions of the definition of incest and marriage within prohibited degrees of consanguinity; and the existence of legally fatherless children. The Attorney-General told the Committee that these kinds of issues were to be addressed following wide consultations. The Committee recommended that legislation should deal with all of these issues urgently. However, since such legislation would give rise to important questions of public policy and ethics, the Committee recommended that these matters should be addressed only in primary legislation introduced for debate in Parliament and not by means of delegated legislation. The Committee adopted this view notwithstanding that the enabling legislation gave the Governor-General a plenary power to make Ordinances "for the peace, order and good government of the Territory".

In each of these three examples the Committee sought to serve the Parliament, within its principles, by reporting, in effect, that the Executive had not acted reasonably in exercising its power to make delegated legislation. Certainly Professor Pearce has argued that it is within the power of the Senate Committee to review legislation against a standard of reasonableness. The Committee may question whether the regulation is "so unreasonable that it is not in accordance with the Statute".⁴⁴ Professor Pearce has contended that:

. this is a form of policy review. To say that the content of the Regulations is not reasonable is a matter of judgement.⁴⁵

From this it was his inevitable conclusion that:

... the decision of Committees to decline to review policy questions is a self-imposed limitation that does not follow as a matter of course from their terms of reference.⁴⁶

44. op. cit. page 9

45. op. cit

46. op. cit

Nevertheless, in the course of subsequent discussions Professor Pearce qualified his views somewhat by adding:

.... there are at least some areas of Government policy that you would not allow to go past juston the say so that it was policy (but) ... if the policy is *clearly political policy* I think that the notion of preservation of the bipartisan approach to committee activity is something that just simply must be preserved.⁴⁷ (Emphasis added)

One recent Chairman of the Committee, Senator Barney Cooney (Labor, Victoria) has been most insistent that the Committee is not and cannot legitimately be involved in any review of the merits or policy of regulations. He has said that:

If one practices politics and questions of merit and policy come up, one must do one's job. The place that that job is done is in the Chamber or in the particular faction that one may belong to rather than before these sorts of bodies that should maintain an absolutely bipartisan approach, which can only be done if legislation - subordinate or otherwise - is tested in terms of specific provisions which we have defined ⁴⁸

In the same context, Senator Cooney said:

If a committee goes into the question of merits, it might get into the area of policy and that could destroy the bipartisan approach that is adopted, and which is so essential. That would be bad for the committee. If a bipartisan approach is not adopted, there are real problems.⁴⁹

It may be that both Professor Pearce and Senator Cooney are right for two reasons. Firstly, over time the nature and content of delegated legislation has changed, the content and application of the Committee's Principles have been refined and the nature of its scrutiny has matured to reflect these other adjustments. Prior to 1979 Principle (d) of the Committee's terms of reference provided that the Committee scrutinised instruments of delegated legislation to ascertain "that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment". In its <si>Sixty-Fourth <res>Report the Committee commented that it was very doubtful whether contemporary delegated legislation could be restricted to administrative detail. A "highly subjective" Principle (d) was substituted which called on the Committee to ensure that delegated legislation "does not contain matter more appropriate for parliamentary enactment".

47. op. cit. Transcript of Proceedings, 5 June 1986, page 73

48. op. cit. page 116

49. op. cit., 6 June 1986, page 153

Secondly, there may be some misunderstanding as to the precise meaning of the terms which are being used to characterise what some have seen as a new departure by the Committee but which is in reality the fulfilment of 50 year old objectives. In the New South Wales Acts Application Ordinance referred to above, it was not fundamental to the government's policy of repealing old Acts that they not be listed in a schedule. However, it was fundamental to the actual capacity of any Senator to invite the House to exercise its power of disallowance that they should be so identified. In the Health Insurance Regulations it was not the government's policy to let the Department of Social Security have access to Health Insurance Commission medical records along with identification data. The fact that this was authorised was regarded by the Committee as simply a mistake in the nature of an oversight. It arose from a lack of imagination and sensitivity to the implications of what, on its face, appeared to be an innocuous provision. It was, therefore, a most serious mistake but still a mistake. In the Artificial Conception Ordinance it was not the government's policy that it deal with this sensitive issue by means of delegated legislation or that it would address other aspects of the matter, such as record-keeping in a similar format. In its Report the Committee was merely foreshadowing that if it encountered a further Ordinance related to artificial conception and associated bio-medical and ethical issues, it would move to have it disallowed under its Principle (d) the matter would be more appropriate for enactment by Bill.

Thus, the Committee has continued the tradition of not evaluating the policy or merits of delegated legislation in political terms. This means, however, that while the Parliament, under the Acts Interpretation Act, has enormous potential to conduct effective merits scrutiny of regulatory activities, it lacks the vehicle to achieve the goal of systematic, regular and informed scrutiny of merits other than on the floor of either House and at the expense of valuable parliamentary time. Even in the Senate that time is already at a premium for debating the policy and substance of bills and issues of national importance.

Merits scrutiny on the floor of the Senate

The present practice in the Senate illustrates how costly it can be both to the chamber and to the Executive for merits review to be conducted essentially by "Committee of the Whole" rather than with the assistance of a specialist committee. For example, Freedom of Information (Charges) Regulations were disallowed by resolution of the Senate on 13 November 1985 (see Senate *Hansard*, page 2046 and 2111) after over two hours of debate. The Regulations increased very substantially the charges payable on applications under the *Freedom of Information Act 1981*. The Regulations and Ordinances Committee had concluded that, although the increased fees were considerable, it could not be said that they were so excessive and unreasonable as to infringe the Committee's principles of technical scrutiny. Scrutiny by the Senate thus became an examination of the merits of the specific increases as well as an opportunity to spend two and one quarter hours of prime parliamentary time debating the inadequacy of the Government's policy on freedom of information generally.

It is probable that a Senate committee examining the merits of these regulations could have extracted from the Attorney-General an undertaking immediately to amend the legislation and lower the fees to an agreed and more reasonable level. The Regulations could have survived. Access to information could have been made only slightly more expensive perhaps in line with a discounted inflation rate. The Attorney-General would not have been precluded for six months from introducing regulations the same in substance as those disallowed. (Even fresh regulations imposing lower charges might not have survived the poisoned atmosphere which the political debate on disallowance had engendered). A considerable amount of parliamentary time could have been employed debating primary legislation or matters of national significance. The upper house review function could once again have demonstrated its unique value but without the disadvantages to both sides of the House which a full scale disallowance debate entails.

The Freedom of Information (Charges) Regulations did, of course, lend themselves to a classic political debate in the Senate. To that extent they are unlike many other instruments of delegated legislation which, while liable to have a major impact on business and individuals are not tailored to catch the headlines. However, the case study may illustrate how chamber scrutiny of the merits of delegated legislation as the first and only tier of parliamentary review is a very blunt weapon.

A second example arose with the disallowance of two Orders contained in the Prescribed Goods (General) Orders (Senate *Hansard* 19 March 1986, page 1210; 1 May 1986, pages 2140 and 2162) following almost 4 hours of debate in the Senate and approximately 2 hours in the House of Representatives.

During the course of an industrial dispute a senior government official refused to order meat inspectors to cross striking picket lines at a company's abattoir, resulting in lost export opportunities for the company. In a subsequent court case (*Mudginberri v Longhorne*, 1985) the full bench of the Federal Court held that the official was under a statutory obligation to provide inspectors and had no discretion in the matter. As a result of this decision the government made orders conferring a discretion on the official, subject to merits review by the Administrative Appeals Tribunal. However, the Minister was also empowered to direct the official to take certain decisions if the Minister considered this "desirable taking into account the national interest". Such decisions could not be challenged on their merits before the Tribunal. Thus, the Minister could direct that inspectors not cross picket lines and the effect of the Federal Court decisions would thus be circumvented. Notice was given in the Senate to disallow the order containing this directive power on the grounds that political interference with the official's decision could bankrupt an abattoir involved in an industrial dispute; "national interest" was not defined; the Minister's discretion was unfettered; and the attempt to side-step the court case should have been done by means of an amendment to the primary Act, not by delegated legislation.

The Regulations and Ordinances Committee had previously concluded that it should not object to the Orders under its principles since the possible flaws arose from the policy or merits of the instrument and were, therefore, beyond its remit. Debate on the motion was adjourned and

before it resumed the Minister, the Hon. John Kerin, M.P., introduced a fresh set of Orders repealing the first set (thus bringing about the discharge from the Notice Paper of the original notice of motion of disallowance) and remaking them with some changes. The changes included: (a) a new discretion in the official to take into account the physical welfare of inspectors who might have to cross picket lines; and (b) an obligation on the Minister to consult with relevant industry bodies before exercising the power to direct that certain decisions be taken.

A new notice of disallowance was given and the orders were subsequently disallowed. Proceedings on both disallowance motions reflected debate and analysis of a high order and resembled debates on bills in committee of the whole. However, once again, very sophisticated legislative machinery was, for a remarkable length of time, tied up in a merits evaluation of orders made under regulations, made under an Act, which were *prima facie* and foreseeably objectionable and unmeritorious. It is highly likely, however, that a merits committee, armed with the potent power to recommend disallowance on the grounds that the orders were not a meritorious exercise of delegated powers within the objectives of the parent Act, could have negotiated an urgent amending order to remove the extremely wide and unfettered political discretion.

The disallowance debate on the A.C.T. *Trading Hours (Amendment) Ordinance 1985* lasted only forty-two minutes and there was no division on the motion. The Ordinance was designed, in the words of the mover of the motion, Senator Vigor (Australian Democrats, South Australia):

.... to increase tenfold various fines that could be imposed on people who sell non-exempt goods outside specified hours.

The Regulations and Ordinances Committee did not find that the Ordinance infringed its Principles. Debate in the chamber focused on the policy aspects of regulating and deregulating trading hours and legal confusion concerning trading activities exempted from the scope of the Ordinance.

After the debate had been adjourned and just prior to the disallowance motion being resolved in the affirmative without a vote, the then Manager of Government Business in the Senate, Senator Grimes, (Labor, Tasmania), said that:

Although the Government and the Minister would prefer this Ordinance not to be disallowed, it is clear that the combined votes of the Opposition will cause this to happen.⁵⁰

However, some hours previously, on moving that the debate be adjourned the then Minister for Education, Senator Ryan, (Labor, A.C.T.), had found herself in some sympathy with the points

50. Senate *Hansard*, 16 May 1985, page 2095

of criticism put forward in the debate, on the basis that the Ordinance had created anomalies. She stated:

I find myself in agreement with the view that if this Ordinance were to be disallowed we would have an opportunity to look at the whole matter afresh, have further consultations with the local community, the trade union movement and so on, and perhaps produce something which better serves the needs of the community than this Ordinance appears to do.⁵¹

The disallowance of the Government's Ordinance, without a division, for reasons of policy and because of the instrument's lack of merit, in circumstances where a government minister (representing the A.C.T.) was apparently sympathetic to the motion, did not cause a constitutional crisis. A merits committee could well have saved the chamber's time and either or both Ministers' embarrassment by persuading the then Minister for Territories that the policy behind the Ordinance lacked merit.

A Proposal for Merits Review

Professor Pearce concluded his paper on *The Limits of Review* by quoting Senator Austin Lewis (Liberal, Victoria) who, during a debate on the tabling of the Regulations and Ordinances Committee's *Seventy-Seventh* Report, said "There may well be a need for a regulations merits committee to probe policies".⁵² Some of the evidence assembled in this paper might suggest that such a committee may be needed if Parliament is effectively to assert its proper role in the deregulation debate. A problem exists in that there is a need for parliamentary supervision of the policy, merits and substance of delegated legislation. An answer to unjustified or improper regulatory activity already exists in the provisions of the Acts Interpretation Act which enable Parliament to strike down unnecessary delegated legislation. A sophisticated committee tradition already exists in the Senate which is equipped to bargain and negotiate with ministers if the opportunity for compromise and agreement exists. The parliamentary vehicle to bring the problem and the answer together in accordance with tradition might well be the appointment of a Senate committee for the review of the merits of delegated legislation.

Merits review involves "analysis of an instrument's substance, expediency, necessary effectiveness and impact".⁵³ It has been suggested that the conduct of such a process, whether in Parliament or in committee, would amount to a highly partisan and time consuming re-examination of the merits of the parent Act. It is said that it would be an abrogation of the very

51. op. cit. page 2039

52. Senator Austin Lewis (Liberal Victoria), Senate *Hansard*, 9 april 1986, page 1529 quoted in: Pearce, *The Limits of Review*, loc. cit. page 9

53. Report of the Study Committee on Parliamentary Control of Delegated Legislation, National Assembly of Quebec, Canada, July 1983, page 102

principle of delegation by which power is transferred for ministerial exercise. However, Parliament must surely strive to control what is done under its authority and the merits review of regulatory instruments can be prevented from becoming merely a re-run of the second reading and committee debates on the enabling bill.

Committee scrutiny of the merits of regulations can be realistic and effective only if it is confined within the objectives of the parent Act itself. Within the legitimate scope of such objectives there are many different ways of regulating to achieve the ends of policy. Many different choices currently present themselves to a largely unaccountable bureaucracy. The choice should not be left to the unquestioned discretion of bureaucrats who often have no detailed or clear-cut guidelines to follow in the express terms of the enabling legislation.⁵⁴ A specialist committee operating with effective sub-committees, receiving representations, calling on expert witnesses and hearing evidence both from interested parties and public authorities, could be capable of selecting for scrutiny the most significant regulations and other instruments and reporting on their merits as instruments designed to achieve the goals of certain policies provided for by Acts of Parliament.

Such a committee could, in many cases, aspire to a surprising degree of bipartisan agreement on regulatory measures and imposts which, on examination, were found to be inadequate, unjustified or unduly onerous within the objectives of the enabling legislation. Paragraph 14(1)(k) of the Victorian *Subordinate Legislation (Review and Revocation) Act 1962* provides an important precedent for a cost-benefit assessment to be made by a merits committee. Thus, a merits committee could determine whether a regulation “is likely to result in costs being incurred directly and indirectly in the administration of and compliance with the rule which outweigh the likely benefits sought to be achieved by the rule”. The Committee could report on whether regulations represented the correct and preferable prescriptive choice from the range of potential prescriptive choices offered by the policy objectives of the Act. A standard drafting practice could ensure that the provisions in any bill conferring a regulation-making power, should spell out in detail, for debate in Parliament, and for the guidance of secondary legislators and committee scrutineers alike, the objectives of the bill, the purpose and scope of the rule-making authority and the limits of its exercise.⁵⁵ The merits committee could itself perform that

54. See for example the remarks of a former Minister Mr Edward Short, in the British House of Commons during the debate on the motion to establish Standing committees on Statutory Instruments, when he said:

Delegated legislation is one of the worrying aspects of democracy. It is law made by civil servants. I know from experience that very often Minister who sign orders do not have time to scrutinise them. Frequently they are worded in completely incomprehensible gobbledegook which only lawyers understand and the Minister himself often does not know what laws are being made in his name. It is extremely important that parliament should have the opportunity to scrutinise and debate these matters. (House of Commons *Hansard*, Vol. 853, 19-20 March 1973, page 685.)

55. See Recommendation 1 (and pages xxi and 149) of the Report on the Subordinate Legislation (Deregulation) Bill, loc. cit. n. 22 above which states:

vital scrutiny role of which the Regulations and Ordinances Committee was long ago deprived and report on the adequacy of the drafting of those clauses in bills delegating rule-making powers.

The very existence of a parliamentary committee, charged with examining the adequacy, justification, merits and impact of the most significant regulatory measures, in the light of specialist representations and advice, could act as a major stimulus to reduce the volume of unnecessary regulations and underwrite the quality of instruments which are tabled for scrutiny. Quite apart from the secondary legislative nature of its subject matter, the involvement of government Senators in the work of such a committee would ensure that a motion for disallowance would not be viewed as a matter of confidence to threaten the life of a government.

Merits scrutiny at Westminster

The advantage of the above proposals is that they make use of the existing, relatively simple, disallowance practice in the Senate which combines committee technical scrutiny with the potential for full debate in the chamber on both technicalities and merits. The proposals also draw on the long standing Senate tradition of competent committee work in which bipartisanship can be put to constructive use. To this extent the enervating defects of the complex House of Commons Merits Committee may be overcome.

The British Merits Committee was established in 1973 following the Report from the Joint Committee on Delegated Legislation.⁵⁶ Until 1973 merits scrutiny had been carried out, as in Australia, on the floor of the Commons and the Lords. It is said that in the British upper house there is no difficulty in finding time to debate the policy and merits of delegated legislation. The Joint Committee therefore considered that it was unnecessary to alter the existing practice.⁵⁷ The real problem was in the House of Commons where pressure of time devoted to the policy of primary legislation had virtually precluded discussion of the merits of secondary legislation.

... as far as possible principal legislation should spell out the policy guidelines to be followed by bodies vested with delegated powers to implement government policy ... it should not go outside the boundaries laid down in the Principal Act, although its terms may further define the policy aims to be pursued under the principal legislation. The Committee therefore recommends that principal legislation should, as clearly and precisely as possible, indicate the boundaries of policy to be implemented by subordinate legislation passed in accordance with that principal legislation.

56. H. L. 184, H. C. 475, Session 1971-1972

57. *op. cit.* page xxxii. See also the following: J. E. Grey, *Delegated Legislation and the Lords A question of Rights*, *The Parliamentarian*, Vol. 64, July 1982, page 121; J. E. Grey, *Delegated Legislation in the United Kingdom Parliament The Work of the Brooke Committee, The Tale*, Vol. XLII, 1974, page 47; and Alan Beith M.P., *Prayers Unanswered: A Jaundiced View of the Parliamentary Scrutiny of Statutory Instruments*, *Parliamentary Affairs*, Vol. 34, No. 2, Spring 1981

However, pressure of time is no answer to those who argue that a merits committee has a definite role to play within the committee structure of the Australian upper house.⁵⁸ In the Lords, the Special Orders Committee, established in 1925, had to some extent streamlined debate on the floor of the chamber because its terms of reference enabled it to highlight or select for further scrutiny provisions which appeared to raise important questions of policy as well as principle. Writing in 1959 Kersell suggested that:

.... while a committee should not, perhaps, itself go into merit, there can be no objection to questions of policy and principle being drawn to the attention of a legislative chamber by one of its committees.⁵⁹

Kersell went on to point out that Principle (d) of the terms of reference of the Australian Regulations and Ordinances Committee enabled it also to perform an identical function “without itself considering policy matters”.⁶⁰ That is correct. However, when Kersell was writing it was accurate to state that “subordinate legislation does not ordinarily deal with policy”.⁶¹ This is no longer the case and that development is reflected in the fact that in its *Sixty-Fourth Report* (March 1979)⁶² the Regulations and Ordinances Committee amended its fourth principle. The Committee switched its emphasis away from scrutiny to ensure that only “administrative detail” appeared in delegated legislation, to the more vague criterion of whether the subject matter is of such significance that it should more appropriately be enacted by a bill. The subjectivity of this assessment has made it a singularly difficult principle for the Committee to apply successfully. This is particularly so because of perceptions of the impact on the legislative programming of both Houses which too robust an application of the Principle might produce.⁶³

58. See also the comments by Paul Byrne that:

the rarity of prayers in the Lords is less a reflection of satisfaction than a recognition that any successful prayer would produce a constitutional crisis.

Parliamentary Control of Delegated Legislation, *Parliamentary Affairs*, Vol.29, No.4, Autumn 1976, page 370. Ten years on however, the Lords actions concerning the *Local Government Bill 1984* suggest that Byrne may have exaggerated the Lord's temerity.

59. J. E. Kersell, *Upper Chamber Scrutiny of Delegated Legislation*, Public Law, Spring 1959, page 47

60. op. cit. page 52

61. op. cit. page 47

62. Parliamentary Paper No. 42/1979

63. See the Committee's *Seventy-Sixth Report* (March, 1986) where the history of the application of Principle (d) is discussed, and the *Eighty-first Report* (December, 1986) where a new reporting mechanism is proposed for substantive instruments which do not otherwise infringe the Committee's principles.

The fact remains however, that without organised scrutiny machinery the upper house cannot ensure that all instruments of delegated legislation embody the correct and preferable choice of prescriptive action. In any event, the procedures adopted by the British Merits Committee do little to achieve this end. Instruments can be referred to Standing Committees on Statutory Instruments but generally such Committees have no power to make any recommendation they simply consider the instrument, a process which, since it need produce no conclusion, is somewhat academic. There is no capacity to negotiate effectively with Ministers over aspects of delegated legislation which could be made negotiable by the identification of unmeritorious, unjustified or inadequate provisions backed up by the threat of disallowance. An important consequence of the British procedure has been to further remove discussion of the merits of instruments from the floor of the House leaving virtually no opportunity to resurrect debate in the Chamber. The beneficiary of such a device is, of course, the Executive.⁶⁴

The proposals in this paper would, however, avoid such a trap. A Senate merits committee could provide for a selection process to facilitate the committee's systematic scrutiny of the merits of significant regulations without tampering with the existing rights of Senators. The existing disallowance rules, Senate Standing Orders which give disallowance motions precedence as Business of the Senate, and the right of individual Senators to give notices of motion of disallowance which can automatically bring on a debate, should all remain extant.⁶⁵

Conclusion

It has not been the intention of this paper to devise a fully worked-out model of a Senate merits committee. The task is complex and might itself require the pooled intelligence of a Select Committee to report on the matter and the options available.⁶⁶ It has been the purpose of the essay, however, to draw attention to a crucial gap in the Senate committee system. At the beginning of the paper it was estimated that over 4,600 separate Statutory Rules were tabled in Parliament over the period 1972 to 1985 (of course, these figures do not include any of up to 85 other types of delegated legislative instruments). During that same period the *Acts Interpretation Act 1901* and Senate Standing Orders made it possible for any Senator to force the Government, at the risk of otherwise losing the regulations through automatic disallowance, to debate and

64. Gavin Drewry, *Legislation*, in Walkland and Ryle, eds., *The Commons in the Seventies*, Fontana 1977, page 92. See also J. Beatson, *Legislative Control of Administrative Rulemaking: Lessons from the British Experience*, *Cornell International Law Journal*, Vol.12, 1979, pages 214 and 217

65. The *Acts Interpretation Act 1901* could of course be amended to improve the effectiveness of existing scrutiny powers by outlawing prejudicial retrospectivity, providing for partial disallowance and an effective sanction for a failure to table an instrument.

66. The Canadian Standing Joint Committee on Regulations and Other Statutory Instruments, although at present concerned only with technical scrutiny, has reported on the need for merits review saying:

There are many who believe that parliamentary scrutiny is a slight thing if it does not concern itself with the policy of subordinate legislation as well as with its legality and propriety. (Fourth Report, July 1980, para. 12).

bring to a vote the merits, policy and substance of any of those regulations. Yet, over the period only 18 Statutory Rules were the subject of notices of motion by Senators.⁶⁷ Five motions were carried. It is unlikely that these 18 were the only inadequate, unjustified or unduly onerous regulations made during a period of 13 years. As the British M.P., Ronald Bell, said when the Westminster Merits Committee was set up in 1973:

We cannot say that we are doing our job as a parliament, which is a legislature, and scrutinising the executive ... when tens of thousands of instruments have gone through unchallenged and with their merits unscrutinised.⁶⁸

A Committee established to concentrate specialist attention on the merits of selected instruments of delegated legislation would enable the Senate to bring a more organised and less random scrutiny to bear on the otherwise overwhelming volume of legislative instruments affecting business and the community.

The appointment of a Senate merits committee would be the one response to the contemporary debate about deregulation which would arrest the tendency to ignore the qualitative oversight which Parliament can bring to the process and content of delegated law-making.

67. This refers to motions moved by Senators independently of the Senate Regulations and Ordinances Committee.

68. House of Commons *Hansard*, Vol.853, 13-30 March 1973, page 692