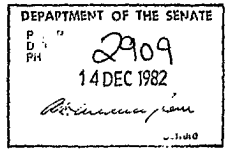
SENATE STANDING COMMITTEE
ON REGULATIONS AND ORDINANCES

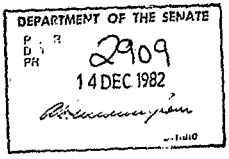


Seventy-third Report

Legislation Considered

March - November 1982

SENATE STANDING COMMITTEE
ON REGULATIONS AND ORDINANCES



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SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

MEMBERS OF THE COMMITTEE

Senator A.W.R. Lewis (Chairman)
Senator M.C. Tate (Deputy Chairman)
Senator N.T. Bonner
Senator J. Coates
Senator D.J. Foreman
Senator A.J. Missen
Senator M.S. Walters

PRINCIPLES OF THE COMMITTEE

(Adopted 1932; Amended 1979)

The Committee *scrutinises delegated legislation to ensure:*

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

(d) that it does not contain matter more appropriate for Parliamentary enactment.

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STANDING COMMITTEE ON REGULATIONS AND ORDINANCES
SEVENTY-THIRD REPORT

1. The Standing Committee on Regulations and Ordinances has the honour to present its 73rd Report to the Senate. The purpose of this Report is to acquaint the Senate with the Committee's consideration of legislation since the 71st Report was presented to the Senate on 11 March 1982.

MATTERS ARISING FROM 71ST REPORT

A. COMMITTEE PROCEDURES

2. In its 71st Report, the Committee advised the Senate that it was giving consideration to certain practices used in other jurisdictions in connection with delegated legislation. It also indicated that it was closely examining a response, from the Attorney-General, which it had received shortly before the presentation of the 71st Report. The Attorney-General's response relates to the four particular practices, outlined in the 71st Report, which were raised for his consideration by the Committee, and these are discussed in turn:

(a) Use of Affirmative Resolution Procedure (in addition to disallowance) in relation to Delegated Legislation

3. The Attorney-General indicated the following reservations about adopting the affirmative resolution procedure:

- an increased legislative workload for the Parliament
- the nullifying of speedy implementation of legislative reform
- the practical constraints of the proposal, notably when the Parliament is in recess.

4. The Committee noted the Attorney-General's reservations in connection with the proposal. In putting the procedure forward for consideration, the Committee did not envisage that it would be the predominant method of implementing delegated legislation. The Committee accepts that it is in the hands of the Government to introduce such procedures in Bills before the Parliament, or for amendments to be made by the Parliament to appropriate legislation, and has drawn the matter to the attention of the Senate Standing Committee for the Scrutiny of Bills, for information.

(b) Delegated Legislation in Draft

5. The Attorney-General favoured the notion of issuing delegated legislation in draft. He made the following points:

- The Government has frequently adopted, on an ad hoc basis, the practice of exposing new regulatory legislation to obtain public comment prior to enactment by Parliament, although he indicated that no firm views had as yet been developed.

- He concluded that, in principle, there are no reasons why a similar approach could not be pursued in relation to delegated legislation.

- While making the point that care would need to be taken that the procedure was not overused in situations for which procedures are adequate, and, further, that the procedures would need to provide, inter alia, scope for urgent measures to be dealt with under the existing procedures, the Attorney-General requested any suggestions which the Committee might have in relation to the matter.

6. The Committee was reassured to note the Attorney-General's approach to the consideration of delegated legislation in draft, because, as the Committee's most recent reports have indicated, the Committee itself has been somewhat ambivalent in this matter.

7. However, the Committee has already received undertakings from Ministers to make certain legislation available in draft. For example, the Committee is at present examining a proposed ordinance relating to Drugs and Dangerous Substances in the Australian Capital Territory, which fulfils a commitment made by successive Ministers for Health. In addition, Ministers themselves have, from time to time, requested the Committee to examine delegated legislation before it is made, to ensure that it does not offend the Committee's principles. As illustration, the Committee draws attention to the Quarantine (Cocos Islands) Regulations, discussed at paragraphs 32-35 below.

8. The Committee has decided that, when draft delegated legislation is made available to it in accordance with an undertaking, the Committee will examine such legislation, while reserving its right to take any action it deems appropriate after the instrument becomes law. In relation to draft delegated legislation on which a Minister may see it as desirable to seek the Committee's advice, the Committee would not wish to be bound automatically to consider such draft legislation, and thus would reserve the right to refuse to consider it as a draft. If the Committee does consider legislation in draft, it would regard itself as bound to report to the Senate, normally in a general report, that such consideration has occurred. Quite clearly, it accepts the point that care would need to be taken that the procedure is not overused in situations for which procedures are adequate, and that

the procedures would need to provide, inter alia, scope for urgent measures to be dealt with under existing procedures.

9. In response to the Attorney-General's request for suggestions, the Committee has put forward for consideration the desirability of formally tabling draft legislation in the Senate. This procedure would be in keeping with both United Kingdom and Canadian practice and would be particularly advantageous in the case of draft A.C.T. Ordinances, many of which are already publicly available by virtue of their being presented in draft to the A.C.T. House of Assembly.

(c) Power to amend, in addition to affirming or disallowing, Delegated Legislation

10. As indicated in the 71st Report, the Committee had some reservations about any proposal that the Parliament itself should amend delegated legislation, and these misgivings were shared by the Attorney-General. However, in the context of discussion of amendments to delegated legislation, the Attorney-General put forward a proposal that the power accorded to each House of Parliament under the Acts Interpretation Act to disallow regulations and other instruments be extended to include power to disallow part of a regulation or instrument rather than the entire regulation or instrument, as at present. The Committee warmly endorses the suggestion, and looks forward to an amendment to the Acts Interpretation Act along the lines of the provisions contained in, for example, the Seat of Government (Administration) Act.

(d) Committee's powers during recess: cf Tasmanian Subordinate Legislation Committee

11. The Committee also proposed to the Attorney-General that the Tasmanian system under which, when Parliament is not sitting, the recommendations made by the Subordinate Legislation Committee of the Tasmanian Parliament in respect of delegated legislation must be accepted or the laws which are the subject of those recommendations are suspended, might be extended to the Commonwealth. The Attorney-General did not favour this course.

12. The Committee is now giving consideration to extending its operations, under Standing Order 36A, during recess. The Committee accepts that, unless action were taken by statute to extend its powers, no formal method of Parliamentary control would be available to it. However, the Committee would at least be able to convey its views on certain instruments which were causing it concern to the relevant Minister soon after they were made and, perhaps, remedial action could be taken by the Executive sooner than is the case at present. One particular advantage of the procedure is that it could overcome delays in fulfilment of undertakings which have caused the Committee problems in the past.

B. UNIFORM COMPANIES LEGISLATION

13. The Committee indicated in its 71st Report that it was corresponding with the Chairman of the Queensland Subordinate Legislation Committee concerning the amendment of State Companies Acts by regulation, rather than by an amending Act ("Henry VIII Clauses"). At the time the Report was presented to the Senate, the Committee was awaiting advice from the then Minister for Business and Consumer Affairs, concerning an approach he had made to his colleagues on the Ministerial Council. The Minister

subsequently advised that the Ministerial Council endorsed comments made by the Western Australian Attorney-General, the Honourable I.G. Medcalf, E.D., Q.C., M.L.C., as follows:

> "This unusual method was adopted deliberately as being necessary to ensure the continuous application of uniform companies and securities legislation throughout Australia, once the application Bills had taken account of the pre-existing diversity in detail of ancillary State laws.
>
> "The continuance in this scheme would be a decision for the Government of the day but it remains technically possible for any State Parliament, by altering the schedule to the application Bill, to alter the text of the relevant code as it applies in that State. It would of course need to be realised that such a move could lead to a breach of the Formal Agreement which could bring the scheme to an end."

14. The Committee appreciates the peculiar circumstances which have given rise to this procedure, but stresses that legislation of this type illustrates the problems created for Delegated Legislation Committees in discharging their responsibilities to examine delegated legislation made under general uniform legislation.

15. Recently, the Queensland Committee has again written to the Regulations and Ordinances Committee, seeking its support in raising the matter once more with the Ministerial Council. The Committee has written to the Acting Attorney-General, endorsing the stand taken by the Queensland Committee.

C. ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) REGULATIONS (STATUTORY RULES 1981, NO. 274)

16. These regulations were extensively debated in the Senate on 23 March 1982. In November 1981, the Committee gave notice of disallowance of the regulations on the ground that they continued in force a limitation, imposed for twelve months in the Schedule to the Administrative Decisions (Judicial Review) Act, on the rights of certain individuals to receive *reasons for decisions on promotions, transfers and appeals* in the Australian Public Service.

17. Following consideration of complex proposals put forward for the amendment of the Public Service Act, the Committee sought an undertaking from the Attorney-General that the proposed amendments would be brought forward for debate in each House of the Parliament before the end of the Autumn Sittings. The Attorney-General gave an appropriate assurance, and on that basis the Committee decided not to proceed with its disallowance motion. However, the regulations in question were in fact disallowed by the Senate.

18. Although the Committee did not proceed with the notice, it made the decision with some degree of reluctance. The regulation was made on 27 September 1981, only three days before the exemption from the provisions of the Administrative Decisions (Judicial Review) Act was due to expire. Further, the Committee sought advice as early as 22 October 1981 on the reasons for continuing in force a limitation on the rights of individuals. The Committee was advised in November 1981 that concrete proposals for conferral of rights would be considered by the Government, but it was not until 11 March 1982 - only 11 days before the notice of disallowance was due for debate - that the Public Service Board put substantive proposals before the Committee.

D. EXPLANATORY STATEMENTS

19. In its 71st Report the Committee drew the attention of the Senate to inadequacies of certain explanatory statements attached to regulations and other instruments. The Committee is pleased to report some improvement in the standard of explanatory statements, and commends the departments which have provided it with adequate information. Most notably, the lucid and detailed statement accompanying the Papua New Guinea (Staffing Assistance)(Superannuation) Regulations (Amendment), contained in Statutory Rules 1981, No. 387 (see paragraphs 58-60), might well serve as a model for all departments preparing statements for the Committee's consideration. In contrast, however, the explanatory statement accompanying the exceedingly complex National Gallery Regulations, contained in Statutory Rules 1982, No. 259, gave the Committee no assistance in considering the regulations.

LEGISLATION CONSIDERED MARCH - NOVEMBER 1982

DEFENCE FORCE (RESERVES)(FINANCIAL) REGULATIONS (AMENDMENT) (STATUTORY RULES 1981, NO.337)

20. In December 1981, the then Minister Assisting the Minister for Defence advised the Committee of the retrospective operation of these Statutory Rules. He indicated that in May 1981 the then Minister for Defence approved a recommendation of the Defence (Conditions of Service) Steering Committee that reservists generally should not be liable for rations and quarters charges, on the ground that they need to maintain their own domestic establishments while performing reserve service. The Minister for Defence decided that the change should take effect from 11 March 1981, the date on which he referred the matter to the Defence Committee for review.

21. While accepting the reasons for the retrospectivity, on the ground that the regulations were conferring a substantial benefit, nonetheless the Committee was concerned that all persons possibly coming under the regulation might not be treated equally. In a letter to the Committee of 8 April 1982, the then Minister for Defence advised that the effect of the regulations was to treat all members who lived in barracks between 11 March 1981, the date on which the regulations were given effect, and 27 November 1981, the date on which they came into operation, as fairly as possible. The Committee accepted the explanation, and took no further action on the regulations.

DEFENCE DETERMINATION NO. 59 OF 1981

22. This Determination was made on 15 December 1981, with retrospective effect to 14 January 1981. The effect of the Determination was to ensure that members of other ranks in the Air Force should not be financially disadvantaged while undergoing officer and flying training, and should retain a rate of flying allowance applicable to their employment categories for the duration of officer and flying training.

23. Subsequently, the Minister Assisting the Minister for Defence advised that an error had been made in the drafting of the Determination, so that the entitlement was extended to other training officers who had not previously been entitled to it. The Minister pointed out that it was not possible to correct the error by a further amending Determination. To do so would have been to affect the rights of persons in a manner prejudicial to them and is precluded by sub-section 58B(5) of the Defence Act 1903. The Minister advised that Determination No. 59 would not be tabled in either House of the Parliament. He pointed out that the consequence would be that on the expiration of the fifteenth sitting day after the Determination was made, the

Determination would become void and of no effect, ab initio (sub-section 48(3) of the Acts Interpretation Act 1901, as applied to Determinations by sub-section 58C(1) of the Defence Act 1903). When the Determination became void, the Minister made a fresh Determination covering the same substantive changes but with the correct dates of effect. The intended entitlements of members were thus maintained.

24. As the Minister pointed out, it is unusual deliberately not to table a subordinate legislative instrument. He therefore drew the attention of the Committee to the matter prior to the expiration of the tabling period. The Committee accepted the Minister's reasons for this unusual course of action.

HIGH COURT OF AUSTRALIA RULE OF COURT AMENDING THE HIGH COURT RULES (STATUTORY RULES 1982, NO. 77)

25. The purpose of this Rule of Court was to fix a rate of interest on judgment debts. The rule stipulated that every debt entered before 21 April 1980 would carry interest at the rate of 5% per annum, while all subsequent debts were to carry interest at the rate of 10% per annum. Prior to 21 April 1980, the rate of interest on judgment debts was prescribed under the High Court Procedure Act 1903, which specified a rate of 5%. That Act was repealed on 21 April 1980. The High Court was then empowered to set interest rates by Rules of Court under the Judiciary Act. However, no rules were made until March 1982. Although the Committee realised that the rate of interest set by the Court was low by existing standards, and understood the need to cover the hiatus which existed between the repeal of the High Court Procedure Act and the making of the Rule, the Committee was concerned, under its principles, at the imposition of the interest rate at double the rate previously imposed, with retrospective effect of almost two years.

26. Following correspondence between the Committee and the Chief Justice of the High Court, the Court agreed to amend the rule to provide that the interest rate be 5% on all judgments made before Statutory Rules 1982, No. 77 came into operation, and 10% thereafter. The promised amendment was effected by *Statutory Rules 1982, No. 262, which came into* force on 5 October 1982. As indicated to the Senate when notice of disallowance of the earlier rule was withdrawn, the Committee was most appreciative of the expeditious fulfilment of the commitment to amend the rule.

CONCILIATION AND ARBITRATION REGULATIONS (AMENDMENT) (STATUTORY RULES 1982, NO. 108)

27. These regulations were the subject of a notice of *disallowance and statements in the Senate. The Committee* noted that sub-regulation 146AJ(5C) granted immunity from civil and criminal proceedings, including defamation, to the Commonwealth and a Returning Officer in respect of the issue of material provided by a candidate and sent out with ballot papers. *The Committee raised with the Minister* the question whether the matters contained in the sub-regulation were of such substance that they might more appropriately be the subject of an Act of Parliament rather than of delegated legislation. The Committee further queried whether the *regulation-making powers provided in sections* 133AA and 198 of the Conciliation and Arbitration Act 1904 were wide enough to authorise the making of the sub-regulation in question.

28. *In a detailed reply* to the Committee, the Minister for Employment and Industrial Relations advised that section 133AA of the Conciliation and Arbitration Act provided an adequate statutory basis for the regulation. The Minister further advised that the new regulation was inserted in Part VAA of the Conciliation and Arbitration Regulations, which constitute a code in relation to the conduct of certain

elections. He put to the Committee that the consequences of sub-regulation 146A(5C) for an individual who may be defamed by electoral material are small. Further, he put the view that considerations of policy amply justified the small diminution in the rights of such a person. He also pointed out that the indemnity of the Returning Officer is of a quite limited character, and relates only to the functions performed under the regulation.

29. The Committee accepted the Minister's view, and withdrew the notice of disallowance on 17 November 1982.

POSTAL SERVICES REGULATIONS (STATUTORY RULES 1982, NO. 147)

30. These regulations, relating to the opening of mail, were prepared in response to an undertaking originally given in November 1975. On examining the regulations, the Committee was pleased to note that the regulations met the objections which had been the subject of such extensive correspondence with the present Minister and his predecessors since 1975. However, one small point of clarification remained: the Committee noted that, while regulation 48B gave a necessary power to destroy a physically offensive postal article, there was no requirement to inform either the sender or the addressee of the destruction of such an article. The Committee therefore asked the Minister for the reasons why a right of notification to a sender or addressee was not included in the regulations.

31. As reported to the Senate, the Minister advised the Committee that instructions had been issued to State managers of Australia Post that a sender or addressee is to be advised, where possible, of destruction of an article under the regulation. In the light of the Minister's advice, and in view of the comprehensive nature of the Postal

Service Regulations as a whole, the Committee decided to withdraw its notice of disallowance. The withdrawal was effected on 17 November 1982.

QUARANTINE (COCOS ISLANDS) REGULATIONS (STATUTORY RULES 1982, NO. 194)

32. On 25 May 1982, the Minister for Health wrote to the Committee, seeking its comments on draft Quarantine Regulations which were intended to provide the legislative framework for a scheme to keep the Cocos Islands free of animal and plant diseases. The Minister's request was made to the Committee towards the end of the Autumn Sittings, and at that time the Committee had not reached a concluded view on its attitude towards consideration of regulations in draft (see paragraphs 5-8 above). The Committee indicated to the Minister that it would be unlikely to meet until the Budget Sittings of the Parliament, but that it would not wish the resultant delays in its deliberations to inhibit the Minister's making the proposed regulations if he wished to have them in place as soon as possible. However, the Committee requested that, if the Minister were in a position to withhold the making of the regulations until the Budget Sittings, it would appreciate his doing so. On 30 June 1982, the Minister advised that, since the Quarantine Station at the Cocos Islands had already commenced operations, it was essential that quarantine controls be effected as soon as possible. He therefore proceeded to have the regulations made and took note that the Committee would examine them in accordance with its normal practice after they were made.

33. Subsequently, the Committee advised the Minister of the following concerns about the regulations: Firstly, regulations 14 and 19 provide for an unrestricted right of a quarantine officer to enter premises. The Committee put to the Minister that such a right should be restricted so that

the officer might do so only after obtaining prior approval from a magistrate or, at the least, a Justice of the Peace. Secondly, the Committee also noted that the right of a quarantine officer to destroy goods is unrestricted.

34. The Minister has now agreed to amend regulations 14 and 19, to require that a warrant be issued by a Justice of the Peace before premises are entered by a quarantine officer without the owner's approval. So far as restrictions on the destruction of goods are concerned, the Minister pointed out that speed is essential in a quarantine control operation, and any delay could cause complications and spread of disease. He therefore considered it inappropriate that a decision to destroy an animal or other goods that are diseased or are a source of infection should be capable of being delayed or overruled. An alternative suggestion - that the approval of the Minister be sought before destruction occurred - was not considered appropriate because of delays necessarily involved in communications between the Cocos Island and Australia. The Committee accepted the Minister's views, and did not pursue the matter further.

35. The Committee commends the Minister for his most constructive attitude to these regulations, in both their draft and final forms.

FREEDOM OF INFORMATION (CHARGES) REGULATIONS (STATUTORY RULES 1982, NO. 197)

36. In considering these regulations, the Committee noted that, under regulation 9, it is provided that charges may be fixed based upon estimates of time that are "in the opinion of the agency or Minister" likely to be necessary to fulfil the request of the applicant. The Committee also noted that regulation 10 enabled the charge to be readjusted, either upwards or downwards, when an estimate was found to be

inaccurate. The effect of regulation 10 was to render the estimated charge under regulation 9 open-ended.

37. The Committee asked the Acting Attorney-General whether, when liability to a charge is significantly greater than the estimate originally given, some mechanism might not be possible, prescribed by regulation, to advise a person seeking information that the charge would be much higher than originally estimated. The Committee suggested that, if such a provision were practicable, some consideration might also need to be given to the consequences of that advice, for example, whether a person could exercise the right not to proceed with the request for information without financial penalty; whether the discretion under Section 30 of the Freedom of Information Act 1982 to waive all or some part of the charges could be automatically exercised under such circumstances; or whether an agency could make available to a person documents which could be produced for the cost originally estimated.

38. The Committee also suggested to the Acting Attorney-General that, in view of the subjective nature of the phrase "in the opinion of the agency or Minister" in sub-regulations 9(1) and (2), the phrase might be deleted. The Committee was aware that, the basis of the charging having been set by regulation 3 as the decision of the agency or the Minister, estimates are indeed a question of opinion, and, further, that adequate appeal provisions were included in the Freedom of Information Act in relation to charges. However, the Committee was concerned that an appeal from "an opinion" is always more difficult to mount than one from a decision based upon objective criteria.

39. The Acting Attorney-General advised that regulations 9 and 10 were drafted in their present form to ensure that only one notice of liability to pay charges may be sent to an applicant before the agency concerned is in a position to

make a decision on his request. The giving of such a notice has the effect, by virtue of section 31 of the Act, of suspending the running of the period of 60 days specified in section 19. It was considered that an agency should not be entitled, by a series of notifications relating to charges, to prolong that period several times.

40. The Acting Attorney-General accepted that an agency should warn an applicant once it seems likely that its original estimate of the charge is likely to be substantially exceeded. He therefore agreed that an agency should consult with an applicant to see whether he wishes to proceed with the request or to amend it in some way so as to reduce the work involved. While the Acting Attorney-General acknowledged that this could be done by putting an appropriate provision in the regulations, he suggested that the matter might be better dealt with administratively, by guidelines which the Attorney-General's Department was preparing at the time the Committee raised the matter, to explain the scheme of charges.

41. The guidelines, which were subsequently made available to the Committee, include a provision that an agency should inform an applicant in any case where it appears that the charges fixed under regulation 9 are likely to be substantially revised upwardly by more than 25% under regulation 10, and consult with the applicant as to whether he wishes the work to proceed or to revise his request. The guidelines further suggest that, where an applicant is disadvantaged because an agency has substantially underestimated the charge fixed in accordance with regulation 9, the agency should consider exercising its discretion under section 30 of the Act to waive the whole or part of any additional charge fixed under regulation 10.

42. So far as the Committee's second point was concerned, the Acting Attorney-General suggested that there are two safeguards against the subjectivity of "in the opinion of the agency or Minister" in sub-regulations 9(1) and (2). Firstly, on the ordinary rules of interpretation, the opinion must be one which has a reasonable basis. Secondly, in any appeal to the Administrative Appeals Tribunal against the fixing of a charge in accordance with the sub-regulations, the Tribunal stands in the shoes of the original decision-maker and is itself fixed with the duty of determining what would be, in its opinion, the amount of the charge that would apply if all steps necessary to enable a decision to be made had been taken by the agency or Minister.

43. The Committee, having considered the views of the Acting Attorney-General and having discussed the regulations with officers of the Attorney-General's Department, has concluded that the matters raised in correspondence with the Acting Attorney-General and during discussions with the officers, might at some future time more appropriately be the subject of regulations rather than guidelines. For the moment, however, the Committee has decided not to pursue amendment of the regulations, and will examine the matter again after twelve months' operation of the regulations and guidelines. The Acting Attorney-General has advised that he would welcome the Committee's further consideration of the regulations.

PAROLE (AMENDMENT) ORDINANCE 1982 (A.C.T. ORDINANCE NO. 1)

44. The Committee considered this ordinance in the light of a submission that was placed before it. The submission drew attention to sub-section 5(4) of the ordinance, which provides that 'one member at least [of the Parole Board] shall be a female'. The view was put to the Committee that the provision might be regarded as discriminatory and

unnecessary. While the Committee did not consider that the existence of the provision contravened any of its established principles, it nonetheless sought the Attorney-General's views. It further suggested that the provision might be worded differently, perhaps along the lines 'one member at least shall be a male and one member at least shall be a female'.

45. The Attorney-General advised that the amendment in question was sought by the former Australian Capital Territory House of Assembly, which saw it as ensuring wider community representation on the Board, and that it was made only after consultation with the Board. So far as the Committee's suggested amendment was concerned, the Attorney-General advised that, on presentational grounds, he saw merit in the Committee's suggestion, and accordingly has asked his department to have regard to this matter when the ordinance is next amended.

BUILDING (AMENDMENT) ORDINANCE (NO. 2) 1982 (A.C.T. ORDINANCE NO. 70)

46. The purpose of this ordinance is to require publication in the Gazette of certain decisions made by the Building Review Committee and the Building Controller, and also to confer protection from civil and criminal actions upon the Building Controller. When considering the ordinance, the Committee was concerned to note that section 7(3A) appeared to absolve the Building Controller from all liability in respect of any act or thing done by him, provided only that it was done in good faith. The Committee was of the view that, should this be the effect of the ordinance, the conferral of such a wide immunity on the Building Controller would alter personal legal rights under the common law very substantially.

47. As reported to the Senate on 17 November 1982, the Minister advised that the Committee's interpretation of the effect of the ordinance was correct and gave an undertaking to amend the ordinance to provide immunity from legal action for the Building Controller, Deputy Building Controller and inspectors appointed under the ruling ordinance in their personal capacities while performing their duties pursuant to the ordinance but ensuring that liability for actions of these officers will be accepted by the Commonwealth. The Minister further undertook to make the proposed amendment retrospective to the date of the making of the Building (Amendment) Ordinance (No. 2) 1982, so that persons' rights will not in any way be adversely affected by the making of the later ordinance. In the light of the Minister's undertaking to amend the ordinance, the Committee withdrew the notice of disallowance which had been given on 26 October 1982.

SEAT OF GOVERNMENT (ADMINISTRATION) (AMENDMENT) ORDINANCE (NO. 4) 1982 (A.C.T. ORDINANCE NO. 73)

48. The Committee noted that this ordinance gives Ministers, other than the Minister for the Capital Territory, power to delegate to any person any powers held by any Minister under any ordinance. While the Committee was aware that the Minister for the Capital Territory already possesses such a power, it also was aware that that power was not conferred by ordinance but by section 12C of the Seat of Government (Administration) Act 1910. The Committee expressed its concern to the Minister that such a wide power of delegation was conferred by an instrument of delegated legislation.

49. The Minister advised the Committee that the general power had been conferred 'for reasons of expediency' and represented a saving of time and administrative expense. The Minister further commented that the general power might, in appropriate cases, be restricted by the insertion of a

specific provision in particular ordinances. Following consideration of the Minister's letter, the Committee decided to take no further action in relation to the ordinance but decided to draw the attention of the Senate to this matter.

PLUMBERS, DRAINERS AND GASFITTERS BOARD ORDINANCE 1982 (A.C.T ORDINANCE NO. 74)

50. The purpose of this ordinance is to establish a Board to license plumbers, drainers, gasfitters and liquefied petroleum gasfitters in the Territory. The Committee's concern with this ordinance lies in sub-section 33(2), which provides that the validity of a decision of the Board to cancel or suspend a certificate or licence is not 'to be affected by a failure to include in a statement under sub-section (1) a notification in accordance with paragraph 1(b)'.

51. The Committee appreciates that technical failures should not usually invalidate decisions. However, it would expect that notification of cancellation or suspension would attract a routine form which should include a routine reference to the right of appeal which would be same in every case. As the Committee has pointed out to the Minister for the Capital Territory, the cancellation or suspension of a licence is such an important matter for the person concerned that it could be argued that the person should be fully informed of the appeal rights without exception. The Minister has advised that he is awaiting comments from the Attorney-General's Department on this matter.

COCOS (KEELING) ISLANDS AND CHRISTMAS ISLAND MEDICAL PRACTITIONERS ORDINANCES (NOS 6 AND 7 OF 1982)

52. The purpose of these ordinances is to regulate the practice of medicine in the Territories, by restricting the performance of medical services and the treatment of certain diseases to persons who are currently registered or licensed as medical practitioners under a law of State or the Northern Territory or the Australian Capital Territory.

53. The Committee sought an assurance from the Minister for Home Affairs and Environment that no existing practitioners on the Islands would be debarred from practising under the ordinances. The Minister gave the assurance in each case.

RETROSPECTIVITY

54. In accordance with the undertaking given to the Senate in the Committee's 25th Report, this Committee draws attention to the following statutory instruments which have retrospective effect for a period of more than two years:

(a) Audit Regulations (Amendment) (Statutory Rules 1981, No. 348)

55. These regulations provide that certain provisions of the Audit Act have application to the annual reports and financial statements of the Australian Capital Territory Schools Authority that relate to the financial year that ended on 30 June 1980.

56. As the excellent explanatory statement indicated, 'the need for such application arose because of legal advice in 1977 that it was not competent by or under an ordinance to vest functions in the Auditor-General in his official capacity. This resulted in the then

Auditor-General accepting appointment as auditor for the A.C.T. Schools Authority in a personal capacity, with his official staff preparing audit reports in the course of their normal duties; the current Auditor-General does not wish to continue this practice. As the former Auditor-General retired before the audit reports for 1979/80 and 1980/81 were ready for his signature, the application of the .....Audit Act is being made effective from the beginning of the 1979/80 financial year in order to remove any legal doubts about completing the audit reports for these periods'.

57. As the amendment did not take effect until 3 December 1981, more than two years' retrospectivity was involved, and the Committee therefore draws these regulations to the attention of the Senate.

(b) Papua New Guinea (Staffing Assistance) (Superannuation) Regulations (Amendment) (Statutory Rules 1981, No. 387).

58. The purpose of these regulations is to make provision for Australian staff who were employed in the administration of the former Territory of Papua New Guinea. The regulations provide retirement benefits for former employees, and continue payment of pensions entitlements under certain Papua New Guinea ordinances which were superseded by the Papua New Guinea (Staffing Assistance) Termination Act 1976. The principal amendments of the regulations are expressed to take effect from and including 1 July 1979. Earlier dates of effect apply to the provisions correcting existing minor defects.

59. The explanatory statement accompanying the regulations indicated that the delay in making the regulations was caused by their scope and complexity; the fact that they modify three separate pieces of legislation added to

their complexity and made them difficult to prepare. In the statement it was indicated that, during the course of their preparation, it was necessary to test the proposed provisions against a wide variety of circumstances that could arise in individual cases to ensure that the proposed benefits would be available to the persons intended and also payable at the rates intended.

60. As indicated at paragraph 19 above, the Committee was impressed with the detailed explanatory statement which accompanied the regulations, and advised the Minister for Finance accordingly. The Committee also asked the Minister whether any interest factor had been included to compensate for the delay in making the regulations, in view of their extensive retrospectivity. The Minister advised that it is not the practice to provide for the payment of interest when beneficial legislation is introduced with retrospective effect.

(c) Remuneration Tribunals (Miscellaneous Provisions) Regulations (Amendment) (Statutory Rules 1982, No. 101)

61. On 14 May 1982, the Minister for Administrative Services wrote to the Committee, advising that this regulation was retrospective to 10 November 1977, the date upon which the Director of Medical Services, Qantas, was appointed as a part-time member of the Administrative Appeals Tribunal. The Minister has previously indicated his views to the Committee concerning the undesirability of retrospectivity, particularly when lengthy periods are involved.

62. In his May letter, the Minister indicated that, although steps have been taken to draw the attention of all departments to problems of retrospectivity, cases such as the present one still continue to appear. He also stated that consideration has been given to denying

retrospectivity in all future cases, but such a course would penalise the office holders involved for what appear to be oversights on the part of responsible departments.

63. The Committee advised the Minister that it agreed with his conclusion, and indicated its own concern with this aspect, as evidenced by its 70th and 71st Reports. The Committee also wrote to the Attorney-General, as the Minister responsible for the appointment of the Director of Medical Services to the Administrative Appeals Tribunal, expressing its concern at the inordinate delay in making appropriate provision for the remuneration of the part-time member.

(d) Compensation (Commonwealth Government Employees) Regulations (Amendment) (Statutory Rules 1982, No. 117)

64. The purpose of these regulations is to ensure that persons who are engaged, or persons whose services have been made available, for the purposes of the High Court of Australia have workers' compensation coverage under the Compensation (Commonwealth Government Employees) Act 1971. The regulations were made retrospective to 21 April 1980, the day on which the High Court of Australia Act 1979 came into operation.

65. As indicated to the Senate on 12 October 1982, when notice of disallowance of the regulations was given, the Committee noted from the explanatory statement accompanying the regulations that, prior to their being made, compensation claims by employees of the High Court of Australia 'have been handled by ex-gratia arrangements'. The Committee therefore asked the Minister for Social Security, firstly, why such arrangements were made and, secondly, the reasons for the delay in making regulations governing compensation for High Court employees.

66. A most detailed and helpful response from the Minister for Social Security was incorporated in the Senate Hansard on 14 October 1982. Briefly, when the High Court of Australia Act came into operation, the legislation did not make reference to the application of the provisions of the Compensation (Commonwealth Government Employees) Act 1971 to staff employed under the High Court of Australia Act. The amendment to the regulations was intended to put beyond doubt the application of the Compensation Act to employees of the High Court. As an interim measure, while drafting of the regulations was being finalised, the High Court adopted an administrative arrangement for the handling of any compensation that arose. The purpose of applying the regulation retrospectively was to ensure that employees of the High Court who suffered injury or disease prior to the making of the regulation would have a right of review by the Administrative Appeals Tribunal if they were dissatisfied with the decision made in respect of such a claim.

(e) Snowy Mountains Hydro-electric Power Regulations (Amendment) (Statutory Rules 1982, No. 231)

67. The purpose of these regulations, which came into operation on 21 September 1982, is to validate New South Wales pay-roll tax payments which have been made by the Snowy Mountains Authority since 1979, and to provide authority for future pay-roll tax disbursements.

68. In 1971, the Authority was specifically designated as one of the Commonwealth institutions which would become subject to State pay-roll tax on transfer of the relevant taxing function from the Commonwealth to the States, and commenced to make New South Wales State pay-roll tax payments from that time. In 1979, however, the Snowy Mountains Hydro-electric Power Act, under which the

Authority is established, was amended, inter alia, to bring its financial provisions into line with legislation applicable to other Commonwealth Statutory Authorities. The effect of the amendments made to the Act was that, unless otherwise provided by regulation, the Authority is not subject to taxation under a law of a State or a Territory. The Authority has, however, continued to pay the tax, and these regulations are required to validate the payments.

SECOND COMMONWEALTH CONFERENCE OF DELEGATED LEGISLATION COMMITTEES

69. The second Commonwealth Conference of Delegated Legislation Committees will be held in Ottawa in April 1983. The Standing Joint Committee on Regulations and Other Statutory Instruments of the Canadian Parliament, in conjunction with the Commonwealth Parliamentary Association, has invited representatives of the Committee to attend the Conference. The President of the Senate has given approval for the Conference to be attended by the Chairman and Deputy-Chairman of the Regulations and Ordinances Committee, by Senator Missen in his capacity as Chairman of the Commonwealth Delegated Legislation Committee, and by a Senate officer.

70. It will be recalled that the first Conference, hosted by the Senate Regulations and Ordinances Committee, was held in Canberra in 1980. This Conference dealt with the general problems of delegated legislation facing the several Scrutiny Committees established in the Parliaments of the Commonwealth. The Canadian Committee hopes that the second conference will be able to deal with at least some specific issues in greater depth. The Regulations and Ordinances Committee has put forward the following four topics for possible inclusion on the conference agenda:

(a) Judicial review of administrative decisions

(b) Parliamentary scrutiny of court procedures

(c) The role of the Senate Standing Committee for the Scrutiny of Bills

(d) Uniform legislation in a Federal system, with particular reference to the scrutiny of delegated legislation.

71. As both the 71st and 73rd Reports indicate, this Committee derived great benefit from the issues discussed at the first conference, and looks forward to an equally productive conference in 1983.

LEGAL ADVISERS TO COMMITTEE

72. The Committee wishes to pay special tribute to its former legal adviser, Mr. B.J. Doyle, LL.B., B.C.L., who for almost six years from 1976 until his resignation took effect on 30 June 1982, performed an inestimable service to the Committee. During that period, he examined more than 2700 statutory instruments, and his profound knowledge of statutory interpretation and dedication to the Committee's purposes were indispensable to the Committee in its operations.

73. The Committee is pleased to inform the Senate that its present legal adviser is Professor Douglas Whalan, Professor of Law at the Australian National University, who has already proved a worthy successor to Mr Doyle.

UNDERTAKINGS TO COMMITTEE

74. The Committee expresses its appreciation of the co-operation extended to it by the Justices of the High Court, Ministers and their Departments. For the information of the Senate, a report of progress made in the fulfilment of outstanding undertakings listed in the Committee's 66th, 69th, 70th and 71st Reports is attached as Appendix I. Also appended is a summary of recommendations of the Committee, other than recommendations for amendment or review of particular pieces of delegated legislation, and action taken or foreshadowed in relation to them.

AUSTIN LEWIS
Chairman
December 1982

APPENDIX I

REPORT ON UNDERTAKINGS BY MINISTERS TO AMEND OR REVIEW DELEGATED LEGISLATION

A Listed in the 66th Report (June 1979)

1 Postal Services Regulations: provisions allowing the opening of mail by officers: undertaking given 5 November 1975. This undertaking was delayed by the consideration of the opening of mail by the Law Reform Commission and the Royal Commission on Drugs. The responsible Minister agreed in February 1979 not to await the reports of those bodies and to proceed with the promised amendments. In April 1980 the Minister reported that difficulties had been encountered in preparing the amendments. These difficulties were the subject of a hearing of various officers on 17 April 1980. The officers considered that there were no substantial difficulties preventing the speedy enactment of the amendments, with minor modifications. The Committee reported this conclusion to the Minister on 18 April 1980. In August 1980 the Minister advised that the amendments would proceed. Following further correspondence with the Committee, the Minister advised on 25 January 1982 that the proposed regulations had been drafted and were being printed for submission to the Executive Council. The undertaking was fulfilled by Statutory Rules 1982, No. 147. (And see paragraphs 30-31 of 73rd Report.)

2 Regulations under the Customs Act: rights of appeal against administrative acts: undertaking given 16 March 1976. This matter is partly still under consideration by the Administrative Review Council. In August 1979 the Council reported that it had sent to the Government the Report on the Customs (Import Licensing) Regulations. In February 1982, the

then Minister for Business and Consumer Affairs indicated that further consideration of the Council's Report on Review of Import Controls and Customs By-laws Decisions would be deferred until the Industries Assistance Commission had reported on the Customs by-law system. The Commission's Report, which was tabled in the Senate on 11 November 1982, includes a recommendation that the Administrative Review Council's recommendations for administrative review of by-law decisions be adopted. In November 1979 the Council reported that it would be 'well into 1980' before the remaining matters were concluded. A further letter from the Council advised that considerable delays had occurred in concluding the reference. It is expected, however, that a report on the remaining matters will be completed during 1983.

3 A.C.T. Sale of Motor Vehicles Ordinance: powers of registrar to determine disputes: undertaking given 20 October 1977. In January 1981 the responsible Minister reported that draft amendments had been received by the Department, following completion of a review of the ordinance, but that further discussions with officers of the Attorney-General's Department were required. The Minister advised the Committee on 9 January 1982 that the proposed amendments to the Ordinance had been prepared and that he expected the draft Ordinance would be considered by the House of Assembly on 8 February 1982. The House of Assembly did not complete its consideration of the Ordinance before elections were held in 1982, and the Committee has been advised that other matters now require resolution before the draft is resubmitted to the Assembly.

B List in the 69th Report (September 1980)

1 A.C.T. Poisons and Narcotic Drugs Ordinance: offences and penalties: undertaking given 19 July 1979. The responsible Minister undertook to amend some provisions of the ordinance

and review others. The Committee is at present examining a draft Drugs and Dangerous Substances Ordinance, made available to it in accordance with undertakings given by previous Ministers.

2 Norfolk Island Regulations: power of Parliament to disallow regulations not made by the local responsible executive: undertaking given 9 October 1978. In May 1980 the responsible Minister advised that the amendments were being drafted and on 29 May 1981 the then Minister for Home Affairs and Environment advised that a draft Bill had been sent to Norfolk Island with a view to its introduction into the Legislative Assembly. In a letter dated 3 March 1982, the Minister advised that consultations with the Assembly were continuing. The present Minister has advised that the Assembly is prepared to introduce the amendments, but that other matters require further consideration.

3 Cocos (Keeling) Islands Immigration Ordinance: entry of persons into the Territory: right of appeal: undertaking given 1 June 1979. In September 1980 the then Minister for Home Affairs advised that the ordinance would be redrafted in the light of the recommendations of the Administrative Review Council. A further letter from the then Minister for Home Affairs and Environment indicated that complex policy issues had been identified, necessitating further consultations with the Attorney-General's Department. On 3 March 1982, he further advised that the Department is examining suitable guidelines for the exercise of necessary discretionary powers, and appeal procedures recommended by the Administrative Review Council, and that the Department was also examining the alternative solution of extending the Migration Act 1958 to the Islands. The present Minister advised on 29 September 1982 that the solution to this question will in large part be determined by the future status of the Territory as chosen by the residents in an act of self-determination.

4 Overseas Students Charge Collection Regulations: question of appeals to be reviewed by the Administrative Review Council: undertaking given 17 May 1980. The Council is at present considering these Regulations in the context of its examination of the Migration Act 1958 and Regulations. Its Annual Report for 1980-81 indicated that some delay had arisen because it had taken longer than expected to obtain the views of the Department of Immigration and Ethnic Affairs. In correspondence with the Committee, the Chairman of the Council advised that the difficulties it was experiencing were likely to be overcome. A draft report on the first part of the reference has been considered by the Council, which expects to present its final report to the Attorney-General early in 1983.

C Listed in the 70th Report (June 1981)

1 A.C.T. Nature Conservation Ordinance: powers of conservator: powers of entry, search, and seizure: Parliamentary scrutiny of Regulations: undertakings given 26 November 1980, 25 February 1981. The undertakings were fulfilled by the Nature Conservation (Amendment) Ordinance 1982, contained in Australian Capital Territory Ordinance No. 22 of 1982.

2 A.C.T. Traffic (Amendment) Ordinance: repeal: code covering law relating to parades, processions and assemblies: undertakings given 13 May 1981. The Committee's consideration of the Public Assemblies Ordinance was reported to the Senate in its 72nd Report, tabled on 21 April 1982.

D Listed in 71st Report (March 1982)

1 National Parks and Wildlife Regulations (Amendment): right of appeal: undertaking given 30 October 1981. The undertaking to insert a right of appeal in the Regulations was expeditiously fulfilled by Statutory Rules 1982, No. 94.

APPENDIX II

RECOMMENDATIONS CONTAINED IN REPORTS
(OTHER THAN THOSE FOR AMENDMENT OR REVIEW
OF PARTICULAR REGULATIONS AND ORDINANCES)

1 The Acts Interpretation Act should be amended to remove the uncertainty about the position of a notice of motion for disallowance remaining on the Senate notice paper at the end of a Parliament when the House of Representatives is dissolved but the Parliament is not prorogued (50th Report, December 1974).

2 A statutory provision to the same effect as section 12 (6) of the Seat of Government (Administration) Act should be applied to instruments made under Acts of the Parliament, so that the disallowance of a repealing instrument would revive the repealed provisions, and so that the present doubtful position with regard to the effect of disallowance and repeal would be clarified (66th Report, June 1979).

3 All statutes providing for the disallowance of statutory instruments should be amended so as to incorporate the provisions in the Acts Interpretation Act relating to the voiding of instruments not tabled in time, the 'automatic' disallowance if a notice of motion is not resolved within a limited time, the opportunity for renewal of a notice of motion unresolved at the end of a session, and the prohibition upon the making of an instrument the same in substance as a disallowed instrument within six months (68th Report, November 1979).

Formal amendments to give effect to the first two recommendations were made to the Acts Interpretation Act by the Statute Law (Miscellaneous Provisions) Act (No. 1) 1982 (Act No. 26 of 1982) and instructions have been sent to relevant departments to ensure that, where practicable, legislation accords with the intent of the third recommendation.

4 The Senate Standing Committee on Constitutional and Legal Affairs should investigate the matter of statutory provisions imposing the burden of proof upon defendants in criminal cases (66th Report, June 1979).

The Constitutional and Legal Affairs Committee was asked to consider this matter at its convenience, and on 9 September 1980 the Senate agreed to a motion by the Chairman of that Committee that the matter be referred to the Committee. The Constitutional and Legal Affairs Committee presented its Report to the Senate on 25 November 1982.

5 The Senate Standing Committee on Constitutional and Legal Affairs should investigate the matter of the alteration of important entitlements by regulation (68th Report, November 1979).

The Committee has been asked to consider this matter at its convenience.