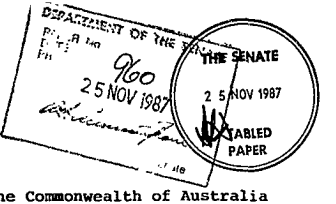

The Parliament of the Commonwealth of Australia

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

EIGHTY-SECOND REPORT

November 1987

THE REPEAL AND RE-ENACTMENT DEVICE

A Report on the reference from the Senate to inquire into and report on a proposed amendment to the Acts Interpretation Act 1901 contained in the Statute Law Bill 1987

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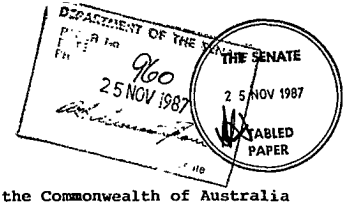

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CONTENTS

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

MEMBERS OF THE COMMITTEE [1]

THIRTY-FIFTH PARLIAMENT

First Session

Senator R. Collins (Chairman) [2]

Senator B. Bishop (Deputy Chairman) [3]

Senator A. Gietzelt

Senator P. Giles

Senator J. Stone

Senator B. Teague

1 Appointed by the Senate on 17 September 1987
2 Elected by the Committee on 8 October 1987
3 Appointed by the Chairman pursuant to Standing Order 36A(3B) on 22 October 1987.

PRINCIPLES OF THE COMMITTEE

(Adopted 1932: Amended 1979[1])

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.

1 Sixty-Fourth Report, March 1979, Parliamentary Paper No. 42/1979

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

The Committee has concluded that the proposed amendment to subsection 48(1)(b) of the Acts Interpretation Act did not arise in the context of consideration of the Australia Card Regulations and would not facilitate the making of regulations that could avoid the disallowance powers of the Senate. **In the course of its examination of this matter it has come to the attention of the Committee that the disallowance powers of the Senate can already be by-passed by a repeal and re-enactment procedure which does not depend on the proposed amendment.** The Committee recommends that this flaw in the statutory disallowance scheme requires urgent examination by the Attorney-General and the Minister for Justice. The loophole should be closed as soon as possible and not later than the end of the 1988 Autumn Sittings. The Attorney-General has agreed to amend the Acts Interpretation Act to address this problem.

Proposed new subparagraph 48(1)(b)(iii) may weaken the rule against retrospectivity in delegated legislation as provided for in subsection 48(2) of the Acts Interpretation Act. The proposed amendment would allow such legislation to be expressed to take effect retrospectively on "the commencement of" an Act that is already in force. A simple amendment could be included in the Statute Law Bill to preserve the purpose of the proposed amendment without weakening the rule against retrospectivity. The Minister for Justice has agreed to amend the Acts Interpretation Act to address this problem.

1. BACKGROUND

1.1. On 7 October 1987, on the motion of Senator Austin Lewis, the Senate agreed to the following motion:

> That the proposed amendment to paragraph 48(1)(b) of the Acts Interpretation Act 1901, omitted from the Statute Law (Miscellaneous Provisions) Bill 1987, be referred to the Standing Committee on Regulations and Ordinances for inquiry and report.

1.2. As it currently stands, paragraph 48(1)(b) of the Acts Interpretation Act 1901 (hereafter AIA) reads:

> Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations made accordingly -
>
> (a) ...
>
> (b) shall, subject to this section, take effect from the date of notification, or, where another date is specified in the regulations, from the date specified; and
>
> (c) ...

1.3. After amendment the provision would read:

> Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations made accordingly -
>
> (a) ...
>
> (b) shall, subject to this section, take effect from:
>
> (i) a specified date;
> (ii) a specified time on a specified date;
> (iii) the commencement of a specified Act or a specified provision of an Act; or
> (iv) in any other case - the date of notification; and
>
> (c) ...

1.4. The proposed amendment to the AIA appeared in the Statute Law (Miscellaneous Provisions) Bill 1987. The relevant part of the Explanatory Memorandum accompanying that Bill stated:

> In some cases it is desirable to make regulations commence on the date of commencement of a specified Act. There is some doubt whether this can be done if the specified Act is to commence on a date to be proclaimed. Proposed amendment of s.48(1) will make it clear that this can be done in such a case. It will also make it clear that regulations may commence at a specified time on a specified day.

1.5. In the relevant part of his Second Reading Speech the Minister for Justice, Senator the Hon. Michael Tate said:

> The amendments will also make it clear that regulations may be expressed to commence at the commencement of a specified Act, even if the Act is to commence on a proclaimed date. It is also necessary to provide that regulations may be expressed to commence at a specified time on a specified day. (Senate Daily Hansard, 24 September 1987, page 622)

1.6. During the debate on the Committee stage of the Bill Senator Lewis said:

> In particular, our concern relates to the recent Australia Card legislation. Some of my colleagues and I have been concerned because, if the proposal had gone through, this might have been a way which the Australia Card Bill could have been implemented notwithstanding the Senate's power to disallow the regulations. We feel that some explanation is necessary and, accordingly, we propose that this amendment go off to a Senate committee for investigation and report. (Senate Daily Hansard, 7 October 1987, page 787)

1.7. The Australia Card Bill 1987 was twice rejected by the Senate in 1986-87. This rejection was referred to the Governor-General as justification under section 57 of the Constitution for a double dissolution of the Parliament which was in fact dissolved on 5 June 1987. The Bill was intended to reduce tax evasion and social security fraud by requiring people to use a numbered, photographic identity card in various transactions relevant to taxation and social security matters. An obligation was to be imposed on employers, banks and others to sight the identity card before completing certain transactions. These obligations were expressed in Part IV of the Bill and were to come into effect on and after the "first relevant day". This expression was defined as "a day declared by the regulations to be the first relevant day for the purposes of this Part". When the Opposition parties in the Senate indicated that they would combine to disallow such regulations pursuant to section 48 of the AIA and thus prevent a major part of the Bill from coming into operation, the Government, on 29 September 1987, announced that it would no longer proceed with the Bill which was laid aside in the Senate on 9 October 1987. (Journals of the Senate, J13, page 157)

1.8. In replying to Senator Lewis in the Committee debate the Minister, Senator Tate said:

> I can assure the Senate that the Government had no nefarious intent of trying to disguise the proposed amendment to the Acts Interpretation Act by including it in this Bill. Apparently queries have been raised as to whether it is possible to make a regulation that does not have a particular commencing date or that does not commence at a definite time in relation to the commencement of a statute. (Senate Daily Hansard, 7 October 1987, pages 788-789)

1.9. Senator Tate went on to give two examples of these queries. Firstly, there had been doubt as to whether, under the AIA as it currently stands, a regulation to be made under the Australian Capital Territory Tax (Transfers of Marketable Securities) Act 1986 could come into effect at 5pm on a particular date. It was eventually decided to place an express provision to this effect in the Act itself.

1.10. Secondly, it had been intended to make regulations under the Protection of the Sea (Civil Liability) Act 1981 pursuant to Australia's ratification of a protocol to a particular Treaty. The ratification was to be provided for by another Act and it was desired that the regulations should come into force simultaneously with the commencement of that other Act. However, that other Act would not commence until the diplomatic formalities associated with the protocol had been completed. The date when such matters would be finalised could not be identified in advance. Hence the need for the proposed amendment to the AIA to enable regulations to take effect from the commencement of a specified Act.

1.11. Having given these examples of the need for provisions to allow regulations to come into effect with greater precision and flexibility than is presently possible, Senator Tate concluded:

> The genesis of the amendment lies in those problems and has nothing to do with the Australia Card legislation.

However, he went on to add:

> Nevertheless, I think it is appropriate that the matter be examined by the Senate Standing Committee on Legal and Constitutional Affairs and that that Committee report to the Senate speedily.

As noted above, the matter was in fact referred to the Regulations and Ordinances Committee which has traditionally had a particular interest in the AIA because the Senate's power of disallowance over regulations (and, by application, many other delegated instruments) is contained in Part XII of that Act.

1.12. Having considered these matters generally at its meeting on 8 October 1987, the Committee wrote to Senator Tate on 9 October seeking his cooperation in obtaining information and assistance from the drafting and policy experts in the Office of Parliamentary Counsel and the Attorney-General's Department who were responsible for drafting and advising on the proposed amendment. On 22 October 1987 the Committee met, in camera, with Mr Ian Turnbull, the First Parliamentary Counsel, Mr Denis Jessop, Senior Assistant Secretary in the General Counsel Division of the Attorney-General's Department and other legal officers from that Department. A transcript of evidence given before the Committee appears in Appendix 1 of this Report. Following this meeting the Committee exchanged correspondence with Senator Tate and the Attorney-General, the Hon. Lionel Bowen, M.P., on the issues which the Committee considered were relevant to its inquiry. Copies of this correspondence appear in Appendix 2

2. AUSTRALIA CARD REGULATIONS

2.1. During the course of their examination by the Committee, the legal witnesses indicated that the origins of the proposed amendment to paragraph 48(1)(b) lay in an internal Departmental minute dated 4 March 1987 from Mr D. J. McLellan, First Assistant Secretary, Commercial and Drafting Division, Attorney-General's Department, to the First Assistant Secretary of the General Counsel Division of the Department. This minute referred to the need for a satisfactory commencement regime for regulations. Some of the difficulties associated with the commencement of regulations were illustrated by reference to the two examples later referred to in the Senate by Senator Tate. Mr McLellan's memo suggested an amendment which is in fact almost identical to that which appeared in the Statute Law Bill. Having examined the issue, Mr N. A. Wareham, the acting First Assistant Secretary in the General Counsel Division, replied on 21 April 1987 that he appreciated the current limitations of paragraph 48(1)(b) of the AIA and the obvious utility of the proposed amendment about which he had no reservations. Copies of both of these minutes appear in Appendix 3 of this Report.

2.2. At the hearing, after referring to these minutes, Mr Turnbull told the Committee that:

> ...[A]t about that time I was preparing a number of amendments that I was going to suggest to the Acts Interpretation Act for purposes of allowing us to simplify our drafting style. We thought that all of these amendments were very minor matters. They did not involve policy at all. They were all legal technicalities really and so we thought that this would be suitable for the Statute Law Bill. (Transcript of Evidence, page 2)

2.3. When, on 23 October 1987, the Committee wrote to the Minister, Senator Tate, seeking his legal advice on the possible implications of the proposed amendment for the disallowance powers of the Senate, the Committee stated:

> ...[Y]our officers supplied the Committee with copies of the Attorney-General's Department memorandum of 4 March 1987 which gave rise to the proposal to amend paragraph 48(1)(b). Your officers have told the Committee that the proposal did not arise in the context of consideration of any proposed Australia Card regulations and the Committee accepts that advice. You yourself in the Senate on 7 October 1987 had already given your personal assurance that "the Government had no nefarious intent of trying to disguise the proposed amendment to the Acts Interpretation Act" and the Committee has no reason whatsoever to question that assurance.

2.4. **For the purposes of this Report the Committee repeats its conclusion that it has no reason whatsoever to consider that the proposed amendments to paragraph 48(1)(b) arose in connection with any consideration of the Australia Card Bill or any proposed Australia Card Regulations.**

3. REPEAL AND RE-ENACTMENT TO AVOID DISALLOWANCE

Weakness in the disallowance machinery

3.1. During the course of its hearing and in subsequent correspondence to Senator Tate, the Committee examined in detail the question whether the proposed amendment to paragraph 48(1)(b) of the AIA could in any way be used to frustrate or by-pass the Senate's disallowance powers.

3.2. Subsection 48(4) of the AIA provides in effect that a Senator may give notice of motion of disallowance of a regulation within 15 sitting days of that regulation being tabled in the Senate and the Senate may, in pursuance of that motion, within a further 15 sitting days, disallow that regulation, which thereupon ceases to have effect.

3.3. From the point of view of parliamentary control the current statutory disallowance scheme is not flawless. It contains a number of serious weaknesses, the exploitation of which could reduce or neutralise the Senate's role as a House of Review for subordinate legislation. These flaws have been discussed in the Committee's Seventy-seventh and Eightieth Reports (Parliamentary Papers Nos. 172/1986 and 241/1986). They are further referred to in greater detail below. They relate in particular to the absence of powers of partial disallowance of regulations, the weakness of the rule against retrospectivity, problems with revival of disallowed instruments, problems with the avoidance of tabling requirements and the use of successive repeals and re-enactments to frustrate a notice of motion of disallowance.

Successive repeals

3.4. Repeal and re-enactment is a quite lawful procedure which is available to a delegated lawmaker to avoid disallowance of a controversial piece of subordinate legislation. The procedure could operate in this fashion. A controversial regulation (or other instrument to which the AIA applies*) is made by the Governor-General in Council or a Minister (or other delegated lawmaker*). It would be tabled in the Senate. A notice of motion of disallowance could be given. Before the motion was disposed of by the Senate, another regulation could be made, repealing the first regulation and re-enacting it in identical form. This is a lawful manoeuvre , since section 49 of the AIA proscribes only the making of an instrument the same in substance as one that has been disallowed. The delegated lawmaker would have acted, in a second regulation, to repeal and re-enact the first regulation before the Senate could have effectively disallowed the first regulation.

3.5. Of course, the repeal and re-enactment, (i.e. the second regulation) itself would also be subject to tabling and disallowance in the Senate. If it were disallowed, however, the first regulation would revive in accordance with subsection 48(7) of the AIA. It is arguable, but by no means certain, that the Senate could immediately proceed to disallow the first regulation in its revived form. Making this assumption, the Senate could proceed to disallow the second regulation containing the repeal and re-enactment, with a view to disallowing the revived regulation immediately thereafter. However, in a third regulation the delegated lawmaker could repeal the second regulation and re-enact its terms prior to any vote on the Senate's motion for disallowance of the second regulation. The passage by the Senate of a motion

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* These parenthetical additions are taken to apply wherever reference is made to regulations or the Governor-General.

to disallow regulations that had already been repealed would be of no effect and section 49 of the AIA would remain inoperative to prevent a further repeal and re-enactment. This cycle of repeal and re-enactment could continue indefinitely, limited only by the delegated lawmaker's capacity to make the regulations before the Senate effectively disallowed one of the regulations in the sequence.

Practical problems

3.6. In his letter of 28 October 1987, Senator Tate expressed no argument that these manoeuvres were not legally possible. Addressing only the situation of regulations being made by the Governor-General in Council, Senator Tate said:

> ...[T]he tactics referred to in your letter could only succeed in maintaining successive regulations in force if the Governor-General in Council were able to engage in repeated regulation-making with a frequency that could hardly be regarded as practicable. Because of the extreme impracticability of the tactics, I see no need for any amendments to deal with the matter.

3.7. Although the Committee recognised that the delegated lawmaker would face practical difficulties in making relevant repealing and re-enacting regulations before the Senate passed any particular motion of disallowance, the Committee did not regard as fanciful the legal and practical possibilities that the Senate's disallowance powers could be avoided by a determined delegated lawmaker. The Committee considered that this was most likely to occur only in circumstances of great political conflict between the Government and the Senate.

Scope of the device

3.8. However, the Committee was also mindful of three important factors giving rise to other concerns. Firstly, the repeal and re-enactment procedure could certainly be used for a short, sustained period to keep regulatory provisions in force for a particular, temporary purpose. Secondly, the range of delegated lawmakers to whom this procedure is potentially open is large, including not only the Governor-General in Council, but also Ministers, ministerial delegates, Secretaries of Departments, their delegates, and statutory authorities when using subordinate lawmaking

powers. Thirdly, at a time of intense political conflict in 1930-1931 (and prior to the existence of section 49 of the AIA), the then Governor-General, on 19 consecutive occasions, made substantially similar Transport Workers (Waterside Workers) Regulations, 17 of which were disallowed by the Senate. There are, therefore, certain risks involved in allowing the repeal and re-enactment loophole to remain in the statute book.

3.9. The Committee cannot guarantee that throughout the whole range of delegated lawmakers, parliamentary principles and standards will at all times prevail over political or administrative expediency if a short-term political or administrative objective could be obtained by the repeal and re-enactment device. The Committee, therefore, looked closely at the possibility that the proposed amendment to paragraph 48(1)(b) of the AIA may even have widened what appeared to be an existing and extremely serious loophole in the statutory disallowance scheme.

Time of effect of disallowance and regulations

3.10. For the delegated lawmaker, the kernel of the repeal and re-enactment device is to ensure that each regulation in a consecutive series is made before a disallowance motion takes effect, thereby avoiding the proscription in section 49 of the AIA that no regulation "the same in substance as" a disallowed regulation "shall be made" without parliamentary consent or within 6 months after the date of a disallowance. There is a rule of statutory interpretation that legislation takes effect from the first moment of the day on which it is to commence. Thus, an Act which receives the assent of the Governor-General at approximately 10am on a particular day is regarded as having commenced at the first moment past midnight of that same day. (See Re Flavel [1916] SALR 47; see also Statutory Interpretation in Australia, D. C. Pearce, 1981, page 95) This rule is (by analogy)

also applicable to the commencement of a regulation. Does this rule apply to the time of effect of a disallowance motion? Subsection 48(4) of the AIA provides that if a House of Parliament passes a resolution disallowing a regulation "any regulation so disallowed shall thereupon cease to have effect". Subsection 48(6) provides that the disallowance of a regulation "has the same effect as a repeal of the regulation." Section 50 is entitled "Effects of repeal of regulations". It provides that the repeal of a regulation shall not affect any rights or penalties acquired or incurred while the repealed regulation was in force. However, section 50 does not necessarily limit the use of the rule in Re Flavel in determining the moment at which a disallowance motion takes effect for the purposes of section 49 of the AIA. If, for the purposes of section 49, a disallowance takes effect at the moment the vote is announced in the Senate then a repealing and re-enacting regulation made prior to that vote could not be void under section 49. On the other hand if, for the purposes of section 49, a disallowance has the same effect as a repeal, including the consequence that a repeal takes effect at the first moment of the day of the repeal, then it might arguably be impossible for a delegated lawmaker to make a repealing and re-enacting regulation before a disallowance motion on the first regulation had taken effect at midnight, simultaneously with the repealing and reenacting regulation itself taking effect. Even in this case though, a court would have to assign some priority to simultaneous events. A second regulation made before the actual vote on a disallowance of the first regulation, could be assigned temporal priority notwithstanding that the disallowance motion might also take retrospective effect from midnight. Thus the making of the second regulation would escape the application of section 49 of the AIA.

Proposed amendment of no assistance

3.11. The specification of a particular time of commencement of regulations pursuant to the proposed amendment to paragraph 48(1)(b) of the AIA would not seem to be of any assistance in enabling a delegated lawmaker to make a repealing and re-enacting regulation (the second regulation) before a disallowance motion on the first regulation took effect at midnight on the day of disallowance (at least for the purposes of section 49). If, in law, disallowance of the first regulation took effect immediately ("thereupon"), then providing for a time of commencement of the second regulation would not affect the question whether it had been made before the disallowance took effect.

3.12. The Committee has concluded, therefore, that the proposed amendment to paragraph 48(1)(b) of the AIA would not assist any delegated lawmaker to avoid the disallowance powers of the Senate by means of the repeal and re-enactment device. Subject to uncertainty as to the time of effect of a disallowance motion, that device relies on a delegated lawmaker's ability to make regulations coming into effect in the usual way at midnight, before a disallowance motion takes effect.

3.13. **Having arrived at this conclusion the Committee reports that, subject to its recommendations concerning retrospectivity, it has no objection in principle to enactment of the proposed amendment to paragraph 48(1)(b).**

Legal loophole in the disallowance scheme

3.14. However, the Committee's inquiry has brought into sharp focus the legal loophole which currently exists in the AIA enabling a determined delegated lawmaker to sidestep the Senate's powers of disallowance using a repeal and re-enactment device. The Committee considers that the

statutory disallowance powers in the AIA confer on the Senate its most important legislative review powers outside the Constitutional powers to amend or reject Bills. It is contrary to parliamentary principle that these powers should be capable of being neutralised by a device that could in practice cause the Senate's disallowance powers to be held in ridicule or contempt.

3.15. The Senators who make up the Committee are not the first to discover this loophole or express concern about it. On 14 May 1970, Senator Lionel Murphy told the Senate:

> Once a regulation or ordinance is made, and especially once a notice of motion has been given in this Senate for disallowance, it should not always be regarded as a proper practice that there should be an amendment to that regulation or ordinance before the Senate has dealt with the motion. In fact, I have a recollection that on some earlier occasion this arose. One could have a defeating of the powers of the chambers given under the Acts Interpretation Act if this method were adopted that when some objection was taken to a regulation or ordinance instead of the Senate being able to proceed on its notice a simple amendment were made to an ordinance or regulation. Once could conceive that by a series of such amendments we would never be able to exercise the power. Indeed, I think it was expressed on an earlier occasion that on the face of it this could be regarded as tending to undermine the powers of the Senate. (Senate Hansard, Vol. S. 44, 14 May 1970, page 1452)

Recommendation

3.16. **The Committee agrees with these views and strongly recommends that the AIA be amended as soon as possible to make the repeal and re-enactment device unlawful.** The Committee's concern about this matter is not assuaged by the fact that to date no delegated lawmaker has successfully used the repeal and re-enactment device.

The Committee cannot guarantee that no future delegated lawmaker will ever be tempted to make use of this procedure now that it has been clearly identified.

Suggested amendment to the Act

3.17. On 6 November 1987 the Committee wrote to the Attorney-General, the Hon. Lionel Bowen, M.P., and the Minister for Justice, Senator the Hon. Michael Tate, pointing out that, while it had no objection to the proposed amendment to the AIA concerning times of commencement, the existing law required further, urgent, amendment to make the repeal and re-enactment procedure unlawful where a notice of motion of disallowance had been given in regard to any regulation. The Committee could not discover any circumstances where a delegated lawmaker motivated by principles of parliamentary propriety and the genuine needs of administration would need to make a regulation and then repeal it and re-enact it again where a notice of motion of disallowance had been given. The Committee, therefore, wrote to the Ministers recommending that the following amendment to the AIA be considered for enactment in the 1988 Autumn sittings.

(1) Without limiting the operation of section 49, where a notice of a motion to disallow a regulation has been given in either House of the Parliament within 15 sitting days of that House after that regulation was laid before that House, a regulation containing a provision the same in substance as a provision of the first-mentioned regulation may not be made unless:

    (a) the notice has been withdrawn; or

    (b) the motion has been disposed of.

(2) A regulation made in contravention of subsection (1) shall be void and of no effect.

3.18. On 23 November 1987 the Committee received a letter from the Attorney-General, the Hon. Lionel Bowen,M.P. in which he acknowledged that there exists under the present law a possibility of abuse of the parliamentary process in regard to regulations and more particularly executive instruments along the lines described by the Committee. In his letter the Attorney-General has given the following undertaking:

> I propose ...to recommend to the government that consideration be given to an appropriate amendment of the Acts Interpretation Act to eliminate any possibility of such successive repeal and remaking of regulations and executive instruments. The draft provided by the Committee would be taken into account in considering the appropriate form of any such amendment.

3.19. **The Committee, therefore, reports to the Senate that the Attorney-General has undertaken to take steps to remove the repeal and re-enactment loop-hole from the AIA.**

4. USE OF THE STATUTE LAW BILL TO AMEND THE ACTS INTERPRETATION ACT

4.1. In the light of its conclusion that the proposed amendment to paragraph 48(1)(b) would not weaken the Senate's disallowance powers because those powers can already be neutralised by the repeal and re-enactment device, the Committee also concluded that the inclusion of the proposed amendment in the Statute Law (Miscellaneous Provisions) Bill 1987 was not, in the circumstances, inappropriate. However, since the Committee considers that the Acts Interpretation Act may well be the single most important piece of legislation on the statute book after the Constitution because it provides a vital statutory mechanism for parliamentary control of delegated lawmaking, **it is essential that great circumspection be exercised when considering whether to place amendments to this Act in a Statute Law Bill.**

5. WEAKENING THE RULE AGAINST RETROSPECTIVITY

Proposed subparagraph 48(1)(b)(iii)

5.1. Although the Committee has concluded that the proposed amendment to paragraph 48(1)(b) will not further weaken the existing weakness in the statutory disallowance mechanism concerning repeal and re-enactment, the Committee is concerned about the possible effect of proposed subparagraph 48(1)(b)(iii) in reducing the effectiveness of the rule against retrospectivity contained in subsection 48(2) of the AIA.

5.2. Subsection 48(2) provides:

> Regulations shall not be expressed to take effect from a date before the date of notification in any case where, if the regulations so took effect -
>
> (a) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) existing at the date of notification, would be affected in a manner prejudicial to that person; or
>
> (b) liabilities would be imposed on any person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification,
>
> and where, in any regulations, any provision is made in contravention of this subsection, that provision shall be void and of no effect.

The leading authority on the interpretation of this provision is the High Court case of Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co. Ltd. (1942) 66 C.L.R. 161 where it was held that there is nothing in the section which prohibits the making of regulations having a retrospective or retroactive operation as long as the regulations are not expressed to take effect as regulations from a date before the date of

notification in the Gazette. The Committee has previously drawn attention to the inadequacy of subsection 48(2) as a means of prohibiting retrospectivity in delegated legislation (see the Committee's Seventy-seventh and Eightieth Reports).

5.3. Proposed subparagraph 48(1)(b)(iii) would enable regulations to take effect from the commencement of a specified Act or a specified provision of an Act. The Committee was concerned that under this amendment regulations could be expressed to take effect from the commencement of a specified Act that was already in force, thereby lawfully imposing retrospective liability. Since such regulations would not be expressed to take effect from a date before the date of notification but rather from the commencement of an Act, the Committee considered that subsection 48(2) might not apply to prevent retrospective regulations taking effect.

5.4. In correspondence with the Committee the Minister argued, in effect, that to provide that regulations were to take effect from the commencement of an Act amounted to an expression of intention that they take effect from a date of commencement. The Committee felt that the issue of prejudicial retrospectivity in regulations was too serious for it to feel comfortable in relying on this view of the law. The Committee was particularly concerned about the narrow and literal interpretation placed on the introductory words of subsection 48(2) by the High Court. The Committee considered that there was a strong likelihood that, given this restrictive interpretation of subsection 48(2) and the Government's reluctance to amend the provision, a court would attach some significance to the fact that proposed subparagraphs 48(1)(b)(i), (ii) and (iv) all expressly refer to a "date" as does subsection 48(2) itself. As the only provision not using this form of nomenclature, the

Committee considered that proposed subparagraph 48(1)(b)(iii) may well have further weakened the rule against retrospectivity contained in subsection 48(2).

5.5. The Committee, therefore, wrote to Senator Tate and recommended that the Government should place the matter beyond doubt by amending subparagraph 48(1)(b)(iii) to read "the date of commencement of a specified Act or a specified provision of an Act". The Committee also recommended that this adjustment should be made by amendment to subparagraph 48(1)(b)(iii) of the AIA as contained in the Statute Law Bill currently before the House of Representatives.

5.6. In his letter of reply received by the Committee on 18 November 1987 Senator Tate acknowledged the Committee's concern that the position regarding the effect of the proposed amendment on the rule against retrospectivity was not absolutely beyond question. **Having considered the Committee's concerns and its *proposed modification the Minister has agreed to amend* subparagraph 48(1)(b)(iii) to read "the date, or date and time, of commencement of a specified Act, or of a specified provision of an Act".** The reference to "and time" would take account of situations where the Act in question would be intended to come into effect at a particular time of the day. In the light of this amendment any regulation within subparagraph 48(1)(b)(iii) would be one expressed to take effect from a date and it would, therefore, be within the narrowly construed limits of subsection 48(2). Thus, if the date of commencement of the relevant Act preceeded the date of notification of the prejudicial regulations the protection in subsection 48(2) would apply.

5.7. The Committee, therefore, reports to the Senate that the amendment to paragraph 48(1)(b) of the AIA in the Statute Law Bill should be, and with the cooperation of the Minister for Justice, will be further amended to preserve the existing rule against retrospectivity.

6. OTHER MATTERS OF CONCERN TO THE COMMITTEE

6.1. The Statute Law (Miscellaneous Provisions) Bill contains a number of amendments to the AIA other than those relating to paragraph 48(1)(b) which have been considered in this Report. The Committee acknowledges that these are technical amendments, making no significant changes in policy and intended to facilitate the drafting of legislation. However, the Committee expresses its concern that, although these amendments have now appeared in a Bill, a number of major reforms of the Acts Interpretation Act proposed by the Committee over a period of almost 3 years have not yet appeared. These reforms were discussed in detail in the Committee's Seventy-seventh and Eightieth Reports and were the subject of considerable debate in the Senate (see, for example, Senate Weekly Hansard, 15 October 1986, page 1341 and 19 November 1986, page 2451). The Committee's proposals, inter alia, referred to the need for a power of partial disallowance of regulations similar to that which already exists regarding Ordinances; the need to overcome the limitations placed by the High Court on the intepretation of the rule against retrospectivity in subsection 48(2); and the need to ensure that tabling of delegated legislation was *mandatory*. The Committee regards these matters as being of considerable importance to the continued integrity of the statutory disallowance scheme. To bring these issues once more to the forefront of debate, Chapter 2 of the Committee's Eightieth Report is included as Appendix 4 to this Report.

6.2. In his letter of 28 October 1987, Senator Tate indicated that he had arranged for the Government's consideration of these reform proposals from the Committee to be expedited. In this Report the Committee has recommended that the Acts Interpretation Act be amended in the 1988

Autumn Sittings to outlaw the repeal and re-enactment procedure described above. The Committee strongly urges the Attorney-General and the Minister for Justice to set the 1988 Autumn Sittings as the latest target date for introduction of all of the changes to the AIA which the Committee has been seeking to protect the Senate's disallowance powers and thereby enable the Senate to protect the rights of individuals and the proprieties of parliamentary government.

6.3. In his letter to the Committee received on 23 November 1987, the Attorney-General, the Hon. Lionel Bowen, M.P., assured the Committee that the questions of partial disallowance and non-tabling were the subject of active consideration within his Department and he would be in a position to provide a further response to the Committee on these matters within the next several weeks. On the question of retrospectivity, the Attorney-General referred the Committee to his previous correspondence in which he outlined a remedial administrative procedure. It is proposed that he, as the Attorney-General:

> ...would given an undertaking to the Parliament that, in respect of each set of regulations, the appropriate officer of my Department (probably the officer holding the position of First Assistant Secretary of the Commercial and Drafting Division) would provide a certificate stating whether a proposed statutory rule appears, without clear and express authority conferred by the Act under which the statutory rule is made, to have a retrospective effect. An undertaking would, in my view, be more appropriate than legislation because, as you are no doubt aware, the authority of my Department to insist on drafting regulations is to be found in an undertaking to the Parliament by one of my predecessors. (Letter from the Attorney-General, the Hon. Lionel Bowen, M.P., to Senator Barney Cooney, the Chairman of the Regulations and Ordinances Committee, dated 6 May 1986.)

7. CONCLUSIONS AND RECOMMENDATIONS

7.1. **The Committee has concluded as follows:**

(a) The proposed amendment to paragraph 48(1)(b) of the AIA was not formulated in the context of consideration of any anticipated Australia Card Regulations. (paragraph 2.4)

(b) The proposed amendment will not circumscribe the Senate's powers of disallowance under Part XII of the Act. (paragraph 3.12)

(c) Since the proposed amendment is technical in nature, designed to facilitate aspects of the drafting of regulations, the Statute Law (Miscellaneous Provisions) Bill was not an inapproppriate vehicle for it. (paragraph 4.1)

(d) However, proposed subparagraph 48(1)(b)(iii) may further weaken the rule against retrospectivity as contained in subsection 48(2) by making it possible for regulations to come into effect on the commencement of an Act which has already come into force. (paragraph 5.3)

(e) As described above in the body of this report there exists in the statutory disallowance scheme a serious loophole which would allow a delegated lawmaker to render the Senate's disallowance procedures ineffective by making use of pre-emptive and successive repeals and re-enactments of an instrument that was subject to a notice of motion of disallowance. (paragraph 3.4)

(f) Unless this loophole is closed by means of a amendment to the AIA there will always be a risk that a delegated lawmaker will make use of the procedure to achieve a permanent or temporary political or administrative objective. (paragraph 3.9).

(g) It is a matter of concern that the present amendments to the Acts Interpretation Act designed to facilitate legislative drafting have taken priority over long standing and major reform proposals from the Committee designed to protect parliamentary control of subordinate legislation. (paragraph 6.1)

7.2. **The Committee recommends as follows:**

(a) Apart from the Committee's reservations about the implications of proposed subparagraph 48(1)(b)(iii), the Committee recommends that the proposed amendment to paragraph 48(1)(b) be accepted by the Senate. (paragraph 3.12)

(b) However, proposed subparagraph 48(1)(b)(iii) should be amended to read "the date [or date and time] of commencement of a specified Act or specified provision of an Act." The Minister for Justice, Senator the Hon. Michael Tate, has undertaken to amend the AIA amendment as contained in the Statute Law Bill to provide for this. (paragraph 5.5)

(c) The potential which exists for a delegated lawmaker to make use of a sequence of repealing and re-enacting instruments to avoid the Senate's powers of disallowance, should be removed as soon as possible. This could be achieved by an amendment to the Acts Interpretation Act, along the lines of that

suggested by the Committee, to prevent the repeal and re-enactment of delegated legislation the same in substance as any delegated legislation which is subject to an undisposed of notice of motion of disallowance. The Attorney-General, the Hon. Lionel Bowen, M.P., has undertaken to recommend that the Government make an appropriate amendment. (paragraph 3.17)

(d) The reform of the Acts Interpreation Act recommended by the Committee in its Seventy-seventh and Eightieth Reports, concerning, inter alia, the provision of a power of partial disallowance of regulations, should be proceeded with as soon as possible. The Attorney-General continues to give this active consideration. (paragraph 6.3)

(e) The reforms and amendment referred to in paragraphs (c) and (d) above should be on the statute book no later than the end of the 1988 Autumn Sittings. (paragraph 6.2)

Bob Collins
Chairman
November 1987

APPENDIX 1

TRANSCRIPT OF EVIDENCE

SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Transcript of Evidence

(Taken at Canberra)

THURSDAY, 22 OCTOBER 1987

Present

Senator Collins (Chairman)

Senator Bishop Senator Stone

Senator Giles Senator Teague

Senator Gietzelt

Mr Guy Macdonald AITKEN, Senior Legal Officer, Attorney-General's Department, Canberra, Australian Capital Territory,

Mr Denis Alfred JESSOP, Senior Assistant Secretary, General Counsel Division, Attorney-General's Department, Canberra, Australian Capital Territory,

Ms Jill SCHEETZ, Senior Legal Officer, Attorney-General's Department, Canberra, Australian Capital Territory, and

Mr Ian TURNBULL, First Parliamentary Counsel, Attorney-General's Department, Canberra, Australian Capital Territory,

were called and examined.

Mr Turnbull - To state that regulations will come into operation on the date of commencement of a particular Act or provision of an Act was all right where the Act itself specified a particular date. Supposing an Act says, 'This Act should come into operation on 1 July 1988', then it was felt that the regulations could say 'shall come into operation on the date of commencement of that Act', because that Act had actually specified a date. But it was felt to be different where the Act, whose date they wanted to refer to, did not actually fix a date of commencement but said 'This Act shall come into operation on a date to be proclaimed'. When they wanted to make the regulations come into operation on the same date as that Act there would be no date actually specified in the regs. The regs would merely say 'on the date of commencement of the XYZ Act'. I think, personally, that that section will allow them to do this but there was some doubt on that point. For reasons of caution the Commercial and Drafting Division of Attorney-General's had taken the view that you could not make your regulations commence on the date of commencement of an Act which itself was only going to come into operation on a proclaimed date, because you were not actually specifying a date in the regulations. So this was one of the problems that they had experienced.

Another problem they had experienced was that on some occasions it was necessary to bring regulations into operation, not on a date but on a time on a date. It is not uncommon for this to be done in Acts. I have no experience myself in drafting regulations but I can see that this problem could arise with regulations as well. It might be necessary to bring the regulations into operation at a particular time on a date. *Section 48(1)(b) of the Acts Interpretation Act makes no* provision for that. It merely says that the regulations shall take effect from a date specified. These two points were the subject of this letter to General Counsel Division of Attorney-General's and in April this year General Counsel wrote back to the Commercial and Drafting Division saying that they understood that there were problems with this section and had no difficulties with the proposal. Indeed, in the letter the suggested amendment was made by the Commercial and Drafting Division and that was agreed to by General Counsel and those are basically the words that are in the draft that appears in the Bill. I, at about that time, was preparing a number of amendments that I was going to suggest to the Acts Interpretation Act for purposes of allowing us to simplify our drafting style. We thought that all these amendments were very minor matters. They did not involve policy at all. They were all legal technicalities really and so we thought that this would be suitable for statute law Bill. I then suggested to the Attorney-General's Department that we go ahead with these amendments. This is the history behind these amendments.

Senator TEAGUE - Is it possible for us to have a copy of the letter of March and the reply that came from your Department?

Mr Turnbull - I have them here.

Senator TEAGUE - Could we have a copy of those so that we can see them?

CHAIRMAN - Are there any questions?

Senator BISHOP - I have not seen them obviously but the first thing that I would query is that in your statement you said that the letter said that section 48(1)(b) was too narrow. The question I would ask you is: for what purpose is it too narrow? The second thing you said was that it was necessary. I would like some examples of practical difficulties that would flow from your alleged complication of not being able to have the regulations commence on the same day as the Act. What practical differences does that make?

Mr Turnbull - I refer to the first point about it being too narrow. The statement that it is too narrow is that all that section 48(1)(b) allows you to do at the moment is to have one of two dates. One is the date of notification in the Gazette.

Senator BISHOP - I appreciate that but what is the problem?

Mr Turnbull - The other is a date specified in the regulations. As I tried to explain earlier a cautious view has been taken that specifying a date in the regulations means that you have actually got to name a date. It is not good enough just to say the date of commencement of the XYZ Act, particularly if that Act is not to come into force except on a proclaimed date. The view has been taken that if you say the date of commencement of the XYZ Act you are not really specifying a date.

Senator BISHOP - I accept all that. What I asked is: why is that a difficulty and why do you consider that, cautiously or incautiously, to be too narrow?

Senator STONE - I think I understood Mr Turnbull to say that he personally was of the opinion that the Act does already cover the requirements that would be proposed.

Mr Turnbull - Yes. Because I feel that if you specify a date you can do that in a number of ways: you can actually name the date or you can describe it by saying 'the date of commencement of the XYZ Act' and that XYZ Act may itself actually name a date. You could also say 'the commencement of the XYZ Act' and that Act may come into force on a proclaimed date. I feel personally that that is still specifying a date. However, the cautious view has been that that is not specifying a date.

Senator BISHOP - I still do not have an answer to my question.

Mr Turnbull - I am afraid that the problem is more difficult for me to describe because I am not involved in drafting regulations. All I can say is that it is quite common, in the case of Acts, that if you have several Acts you might have one of them coming into operation on a proclaimed date. For convenience you may wish another Act, or several other Acts, all to come into operation on the same date as the Act that is to be proclaimed. So the simplest way to deal with it, rather than have a whole lot of proclamations, is to say 'these Acts come into operation on the date of commencement of this Act', the one that is to be proclaimed. This is quite common practice in drafting Bills and I can see that the same sorts of reasons would apply in the case of regulations. But I have to defer to the Attorney-General's Department for actual cases of problems that have been experienced.

Senator TEAGUE - Could we put Senator Bishop's question to other officers who may have more experience?

Mr Jessop - I have not got particular examples myself, except the one that in this regard was stated by Senator Tate himself in the Senate on 7 October. He mentioned this question of the need to have regulations which would come into force when an Act would require the providence or ratification of a protocol under the protection of cease of the liability.

Senator BISHOP - Could you speak up a little, please?

Mr Jessop - The situation there was that there was an Act providing for ratification of a convention by Australia. It was not sure when the convention was to come into force and it was not therefore sure when the Act could be proclaimed. But regulations were needed to accompany the Act so that the lot could come into force as a package on the same day. Broadly speaking, that is the problem you have. Provision is almost always made for regulations in Acts, and Acts are often made to come into force on a date to be proclaimed: this is to take care of the situation where you need to have regulations that will supplement the Act. Of course, the regulations themselves will be made before the Act comes into force and then according to section 48(1)(c) they have to be tabled within 15 sitting days of the making. The Parliament has the opportunity to see them even perhaps before the Act has come into force. The main object of the exercise is to be able to bring regulations and Acts into operation on the same day.

Senator BISHOP - Mr Turnbull's private view is that the power to do that is already in place. Do you agree with that view?

Mr Jessop - We took the cautious view, I think mainly because, if the Act's provision is that it is to come into operation on a date to be proclaimed and then you make a regulation saying this is to come into force when the Act comes into force, at the time the regulations are made it is uncertain what that date will be. Therefore, it could be argued that it is

not a specified date. As Mr Turnbull says, the primary purpose was to clarify the operation of the present provision to make it clear that you can do it this way.

Senator BISHOP - If this is such a desperately important issue on precisely this point, why is it that this provision has never been tested?

Mr Jessop - There is no occasion for the Government to test it because if it has been done, the regulation would have to be open to challenge. I think, generally speaking, that this is a point that was picked up in the course of administering the Act. It was a point that was thought to be a problem and that it was a non-contentious matter. That is why we thought it was better to clarify it when the occasion arose, rather than leave it to be tested because, after all, litigation is expensive and can be made unnecessary.

Senator STONE - It does seem to me that the obvious point to which Senator Bishop's question is leading is that we have had 80-odd years in which this Act has been in operation. The civil courts have been available for testing any regulations made by various arms of government during that time as to the meaning of the time provisions in this Act for the commencement of regulations. Nobody, so far as I am understanding the response given, has yet sought to question it. Obviously, as you say, it is not a matter for government to question but there are a lot of people in the private sector who are affected by the making of regulations and who, one would have thought, had there been any doubt upon the matter, would previously have tested it in the courts. Yet nobody has done so?

Mr Jessop - I suspect what has happened is that no regulations have been made in those circumstances because of the fear that they might be challenged. There seems no point to invite a challenge when you can clarify the matter by what we took to be a clarifying amendment.

CHAIRMAN - At what time do regulations commence now?

Mr Jessop - The Act provides that they come into force on the date of notification in the Gazette or other specified date. The situation here is that you would have to wait until the date had been proclaimed at least.

CHAIRMAN - At what time do they come into force?

Mr Turnbull - What time of day? The time is midnight before the date specified. That raises another question. Would you like me to talk about that now?

CHAIRMAN - You could talk about that now.

Mr Turnbull - Again, in the case of Acts, it is not uncommon for Acts to come into operation at a particular time on a day for special reasons. For example, if you are raising the rate of a tax, you want to be able to fix precisely the moment at which the law changes so that people cannot take advantage of the change. Regulations have not been able to do this because section 48(1)(b) says 'a date' and does not mention a time. Another thing that I think is a problem with regulations is that they cannot be made retrospective. Let us say you want to make regulations urgently, quickly and immediately and you make them say on a particular day, say, 2 February. When you make them at, say, midday that day or in the evening of that day they actually come into force from midnight the night before, and that makes them retrospective. If it is desired not to make them retrospective and at the same time to make them come into force as immediately as you can, then you need to be able to make them come into force from a particular time.

Senator TEAGUE - Have you a precise example of where that has been against the national interest or leading to complication?

Mr Turnbull - I do not think it would be so much a question of national interest but it is just good practice that in some cases a law should come into operation at a specific time.

Senator TEAGUE - So you do not have a precise answer.

Mr Turnbull - No; once again, because I do not deal with regulations.

Senator BISHOP - But, on that same basis, you would not need an entire new section to simply add the words to give the power to also specify the time, would you?

Mr Turnbull - No. On the other hand, this is just a matter of drafting style. All that we have done is remake paragraph (b) to try to set out as clearly as possible the four alternatives. There are two alternatives presently in paragraph (b) and, by dividing it the way I chose to divide it, I was just trying to make it clear what those four alternatives were. It is just a matter of clarity.

CHAIRMAN - Is there any way at all of legally specifying a time for regulations to come into effect now?

Mr Turnbull - Not to commence. I do not think there is, no. I think the only way you could achieve a similar result would be to bring them into force on a date and say that they do not affect certain transactions until a particular time. But I think the problem is that, if you do want to make regulations to come into force immediately on a particular day, you cannot avoid making them retrospective because they come into force from midnight the night before, which is ultra vires in many cases. An Act can do that but regulations cannot.

Mr Jessop - Senator Teague did cite an example in the Senate of a regulation under the Australian Capital Territory Tax (Transfers of Marketable Securities) Act that had to come into force at 5 p.m. on a particular date. Apparently it was necessary for the purpose of that Act - I am not familiar with the details of it - for it to happen at a particular time. That is one example which we are aware of.

Senator TEAGUE - Why was it to be precisely at 5 p.m.?

Mr Jessop - As I say, I do not have any additional information on that particular one but it was apparently to coincide with the statute coming into force. I imagine - I should not speculate - that it could well have something to do with the closure of the stock market or something like that.

Senator TEAGUE - Were there regulations published in the Gazette in respect of that Act?

Mr Jessop - Apparently what happened was that they had to change the Act itself to deal with that particular problem. The purpose of this amendment was to allow this to be done generally----

CHAIRMAN - I have just been given the invaluable information that Pearce's standard text on statutory interpretation - I am going back to my first year in law - does provide examples of where this has been a problem. So perhaps we could short-circuit this a bit by just asking the officers whether they could give us written advice. We are getting a Hansard transcript of this which we will examine in the next couple of days. Perhaps you could expeditiously give us some written advice and some examples of where time of commencement has been a problem.

Senator BISHOP - In that written advice you might add why the problem could not simply be overcome by saying in the existing section that sub-section (b) shall, subject to this section, take effect from the date and time of operation.

Mr Turnbull - I could answer that immediately and say that it would be possible to do that. We are trying to draft our Bills as clearly as possible these days and it is just a matter of clarification. You would have to say something like: 'shall take effect from the date of notification or, where another date or a time on another date is specified in the regulations, from the date or that time specified'. There would be no objection to doing that.

Senator GILES - It takes twice as long.

Mr Turnbull - It just means that the paragraph is rather long and a little more difficult to understand.

Senator GILES - It looks to be very specific, the way you have suggested it be done.

CHAIRMAN - I imagine it would follow from your previous answer that if a regulation has the effect of repealing an existing regulation, that repeal would come into effect at midnight the night before.

Mr Turnbull - Yes. Paragraph (b) could have been altered in the way suggested merely to deal with the specified time, but if we were going to deal also with the question of the commencement of a specified Act or a specified provision of an Act, that would make paragraph (b) almost impossible to read.

Senator BISHOP - That is precisely why I made that suggestion; we will come to that other proposal now. That is where we get into the area of conflict and controversiality and all sorts of difficulties. Far from the Act simplifying matters, your proposed amendment would make life more difficult and open up other areas of possible litigation.

CHAIRMAN - I am sure you appreciate the timing of the introduction of this change in respect of other dramatic events.

Mr Turnbull - Yes. I understand that the Australia Card was considered but I was quite astonished to see that there was any suggestion----

CHAIRMAN - The two events, obviously, have no connection - I think we all accept that - but it was an extraordinary coincidence.

Senator STONE - It is true that, as we have been advised, the particular Act under discussion, the Acts Interpretation Act, was one of the first enactments of the Parliament. It seems to have stood the test of time and it can justly be said that it is possibly the single most important piece of legislation in the statute book after the Constitution itself. There is a question whether, on those grounds alone, it is proper to proceed to amend an Act of that degree of significance by means of a particular set of provisions tucked away in 150 pages or whatever it was of something called the Statute Law (Miscellaneous Provisions) Bill. I think that was a reference to the guidelines for determining what should be included in statute law Bills. These guidelines can be interpreted; I understand that. But the second of them, in paragraph 2.33 of the guidelines says:

> The following guidelines apply in determining whether a matter is suitable for inclusion in these Bills.

Paragraph (b) of that reads:

> No matter that is contentious or is closely related to a contentious matter may be included.

Leaving aside all the Australia Card stuff - I agree with the Chairman that it has nothing to do with this subject - the fact of the matter is that the Acts Interpretation Act has throughout its whole life been the basis for innumerable matters of contention, generally a fact involved in many cases and even in the operation of this Committee over years past. Picking up the words 'is closely related to a contentious matter' at least would have raised a question in my mind as to whether any amendments to this Act should properly be handled by way of a provision in the Statute Law (Miscellaneous Provisions) Bill.

CHAIRMAN - Are you putting that by way of a question?

Senator STONE - I am asking whether that matter was considered. After all, these matters have to be put to the Minister even if there is not considered to be a policy question involved. I take it that your position was that there was not even a minor question involved, therefore it did not have to go to the Prime Minister. It simply had to go to your Minister.

Mr Turnbull - The Prime Minister's approval was sought. As a matter of minor policy this is automatic.

Senator STONE - This was regarded as a matter of minor policy, was it?

Mr Turnbull - Yes, I think it was a minor legal----

Senator STONE - That is an important distinction for these guidelines. Matters of minor policy, on the one hand, as you quite rightly point out have to go to the Prime Minister; but matters which are not regarded as having any policy significance at all are subject to the determination of the Minister or the Attorney-General, who in this case is the Minister. This was submitted to the Prime Minister?

Mr Turnbull - I am subject to correction here. When I initiated the changes - because I felt that the changes that we were proposing were largely a matter of drafting style, so I started them off - I thought that it might be proper to seek the authority of the Prime Minister. At a later stage we thought that that might not be necessary; I cannot remember, perhaps Mr Jessop could answer that. Getting back to your initial question, although the Acts Interpretation Act is, I agree, important, most of the amendments proposed at this time are merely to put words into the Act that would otherwise be in each Bill. There are a lot of standard provisions that I was trying to remove from each successive Bill and place in the Acts Interpretation Act. I felt that this was largely a matter of drafting style, and therefore could not possibly be regarded as contentious. That is why I say that I was somewhat surprised when the Australia Card was brought up as possibly having some bearing on this, because I could see that that would then be regarded as contentious. However, when we put up these amendments, nothing was further from my mind.

Senator STONE - I will second that Mr Turnbull; we are not getting at that.

Mr Turnbull - At that stage, it appeared to us that there was nothing at all contentious in the proposal we were making. As far as commencement of regulations is concerned, that too did not occur to us to be contentious. As I say, we thought that paragraph (b) might already cover the case of specifying a commencement date as being the date of operation of an Act. We were just clarifying the law, removing any area of doubt. As far as the time is concerned, that would be a new matter, but it did not occur to us that that would be contentious.

Senator STONE - I think, with respect, that Mr Turnbull has not quite understood my question. He has certainly not quite responded to it.

CHAIRMAN - Perhaps you would like to put it again.

Senator STONE - I was putting to him the view that the guidelines say, very specifically that no matter that is closely related to a contentious matter may be included. I accept your view that this was not a contentious matter, had nothing to do with the Australia Card. What I am putting to you is that the Act itself, the subject Act, is an Act about which contention has revolved on many famous occasions in the history of the Commonwealth. I am merely putting to you why it was not thought more proper - I do not want to use that word too heavily - to move on this matter through a Bill amending the Act itself. I understand your point that you wanted to make some amendments to the Act, almost all of which you regarded as non-policy, although you thought on reflection that some parts were of minor policy significance and would be put to the Prime Minister. There were four pages, I think, of amendments of this kind. Why could they not have more properly formed the subject of an amending Bill to the subject Act principally?

Mr Turnbull - I think what Senator Stone is suggesting is that if an Act in itself is important, any amendment of that Act is potentially contentious. We have certainly not construed the guidelines in that way. You might take a very contentious Act and merely be making a very minor amendment which in itself is not contentious and in itself is not related to a contentious matter. We could then regard that as being suitable for a statute law Bill. I do not think that we have ever taken the view that the guidelines are saying that certain Acts simply must never be touched in the statute law Bill. We look at the effect of the amendment rather than the Act that is being amended.

Senator STONE - I do not want to pursue the point. I think I disagree on this particular instance.

CHAIRMAN - Would it be fair to say, from what you have said to us, that as far as a significant change is concerned, it would be your view, would it not, that the only matter of new substance that was covered - apart from clarifying for cautious people the business of commencement of regulations - would be in fact the provision for the time to be specified?

Mr Turnbull - I think that is the only new matter in this particular amendment. You are speaking of this particular amendment?

CHAIRMAN - Yes, I am.

Mr Turnbull - I think that is about it.

Mr Jessop - I would agree with that.

Senator BISHOP - Mr Turnbull has stressed that his amendment, he felt, was a question of drafting style, whereas upon further examination we are going to see, I think, that it is more than that. I would like to ask you very simply, Mr Turnbull, whether drafting in the modern way has not packed the courts in one way or another with people who find the need to reinterpret drafting style and the way things change when an old Act is amended in new drafting style. It has caused all sorts of difficulties in interpretation and indeed ended up in the courts.

The point I was making earlier and that Senator Stone stressed is that for 80-plus years we have got by quite satisfactorily with the old drafting style and the law is certain, but by changing the law in the way you propose with your new drafting style we could render the law uncertain.

Mr Turnbull - I am happy to answer that. There are two questions. First, I would like to correct a possible misunderstanding I may have created. I am not suggesting that this amendment itself is anything to do with drafting style. I merely indicated that my commencing the whole proposal to amend the Acts Interpretation Act was motivated by a number of changes I wanted to make in order to simplify our drafting style. This is the only amendment that did not originate in our Office. It came, as I said, as a result of a letter from the Attorney-General's Department about a problem it had about commencement. This is nothing to do with drafting style. On the second question, the Office of Parliamentary Counsel has been under mounting attack from a number of quarters for drafting what has been described as gobbledegook, legalese, incomprehensible statutes and unintelligible statutes. We have tried to defend our position but at the same time I do believe that there is room for improvement in our style. We have concentrated always on precision at all costs. Sometimes precision, particularly when we are dealing with very complex subject matter, results in a law that is very difficult to understand. We are trying to improve our style and make it easier to understand, but at the same time without losing precision.

In answer to the question put to me, I am not aware of any troubles in the courts arising from simplification of drafting style, as far as this Office is concerned. There was a case in Victoria where an Act that was drafted in what is called the plain English style, advocated by Mr Kennan, the Attorney-General of Victoria, was criticised in the Victorian Supreme Court

because it was alleged that accuracy had been sacrificed for the cause of simplicity. However, we in our Office have resisted the suggestions by the plain English school that we should follow its style and we do not intend to follow its style. What we are trying to do is to maintain 100 per cent accuracy, as we have always tried to in the past, but at the same time get rid of antiquated phrases or set forms of phrase which have resulted in the style being unduly complex. This is a very difficult thing to do - we are trying to walk a tight-rope - but we are not losing sight of the fact that our first responsibility is to make the law accurate. I do not think that what we are doing is going to give rise to trouble in the courts, because we are trying to avoid the extreme line that has been adopted in the Victorian school, particularly by the Victorian Law Reform Commission.

Senator BISHOP - The point I want to make is that the law, as it presently is, is certain. It has stood the test of time; it has, on your own evidence, been unchallenged.

Mr Turnbull - I would not say that it has been unchallenged.

Senator BISHOP - This section has not been tested in the courts.

Mr Turnbull - So far as I know this section has not been tested in the courts - I would not know.

Senator BISHOP - I did ask whether it had ever been tested. You thought that there was power there to do some of the things that you were trying to do in the amendment, but we dealt specifically with the question of whether or not that power had ever been tested.

Mr Turnbull - The reply to that is that the division in the Attorney-General's Department drafting regulations has avoided a test by being extra cautious.

Senator BISHOP - That is exactly my point. We have been able to get by for the last 80 years in a certain manner.

Mr Turnbull - So it seems, but I do not know how much difficulty people have had. It seems they have had difficulty at times.

Senator BISHOP - Is this the first time that anyone has raised the difficulty in this minute, a copy of which we now have?

Mr Turnbull - It is the first time it has been brought to our attention in the Office of Parliamentary Counsel, but I do not know that that means it is the first time there has been difficulty.

Senator BISHOP - Is there any record of any other raising of this difficulty?

Mr Turnbull - I do not know.

CHAIRMAN - Do you work on the principle that it is not necessary for someone to be killed in this section before traffic lights are put up?

Mr Turnbull - That is right. We have been requested to make the amendment because some difficulty has been experienced.

CHAIRMAN - I am sure you would have no trouble in accepting that being criticised for never getting it right is an occupational hazard for parliamentary counsel.

Mr Turnbull - That is right. Surprisingly, this is the first time it has been suggested that we should not simplify our style.

CHAIRMAN - That suggestion did not come from me.

Senator GILES - I would like to put on record that many of us greatly appreciate your efforts towards simplification. I have noticed a remarkable difference over the six years that I have been here in the way in which I am, as a lay person, able to deal with legislation and memorandum and so forth. I would like to congratulate you.

Mr Turnbull - I am most gratified to hear that.

Senator BISHOP - I did not mean to complain about the Act becoming easier to read. What I am saying is, when you change an Act which is existing and operating effectively, and you try to change it by changing wording, what flows from that is that you inevitably get some uncertainty into the area. If you want to look at the Tax Act, that is a classic example, is it not?

CHAIRMAN - We now have the record straight on that.

Senator STONE - I recall that in some of the preparatory documentation that the new senators, of which most of us are as far as this Committee is concerned were given before we assembled here a week or so ago, there was at least one paper which recalled a set of episodes in the 1930s in which there was considerable disputation between the Executive of the day, the Senate of the day and this Committee, over the processes that the then government attempted to invoke to get around these specific provisions. I may be chasing an irrelevant hare in raising that matter, but I do wonder whether the Executive of that particular day might have found things a lot easier to handle if it had had the provisions of the Acts Interpretation Act in a form which this amendment would have transformed it into, rather than the one which it had at the time and which, in the end, it found impossible to get around. In other words, the Parliament won and the Executive was defeated on that occasion.

Mr Jessop - Was that the occasion that led to these various Dignan cases. If it is, it was in the 1930s and the situation there was that there were regulations made which the Executive

wanted made and the Parliament did not, and they were disallowed. As soon as they were disallowed a fresh regulation, in the same sense, was brought straight back in again. That has been got over by the prohibition on regulations being presented within six months of disallowance. But that was, I understand, the point that arose there. It was not a question of commencement.

Senator STONE - Thank you for refreshing my memory. You are perfectly right, it was the section 49 provision. Nevertheless, I still think my question has point, can one conceive of circumstances in which had the Act, as it then stood, been in the form which it is now proposed to be, would the actions of the executive of the day been materially assisted. You might like to think about it. Perhaps it is something to take on notice.

Mr Turnbull - Might I comment on that. I have difficulty in seeing how this has any bearing at all on the disallowance power. Right now, under the section as it stands, regulations can be made to come into force on a particular date, which might be a date in a week's time after the making of the notification, or a year's time. They can be made to come into force prospectively, even now. That has not prevented those regulations from being disallowed. The proposed amendment merely allows a regulation to state that it is to come into force on the commencement of a specified act. That does not affect the power of disallowance either, those regulations could still be disallowed. As far as I can see it has no bearing at all on the power of disallowance.

Senator STONE - I was prepared to allow this to go on notice, but since Mr Turnbull is basically saying that he does not believe there is anything in it, can I put one or two thoughts to him. I apologise for doing so because they are untrained thoughts. We have a possible situation where a government wishes to make a regulation which basically the Senate

does not want to be effective for some reason or other. You have a situation where the Senate begins to debate the objectional regulation, in its eyes, which the Government has made, and begins to prepare for a vote on the disallowance of those regulations. Before the vote is taken the Government actually moves to repeal the regulation and re-enacts it in the same form, but expressed to be effective from a specified time before the Senate vote is taken.

The Senate then votes and disallows the original regulation, but meanwhile there is a new regulation in being which is effective from the time on that day before the Senate vote was taken. You have, therefore, a continuing life, so to speak, or a reborn regulation which then continues until the Senate can vote again on that. Before that happens you have the same repeal and remaking of regulation procedure in operation again. These may be thought to be fantastic speculations and in a sense they are, nevertheless, at moments of great political tension and constitutional stress, governments resort to such fantastic actions, not merely thoughts - I can personally testify that in relation to 1975, for example. That is really the gravamen of my question, Mr Chairman.

CHAIRMAN - Hardly untrained.

Mr Turnbull - I may not have fully grasped the implications of that but I fail to see how the amendment makes any difference. The same scenario could appear even under the section as it stands at the moment.

Senator GILES - It is a difficult matter and it is one that has exercised our minds on this Committee from time to time.

Mr Turnbull - Is the point the specifying of the time?

Senator STONE - Yes, it is the time.

Mr Turnbull - I see. But why could that not be done by specifying a date, because the regulations could then come into operation from the midnight before. I may have missed the full significance of that but certainly I would like to think about it.

Senator STONE - As I said, it is an untrained question.

Senator BISHOP - It is time that enables you to have continuity - a continuous effect - to effectively leave the effect of the regulation which gets repealed and re-enacted to remain in force without a break.

Mr Turnbull - If you make the subsequent regulation on the relevant day and it comes into force from midnight the night before you make it, I think you are in an even better position.

Senator STONE - That is what I understood to be your response.

CHAIRMAN - It is your view that in that situation the Senate's powers of disallowance are unimpaired?

Mr Turnbull - They are not changed. I do not think they are changed by this amendment at all.

Mr Jessop - I really cannot see how the amendment makes any difference in the kind of situation that has been put before the Committee - that turns on different considerations. This amendment is merely relating to the time of effect. Disallowance is dealt with quite separately. Regulations have to be tabled within 15 sitting days of making - coming into effect is actually to do with tabling. Once they are tabled, the House can consider them. I do not think that this question of commencement dates, specified or other, seems to have anything to----

Senator BISHOP - It is not the date, it is time. I think this is a point which needs----

Mr Jessop - I still do not see what relevance it has. It just does not seem to me to have any----

CHAIRMAN - I have a suggestion to make to the Committee in respect of this and, perhaps, in a general sense. We are getting bogged down on this, and I agree that it is a very important point and we have to come back to it. Do senators have any other questions on any other matter? What I would like to suggest to the Committee is this: the Committee has, in fact, prepared a number of its concerns in draft form. We have dealt with a number of those this morning and it has been more than useful. I wonder if I could simply ask for the discretion of the Committee for my suggestion. A number of the concerns that we have, which have been previously circulated to all members of the Committee,

have been clearly dealt with - I have made notes of that - and I wonder if the Committee could allow me to have the discretion to raise the questions that we have not put this morning by way of questions on notice. We can get written replies to those when we get the Hansard transcript of this. In respect of this present matter that we are dealing with, perhaps we could draft very precisely the concerns that have been raised by Senator Stone and Senator Bishop and actually get a considered legal response at the same time as these other matters. Would that be satisfactory to you?

Mr Turnbull - It would be very helpful to us, yes.

Mr Jessop - I would appreciate that very much because it could well clarify the matter.

CHAIRMAN - I would need at least a half a dozen cups of coffee before I could answer it.

Senator BISHOP - I take it that we are getting that legal advice from the counsel who advises us?

CHAIRMAN - In fact, there is no difficulty for us to do both. Initially, though, I would like the legal advice from the people whom we have before us this morning, but there would be nothing to prevent us from asking our own counsel to provide advice on that as well.

Senator BISHOP - If we did that - I think I would quite like to have that done - I would like him not only to advise on the matters that may flow from the amendment but also give his own suggestions as to how the amendment could be, perhaps, further amended in order to overcome the problems that may be thrown up by it in its present form.

CHAIRMAN - My view would be that it might be more appropriate, in fact, to take that next step later, rather than having a look at both his advice and the advice of the officers here.

Senator BISHOP - Okay.

Senator GILES - Where is this Bill, incidentally?

CHAIRMAN - It has gone back to the House of Representatives. Are there any other questions that need to be asked of our visitors this morning? If not, thank you very much for your attendance. It has been more than helpful.

Committee adjourned

APPENDIX 2

COMMITTEE CORRESPONDENCE

PARLIAMENT OF AUSTRALIA · **THE SENATE** XXXII/O

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

9 October 1987

Senator the Hon. M. C. Tate
Minister for Justice
Parliament House
CANBERRA A.C.T. 2600

Dear Minister

As you know, on 7 October 1987 the Senate referred to the Regulations and Ordinances Committee for inquiry and report the proposed amendments to paragraph 48(1)(b) of the Acts Interpretation Act 1901 as they appeared in the Statute Law (Miscellaneous Provisions) Bill 1987 prior to its amendment by the Senate.

At its meeting on 8 October 1987 the Committee considered this reference and agreed that it would seek information and advice from your specialist legal drafting and legal policy experts in the Office of Parliamentary Counsel and in the Attorney-General's Department. The Committee has, therefore, agreed to hear evidence from your nominated officers at 8.30am on Thursday 22 October 1987 in Senate Committee Room 6.

Yours sincerely

Bob Collins
Chairman

PARLIAMENT OF AUSTRALIA · THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

23 October 1987

Senator the Hon. Michael Tate
Minister for Justice
Parliament House
CANBERRA A.C.T. 2600

Dear Minister,

At its meeting on 22 October 1987, the Committee met the First Parliamentary Counsel, Mr Ian Turnbull and other officers nominated by you from the Attorney-General's Department to discuss the implications of a proposed amendment to paragraph 48(1)(a) of the Acts Interpretation Act 1901. The proposed amendment appeared in the Statute Law (Miscellaneous Provisions) Bill 1987 prior to its amendment by the Senate. You will recall that on 7 October 1987 the Senate referred this proposed amendment to the Committee for inquiry and report. Although no time limit was placed on the Committee, it is conscious of the need to deal with this matter expeditiously. I enclose for your information a copy of the transcript of evidence taken by the Committee. The Committee now raises for your consideration and advice a number of matters.

Firstly, your officers gave a helpful summation of the background to the proposed amendment. However, the Committee would be grateful if you would briefly inform it of the various cases where the lack of provisions similar to those in proposed subparagraphs 48(1)(b)(ii) and (iii) have caused difficulty?

Secondly, your officers supplied the Committee with copies of the Attorney-General's Department memorandum of 4 March 1987 which gave rise to the proposal to amend paragraph 48(1)(b). Your officers have told the Committee that the proposal did not arise in the context of consideration of any proposed Australia Card regulations and the Committee accepts that advice. You yourself in the Senate on 7 October 1987 had already given your personal assurance that "the Government had no nefarious intent of trying to disguise the proposed amendment to the Acts Interpretation Act" and the Committee has no reason whatsoever to question that assurance.

Thirdly, in appraising itself of the background to this matter the Committee examined generally the proposed amendments to the Acts Interpretation Act in the light of the guidelines for determining whether particular proposals are suitable for inclusion in the Statute Law Bill. These guidelines appear in the 1987 edition of the Legislation Handbook. This matter was also the subject of debate in the Senate on 7 October 1987. It

is not the Committee's role to enter that general debate. However, the Committee has long regarded itself as having an informal watching brief, on behalf of the Senate, over amendments to the Acts Interpretation Act. This arises because Part XII in that Act contains the statutory procedures for disallowance of subordinate legislation. From the point of view of the Parliament and its role in overseeing executive law making it is essential that those procedures facilitate, to the fullest extent, the Senate's role as a house of legislative review. The Committee recognises that as much as any other Senator in recent times, this is a view to which you subscribe and which, during your period as a distinguished Chairman of Senate Committees, you firmly espoused.

Against the general background, therefore, the Committee draws your attention to its view that the Acts Interpretation Act as a whole may arguably be the single most important Act on the statute book after the Constitution itself. It provides for parliamentary control over secondary legislation that is much larger in volume than the primary legislation coming before Parliament. It also provides the vital code of interpretive rules for understanding all other legislation. It is quite simply an Act of supreme importance to the Parliament. It should not, therefore, be subject to amendment by a Statute Law Bill unless the proposed amendments are unquestionably of the most demonstrably innocuous character.

In this case of the Statute Law Bill the proposed amendments to the Act constitute some 4 pages of amendments. It was not part of the Committee's reference to examine other provisions in detail though the Committee has noted briefly that proposed section 46A by expressly applying section 49A of the Acts Interpretation Act to other instruments may have properly restricted to more defined limits the growing and worrying practice of legislation by reference. The Committee has drawn these matters to your attention for future consideration though your comments would also be appreciated.

Thirdly, and again while considering the background to its reference, the Committee noted that for some considerable time it has been engaged in correspondence with the Attorney-General seeking certain amendments to the Acts Interpretation Act in order to protect the Parliament's disallowance powers. The most important of these amendments relates to the need for a power of partial disallowance over regulations, of the kind that currently exists over A.C.T. Ordinances. The absence of this power is a very serious flaw in the statutory disallowance scheme. It requires a member of either House of the Parliament, who wishes to persuade that House that a particular provision is unsatisfactory and should therefore be disallowed, to place in jeopardy the whole provision rather than merely the objectionable part. This flaw is particularly serious where matters are included in extensive schedules introduced by a single regulation, the disallowance of which necessarily eliminates the entire schedule rather than some small objectionable part of it. This matter has been under consideration in the Attorney-General's Department since it was raised by the Senate Committee as early as 1982 (Committee's Seventy-first Report, Parliamentary Paper No. 47/1982, paragraph 17). The other amendments sought by the Committee relate to: the probability

that the wording of subsection 48(2) of the Acts Interpretation Act permits retrospectively prejudicial instruments to be lawfully made notwithstanding that this is almost certainly contrary to what Parliament intended at the time of enacting the provision; the absence of an effective obligation to table disallowable instruments, particularly those with a short life-span; and issues arising from the repeal and re-enactment of delegated legislation which involve questions about the disallowance of revived instruments.

These matters were extensively canvassed in correspondence from the Committee to the Attorney-General, the Hon. Lionel Bowen, M.P., dated 28 March 1985, 18 February 1986, 19 March 1986, 2 June 1986, 18 November 1986 and 29 May 1987. They have also been reported on at length in the Committee's Seventy-seventh Report (Parliamentary Paper No. 172/1982, Chapter 3) and its Eightieth Report (Parliamentary Paper No. 241/1986, Chapter 2). The latter Report gave rise to considerable debate in the Senate (Senate Hansard, 15 October 1986, page 1341) and led to the introduction of a private Senator's Bill to correct the serious flaws identified by the Committee (Disallowance Provisions Amendment Bill 1986, Senate Hansard 19 November 1986, page 2451).

In considering the background to its reference the Committee noted that after almost 3 years the reasonable changes sought by the Committee have yet to appear in legislation while changes for which there may have been no equally pressing need are now before the Parliament. The Committee acknowledges, of course, that the Attorney-General has replied to all of its correspondence. However, firm and acceptable proposals for amendment are still awaited.

Fourthly, before coming to any conclusions about the possible effects of the proposed amendment to paragraph 48(1)(b) on the general power of disallowance, the Committee would respectfully seek your legal advice on a number of propositions. Is it, in your opinion as the Minister for Justice, legally possible for the proposed amendment to be put to use in order to frustrate the Parliament's power of disallowance of subordinate legislation? Would it be legally possible for the following events to occur to frustrate the Parliament's disallowance power, making use of the proposed amendments: a controversial regulation is made and tabled; a House of Parliament moves to disallow that regulation; prior to the vote on that disallowance motion another regulation or set of regulations is made, repealing the first regulation, re-enacting it and providing that the repeal and re-enactment are to take simultaneous effect from a specified time known to be a time prior to a vote on the disallowance motion; the disallowance motion becomes ineffective since the subject regulation no longer exists at the time of the vote; when the second regulation or set of regulations is tabled (which may take some days), the House again moves for its disallowance and the cycle of events is repeated; section 49 of the Acts Interpretation Act, proscribing the making of a regulation the same in substance as that disallowed becomes inoperative in each case because there has been no lawful disallowance; section 50 of the Acts Interpretation Act, providing for the effects of a repeal of a regulation, operates so that obligations arising under each regulation in the sequence of regulations are preserved and the substantive provisions of the regulations are,

for practical purposes, in continuous operation. The Committee seeks your advice on whether the proposed amendments to paragraph 48(1)(b) of the Acts Interpretation Act could be lawfully used in this way. It may be that some assurance from you, as the Minister for Justice, may be requested that, if this procedure is lawful, in no circumstances will it be used to defeat a disallowance motion. Alternatively it may become necessary if such procedures are lawfully possible under the amendment to section 48(1)(b) as it currently stands, for the amendment to be accompanied by some other amendment which would make the procedures described above unlawful. Your advice on all of these difficult issues would be much appreciated by the Committee.

Fifthly, the Committee would be pleased if you could let it have your advice on what effect the proposed subparagraph 48(1)(b)(iii) (regulations to take effect "on the commencement of a specified Act") would have on subsection 48(2) (regulations not to be expressed to take effect from a date before gazettal if this would prejudice individuals' rights). As alluded to above some time ago the Committee raised questions about the weakness of subsection 48(2) in preventing prejudicially retrospective effects of delegated legislation that falls outside the very narrow limits of the subsection as laid down by the High Court in the Australian Coal and Shale Employees' Federation Case. The Committee would be concerned if the proposed amendment in subparagraph 48(1)(b)(iii) were a further weakening of the rule against retrospectivity.

The Committee has raised a number of issues for your expert consideration. Each of these matters is of considerable significance to the Committee both in its traditional role as a bipartisan scrutiny committee and in its role as a committee asked to report on the particular issue of paragraph 48(1)(b).

The Committee looks forward to obtaining your comments and advice.

Yours sincerely

Bob Collins
Chairman

MINISTER FOR JUSTICE
SENATOR THE HON. MICHAEL TATE

Rec'd 28/10/87

GC87-5637

Dear Senator Collins

I refer to your letter dated 23 October 1987 concerning the proposed amendment to s.48(1)(b) of the Acts Interpretation Act 1901 and certain other matters relating to the disallowance of subordinate legislation.

The proposed amendment formed part of the Statute Law (Miscellaneous Provisions) Bill 1987, clause 3 and Schedule 1 of which sought to repeal the present s.48(1)(b) and to substitute a new provision. The present provision provides that a regulation shall, subject to s.48, take effect from the date of notification in the Gazette, or if a date is specified in the regulation, from that date.

The amendment sought to amend s.48 so that the relevant provisions would read:-

> '48(1) Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations made accordingly -
>
> .....
>
> (b) shall, subject to this section, take effect from:
>
> (i) a specified date;
> (ii) a specified time on a specified date;
> (iii) the commencement of a specified Act or a specified provision of an Act; or
> (iv) in any other case - the date of notification;'.

The proposed amendment is designed -

- to remove doubts as to whether the commencement of a regulation may be prescribed by reference to the commencement of a specified Act or specified provision of an Act; and

- to allow a particular time of day to be specified for the commencement of a regulation.

On 7 October 1987, the Senate deleted the proposed amendment from the Statute Law Bill and referred it to your Committee

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for inquiry and report. Assuming that your Committee finds the proposed amendment satisfactory, the Government's present intention is that the amendment will be re-inserted by the House of Representatives before the Bill is returned to the Senate.

Evidence was given to your Committee on 22 October 1987 by the First Parliamentary Counsel and officers of the Attorney-General's Department. However, the Committee seeks further information and advice.

First, you ask for information on the various cases where the current limitations on the operation of s.48(1)(b) have caused difficulty. Apart from the cases that I cited in the Senate on 7 October 1987 (Hansard, p.789), officers of my Department are unable to recollect details of other specific instances where problems have arisen. It would be impracticable to search back through Departmental files for examples of cases that have arisen over the years where difficulties and inconvenience would have been avoided if the alternatives referred to in the proposed s.48(1)(b) had been available.

The Committee has also questioned whether a Statute Law Bill is an appropriate vehicle for amending the Acts Interpretation Act. In the Committee's view, that Act should not be amended by a Statute Law Bill unless the proposed amendments are 'unquestionably of the most demonstrably innocuous character'.

I share the Committee's view that the Acts Interpretation Act is a uniquely important piece of legislation. However, this does not mean that every amendment to the Act is necessarily significant or controversial, or related to contentious matter in any sense that makes its inclusion in a Statute Law Bill inappropriate (cf. the guidelines in the Legislation Handbook to which you refer). In my view, all of the amendments to the Act contained in the Statute Law (Miscellaneous Provisions) Bill 1987 are entirely appropriate for inclusion in a Statute Law Bill. You specifically refer to the proposed s.46A, which forms part of the present Bill. If this is intended as a criticism of the inclusion of s.46A, I point out that it merely avoids the need to reproduce in each relevant Act a set of provisions providing for the notification, tabling and disallowance of subordinate instruments. In keeping with a principal purpose of the Acts Interpretation Act, s.46A provides a mechanism for simplifying and streamlining the language of legislation. (Such an amendment, of course, must be contrasted in this respect with the insertion in 1984 of s.15AB which authorises the use of extrinsic materials in the interpretation of legislation. Section 15AB did therefore effect a change in the law and was accordingly contained in a separate Bill.)

The Committee is also concerned that some of its proposals made in recent years for amendments to the Acts Interpretation Act have not yet been acted upon. These proposals are

detailed on pages 2-3 of your letter. On the matter of retrospectivity the Attorney-General provided a comprehensive response to the Committee in his letters of 24 February 1986 and 6 May 1986. In relation to partial disallowance and the successive remaking of regulations, I confirm that the Government has these matters under consideration. I have arranged for that consideration to be expedited.

I turn now to the Committee's question whether the proposed amendment to s.48(1)(b) would affect the powers of the Houses to disallow subordinate legislation. I see no way in which it could have any such effect. It is concerned simply with allowing greater scope for specifying precisely when a regulation is to take effect. It does not touch upon the questions of tabling and disallowance.

The Committee's specific concerns are set out in the following passage from your letter:-

> 'Would it be legally possible for the following events to occur to frustrate the Parliament's disallowance power, making use of the proposed amendments: a controversial regulation is made and tabled; a House of Parliament moves to disallow that regulation; prior to the vote on that disallowance motion another regulation or set of regulations is made, repealing the first regulation, re-enacting it and providing that the repeal and re-enactment are to take simultaneous effect from a specified time known to be a time prior to a vote on the disallowance motion; the disallowance motion becomes ineffective since the subject regulation no longer exists at the time of the vote; when the second regulation or set of regulations is tabled (which may take some days), the House again moves for its disallowance and the cycle of events is repeated; section 49 of the Acts Interpretation Act, proscribing the making of a regulation the same in substance as that disallowed becomes inoperative in each case because there has been no lawful disallowance; section 50 of the Acts Interpretation Act, providing for the effects of a repeal of a regulation, operates so that obligations arising under each regulation in the sequence of regulations are preserved and the substantive provisions of the regulations are, for practical purposes, in continuous operation. The Committee seeks your advice on whether the proposed amendments to paragraph 48(1)(b) of the Acts Interpretation Act could be lawfully used in this way.'

I do not see any way in which tactics of this kind could be assisted by the proposed amendment to s.48(1)(b). Furthermore, the Senate would have ample power to frustrate such tactics, given the strong High Court authority (not adverted to in your letter) for the propositions (a) that the disallowance power under s.48(4) is not conditioned upon the regulation being laid before the Senate by or on behalf of

the Government, and (b) that the regulation could be laid before the Senate, at any time after its making, by order of the Senate itself in accordance with its own procedures (Dignan v. Australian Steamships Pty Ltd (1931) 45 C.L.R. 188 especially at 204-205 per Dixon J.; also per Rich J. at 197-198; see also Odgers, Australian Senate Practice, Fifth Edition 1976, at 452-453). It might assist you if I explained the process in some detail. Assume that a controversial regulation has been made, and notified in the Gazette, on a non-sitting day. It can be laid before the Senate, on the initiative of the Senate itself, on the first sitting day thereafter, and notice of disallowance can be given immediately. The motion can be brought on as soon as possible in accordance with the Senate's own procedures. Assume that, before the motion is brought on, the regulation is repealed, and its terms repeated, in another regulation made and notified in the Gazette. (If no date of commencement is specified, the new regulation will commence at the beginning of the day of notification; there seems to be no advantage for the Government in making use of the proposed s.48(1)(b)(ii) or (iii) to make it commence at some time other than the beginning of the day of notification. If an earlier date were specified, s.48(2) would apply.) As soon as the Senate learned of the notification of the repealing regulation, it could arrange for that regulation to be laid before the Senate. Notice of a motion for disallowance could be given immediately and the motion brought as soon as possible in accordance with the procedures of the Senate. This could presumably be done quickly. In order to prevent disallowance (and the resulting application of reg.49), the Government would need to move quickly to get the Governor-General in Council to make a second repealing regulation. I have probably said enough to demonstrate that, given the Dignan case, the tactics referred to in your letter could only succeed in maintaining successive regulations in force if the Governor-General in Council were able to engage in repeated regulation-making with a frequency that could hardly be regarded as practicable. Because of the extreme impracticability of the tactics, I see no need for any amendments to deal with the matter.

The remaining point on which you seek advice is whether the proposed s.48(1)(b)(iii) could result in a 'further weakening of the rule against retrospectivity' contained in s.48(2). I do not think the amendment would have any such effect. Without the amendment, a relevant regulation would need to specify a particular date, being the date when the relevant Act or provision of an Act was to commence. Thus if the date was a past one, the regulation could not be made if it fell within s.48(2)(a) or (b). The proposed amendment would make it unnecessary to specify a particular date - and hence would avoid awkward problems that can arise in making a regulation intended to take effect concurrently with an Act that is not expressed to commence on a particular date but on some uncertain future date such as the date of the Royal Assent.

Under the proposed s.48(1)(b)(iii), a regulation could be expressed to take effect from the commencement of an Act or provision of an Act, but this would be fully subject to s.48(2), so that, if the relevant Act or provision had already commenced, the regulation could not be made if it fell within s.48(2)(a) or (b). In other words, s.48(2) would have exactly the same operation (neither stronger nor weaker) whether the regulation was expressed to take effect from a particular past date or expressed, by virtue of s.48(1)(b)(iii), to take effect upon the commencement of a specified Act or provision of an Act.

If any further assistance is required on the amendment to s.48(1)(b), please let me know. It would be appreciated if the Committee could complete its consideration of the matter in time for the provision to be restored to the Bill in the House of Representatives [next Friday].

Yours sincerely

(Michael Tate)

Senator R Collins
Chairman
Standing Committee on Regulations
and Ordinances
Parliament House
CANBERRA ACT 2600

XXXIV/O

PARLIAMENT OF AUSTRALIA · THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

6 November 1987

Senator the Hon. Michael Tate
Minister for Justice
Parliament House
CANBERRA A.C.T. 2600

Dear Minister,

At its meeting on 5 November 1987, the Committee again considered your letter of 28 October 1987 concerning the proposed amendment to paragraph 48(1)(b) of the Acts Interpretation Act 1901 (hereafter AIA) as contained in the Statute Law (Miscellaneous Provisions) Bill 1987 prior to its amendment by the Senate. The Committee also considered written legal advice from its legal adviser, Professor Dennis Pearce, concerning possible use of this proposed amendment to frustrate the Senate's power of disallowance, and the possible effects of the proposed amendment on the rule against retrospectivity contained in subsection 48(2) of the AIA. The propriety of the government making use of the Statute Law Bill as the vehicle for the proposed amendment was also considered, as was the question of what action should be taken by the Committee to persuade the Government that certain amendments to the AIA, requested by it over past months, are significant matters of concern and require urgent consideration.

After deliberating on these issues the Committee decided that it would write to you and the Attorney-General, the Hon. Lionel Bowen, M.P., informing you of the position which the Committee has agreed to adopt and which it will convey to the Senate in its Report on the AIA reference. I will send a copy of this letter to the Attorney-General for his information. I have enclosed for your information a copy of the Committee's letter to the Attorney-General.

Firstly, the Committee has concluded that the proposed amendment to the AIA would not facilitate any attempt to frustrate the Senate's powers of disallowance by means of a calculated repeal and reenactment procedure. However, the Committee has further concluded that such a legal mechanism already exists which, notwithstanding some practical difficulties, could nullify the Senate's powers under the AIA. In the Committee's view, and indeed it seems in your own view, the proposed amendments will not, per se, facilitate the device of repeal and reenactment because that procedure is already available under the AIA and it will continue to be available, whether or not your proposed amendment is made. That such a loophole exists in the statutory disallowance scheme is a matter of serious concern to the Committee. As you know, aspects of this matter were discussed in the Committee's Eightieth Report (P.P.241/86, (October 1986),

para 2.35). The Committee recognises that certain practical difficulties may impede the use of this device, for example, the need to ensure that a repealing and reenacting instrument is "made" before a disallowance motion "takes effect". On the other hand different practical problems may impede the Senate in its attempts to exercise a disallowance power, for example, problems associated with obtaining a tabling copy of a repealing and reenacting instrument as soon as it is "made". Nevertheless while these practical difficulties might be acute in regard to the making of statutory rules, they are less so where Ministers, ministerial delegates, statutory authority heads or senior public servants exercise powers to make various instruments of delegated legislation to which the AIA is made to apply by relevant enabling legislation. As you know a wide range of instruments is made by delegated law-makers through processes completely removed from those of the Governor-General in Council.

The Committee takes the view that, regardless of the practical obstacles to be overcome in making use of the procedure, it is contrary to the principles of parliamentary control over subordinate legislation that this loophole should remain on the statute book. The Committee, therefore, seeks your undertaking that the AIA will be amended to remove the legal possibility that repeal and reenactment procedures could ever undermine the Senate's disallowance powers. The Committee recognises that a suitable amendment to deal with this complex issue in a fashion which does not itself create unwanted effects, will require careful drafting. The Committee does not suggest that such an amendment should be hastily prepared and inserted into the proposed amendment to the AIA in the Statute Law Bill. The proposed amendments in that Bill are essentially unrelated to this problem. The Committee considers that passage of the Bill in so far as it relates to proposed new paragraph 48(1)(b) of AIA, should not be delayed pending an amendment such as this.

The Committee has given some attention to the question of what would constitute a suitable amendment and offers the following tentative draft for your consideration and for professional analysis and improvement by your drafting experts -

(1) Without limiting the operation of section 49, where a notice of a motion to disallow a regulation has been given in either House of the Parliament within 15 sitting days of that House after that regulation was laid before that House, a regulation containing a provision the same in substance as a provision of the first-mentioned regulation may not be made unless:

(a) the notice has been withdrawn; or

(b) the motion has been disposed of.

(2) A regulation made in contravention of subsection (1) shall be void and of no effect.

It may be that an improved version of this amendment and the other amendments to the AIA sought by the Committee, could be made as part of an AIA reform package for introduction to Parliament in the Autumn Sittings. Any further delay,

particularly in regard to those amendments already requested by the Committee, would be a matter of serious concern to the Committee. Through your good offices, and those of the Attorney-General, the Committee respectfully seeks an undertaking from the Government to amend the AIA to close the repeal and reenactment loophole and to provide for the other amendments which have been the subject of correspondence between the Committee and the Attorney-General. The Committee acknowledges and is, of course, grateful for your intervention in seeking to expedite those outstanding matters.

Secondly, since the Committee has concluded that the proposed amendments per se could have no neutralising effect on the Senate's disallowance powers and are merely of a technical nature, the Committee accepts your view that the Statute Law Bill was not an inappropriate legislative vehicle for them.

Thirdly, the Committee remains concerned about the possible effects of proposed subparagraph 48(1)(b)(iii) on the already too narrow rule against retrospectivity contained in subsection 48(2) of the AIA. The Committee has carefully considered your advice that this amendment would not weaken the rule against retrospectivity; that it would make it unnecessary to specify a particular date and hence avoid difficulty in making regulations intended to come into effect concurrently with an Act expressed to commence on some uncertain future date; that a regulation expressed to take effect from the commencement of an Act would be fully subject to subsection 48(2); and that that subsection would have exactly the same operation, neither stronger nor weaker if the regulations were expressed to take effect upon the commencement of an Act. The Committee is not confident that a court would adopt these views.

The rule against retrospectivity applies only where regulations are expressed to take effect from a date before the date of notification and thereby cause prejudice to individuals. The Committee has previously indicated that the rule against retrospectivity can be evaded merely by providing that regulations apply in some retrospective way (e.g. "... any person who before the commencement of this regulation has done ABC shall be liable to pay a fee of $XYZ"). The Committee had anticipated that, if this kind of possibility was not eliminated by statute, a certification procedure involving the Attorney-General's Department would be instituted to screen out delegated legislation which could have prejudicially retrospective effects.

The proposed amendments in paragraphs 48(1)(b)(i),(ii) and (iv) use the word "date". Subsection 48(2) of the AIA uses the word "date". Paragraph 48(1)(b)(iii) does not use that word. A court is unlikely to conclude that there is no significance behind that drafting. When faced with regulations expressed to "come into operation on the commencement of the CDE Act", being an Act which had already commenced some time in the past, a court could well conclude that those regulations are not regulations expressed to take effect from a date before notification. The decision of the High Court itself on this very point has not been revised or overruled (see Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co. Ltd, (1942) 66 CLR 161). As will be evident from the Committee's previous correspondence on the need for certain amendments to the AIA, this High Court decision has

caused the Committee to seek some strengthening of subsection 48(2). It seems however, that enactment of sub-paragraph 48(1)(b)(iii) will merely heighten the Committee's concern. A solution to this problem (at least as far as the Statute Law Bill is concerned) might lie in the insertion of the words "date of" into the subparagraph which would then provide that regulations shall not take effect from "the date of commencement of a specified Act etc." The Committee invites you to insert this amendment. Your undertaking to have this done when the provision is again considered by the House of Representatives will be reported to the Senate in the Committee's report on its reference.

Finally, the Committee proposes to report to the Senate as soon as possible after it receives your reply to this letter. The Committee hopes that, on behalf of the Government, you will be able to give the Committee the undertakings it seeks. In approaching its examination of these issues the Committee has sought to preserve its traditional bipartisan approach. It has dealt with the issues before it with the intention of protecting Parliament's vital power of control over subordinate legislation, from any possibility of abuse. The Committee does not suggest that any abuse of the disallowance procedure has ever been seriously contemplated. However, the Committee is concerned with, and acts on the basis of, parliamentary principles. It would undoubtedly be contrary to those principles for the Executive, or any agency of it, in making delegated legislation to be able lawfully to evade the disallowance procedures of Parliament.

The Committee looks forward to receiving your comments and advice on these matters.

Yours sincerely,

Bob Collins
Chairman

XXXIV/O/2

PARLIAMENT OF AUSTRALIA · THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

6 November 1987

The Hon. Lionel Bowen, M.P.
Attorney-General
Parliament House
CANBERRA A.C.T. 2600

Dear Attorney-General,

As you may know, at the request of the Senate the Committee has been examining a proposed amendment to paragraph 48(1)(b) of the Acts Interpretation Act (hereafter AIA) that was contained in the Statute Law (Miscellaneous Provisions) Bill 1987 prior to its amendment by the Senate. Concern was expressed in the Senate that the proposed amendment could adversley affect the statutory disallowance powers of the Parliament. The Committee has been corresponding with the Minister for Justice, Senator the Hon. Michael Tate, on this issue. The Committee has also met some of your senior officials and received advice from them. The Committee appreciates the cooperation you have shown in this regard.

Having considered the issues, the Committee has concluded that the proposed amendment will not adversely affect the Senate's disallowance powers. The Committee will report this finding to the Senate. However, the Committee's inquiry has revealed that, regardless of the proposed amendment, use of a repeal and reenactment device could neutralise disallowance procedures, notwithstanding some practical difficulties associated with the effective use of that device. The Committee considers that it is contrary to the principle of parliamentary control over subordinate law-making for this possibility to exist under the AIA.

You may recall that over the past months the Committee has exchanged correspondence with you concerning the need to reform certain aspects of the AIA in order to protect the scope and utility of Parliament's supervisory scrutiny of subordinate laws. The Committee considers, with respect, that implementation of these reforms is now overdue. It would be most encouraging for the Committee if you would give serious consideration to expediting the necessary amendments, and include among them a further amendment to prevent the use of any repeal and reenactment device as a means of neutralising the disallowance powers of Parliament.

I have enclosed for your information and consideration a copy of the Committee's letter to Senator Tate on these matters. As you will see from that letter to your colleague who has carriage of

this issue as it affects the Statute Law Bill, the Committee is seeking an undertaking from the Government to amend the AIA to remove the possibility that disallowance procedures can be evaded. As the Minister responsible for the Act, your views are obviously crucial and the Committee hopes that you can give an undertaking or recommendation that an undertaking be given by Senator Tate to amend the AIA and close this loophole.

As the Committee has made clear in its letter to Senator Tate, there is no suggestion that a Government or any of its officials or statutory agencies would avail of the loophole. However, the Committee considers that, on principle, and in the interests of clarity, certainty and propriety, the loophole should be closed by an amendment to the AIA. The Committee has forwarded to Senator Tate a suggested draft amendment for his information. I have enclosed a copy of this amendment for your consideration as Attorney-General. It may be that a suitable amendment could be included along with the other AIA amendments sought by the Committee.

The Committee would be very pleased to have your cooperation with this matter. Your comments and advice on the proposal would be much appreciated.

Yours sincerely,

Bob Collins
Chairman

Proposed Amendment to the Acts Interpretation Act

(1) Without limiting the operation of section 49, where a notice of a motion to disallow a regulation has been given in either House of the Parliament within 15 sitting days of that House after that regulation was laid before that House, a regulation containing a provision the same in substance as a provision of the first-mentioned regulation may not be made unless:

(a) the notice has been withdrawn; or

(b) the motion has been disposed of.

(2) A regulation made in contravention of subsection (1) shall be void and of no effect.

MINISTER FOR JUSTICE
SENATOR THE HON. MICHAEL TATE

Rec'd
18/11/87

GC87-5637

Dear Senator Collins

I refer to your letter of 6 November 1987 concerning the proposed amendment of paragraph 48(1)(b) of the Acts Interpretation Act 1901 as contained in the Statute Law (Miscellaneous Provisions) Bill 1987.

You have invited me to insert the words 'date of' in sub-paragraph 48(1)(b)(iii) which would then provide that regulations may be expressed to take effect from 'the date of commencement of a specified Act or a specified provision of an Act'. In my opinion, such a change is not necessary to attract s.48(2) since a regulation expressed to take effect upon the 'commencement' of a specified Act is necessarily a regulation expressed to take effect on a date - i.e. the date upon which the specified Act commences.

However, I appreciate your concern that the position is not absolutely beyond question and have therefore considered your suggested modification. It seems to me that it would not take account of those cases when an Act commences at a particular time on a specified day (e.g. the Australia Act 1986 which came into operation at 5.00 a.m. Greenwich Mean Time on 3 March 1986). This point could be overcome by amending s.48(1)(b)(iii) to read 'the date, or date and time, of commencement of a specified Act or of a specified provision of an Act'. Any regulation within s.48(1)(b)(iii) would then be one that was expressed to take effect on some 'date' and therefore be within s.48(2) if the date was one before the date of notification and if the regulation fell within the other provisions of s.48(2). The amendment to s.48(1)(b)(iii) would therefore not be exposed to the objection expressed in your letter.

In order to meet the Committee's concerns, I propose to have s.48(1)(b)(iii) in this amended form placed in the Statute Law Bill when it is introduced in the House of Representatives.

Your letter also raised a number of other matters in relation to disallowance of instruments, retrospective operation of

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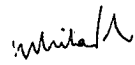
regulations and related matters. These matters are receiving attention and will, I understand, be the subject in due course of correspondence from the Attorney-General with whom the Committee has corresponded on them previously.

Yours sincerely



(Michael Tate)

Senator R Collins
Chairman
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Recd 23/11/87

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

M86/4251

Dear Senator Collins

I refer to your letter of 6 November 1987 concerning the proposed amendment of paragraph 48(1)(b) of the Acts Interception Act 1901 contained in the Statute Law (Miscellaneous Provisions) Bill 1987. The matters raised in your letter relating to that amendment are being replied to by the Minister for Justice.

You also raised the question of other amendments sought by the Committee that had been the subject of previous correspondence with me. These are the Committee's proposals for amendments of the Acts Interpretation Act -

(a) to enable either House of the Parliament to disallow part of a regulation;

(b) to prevent the successive remaking, at the expiry of each period of 15 sitting days, of regulations which have not been tabled; and

(c) to prevent the making of regulations having a retrospective operation.

Active consideration of the first two of these matters is proceeding and I expect to be in a position to provide a further response within the next several weeks. In relation to retrospectivity, Senator Tate drew the Committee's attention to the response contained in my letters dated 24 February 1986 and 6 May 1986 to your predecessor. I do not see any reason to alter the views expressed in that correspondence.

You have, in addition, asked that consideration be given to an amendment of the Act that would prevent the use of any repeated repeal and remaking device that might be capable of circumventing the disallowance powers contained in s.48. As Senator Tate has already indicated in his letter of 28 October, the likelihood of a government adopting such a course in relation to the making of regulations would not, because of the extreme impracticability of such a tactic, seem to call for an amendment. Your letter of 6 November to Senator Tate recognises these practical difficulties.

The Committee has, however, reiterated its concerns in relation to the possible use of such a device for the successive repeal and remaking of executive instruments. In that connection, you have provided a draft designed to preclude such a possibility arising. While I believe that there would also be very considerable practical difficulties in a government adopting such a course in relation to executive instruments in the way described by the Committee, I accept nevertheless that such possibility of abuse as exists is more likely to arise in connection with executive instruments than in respect of regulations.

I propose, therefore, to recommend to the government that consideration be given to an appropriate amendment of the Acts Interpretation Act to eliminate any possibility of such successive repeal and remaking of regulations and executive instruments. The draft provided by the Committee would be taken into account in considering the appropriate form of any such amendment.

Yours sincerely

(Lionel Bowen)

Senator Bob Collins
7th Floor, Hooker Building
Mitchell Street
DARWIN NT 5790

APPENDIX 3

ATTORNEY-GENERAL'S DEPARTMENT MEMORANDA

Commonwealth of Australia

ATTORNEY-GENERAL'S DEPARTMENT

CANBERRA

Subsection 48(1) of the Acts Interpretation Act 1901

First Assistant Secretary
General Counsel Division

Subsection 48(1) of the Acts Interpretation Act 1901 provides, so far as is relevant, as follows:

> "48.(1) Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations made accordingly -
>
> (a) .....;
> (b) shall, subject to this section, take effect from the date of notification, or, where another date is specified in the regulations, from the date specified; and
> (c) .....".

2. The view that has been acted upon is that where regulations are to take effect other than from the date of notification, it is necessary to actually specify a date in the regulations. For example, the regulations should specify '1 May 1987' and not 'the date on which the XY Act comes into operation'.

3. From time to time, the constraints of such a system give rise to difficulties. By way of example, we are at present working on some regulations under the Protection of the Sea (Civil Liability) Act 1981. The Department of Transport, in order to facilitate ratification by Australia of a Protocol to a Convention, wishes to make the Regulations in the near future and have them expressed to come into operation at the time of commencement of certain provisions of an amending Act that relate to the Protocol. That time is dependent on the entry into force for Australia of the Protocol; it is at present unknown and probably will remain so for some time. We have informed the Department that we are unable to give effect to their instructions in this regard. Another kind of difficulty, namely, commencement at a particular time on a day, is exemplified by subsection 7(2) of

the Australian Capital Territory Tax (Transfers of Marketable Securities) Act 1986. This provision was included in the Act in order to avoid questions arising in the context of subsection 48(1).

4. Accordingly, the matter is brought to your notice because of the responsibility of your Division for administration of the relevant provisions of the Acts Interpretation Act. It is suggested that appropriate amendment of subsection 48(1) be made through the medium of a Statute Law (Miscellaneous Provisions) Act if a suitable amending Bill is not otherwise at present in contemplation.

5. As to the nature of a satisfactory commencement regime for regulations, it is suggested that the amendment be such as to permit regulations to take effect -

- on a specified date,
- at a specified time on a specified date;
- at the commencement of a specified Act or specified provision of an Act; and
- in any other case - on the date of notification.

(D.J. McMILLAN)
for First Assistant Secretary
Commercial and Drafting Division

March 1987

Commonwealth of Australia

ATTORNEY-GENERAL'S DEPARTMENT

CANBERRA

Section 48(1)(b) of the Acts Interpretation Act 1901 - Commencement Date of Regulations

First Assistant Secretary
Commercial and Drafting Division

Attention: D J McLellan

I refer to your minute of 4 March 1987 concerning your proposal to amend s.48(1)(b) of the Acts Interpretation Act 1901 ('the Interpretation Act'). You seek my views on the matter in light of this Division's responsibility for the administration of the Interpretation Act.

2. Section 48(1)(b) provides:

'48 (1) Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations made under the Act -

(a) ...

(b) shall, subject to this section, take effect from the date of notification, or, where another date is specified in the regulations, from the date so specified; and

(c) ...'

3. You say that the Department acts upon the view that where regulations are to take effect other than from the date of notification, s.48(1)(b) requires a date to be actually specified in the regulations, ie. the regulations must specify a date such '1 May 1987' and not 'the date on which the XY Act comes in to operation'. This constraint has given rise to difficulties in cases where it would be more convenient to express regulations to come into force [illegible] commencement.

4. Another constraint is that s.48(1)(b) does not allow a regulation to be expressed to come into operation at a particular time on a specified day. You say that this has caused problems.

[illegible]

5. Accordingly, you suggest that s.48(1)(b) be amended to permit regulations to take effect -

- on a specified date;
- at a specified time on a specified date;
- at the commencement of a specified Act or specified provision of an Act; and
- in any other case - on the date of notification.

6. I have no difficulties with this proposal. I appreciate the current limitations of s.48(1)(b) and the obvious utility of the proposed amendments. I will arrange to have the matter dealt with when the Act is next being amended.

(J A WARD,MAY)
for Acting First Assistant Secretary
General Counsel Division

21 April 1987

Contact Officer: Mr Aitken
Telephone No.: 71 9405

61

APPENDIX 4

CHAPTER 2 OF THE COMMITTEE'S EIGHTIETH REPORT

CONCERNING REFORM OF THE ACTS INTERPRETATION ACT

CHAPTER 2

POWERS OF DISALLOWANCE

Introduction

2.1. The major legislative basis of the Senate's power of disallowance is provided by Part XII of the Acts Interpretation Act 1901 (the Act).

2.2. Paragraph 48(1)(c) provides that regulations shall be tabled in each House of Parliament within 15 sitting days of being made[1]. Without this formal alerting process Parliament's position as the origin of all legislative authority could be overlooked and ultimately ignored. Therefore, sub-section 48(3) provides that regulations which are not properly tabled "shall be void and of no effect".

2.3. Sub-section 48(4) provides that if either House passes a resolution of disallowance, the regulations "shall thereupon cease to have effect". Sub-section 48(5) ensures that a motion of disallowance cannot be adjourned indefinitely. It provides that unless the motion is withdrawn or defeated within 15 sitting days of notice being given, the regulations shall be deemed to have been disallowed by effluxion of time. Sub-section 48(5A) provides that if a motion of disallowance has not been disposed of before a House is dissolved, the regulations are deemed to have been retabled when the House next sits.

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1 There have been suggestions that 15 sitting days, while a period well suited to the horse and buggy days of the past, is now too long a delay in notifying Parliament of the making of delegated legislation. The Committee has, as yet, no concluded view on this.

2.4. Sub-section 48(6) provides that disallowance has the same effect as a repeal. Sub-section 48(6) and section 50 together have the effect that disallowance shall not affect rights already accrued or liabilities already incurred. Sub-section 48(7) provides however, that the disallowance of regulations which repeal other regulations, will revive those repealed regulations in order to prevent an hiatus arising from disallowance. Section 49 provides that, for 6 months after disallowance, no regulations can be made in substitution for those disallowed, unless the disallowing House has, by resolution, agreed to them being made.

2.5. The Seat of Government (Administration) Act 1910, provides almost identical powers of disallowance of A.C.T. legislation. Other federal legislation which permits the making of instruments other than regulations, for example determinations and orders, almost always expressly applies some of the provisions of Part XII of the Act to those instruments.

2.6. Where they apply in full, these provisions are, prima facie, a formidable battery of protections which enable each House to exercise over instruments the kind of veto which it can exercise over primary legislation which confers rule-making powers. It is logical and proper that a House should possess such powers. Indeed it might even call into question the practical sovereignty of a House if it did not expressly take such a power to itself.

2.7. Contemporary federal parliamentarians still acknowledge the wisdom and prescience of the first generation of federal politicians who, in the 1904 Acts Interpretation Bill, recognised that disallowance was the only effective means which a House could use to ensure that Executive law-making was subject to accountability and control in Parliament.

2.8. Provisions of the Act have been refined from time to time. However, in spite of its advantages, the present Acts Interpretation Act contains a number of significant limitations which could result in the infringement of personal rights and the undermining of parliamentary supervision of legislation.

Retrospectivity

2.9. Sub-section 48(2) of the Act provides that regulations shall be void if they are "expressed to take effect" from a date before their gazettal and by doing so retrospectively prejudice the interests of a person other than the Commonwealth. The High Court in Australian Coal and Shale Employees' Federation v Aberfield Mining Co. Ltd. (1942), 66 C.L.R. 161 gave this sub-section an extremely literal interpretation by emphasising the significance of the words "expressed to take effect". When it considered this matter in its Seventy-seventh Report (March 1986) the Committee noted:

> ".... a regulation which would be void if expressed to take effect from a date earlier than notification could achieve the same retrospective effects with simple alteration to the drafting. Thus sub-section 48(2) of the Acts Interpretation Act does not achieve what Parliament undoubtedly intended it should achieve - the proscription of retrospectivity in delegated legislation by regulations where prejudice to individuals will result." (paragraph 21)

2.10. The Committee also warned that:

> ".... until sub-section 48(3) is amended it is difficult for [the Committee] adequately to scrutinise delegated legislation which is retrospective in operation, when that retrospectivity is artificially distinguished from other retrospectivity .... regardless of the identical nature of the consequences".

2.11. In that Report the Committee stated that it had corresponded with the Attorney-General about amendments to the Act. Since then the Attorney-General has tentatively proposed a non-statutory administrative procedure, details of which could be announced in Parliament, under which a senior official of his Department would provide a "certificate stating whether a proposed statutory rule appears, without clear and express authority conferred by the Act under which [it] is made, to have a retrospective effect". This administrative procedure was preferred to amending the Act because the role of the Attorney-General's Department in drafting regulations for other Departments was itself based on administrative arrangements.

2.12. This proposed administrative scheme has a legislative precedent in sub-paragraph 13(3)(b)(i) of the Victorian Subordinate Legislation Act 1962 which provides that a proposed statutory rule is not to be submitted to the Governor unless it is accompanied by written advice from the Chief Parliamentary Counsel as to whether it appears to have a retrospective effect without there being clear and express authority for this under its enabling Act.

2.13. It is to be noted that these methods of dealing with retrospectivity do not make a prejudicially retrospective instrument void, although the Victorian practice has the advantage that it is securely founded on a legislative provision which is precise and certain, and therefore beyond the exigencies of administrative expediency.

2.14. Because of the complexity of the modern regulatory environment, it is not realistic to outlaw all retrospectivity in delegated legislation. However, it should be possible, and it is certainly preferable, to legislate to prohibit regulatory retrospectivity which is prejudicial to the rights and interests of individuals unless this is expressly authorised by statute. It is no

answer to the otherwise real risk of injustice to say that screening by Government lawyers will prevent it, and, in any event, the Regulations and Ordinances Committee will always ensure that retrospective legislation is carefully scrutinised. In examining almost 900 instruments annually, the Committee and its Legal Adviser operate under great pressure. The Committee responds to that pressure and does its utmost to discharge its responsibilities to the Senate. Nevertheless, retrospective effects can be concealed in relatively innocuous or highly complex legal language, the effects of which become evident in practice.

2.15. In this respect the Committee should not be viewed as an ultimate guarantor of the individual's right to be protected from the prejudicial consequences of a ministerially decreed retrospectivity. The Committee cannot protect such a right. It can be protected adequately only by operation of law. With a resolution of the Senate, the Committee may assist in releasing a person from the future effects of a trespass on rights. However, there will be circumstances where disallowance of retrospective legislation will not protect a person from the consequences of liabilities which have been retrospectively incurred up to the date of disallowance. Only the operation of law can adequately protect such a person by invalidating retrospective liabilities ab initio.

2.16. The Committee does not doubt that internal administrative procedures already exist to check draft legislation, and identify and remove prejudicial retrospectivity from it. Indeed, the legislative entrenchment of a revised administrative check, conducted at a senior level and similar to that operating in Victoria, would be a very important addition to the protection of individual rights

from encroachment by retrospectivity. The Committee encourages the Attorney-General to proceed with such a reform.

2.17. However, that alone will not remove the need for an amendment which would have the effect of expressly invalidating that part of a provision which has a retrospectively prejudicial effect. Until this is in place the strong possibility exists that that prejudicial retrospectivity may at some time cause a serious trespass on individual rights. The Committee therefore repeats the recommendation it made in paragraphs 23 and 24 of its Seventy-seventh Report and again urges the Attorney-General to amend sub-section 48(2) of the Acts Interpretation Act to remove the possibility.

Partial Disallowance

2.18. Since 1957, the Seat of Government (Administration) Act 1910 has provided that part of an A.C.T. Ordinance may be disallowed. A part can include a word or a figure. In spite of repeated requests from the Committee, and at least one ministerial undertaking to address the question[2], this power had not yet been included in the Acts Interpretation Act and extended to federal regulations. In its Seventy-seventh Report the Committee, reporting on its latest attempts to persuade the Attorney-General to amend the Act, said:

> "In the interests of legislative scrutiny the Committee considers that Parliament should extend the scope and precision of its disallowance powers ...." (paragraph 30)

2.19. At present nothing less discrete than a single regulation can be disallowed. (See Victorian Chamber of Manufactures v The Commonwealth (Women's Employment

2 See the Committee's Seventy-third Report (December 1982) where it was reported that the then Attorney-General intended to act. There was a change of Government before he could act.

Regulations) (1943), 67 C.L.R. 347 at 360.) With the increasing complexity of modern government a single amending regulation can often be long and detailed. Should one part of that amendment not meet with the approval of Parliament, a successful disallowance motion would obliterate the entire provision. (See, for example, the Superannuation (Salary) Regulations (Amendment) discussed below at page 116.) The right partially to disallow a federal regulation is not yet available to the Parliament and indeed the Executive may be reluctant to trust Parliament with a power over regulations similar to that which it enjoys over Acts and Ordinances. Yet when it passed the Acts Interpretation Act three years after Federation, the Parliament regarded itself as responsible enough to exercise large powers of disallowance to which the lesser power of partial disallowance is clearly incidental and ancilliary.

2.20. It is no answer to the Committee's quest for a partial disallowance power to argue that a reckless exercise of such power could have serious consequences for government policies and public administration, particularly where financial entitlements and liabilities are involved. Parliament is not a reckless institution. It is the sovereign source of national legislative power to which all other power is ultimately subordinate. If a House of a democratically elected Parliament cannot be trusted by the Executive to use a partial disallowance power with responsibility and in the national interest, then the Executive might appear in some eyes to be calling into question the value of democracy itself. If a Minister considers that partial disallowance of a regulation, of which notice has been given, will seriously distort the way in which that regulation will operate and will thereby undermine the national interest, he or she can demonstrate that in Parliament. There can be no doubt that if the Minister's assessment is accurate such a disallowance motion will be overwhelmingly defeated.

2.21. It may be that, before a successful motion for partial disallowance becomes effective, the Minister should have an opportunity, under the Act, to withdraw or repeal a provision which would otherwise be partially disallowed. The Committee has no concluded view on this aspect. Such an amendment would require careful drafting to ensure that the expression of parliamentary dissent which a disallowance motion represents was not frustrated by the consequences of the repeal or withdrawal.

2.22. The Committee will report to the Senate on the progress of its discussions with the Attorney-General before it, as a Committee, endorses any particular proposals to provide for partial disallowance.

Tabling of Instruments

2.23. Under the Acts Interpretation Act (the Act), provision is made for delegated legislation to be laid before each House. This reflects the significance of the tabling procedure as an aspect of the relationship between the Parliament and the Executive. Gazettal of a law made under powers delegated by Parliament, while of importance for the official promulgation of that law, is not a proper notification to the sovereign legislature that its delegated law-making authority is being exercised. The act of tabling alerts and informs the Parliament. It also reinforces Parliament's role as the originator of delegated powers and the scrutineer of their use.

2.24. However, for the purposes of applying the disallowance provisions of Part XII of the Acts Interpretation Act, tabling is not strictly necessary. The Senate may disallow an instrument that has not been tabled. In any event a Senator who obtains a copy of a disallowable instrument may table it and the Senate may disallow it. In Dignan v Australian Steamships Pty. Ltd. (1931), 45 C.L.R. 188, the High Court established these

propositions. Although the relevant provisions of the Act have been changed somewhat, the Attorney-General's Department advised the Clerk of the Senate that Dignan "should still be regarded as authority".[3]

2.25. However, although tabling is not a condition precedent to the exercise of disallowance powers, it is a condition precedent to the continued validity of the legislation itself. Yet under the Act, delegated legislation can validly operate for a lengthy period of time even if it is never tabled. This arises because, although a failure to table has the effect of making the instrument "void and of no effect", that merely means it is to have the same effect as a repeal (sub-sections 48(6) and (7)). Under section 50 of the Act, a repeal shall not affect liabilities and obligations already incurred up to the repeal. It is therefore possible for the Executive to make delegated legislation which will be effective for 15 sitting days after being made and, on the 16th sitting day, make a fresh instrument repeating the cycle thereafter indefinitely. For each period of 15 sitting days the non-tabled instrument will have full effect and section 50 will ensure continuing effects.

2.26. Prior to the making of certain amendments to the Acts Interpretation Act by the Statute Law (Miscellaneous Provisions) (No. 1) Act 1982, this device could not have been used because under the pre-1982 Act if an instrument was not tabled within 15 sitting days it was deemed to be void and of no effect ab initio. It may be that the Parliament, when it passed these amendments, did not fully appreciate the significance of this change or foresee the opportunity which it created for parliamentary scrutiny to be by-passed.

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3 See J. R. Odgers, Australian Senate Practice, Canberra 1976, page 452.

2.27. When it raised this matter with the Attorney-General on 19 March 1986 the Committee cited a worst possible scenario when it wrote:

> "Inadequate scrutiny can also arise in the event of a double dissolution of Parliament. Fourteen sitting days prior to such a double dissolution a Minister could make an objectionable instrument under delegated powers with neither the intention nor the practical obligation to table it. Such an instrument could operate for as long a period as 4 months, for example, during the period of an election campaign and thereafter until the new Parliament sat. Not having been tabled, the instrument would cease to have effect on the 16th sitting day after being made. However, actions taken under the regulations, affecting rights, or imposing liabilities, would not be affected by the failure to table. On the 16th sitting day an identical instrument could be made, again with no intention or practical obligation that it be tabled. Once more this instrument, possibly infringing basic principles of liberty, could operate in lawful effect until the 16th sitting day after it was made. It is thus possible, as a consequence of amendments made in a Statute Law Bill, for the Executive, without legal impediment or penalty, indefinitely to by-pass the scrutiny and sanction of Parliament in the process of making delegated legislation. Such legislation could of course abrogate or affect fundamental personal rights and liberties. While it may be most improbable that a Government or individual Ministers would, in all conscience, attempt a manoeuvre of this kind, the possibility appears to exist that effective parliamentary scrutiny, dependant as it is under the Acts Interpretation Act on the procedure of tabling, could be set at naught."

2.28. When consideration is given to the scope of regulatory power, it will be recognised that any misuse of the tabling requirement could be a serious impediment to Parliament's supervision of Executive law-making. The Committee awaits the comments of the Attorney-General on this important question.

PROCEDURE IN THE RECESS

2.29. Although not exactly a case in point, the World Cup Athletics (Security Arrangements) Ordinance 1985, discussed below at page 122, is an illustration of what can happen when there is no obligation to table an instrument before it comes into operation.

2.30. It may be that consideration should be given to a legislatively based procedure whereby instruments made when Parliament is not sitting, should be delivered to the President of the Senate who, on a recommendation from the Committee (which can sit during the recess) would invoke a legal mechanism which, except in cases of certified necessity, would cause the operation of the instrument to be suspended until it had been considered by the Senate. Clearly, the Committee would avail of such procedures only where the urgent suspension of an instrument was necessary to prevent a trespass on personal rights and liberties or to prevent a serious abuse of delegated law-making powers. Prior consultations with the relevant Minister would be likely to result in the repeal or amendment of the instrument on the Minister's own initiative before any such mechanisms were invoked. Procedures somewhat similar to this operate in Victoria and Tasmania.

Revival of Instruments

2.31. In its Seventy-sixth Report (December 1985)[4] the Committee indicated that amendments made to the Seat of Government (Administration) Act 1910 by the Statute Law (Miscellaneous Provisions) (No. 1) Act 1982, may have restricted the circumstances in which disallowance of a repealing Ordinance will revive laws repealed by that Ordinance. Previously, disallowance of a repealing

[4] Parliamentary Paper No. 507/1985.

Ordinance would have revived any law which it had repealed. Since 1982, it appears that there is revival only of another repealed Ordinance, although, from time to time, Ordinances do repeal laws such as N.S.W. Acts in force in the A.C.T. Unless a comprehensive revival rule operates, disallowance of an Ordinance which repeals laws may cause an hiatus by creating legal gaps which were previously filled by a repealed N.S.W. law which does not revive on disallowance of the Ordinance. The loss of both the Ordinance and the repealed law can leave a void which only statutory intervention or possibly the operation of common law principles, may fill. The absence of revival may therefore be an unnecessary and improper deterrent to disallowance of Ordinances which unjustifiably repeal laws.

2.32. In its Report, the Committee recommended that the disallowance of an instrument which repealed or terminated another law should result in revival of that repealed or terminated law. This was the situation under common law which may have been superseded by provisions in the Acts Interpretation Act and the Seat of Government (Administration) Act. In its Sixty-sixth Report (June 1979)[5] the Committee strongly recommended that common law principles of revival should apply to the disallowance of a repealing instrument. Amendments made by the Statute Law Act in 1982 were intended to implement this recommendation but they may not have done so.

2.33. On 19 November 1985, the Attorney-General gave the Committee an undertaking that he would write to the Minister for Territories, who is responsible for administering the Seat of Government (Administration) Act, to suggest that that Act be amended "as a matter of

5 Parliamentary Paper No. 116/1979, page 3.

high priority" to provide that disallowance of an Ordinance which repeals a N.S.W law in force in the A.C.T. will revive that law.

2.34. The Committee continues to await progress on this important matter. However, in the interim, the Attorney-General has given the Committee undertakings to the effect that, should the Senate disallow particular Ordinances which repeal laws other than other Ordinances, he will by express re-enactment revive those other laws in order to overcome the apparent inadequacy of the 1982 amendments. In the event, the Senate did not move to disallow these Ordinances (the Perpetuities Ordinance 1985 and the Limitation Ordinance 1985). The Committee commends the Attorney-General for these undertakings and urges that priority be given to amendments to provide for revival of laws repealed by disallowed instruments.

Repeal and Re-enactment of Instruments

2.35. Revival rules are intended to avoid an hiatus where the Senate disallows a repealing instrument. The rules also protect the Senate from the deterrent effects of contemplating such an hiatus if it desires to disallow in order to express its dissent. However, the current revival rules and the Senate's inability to practice partial disallowance could, in practice, perpetuate the intimidating effects of a non-revival rule.

2.36. If a Minister desires to avoid disallowance of a legislative instrument which may trespass on personal rights and liberties in a fashion and to a degree that would offend against the Committee's principles, he or she may simply make the instrument and then repeal and remake it. Disallowance of the second repealing instrument would merely revive the first. If the repealing instrument is drafted in such a way as to incorporate, in a single regulation, both the repealing

provision and the remade provisions, then, in the absence of a power of partial disallowance, a successful disallowance motion would disallow the whole regulation, including the repeal. The result would be that the remade provisions would fall but the original instrument would revive.

2.37. The Committee does not consider that any Minister would deliberately adopt such a course for the express purpose of by-passing parliamentary scrutiny. However, the Committee can neither guarantee the future nor underwrite the propriety of every administration. There may arise circumstances of intense political controversy where the temptations of administrative expediency could overcome the instincts of parliamentary propriety. This anxiety is compounded by the fact that repeal and re-enactment is an option open to statutory authorities and other delegated law-makers over whose activities a Minister answerable to Parliament has a limited degree of control.

2.38. The Committee considers that an amendment to the Acts Interpretation Act, the Seat of Government (Administration) Act and other Acts which independently of those Acts provide for disallowance procedures, should be made as a matter of urgency to provide the Parliament with partial disallowance powers in order to deal with the repeal and re-enactment of legislation which could otherwise undermine the role of the Committee.

Conclusion

2.39. The Federal Parliament's power to control executive law-making rests exclusively on the terms of the Acts Interpretation Act 1901, the Seat of Government (Administration) Act 1910 and other Acts which apply provisions from these Acts or independently provide for disallowance. During the past year the Committee's scrutiny of legislation has continued to reveal that

these provisions do not provide an adequate legislative foundation for the protection of personal rights and liberties and the preservation of legislative and parliamentary proprieties. The provisions must be amended urgently if it is still to be claimed that Executive law-making is in practice subordinate to and controlled by a supreme parliamentary institution.

2.40. It might be argued that the integrity and good sense of the Executive will, with effective administrative measures, minimise problems associated with retrospectivity, non-tabling, non-revival, or repeal and re-enactment, without the need for comprehensive legislative changes. It may also be argued that partial disallowance powers could create too great a degree of uncertainty in the operation of delegated legislation during the potential disallowance period. The Committee does not accept that such arguments answer its concerns about the long term effectiveness of the current Acts Interpretation Act.

2.41. Effective administrative scrutiny procedures are essential to enhance the ultimate quality of executive law. However, mere administrative changes are not an effective substitute for the precision, the certainty and the security which adequately drafted legislative amendments could introduce into a very important aspect of parliamentary government which has become imprecise, uncertain and insecure. No Executive which respects the sovereignty of Parliament will hesitate to introduce carefully drawn legislation to make parliamentary scrutiny of delegated legislation properly effective. No Executive should place the requirements of power and the needs of administrative expediency above the rights of Parliament.

2.42. Prudence suggests that what the law says can happen will eventually happen. This insight was the rationale for the Committee's strong reaction to the Health Insurance Regulations (Amendment) which theoretically would have made gross intrusions into the medical privacy of millions of people quite lawful (Seventy-ninth Report). Although neither the Minister nor any of his officials intended that this should occur, it could lawfully have occurred. Nothing but disallowance of the regulations could guarantee that it would not occur. Nothing but proper amendments to the Acts Interpretation Act will guarantee that the present flawed provisions will not at some time be abused.

2.43. Administrative resistance to these reforms would be most regrettable. Without them grave injustice may be done to individuals whose rights, at some time in the future, will be perhaps unintentionally removed in circumstances which are beyond the capacity of the Senate to control without express remedial legislation passing both Houses of Parliament. The Committee respectfully urges the Senate and the Attorney-General to give serious consideration to the issues raised in this chapter.