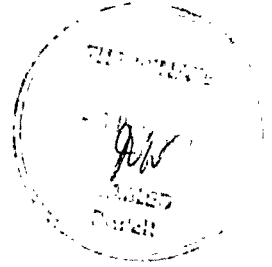


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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES**

**ONE HUNDREDTH REPORT
ANNUAL REPORT 1993-94**

DECEMBER 1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

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**ONE HUNDREDTH REPORT
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**SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES**

MEMBERS OF THE COMMITTEE

Senator Mal Colston (Chairman)
Senator Bill O'Chee (Deputy Chairman)
Senator Eric Abetz
Senator Stephen Loosley
Senator Nick Minchin
Senator Olive Zakharov

PRINCIPLES OF THE COMMITTEE

(Adopted 1932: Amended 1979)

The Committee scrutinises delegated legislation to ensure:

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

CHAPTER 1

OVERVIEW AND STATISTICS

Introduction

1.1 The Standing Committee on Regulations and Ordinances was established in 1932 and, apart from certain committees dealing with internal parliamentary matters, is the oldest Senate committee. Its functions, which are set out in the Standing Orders, are to scrutinise all disallowable instruments of delegated legislation to ensure their compliance with non-partisan principles of personal rights and parliamentary propriety.

1.2 The Committee engages in technical legislative scrutiny. It does not examine the policy merits of delegated legislation. Rather, it applies parliamentary standards to ensure the highest possible quality of delegated legislation, supported by its power to recommend to the Senate that a particular instrument, or a discrete provision in an instrument, be disallowed. This power, however, is rarely used, as Ministers almost invariably agree to amend delegated legislation or to take other action to meet its concerns.

1.3 The general requirements of personal rights and parliamentary proprieties under which the Committee operates are refined by the Standing Orders into four principles. In accordance with these principles, 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.

1.4 The above principles have been amended only once since 1932. This was in 1979, following the establishment of the Administrative Appeals Tribunal, the first Commonwealth tribunal intended to review the merits of a comprehensive range of administrative decisions.

Membership

1.5 The Committee has six members with, in accordance with the Standing Orders, a government Chairman. There is a non-government Deputy Chairman. During the reporting period the membership of the Committee was as set out below:

Senator Mal Colston (Chairman)¹
 Senator Stephen Loosley (Chairman)²
 Senator Bill O'Chee (Deputy Chairman)³
 Senator Bronwyn Bishop (Deputy Chairman)⁴
 Senator Eric Abetz⁵
 Senator Brian Gibson⁶
 Senator Nick Minchin⁷
 Senator Kay Patterson⁸
 Senator Olive Zakharov

Independent Legal Adviser

1.6 The Committee is advised by an independent legal adviser, who examines and reports on every instrument of delegated legislation, comments on all correspondence received from Ministers, writes special reports and attends meetings of the Committee when required. Since 1982 the independent legal adviser has been Emeritus Professor Douglas Whalan AM of the Law Faculty of the Australian National University.

Committee Staff

1.7 The Committee secretariat consists of a Secretary, a research officer, and two administrative officers.

Statistics

1.8 During the year the Committee scrutinised 1,803 instruments, which was a greater number than in any previous year. The following Table sets out the numbers and broad categories of these instruments.

1. Elected as Chairman 30 September 1993. Senator Colston was a former Chairman from 14 May 1990 to 18 October 1990.
2. Resigned as Chairman 30 September 1993. Senator Loosley was Chairman from 10 September 1992.
3. Appointed as Deputy Chairman 30 September 1993.
4. Resigned as Deputy Chairman and from Committee 18 August 1993.
5. Appointed 24 February 1994.
6. Appointed 18 August 1993, resigned 24 February 1994.
7. Appointed 18 August 1993.
8. Resigned 18 August 1993.

TABLE
INSTRUMENTS EXAMINED BY COMMITTEE
1993-94

Statutory Rules	490
Civil Aviation Orders	418
Public Service and Defence Determinations	328
Education instruments	163
Community Services and Health instruments	88
Territory instruments	62
Primary Industries and Energy instruments	59
Remuneration Tribunal Determinations	23
Superannuation instruments	22
Radiocommunications instruments	21
Miscellaneous instruments, details of which are in Appendix 1	129
	1,803

Ministerial Undertakings

1.9 During the year Ministers and other law makers undertook to amend or review 35 different instruments or parent Acts to meet the concerns of the Committee. This number includes only undertakings to amend existing legislation. It does not include many other undertakings to improve explanatory statements, include provisions for numbering and citation or take administrative action. Details of undertakings are given in Chapters 4 and 5.

Other Committee Activities

1.10 The Committee tabled the following reports:

- *Ninety-Sixth Report*, Annual Report 1992-93, tabled on 9 December 1993.
- *Ninety-Seventh Report*, Delegated legislation and the *Acts Interpretation Act 1901*: a case study, tabled on 15 December 1993.
- *Ninety-Eighth Report*, Scrutiny by the Committee of amendments of the Family Law (Child Abduction Convention) Regulations, tabled on 29 June 1994.

1.11 Several other significant matters, which are reported in subsequent chapters, are as follows:

- On 16 December 1993 Senator Colston, on behalf of the Committee, made a statement to the Senate on delegated legislation made under the *University of Canberra Act 1989*.
- On 16 December 1993 Senator Colston, on behalf of the Committee, made a statement to the Senate on the standard of proof in Australian Federal Police disciplinary proceedings.

- On 29 June 1994 Senator Colston, on behalf of the Committee, made a statement to the Senate on tabling requirements for delegated legislation.
- On 29 June 1994 Senator Colston, on behalf of the Committee, made a statement to the Senate on the **Territory of Christmas Island Casino Control Ordinance 1988**.
- On 16 December 1993 and 30 June 1994 Senator Colston, on behalf of the Committee, made statements to the Senate on the work of the Committee.

CHAPTER 2

ISSUES AND ROLES

2.1 At the end of each major sittings period during the reporting year the Chairman made a detailed statement to the Senate on the work of the Committee. The following are extracts from those statements.

Senator Colston, 16 December 1993, Senate Weekly Hansard, p.4753

Overview

2.2 "During the present sittings the Committee maintained its non-partisan scrutiny of the continuing large number of disallowable instruments of delegated legislation tabled in the Senate. In the course of the sittings the Committee scrutinised 977 such instruments. Only 252 of these were in the Statutory Rules series, which are generally better drafted and presented than other series. This is a trend which has been evident for some years. The other 725 instruments were the usual heterogeneous collection of different series.

2.3 "The Committee acts on behalf of the Senate to scrutinise each of these instruments to ensure compliance with its four principles, which cover all aspects of personal rights and parliamentary propriety. If the Committee detects any breach of these principles it writes to the Minister or other law maker in respect of the apparent defect, asking that the instrument be amended or an explanation provided. If the breach appears serious

then the Chairman of the Committee gives a notice of motion of disallowance in respect of the instrument. This allows the Senate, if it wishes, to disallow the instrument. This ultimate step is rarely necessary, however, as Ministers almost invariably take action which satisfies the Committee.

2.4 "The concerns raised by the Committee are described below under each of the four principles which constitute its terms of reference.

**Principle (a)
Is delegated legislation in accordance with the statute?**

2.5 "This principle is interpreted broadly by the Committee. Together with the Committee's fourth principle, it covers not only technical validity, but also every other aspect of parliamentary propriety.

2.6 "Technical validity, however, is an important aspect of the Committee's work. During the sittings some instruments were void because they purported to subdelegate the legislative power granted by the parent Act. Several other instruments purported to commence before commencement of relevant amendments of the parent Act. One instrument was made in reliance on a Bill, whereas delegated legislation may only be made under express provisions of an Act. Another instrument obviously intended to effect the provisions of an

attached appendix and this intention was confirmed by the explanatory statement. The instrument itself, however, did not mention the appendix. One instrument provided for a fee higher than the maximum authorised by the parent Act. Several instruments with retrospective effect operated to affect rights prejudicially and were therefore void. Others were not themselves invalid but action under them was invalid. For example, payments were made in reliance on instruments with no commencement date and which had not been gazetted. Other instruments were not tabled within fifteen sitting days of making and thereby ceased to have effect.

2.7 "Other instruments may have been valid but were of great concern to the Committee. One series of instruments which are not disallowable may legally amend or even repeal instruments which are disallowable. Another series of instruments which are not subject to tabling or disallowance included offence provisions.

2.8 "The drafting of delegated legislation should be of a quality not less than that of Acts. A number of instruments included wrong references to other legislation and provisions. One instrument was made under an Act which did not exist. Other instruments referred to "he" and "him", whereas contemporary drafting practice would refer to "he or she" and "him or her". One instrument referred to review of a decision, but neither the parent Act, the principal instrument nor the amendment provided for review. Other instruments provided for mandatory requirements in an unclear way. Others included vague and uncertain expressions such as "honest and efficient provider". One principal instrument was expressed to be made under two Acts while an

amendment was expressed to be made under one Act. The explanatory statement for another instrument advised that it was made under two provisions of an Act but the making words of the instrument itself cited only one provision. Another instrument used only the scientific expression *cairina muschata*, which in fact is a muscovy duck. An instrument providing for the design of a proof gold coin omitted any reference to Australia. Numbers of instruments were not provided with numbering or citation.

2.9 "Full and detailed explanatory material should accompany every instrument of delegated legislation. Several instruments had no explanatory statement. Several explanatory statements lacked attachments to which they made reference. The explanatory statements for others did not advise of the basis upon which fees and charges were levied or increased, even where fees were increased up to seven times or where the parent Act provided that the fees must not amount to taxation. One instrument included Notes which were inconsistent. Some instruments made to implement an undertaking given to the Committee did not acknowledge this in the explanatory statement. Other instruments which commenced on gazettal did not indicate the date of gazettal. In one case the wrong date of gazettal was given.

2.10 "In particular, the explanatory statement should explain any unusual aspect of an instrument. For instance, in certain countries the vehicle allowance paid to Australian officials was greater for vehicles with less than 1,500 c.c. engine capacity than it was for those with a larger engine capacity; a sunset clause was extended for twelve months; and ten instruments made in 1993 included citations for 1990, 1991 and 1992. No

explanation was given for any of these provisions.

2.11 "The Committee was pleased to note, however, that some instruments were particularly well presented. One included a special explanation because it was the first instrument in the series to come before the present Parliament. Another had helpful notes for users and colour coding of provisions.

2.12 "Any power to delegate in delegated legislation should be narrow and specific. As usual, several instruments provided for the Minister or other law maker to delegate his or her powers to any person at all. Also, several instruments similarly provided for the appointment of authorised persons, without proper restrictions on who could be appointed. In one of these cases, authorised persons could exercise important powers in relation to offence provisions.

Principle (b) Does delegated legislation trespass unduly on personal rights and liberties?

2.13 "The Committee interprets this principle in the broadest way, to include every aspect of personal rights. During the sittings the Committee detected the following possible defects in delegated legislation.

2.14 "Provisions of delegated legislation should not operate harshly or unfairly. One instrument required persons to give an undertaking to indemnify a statutory authority to what appeared to be an unreasonable level. Another required persons in certain circumstances to act as a guarantor for another's food, clothing, accommodation, household goods,

obtaining employment and receiving English language lessons. Another imposed what may have been harsh conditions on the grant of a permit. Another increased fees by what may have been an unreasonable degree. One instrument created an offence with vicarious liability, which the Committee regards as always requiring detailed explanation and justification.

2.15 "Procedural requirements in delegated legislation should be as reasonable as possible. In the case of a number of instruments providing for ATSIIC elections, the Committee was concerned that procedural safeguards should not be less than those for elections for the Australian Parliament. Another instrument gazetted on 23 June provided detailed procedures for an annual general meeting required to be held before 30 June in that year. It was impossible to comply with some of these procedures. Another instrument provided for a retirement benefit for a public servant, but only if that officer retired on the same day as the instrument was made. That instrument appeared to be made in haste, as the name of the officer was spelt in two different ways. It is not known whether the instrument was gazetted on the day on which it was made. Another instrument provided that a person must state not only if he or she had been convicted of an offence, but also whether he or she was merely subject to proceedings. Conviction was defined as including a person discharged without conviction or found not guilty but had the charge taken into account when sentence was passed for another offence. Another instrument provided for important safeguards for persons selected for mandatory drug testing to be permissive rather than mandatory.

2.16 “Delegated legislation must provide for people to be notified of their rights. One instrument provided that if a person elected to pay an administrative penalty for an offence, then all liability was discharged, no further action may be taken and the person is not regarded as having been convicted of any offence. These were important safeguards, but the instrument did not require them to be communicated to the offender. Another instrument notified people only of some of their rights. Also, the notification was in technical legalistic terms.

2.17 “The Committee protects personal privacy. The explanatory statement for one instrument advised that it accorded with the Privacy Principles. The importance of its subject matter, however, indicated that this was a case where the Privacy Commissioner should have been consulted. The Committee also guards against discrimination based on personal circumstances. One amending instrument expressly excluded de facto spouses, who were expressly included by the principal instrument. Another instrument expressly excluded divorced or separated females from a definition of unmarried employees.

Principle (c)
Does delegated legislation make rights unduly dependent upon administrative decisions which are not subject to independent review of their merits?

2.18 “Delegated legislation often provides for Ministers and other public officials to exercise discretions. Such discretions should be as narrow as possible, include objective criteria to limit the exercise of the discretion, and provide for appropriate

review of the merits of a decision to an external, independent tribunal, which would normally be the Administrative Appeals Tribunal.

2.19 “The explanatory statement for one instrument advised that a discretion was subject to external review under the parent Act but did not give the same assurance in respect of other equally important discretions which appeared also to be subject to review under the same provision. Another instrument providing for discretions was expressed to come into effect before amendments of the parent Act providing for AAT review. Another provided for discretions in a type of instrument which had not previously included such provisions and in respect of which they appeared unsuitable.

2.20 “Discretions should be limited by objective criteria. One instrument included as a criterion “any other information which the Minister believes is relevant” and another “any other matters that the Board considers relevant”. Other subjective expressions in provisions dealing with discretions included “definite unmet public need” and “the activity is of national importance”. Other provisions included what were actually discretions but with no indication of this fact or of the person who was to exercise the discretion.

2.21 “Some instruments which did not provide for merits review of discretions where it may have been appropriate to do so included the power to waive a fee, to revoke or suspend permits, to extend retiring age from 60 to 65, to decide who is a child and to make decisions affecting personal superannuation.

2.22 “There is a stronger case for merits review where a decision maker may

delegate his or her powers to others. The Committee takes into account the power to delegate when considering whether review provisions are appropriate.

Principle (d)
Does delegated legislation contain matters more appropriate for parliamentary enactment?

2.23 “The Committee raises this principle less often than its other principles. It is a principle, however, which goes to the heart of parliamentary propriety and complements the first principle of the Committee, that an instrument should be in accordance with the statute.

2.24 “The *Ninety-Third Report* of the Committee, a Report on scrutiny by the Committee of regulations imposing United Nations sanctions, discussed whether such sanctions, including imports and exports, air navigation, foreign exchange and migration, were more suitable for parliamentary debate and enactment. This Report was favourably mentioned in both the second reading speech and the explanatory memorandum for the Bill for the eventual *Charter of the United Nations Amendment Act 1993*, which expressly provided for such sanctions to be made by regulation. Regulations under provisions inserted by that Act were tabled during the sittings.

Other Developments

2.25 “In addition to its main task of scrutinising legislation, the Committee was active in other ways during the Budget sittings.

2.26 “On 30 September 1993 Senator Loosley resigned as Chairman and Senator Colston was elected as Chairman. Senator

Loosley had been Chairman since 10 September 1992 and the Committee appreciated his leadership. Senator Colston was a former Chairman of the Committee from 14 May 1990 to 18 October 1990.

2.27 “On 18 August 1993, the Deputy Chairman, Senator Bishop, and Senator Patterson resigned from the Committee. They were replaced by Senators Gibson and Minchin, appointed to the Committee on 18 August 1993. On 30 September 1993, the Chairman appointed Senator O’Chee as Deputy Chairman.

2.28 “The Committee tabled two Reports during the sittings, the *Ninety-Sixth Report*, the Annual Report for 1992-93; and the *Ninety-Seventh Report*, a report on a case study of delegated legislation and the *Acts Interpretation Act 1901*.

2.29 “The Chairman, on behalf of the Committee, made special statements to the Senate on delegated legislation under the *University of Canberra Act 1989*, and on the standard of proof in Australian Federal Police disciplinary proceedings.

2.30 “The Committee continued its practice of meeting with others concerned about delegated legislation. These sittings it met with Ms Jean Baker, head of the Office of Legislative Drafting (for the second time this year), with the Director of Research of the Administrative Review Council, with an official of the Australian Sports Drug Agency and an official of the Department of the Environment, Sport and Territories. The Secretary met with officials of the Department of Employment, Education and Training.

2.31 “Members of the Committee and the Legal Adviser attended the Fourth Australian and Pacific Conference on

Delegated Legislation held in the Victorian Parliament House in July. The then Chairman, Senator Loosley, presented a paper and Senator Colston presented a report and chaired a session. Senator Colston was also invited to chair the closing session dealing with resolutions and to close the Conference. This was an honour not only for the Committee, but also for the Senate.

2.32 "The Committee was briefed and consulted on the Cabinet and budgetary processes for implementing the major report of the Administrative Review Council on rule making by Commonwealth agencies.

2.33 "The Committee hosted a visit by the Victorian Scrutiny of Acts and Regulations Committee. The secretariat hosted a visit by the Secretary of the South Australian Legislative Review Committee.

2.34 "On 9 December the Chairman hosted the Committee's biennial dinner with the Administrative Review Council and others, attended by 30 people.

2.35 "The Committee would like to record its appreciation of the sterling work of its independent Legal Adviser, Emeritus Professor Douglas Whalan AM.

2.36 "The Committee is grateful for the support which it has received from all Senators during the past sittings."

Senator Colston, 30 June 1994, Senate Weekly Hansard, p.2362

Overview

2.37 "During the present sittings the Committee scrutinised the usual large

number of disallowable legislative instruments tabled in the Senate, made under the authority of scores of parent Acts administered through virtually every Department of State. Almost every legislative scheme relies on delegated legislation to provide the administrative details of programs set out in broad policy in parent Acts which authorise such delegated legislation.

2.38 "The Committee acts on behalf of the Senate to scrutinise each of these instruments to ensure that they conform to the high standards of parliamentary propriety and personal liberties which the Senate applies to Acts. If the Committee detects any breach of these standards it writes to the Minister or other law-maker in respect of the apparent defect, asking that the instrument be amended or an explanation provided. If the breach appears serious then the Chairman of the Committee gives notice of a motion of disallowance in respect of the instrument. This allows the Senate, if it wishes, to disallow the instrument. This ultimate step is rarely necessary, however, as Ministers almost invariably take action which satisfies the Committee.

2.39 "As usual, by the end of the sittings Ministers have given the Committee undertakings to amend many provisions in different instruments or parent Acts to meet its concerns, reflecting a continuing high level of cooperation from Ministers in its non-partisan operations. The Committee is grateful for this cooperation.

2.40 "During the sittings the Committee scrutinised 826 instruments, which is an historic high. Of these, 237 were statutory rules, which are generally better drafted and presented than other series of

delegated legislation. The other 589 instruments were the usual heterogeneous collection of different series.

2.41 "Each of the 826 instruments were scrutinised by the Committee under its four principles, or terms of reference, which are included in the Standing Orders. There were 97 prima facie defects or matters worthy of comment in those 826 instruments. The defects are described below under each of the four principles.

Principle (a) Is delegated legislation in accordance with the statute?

2.42 "This principle is interpreted broadly by the Committee to include not only technical invalidity, but also every other aspect of parliamentary propriety.

2.43 "Nevertheless, detection of technical validity is an important part of the work of the Committee. As usual, a number of instruments may have invalidly subdelegated legislative powers. Several apparently invalid subdelegations were to statutory authorities, another was to the Minister, another to the Minister on the recommendation of agencies and another to the Secretary of the Department. One instrument may have been invalid because it purported to incorporate foreign laws, another because it incorporated international treaties which could be amended from time to time and another because it appeared to incorporate administrative actions. Another instrument purported invalidly to exclude the application of a provision of an Act.

2.44 "Other instruments did not operate validly as intended. One amending instrument appeared to amend the wrong instrument. Another did not actually effect

its obvious intent to revoke an earlier instrument. The explanatory statement for another advised that its intended date of operation was different from the date provided in the instrument. The explanatory statement for another did not confirm that detailed mandatory procedures, required before making, had been met.

2.45 "The drafting of delegated legislation should be of a standard equal to that of Acts. During the present sittings one instrument did not indicate the date on which it was made. Numbers of other instruments included wrong references and cross-references, numbering and citation errors, reference errors in Notes to provisions, inconsistencies and misprints. Several instruments were drafted without a citation or numbering. In two cases different agencies produced two separate instruments made under the same Act with the same numbering. One instrument referred to a statutory office abolished nine years ago. Another did not define terms which are different in each State and territory. Another used the expressions "he" and "him", rather than the more usual "he or she" and "him or her". Several instruments included undefined, uncertain and subjective expressions, such as "public disrepute", "misleading" and "seriously disruptive".

2.46 "Every instrument should be accompanied by full and detailed explanatory material. Some instruments had no explanatory material at all, while other material was inadequate. Several explanatory statements had wrong references to statutory powers under which the instrument was made. A substituted version of an instrument did not explain why it was substituted. In several cases instruments which implemented

undertakings given to the Committee did not indicate this in the explanatory statement.

2.47 "The *Acts Interpretation Act 1901* provides that delegated legislation which operates to prejudice a person retrospectively is void. Even where retrospectivity is valid, however, the Committee will ask for reasons for long periods of unexplained retrospectivity. Several instruments were expressed to operate two years before making.

2.48 "The Committee always questions provisions which may give excessive power to public officials. In one case an instrument was to commence upon proclamation, with no provision for automatic commencement if not proclaimed within six months. Another instrument conferred important powers on authorised persons, with no restrictions at all on persons who could be authorised. Another provided that significant powers could be delegated to any person at all. In another case, the Minister could make important guidelines, which appeared to be legislative in nature, which were not subject to disallowance or even to tabling.

Principle (b)
Does delegated legislation trespass unduly on personal rights and liberties?

2.49 "The Committee interprets this principle broadly, to include every aspect of personal rights. During the present sittings the Committee detected the following apparent defects in delegated legislation.

2.50 "Provisions of delegated legislation should not operate harshly or unfairly. In one case an instrument removed the protection of the Child Abduction

Convention from the territory of the former Yugoslavia, but replaced it with fresh provisions which covered only part of that territory. The Committee's scrutiny of this instrument was the subject of its *Ninety-Eighth Report*. Another instrument included a provision which may have been impossible to apply. In another case people were given an unreasonably short time in which to respond to demands from a public official. One instrument included a strict liability offence. Another required people to incriminate themselves. In another case provisions for the conduct of a ballot may have operated unfairly. Another instrument did not provide for recovery of money paid as security although an earlier instrument included such a provision.

2.51 "The explanatory statement which accompanies an instrument should always explain fully any changes in the level of taxes, charges, fees and allowances. It is a breach of personal rights as well as a breach of parliamentary proprieties if changes are so large or unexpected that they may operate unreasonably. In one case the monetary penalty for a number of offences was increased ten times. In another the formula for calculating the increases was given, but not the reasons for determining the formula. In another the expected increase in receipts was given but not the reasons for the increase. In another case substantial fees were halved with no explanation.

2.52 "The Committee carefully scrutinises the effect of provisions in delegated legislation. In one case an instrument adapted provisions of the *Crimes Act 1914* which related to pardons, quashed convictions and spent convictions and which were intended to operate to the benefit of people who had been convicted

of offences. The instrument expressly used the provisions, however, to prejudice people. Retrospective delegated legislation which operates prejudicially is void under the Acts Interpretation Act. The Committee raised with Ministers a number of provisions which appeared to be void for this reason. In one case an instrument implementing an earlier undertaking to the Committee operated retrospectively to assist individuals. The instrument appeared to be void, however, because it operated to the detriment of funds which were required to pay money to the individuals. The Acts Interpretation Act actually provides that the relevant date for retrospectivity is the date of gazettal, not the date of making. In one case an instrument was made and expressed to come into effect on the same day. The instrument was not gazetted, however, until more than five weeks later and was therefore void because its provisions were prejudicial.

Principle (c)
Does delegated legislation make rights unduly dependent upon administrative decisions which are not subject to independent review of their merits?

2.53 "Many instruments of delegated legislation provide for Ministers, statutory office holders and other public officials to exercise discretions. The Committee believes that such discretions should be as narrow as possible, include objective criteria to limit and guide their exercise, and include review of the merits of decisions by an external, independent tribunal, which would normally be the Administrative Appeals Tribunal.

2.54 "In some cases instruments were drafted in such a way that they could

operate only if a discretion was exercised, but there was no formal provision for this or of any right of review. On the other hand, the explanatory statement for another instrument advised of the existence of AAT review of discretions although this was not reflected in the instrument itself.

2.55 "Numbers of discretions concerning personal rights did not appear to be subject to review, such as discretions to recognise overseas trade qualifications. Other instruments provided for review of some decisions which appeared less important than others for which review was not provided.

2.56 "The Committee is particularly concerned about discretions to waive or reduce fees and charges. One instrument conferred discretions to extend the time for payment of a fee, to allow payment of fees by instalment and to cut off services for unpaid fees. Another gave a discretion to remit charges and another to waive fees. There was no indication that these discretions were subject to review.

2.57 "During the sittings many instruments dealt with public and private sector superannuation. These included numbers of important discretions. For instance, those concerning public sector superannuation included discretions on levels of salary, payment of premiums, involuntary retirement, payment of lump sums and whether there was a significant and sustained improvement in the invalidity retirement rate. Those concerning private sector superannuation included discretions on whether a person was suffering financial hardship and on the payment of lump sums to relieve hardship.

2.58 "As usual, the Committee takes into account whether a decision maker may

delegate his or her decision making powers. There is a stronger case for merits review where powers may be delegated, particularly where powers may be delegated to wide classes of people.

Principle (d)
Does delegated legislation contain matter more appropriate for parliamentary enactment?

2.59 "The Committee does not raise this principle as often as its other three principles. Nevertheless, it is a principle which goes to the heart of parliamentary propriety and complements the first principle, that an instrument should be in accordance with the statute.

2.60 "The *Charter of the United Nations Amendment Act 1993*, which provided for Australia to impose United Nations sanctions by regulation, relied substantially on the *Ninety-Third Report* of the Committee, which concluded that it was appropriate for delegated legislation to be used in this way. Following that Act, numbers of instruments have imposed sanctions, most recently, during this sittings, on Angola and Haiti.

Other developments

2.61 "On 24 February 1994 Senator Gibson resigned from the Committee and was replaced by Senator Abetz, appointed on 24 February 1994.

2.62 "During the sittings the Committee tabled its *Ninety-Eighth Report*, on Scrutiny by the Committee of Amendments of the Family Law (Child Abduction Convention) Regulations.

2.63 "The Chairman, on behalf of the Committee, made special statements to the

Senate on the Territory of Christmas Island Casino Control Ordinance and on tabling requirements.

2.64 "The Committee's independent Legal Adviser since 1982, Emeritus Professor Douglas Whalan, was made a Member of the Order of Australia in the Australia Day 1994 honours list, for service to the law and to Parliament, particularly as a parliamentary legal adviser. This was an honour not only for Professor Whalan, but also for the Committee and the Senate.

2.65 "The Deputy Clerk of the Senate and the Committee secretary wrote an article on commencement of Acts by proclamation which was accepted for publication in the July 1994 issue of the *Parliamentarian* journal. An advance copy of the article was reviewed in several publications, including the *Bulletin* magazine.

2.66 "The staff of the Committee visited the Joint Legislative Review Committee of the Parliament of South Australia and the staff of the Legislative Council.

2.67 "The Committee is grateful for the support which it has received from all Senators during the present sittings."

CHAPTER 3

GUIDELINES ON THE APPLICATION OF THE PRINCIPLES OF THE COMMITTEE

3.1 Standing Order 23(3) establishes the four principles under which the Committee scrutinises every disallowable instrument of delegated legislation. These principles are set out at the start of this and every other Report of the Committee. The Committee interprets the principles in a broad and expanding fashion, to cover any possible defect affecting personal rights or parliamentary proprieties. This Chapter illustrates aspects of delegated legislation which the Committee has raised with Ministers and other law makers during the reporting period.

Principle (a)
Is delegated legislation in accordance with the statute?

Technical validity and effect

3.2 Delegated legislation must be legally valid and must comply with its parent Act and with other relevant Acts such as the *Acts Interpretation Act 1901*. Notice No.5 of 1992 under ss.4 and 97 of the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* specified a rate of interest as two percentage points higher than the yield on 90 day Australian Merchant Bankers Bill for each relevant day. The Committee asked whether this incorporation was invalid under s.49A of the Acts Interpretation Act, which limits the type of material "as in force from time to time" which may be incorporated in legislative instruments. The Minister advised that the Notice was of no effect and that a fresh instrument had been made.

3.3 The *Migration (1993) Regulations, Statutory Rules 1992 No.367*, defined a matter in relation to a register kept under another Act. The Committee suggested that the incorporation would be valid only if it referred to the register as existing when the Regulations were made. The Minister advised that the Regulations were consistent with a longstanding view of s.49A of the Acts Interpretation Act, but that present advice was that the relevant provisions were invalid. The Regulations would be amended as a matter of urgency. The Committee requested and received a copy of the present advice.

3.4 Several instruments were void because they purported invalidly to subdelegate legislative power. The *Meat Inspection (General) Orders (Amendment), Meat Inspection Orders No.3 of 1993*, included such a provision in relation to quality assurance arrangements. The Minister undertook to make appropriate amendments. In respect of an apparent invalid subdelegation in the *Australian Meat and Live-stock Corporation Order No.M62/93* the Minister advised that the provision was intended to recognise the totality of powers of the AMLC under two relevant Acts. In the case of *Schedule D Application of Agreement to Queensland of the Murray-Darling Basin Act 1993* the Minister advised that, although it was arguable that apparent subdelegations were invalid, the powers in question were in fact not legislative, because the Agreement

related only to the rights and duties of parties to it.

3.5 The **Export Meat Orders (Amendment), Export Control Orders No.2 of 1994**, provided for the Secretary to declare foreign countries for the purposes of the Orders. The Minister advised that advice from the Attorney-General's Department was that the relevant provision was not an invalid subdelegation of power. The Committee wrote back to the Minister, however, noting that the advice was that it was not clear whether the power was intended to be used in particular cases or generally and that the power would be valid only if used for particular cases. The Committee suggested that it may be worthwhile making this clear the next time the principal instrument was amended. The **Formulation of Principles made under s.58CD of the National Health Act 1953** provided for the amount of Commonwealth benefit for upgrading a nursing home to be a specified sum or such larger amounts as determined by the Minister from time to time. The Minister undertook to amend the instrument to avoid the possibility of invalid subdelegation.

3.6 There were apparent problems with validity in respect of commencement of the **Migration (1993) Regulations (Amendment), Statutory Rules 1993 No.29**, because the Regulations, made on 8 February 1993 and deemed under the Acts Interpretation Act to commence on gazettal on 12 February 1994, exercised powers under an amendment of the parent Act which did not commence until 1 March 1993. The Minister advised that while the Regulations were not invalid they could not commence until 1 March 1993. Nevertheless, to meet the concerns of the Committee, the **Migration (1993) Regulations (Amendment), Statutory Rules 1993 No.218**, retrospectively

provided for commencement of the earlier Regulations on that date. Similarly, the **Childcare Assistance (Fee Relief) Guidelines, CAA/12A/93/1, under the Child Care Act 1972**, appeared to be dependent for their validity on a Bill which had not become law on 16 October 1993, the date on which the Guidelines were made. The Guidelines were expressed to take effect on 1 January 1994, by which date the relevant Act had come into effect. The Minister attached advice from the Attorney-General's Department that the fact that the Guidelines referred to matters governed by an Act which had not received assent at the date of making did not affect their validity.

3.7 The Minister accepted that **Determination INS 21/1993 made under s.4(1)(dd) of the National Health Act 1953** failed to effect its legislative intention to incorporate a Schedule of proposed amendments and undertook to make a fresh Determination. On the other hand, the Minister advised that **Determination No.TAFE 45/93 made under the States Grants (TAFE Assistance) Act 1989**, which failed to include an intended provision revoking an earlier Determination, did effect its legislative intention. This occurred because, reading both the Determination as a whole and the explanatory statement, it was clear that revocation was intended.

3.8 The **Civil Aviation Regulations (Amendment), Statutory Rules 1993 No.268** provided for charges for a particular matter to be determined by the Board of the Civil Aviation Authority. This provision was invalid, however, because the enabling legislation did not extend to charging for this matter. The Minister advised that the Regulations had been amended.

3.9 In the past the Committee has considered instruments which invalidly

impose a tax or charge. On the other hand, the **University of Canberra Regulations, Statutory Rules 1993 No.244**, resulted from an agency voluntarily paying a tax from which it was exempted by legislation. Senator Colston made a special statement to the Senate about these Regulations. This statement appears in Chapter 6.

3.10 The explanatory statement for the **Great Barrier Reef Marine Park Regulations (Amendment), Statutory Rules 1993 No.188**, advised that the Regulations were made under an Act which did not exist. The Minister advised that the Governor-General's power to make regulations is not dependant on the correct citation of the source of power. Advice from the Attorney-General's Department was that the "slip rule" applied in this case because, while the making words contain an error, the drafter's intention is plain. The Committee then asked for and received more detailed advice on the application of the rule to Commonwealth delegated legislation.

3.11 The Committee considered the question of invalidity in respect of numbers of instruments made under the **States Grants (TAFE Assistance) Act 1989** (the TAFE Act) and under the **Higher Education Funding Act 1988** (the Higher Education Act). **Determinations Nos.TAFE 19/93 and 20/93** amended every one of the 18 earlier 1993 Determinations by inserting retrospective commencement provisions and, in some cases, by amending references to provisions under which the Determinations were made. **Determinations Nos.TAFE 31-32/90, 40-42/91 and 35-39/92**, all made on 13 August 1993 under the TAFE Act, with retrospective effect of up to three and a half years, similarly amended every Determination for recurrent and capital

spending made in 1990, 1991 and 1992. The explanatory statements which accompanied the Determinations were brief and did not explain why the Determinations were made. This was in contrast to similar Determinations under the Higher Education Act, which their explanatory statements advised were made variously because the Determinations were never gazetted, payments were made under them before gazettal, and there were tabling irregularities or prejudicial retrospectivity. The Minister advised that the purpose of the Determinations was to correct oversights similar to those described in the explanatory statements for the Determinations under the Higher Education Act. **Determination No.TAFE 26/93** was made on 30 June 1993 and expressed to commence on that date. Among other things, it reduced a grant. Therefore, unless the Determination was gazetted on that day it would operate with prejudicial retrospectivity and be invalid under s.48(2) of the Acts Interpretation Act. The Minister advised that the Determination was invalid and that a fresh instrument would be made.

3.12 Some 63 Determinations under the Higher Education Act corrected defects described in the previous paragraph in respect of Determinations made for payments for the five years from 1989 to 1993. The Committee also asked about **Determinations Nos.T62 and T63 of 1993**, which retrospectively reduced amounts of grants. The Minister advised that the Attorney-General's Department considered that the Determinations were valid. The Committee then wrote to the Minister in respect of advice in an earlier explanatory statement that **Determination No.T10-93** reduced an amount of a grant to take effect before gazettal and was therefore of no effect. The Minister advised that the

explanatory statement was based on advice from the Attorney-General's Department given in May 1993. Following further discussions the Attorney-General's Department had concluded in June 1993 that such Determinations were not invalid.

3.13 Subsection 48(2) of the Acts Interpretation Act provides generally that prejudicially retrospective delegated legislation affecting anyone except the Commonwealth is void. The **Public Service Determination 1992/333** provided for the payment of a disability allowance which could be retrospectively increased or decreased by a public official. The Minister undertook to remove the power to decrease the allowance. The **Superannuation (PSS) Temporary Employee Declaration No.2, Statutory Rules 1993 No.222**, appeared to operate with prejudicial retrospectivity. At the suggestion of the Committee, the Minister obtained advice from the Attorney-General's Department which indicated that the instrument was valid. The Committee then suggested that the Minister obtain further advice from the Department. This further advice was also that the instrument was valid. The Committee pointed out, however, that the advice was that the present case was special, that in many other cases retrospectivity would not be possible and that, even in the present case, any arrears or irregularities affecting contributions would not be a legally enforceable debt. The Committee advised the Minister that, while only a court could rule definitively on the matter, the Committee considered, with respect to the Department, that it was more likely that the present instrument would infringe the Acts Interpretation Act. The Minister then undertook to amend the *Superannuation Act 1976* and the *Superannuation Act 1990* to put the matter beyond doubt.

3.14 The explanatory statement for the **South East Fishery (Individual Transferable Quota) Management Plan 1991 (Amendment) (No.3), No.11 of 1992**, advised that the instrument made changes in relation to saving and validating all previous activities undertaken under the Plan. The Committee wrote to the Minister, noting that although the explanatory statement did not advise of the reason for this, the Committee assumed that it resulted from recent Federal Court decisions on the validity of the Plan. The Committee also suggested that several provisions of the instrument may be invalid because of prejudicial retrospectivity. The Minister advised the Committee of developments in the Federal Court and that the relevant provisions would not be used as the basis for any prosecution.

3.15 The **Form for the Casino licence granted under s.53(1) of the Territory of Christmas Island Casino Control Ordinance 1988** may not have been validly tabled. This was the subject of a special statement to the Senate by Senator Colston which is reproduced in Chapter 9.

Retrospectivity

3.16 Even if it appears likely from the terms of an instrument which operates retrospectively that no person apart from the Commonwealth or a Commonwealth authority is prejudiced, the Committee seeks this assurance from the Minister if it is not expressly included in the explanatory statement. The Committee did this for the **AUSTUDY Regulations (Amendment), Statutory Rules 1992 No.399**; the **Income Tax Regulations (Amendment), Statutory Rules 1993 No.91**; the **Patents Regulations (Amendment), Statutory Rules 1993 No.227**; the **South East Fishery (SEF) (Individual Transferable Quota) Management Plan (Amendment No.3)**; the

Declaration T69-93 made under the Employment, Education and Training Act 1988; the **Military Superannuation and Benefits Trust Deed (Amendment), Instrument No.2 of 1993**; and the **Locally Engaged Civilian Butterworth Determination 1993/1**. In the case of the **Wool International Regulations (Amendment), Statutory Rules 1994 No.43**, and the **Australian Wool Research and Promotion Organisation Regulations (Amendment), Statutory Rules 1994 No.44**, the Committee received confirmation from the Minister that both Wool Australia and the AWRPO are authorities of the Commonwealth.

3.17 Instruments which operate retrospectively, even if valid, may breach parliamentary propriety if such retrospectivity was not reasonable in the circumstances. If an instrument operates with lengthy retrospectivity or if there is some other unusual aspect of its operation, the Committee will ask the Minister for an explanation. In the case of the **National Health Regulations (Amendment), Statutory Rules 1993 No.280**, which retrospectively provided for the release of detailed personal information, the Committee asked for reasons for the retrospectivity, whether any information had been released before the Regulations were made and whether the Privacy Commissioner had been consulted. In the case of the **Overseas Students (Refunds) (People's Republic of China) Regulations (Amendment), Statutory Rules 1992 No.424**, and the **Overseas Students (Refunds) (General) Regulations (Amendment), Statutory Rules 1992 No.425**, the Minister explained that the purpose of two years retrospectivity was to enable the Commonwealth to take advantage in recovery proceedings of the evidentiary assistance afforded by the Act. Given the circumstances, however, the

Commonwealth had decided not to rely on the Regulations in the present proceedings. The Committee then asked for copies of relevant counsel's advice. The **Classification of Publications (Amendment) Ordinance (No.3) 1994, ACT Ordinance No.5 of 1994**, provided for nine years retrospective liability to pay an application fee, with any payments made during that time taken to discharge that liability. It appeared that this prejudicial retrospectivity was valid under the parent *Seat of Government (Administration) Act 1910*. Nevertheless, the Committee asked for advice on the legislative and administrative considerations which dictated the retrospective liability and its apparent simultaneous discharge and on the amount of money involved. In the above cases the relevant Ministers provided advice which satisfied the Committee.

Inappropriate levels of delegation

3.18 Many instruments of delegated legislation provide for a decision maker to delegate his or her powers. The Committee ensures that such delegation is restricted to persons of suitable seniority and experience. **Instrument No.DSA 1-1993 made under s.14F of the Disability Services Act 1986** provided that the Minister may delegate a power to any officer of the Department, no matter how junior. The Minister advised the Committee that in practice delegation would be restricted to senior executive service officers in central office and program managers in the States and Territories. The **Migration (1993) Regulations, Statutory Rules 1992 No.367**, provided that the Minister and the Secretary may delegate any of their powers to any person at all. The Minister advised that this provided a high degree of administrative flexibility, particularly where

an officer of the Department was not available. The **Importation of Arms, Ammunition and Explosives Ordinance 1992, Territory of Cocos (Keeling) Islands Ordinance No.6 of 1992**, appeared to include no provision for the Minister to delegate a power. The Minister confirmed that this was the case. The sole substantive provision of the **Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1994 No.124**, provided for delegation of all of the powers of the Secretary to any officer of the Australian Quarantine and Inspection Service. The Minister advised the Committee that delegation would be restricted to a small number of AQIS senior executive service officers in Canberra. The **Migration (Review) (1993) Regulations, Statutory Rules 1993 No.18**, provided for all of the powers of the Secretary to be delegated to any person at all. The Minister advised that this power of delegation was in the interests of smooth, efficient and flexible administration. The **Antarctic Seals Conservation Regulations (Amendment), Statutory Rules 1993 No.289**, provided for an authorised person to be any person at all. The Committee asked for advice from the Minister but indicated that such a power may be necessary, given the particular background and purpose of the Regulations. The Minister advised that an authorised person would normally be the Director of the Antarctic Division of the Department, although sometimes, to fulfil Australia's obligations under the Antarctic Treaty, it may be necessary to authorise persons at the Antarctic stations.

3.19 The **Importation of Arms, Ammunition and Explosives Ordinance 1992, Territory of Cocos (Keeling) Islands Ordinance No.6 of 1992**, provided that a public official could delegate all of his or

her powers to any person at all. Also, any person to whom the official delegated a power could, in turn, subdelegate all of such power to any person at all. The Committee suggested to the Minister that these powers of delegation and subdelegation were unusual. The Minister advised that, although the powers were unusually wide, they were necessary because of the remoteness of the Cocos (Keeling) Islands.

Drafting deficiencies

3.20 The drafting of delegated legislation should be of a standard equal to that of Acts. The Committee raised a number of different issues under this heading.

3.21 A number of instruments included imprecise or subjective expressions. The **Migration (1993) Regulations, Statutory Rules 1992 No.367**, included numbers of such expressions, such as "consistent with the interests of Australia", "likely to endanger the Australian community" and "community resources in short supply". The Instrument No.DSA 1-1993 made under s.14F of the **Disability Services Act 1986** included the expression "except in exceptional circumstances". The **Principles CACSAP 1/1993 and CACSRP 1/1993 made under the Aged or Disabled Persons Care Act 1954** included "honest and efficient provider", "demonstrated management skills" and "circumstances giving the Minister cause to consider revocation". The **ATSIC (Misbehaviour) Determination No.1 made under s.4A of the Aboriginal and Torres Strait Islander Commission Act 1989** included "seriously disruptive", "misleading information" and "public disrepute". The above expressions were not defined adequately by the parent Act or by the delegated legislation. Also, the expressions were often drafted as if they were objective standards, whereas

they may be matters of dispute. The relevant Ministers advised the Committee on the use of the expressions.

3.22 Drafting oversights may not necessarily affect the validity or operation of instruments, but corrections may be desirable. The following instruments included wrong references to provisions of the same or other legislation: the **Ozone Protection (HCFC, HBFC and Methyl Bromide) Regulations, Statutory Rules 1993 No.359**; the **Regional Council Election Rules (Amendment) (No.1) 1993 made under the Aboriginal and Torres Strait Islander Commission Act 1989**; the **Wool International Regulations (Amendment), Statutory Rules 1994 No.43**; the **Wool Tax (Administration) Regulations (Amendment), Statutory Rules 1994 No.45**; the **Australian Dried Fruits Board (AGM) Regulations, Statutory Rules 1993 No.144**; the **Occupational Superannuation Standards Regulations (Amendment), Statutory Rules 1992 No.463**; the **Importation of Arms, Ammunition and Explosives Ordinance 1992, Territory of Cocos (Keeling) Islands Ordinance No.6 of 1992**; and the **Migration (1993) Regulations, Statutory Rules 1992 No.367**. In all the above cases Ministers advised that the instruments would be, or had been, amended.

3.23 Contemporary drafting practice uses the expressions "he or she" and "him or her", rather than "he" or "him". Ministers undertook to amend the following instruments to provide for this: the **Importation of Arms, Ammunition and Explosives Ordinance 1992, Territory of Cocos (Keeling) Islands Ordinance No.6 of 1992**; the **Locally Engaged Civilian Butterworth Determination 1993/1**; and the **Exempt Nursing Homes Principles 1990, EXP 1/1993, made under the**

National Health Act 1953. In the case of the **Patents Regulations (Amendment), Statutory Rules 1993 No.227**, the Minister advised that reference to "he" rather than "he or she" in the English text of the Patent Cooperation Treaty accords with the certified copy of the Treaty.

3.24 The following instruments included other technical drafting deficiencies which the Minister undertook to correct: the **Migration (1993) Regulations, Statutory Rules 1992 No.367**; the **Migration (1993) Regulations (Amendment), Statutory Rules 1993 No.29**; the **Australian Horticultural Corporation (Honey Export Control) Regulations, Statutory Rules 1993 No.26**; the **Australian Wool Corporation Regulations (Amendment), Statutory Rules 1992 No.438**; the **Wool Research and Development Corporation Regulations (Amendment), Statutory Rules 1992 No.443**; the **Civil Aviation Regulations (Amendment), Statutory Rules 1992 No.417**; and the **Australian Dried Fruits Board (AGM) Regulations, Statutory Rules 1993 No.144**. The Minister also explained apparent drafting anomalies in the Guidelines under s.18 of the **Tobacco Advertising Prohibition Act 1922**; the **Wildlife Protection (Regulations of Exports and Imports) Regulations (Amendment), Statutory Rules 1993 No.226**; the **Primary Industries Levies and Charges Collection (National Residue Survey – Game Animals) Regulations (Amendment), Statutory Rules 1993 No.250**; the **Currency Determinations Nos.9 and 12 of 1993 made under the Currency Act 1965**; and the **Nursing Homes Financial Principles 1989 No.NHP 1/1993 made under the National Health Act 1953**.

3.25 In accordance with the concept of all aspects of delegated legislation being of a standard not less than that of Acts, the

Committee questioned the commencement clause in the *Importation of Arms, Ammunition and Explosives Ordinance 1992, Territory of Cocos (Keeling) Islands Ordinance No.6 of 1992*, which provided for the Ordinance to take effect on the gazettal of a notice by the Minister. This was a departure from the usual practice for Acts where, if there is no date fixed for commencement, the Act commences after a set period, usually six months. Delegated legislation usually comes into effect on gazettal if no commencement date is specified. The Minister advised that commencement of an Ordinance by ministerial notice is unusual, but it was not practical for the Ordinance to commence on gazettal because the regulations and forms necessary for it to operate effectively had not been finalised. Also, a specific date may have enabled persons to take advantage of the deficiency in the existing law.

Lack of numbering or citation

3.26 Due to the efforts of the Committee, it is now accepted that every instrument of delegated legislation should provide a system of numbering or citation. Without such a system delegated legislation may be imprecise and confusing. Ministers undertook to provide numbering or citation for instruments in the following series : Formulation of Principles made under ss.52B, 58A, 58C and 58CD of the *National Health Act 1953*; Guidelines made under s.18 of the *Tobacco Advertising Prohibition Act 1922*; Declaration in relation to significant objects made under s.12 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1973*; Determination of representative Aboriginal/Torres Strait Islander bodies made under s.202(1) of the *Native Title Act 1993*; and the Regional Council Election (Casual Vacancies) Rules

made under the *Aboriginal and Torres Strait Islander Commission Act 1989*.

Inadequate explanatory material

3.27 Due to the efforts of the Committee it is now accepted that each instrument of delegated legislation should be accompanied by adequate explanatory material. The Minister undertook to provide explanatory statements for the following instruments : Approval of Amendment No.7 to the National Capital Plan made under s.19 of the *Australian Capital Territory (Planning and Land Management) Act 1988*; Regional Council Election Rules (Amendment) (No.1) 1993 made under the *Aboriginal and Torres Strait Islander Commission Act 1989*; and Regional Council Election (Casual Vacancies) Rules (Amendment) made under the *Aboriginal and Torres Strait Islander Commission Act 1989*.

3.28 The Committee wrote to the Minister and to the Chief Justice about defects in the explanatory statements for the *Migration Regulations (Amendment), Statutory Rules 1992 No.451*; the *Federal Court Rules (Amendment), Statutory Rules 1993 No.290*; the *Primary Industries Levies and Charges Collection (Citrus) Regulations, Statutory Rules 1992 No.439*; and the *Primary Industries Levies and Charges Collection (Apple and Pear) Regulations, Statutory Rules 1992 No.441*.

Legislative instruments not subject to tabling and disallowance

3.29 Numbers of instruments of delegated legislation themselves provide for legislative instruments to be made. The Committee not only ascertains that such instruments are valid, but also ensures that they are subject to appropriate parliamentary scrutiny. In the case of the *Importation of Arms, Ammunition and*

Explosives Regulations, Territory of Cocos (Keeling) Islands Regulations 1993 No.1, the Minister advised that although it was an option to provide for parliamentary scrutiny of mandatory forms, the forms mirror those in applied Western Australian legislation and to table all of them would be expensive in time and money. The Committee was advised that the parent *Migration Act 1958* provided for the Minister to approve the forms required by the *Migration (Review) (1993) Regulations, Statutory Rules 1993 No.18*. The Minister advised that while mandatory forms provided for by the *Australian Horticultural Corporation (Honey Export Control) Regulations, Statutory Rules 1993 No.26*, were not legislative, there was no need for a fixed format for the forms and the relevant provision would be deleted. The Minister advised that while the *Quarantine (Animals) Regulations (Amendment), Statutory Rules 1993 No.229*, provided for applications to be in a form approved by the Director, there was no application form, applicants applying by letter.

3.30 The Minister undertook to amend the *Migration (1993) Regulations (Amendment), Statutory Rules 1994 No.38*, to make clear that certain *Gazette* notices were not legislative. In the case of the *Principles NHP 2/1993 made under the National Health Act 1953* the Minister advised that one possibly legislative power had been deleted, undertook to remove another and suggested that three more remain on an interim basis pending a review of the legislation by the Australian Law Reform Commission. The *Civil Aviation Regulations (Amendment), Statutory Rules 1993 No.319*, provided for the Civil Aviation Authority to give directives, breach of which was an offence. The Minister undertook to make the

directions disallowable.

Access, presentation and publication

3.31 As with drafting, standards of access, presentation and publication of delegated legislation should be not less than those of Acts. The Minister agreed with the Committee that, given extensive amendments of the *Migration (1993) Regulations, Statutory Rules 1992 No.367*, a reprint may be appropriate. The *Nursing Homes Financial Principles made under s.40AA(7) of the National Health Act 1953*, were amended for the sixth time since they were made in 1989. The Committee suggested to the Minister that they were now difficult to follow, that this difficulty would be acute for those affected and that it would be appropriate to produce a reprint. The Minister furnished the Committee with an unofficial reprint produced for internal departmental use and advised that the Principles would be completely redrafted as a result of legislation shortly to be introduced.

3.32 The *Declaration made under s.9(1) of the Wildlife Protection (Regulation of Exports and Imports) Act 1982*, referred to an animal species only by its scientific name and not by its common name as well. The Committee noted that common names would assist the public and that these were included in both the *Great Barrier Reef Marine Park Regulations* and the *National Parks and Wildlife Regulations*. The Minister undertook to do this for species which have a common name.

Failure to explain changes in fees, charges and allowances

3.33 An unexpected or unusual change in fees, charges or allowances may breach parliamentary propriety. The explanatory

statement should advise the absolute or percentage change and the basis upon which it was made. The **Fisheries Levy (East Coast Tuna Longline Fishery) Regulations (Amendment)** and the **Fisheries Levy (East Coast Tuna Purse Seine Fishery) Regulations (Amendment), Statutory Rules 1992 Nos.406 and 408**, varied amounts of levy. One amount was increased by 60%, others increased by smaller percentages, others were decreased (a decrease of 17.5% for two levies was described in the explanatory statement as a decrease of "about 25%"), others removed and one more added. Similarly, the explanatory statement for the **Fisheries Levy (Northern Prawn Fishery) Regulations (Amendment), Statutory Rules 1993 No.193**, although otherwise comprehensive, did not give reasons for changes in fees. The Minister advised the Committee of these details.

3.34 The **Endangered Species Protection Regulations, Statutory Rules 1993 No.84**, prescribed a fee. The Committee noted that the parent Act provided that such a fee must not amount to taxation. There was no indication in the explanatory statement of why this level of fee was prescribed or why the fee was not taxation. The Minister advised that the fee was intended to cover a proportion of the relevant administrative costs. The fee was not taxation because it will not recover all of these administrative costs.

3.35 The Committee is particularly concerned where unexplained fees or charges affect individuals in the exercise of their personal rights. The **Superannuation (PSS) Fees Regulations** and the **Superannuation (CSS) Fees Regulations, Statutory Rules 1993 Nos. 200 and 201**, provided for application fees for reconsideration of decisions by the respective Boards of Trustees. The

Migration (1993) Regulations (Amendment), Statutory Rules 1993 No.253, increased certain application fees by from 8% to 31%. The **Corporations (Fees) Regulations (Amendment), Statutory Rules 1993 No.242**, increased occupational licensing fees for auditors, liquidators and investment advisers. The explanatory statements did not advise of the reasons for these levels of fees. The Ministers advised the Committee of these details.

3.36 The explanatory statement for the **Motor Vehicle Standards Regulations (Amendment), Statutory Rules 1994 No.23**, advised that fee increases were to continue full cost recovery and were in line with inflation. The Committee pointed out that the increases were greater than inflation. The **Bankruptcy Rules (Amendment), Statutory Rules 1993 No.90**, increased one fee by a factor of 7 and another by a factor of 5. The **Industrial Chemicals (Notification and Assessment) Regulations (Amendment), Statutory Rules 1993 No.35**, set additional fees. The Minister explained these changes to the satisfaction of the Committee.

3.37 The **Export Inspection and Meat (Establishment Registration Charges) Regulations (Amendment)** and the **Domestic Meat Premises Charge Regulations (Amendment), Statutory Rules 1994 Nos.64 and 66**, reduced a number of charges by half. Some of the changes were substantial. For instance, one charge of \$45,040 became \$22,520. The Committee welcomed the changes but asked about the reason for the reductions. The Minister advised that the reductions were an interim measure pending the report of a charging review committee which is considering the most appropriate charging structures for cost recovery. Previously, the Minister had explained

changes to fees in the same two principal Regulations set by **Statutory Rules 1993 Nos.375 and 377**. The explanatory statements for the **Meat Inspection (Fees) Orders, Meat Inspection Orders No.1 of 1994**, and the **Export Control (Fees) Orders (Amendment), Export Control Orders No.1 of 1994**, advised that the Orders would result in total fees being reduced by \$0.3 million in a full financial year. Again, the Committee welcomed the reductions but asked whether the fees were based on full or partial cost recovery, or on some other basis. The Minister advised that the new fee structure was based on full cost recovery.

3.38 The **Administrative Appeals Tribunal Regulations (Amendment), Statutory Rules 1993 No.276**, included notes about fees payable to witnesses. The Committee suggested that the notes were technical and legalistic and did little to inform people of their rights. The Committee noted that AAT procedures were intended to be simple and non-legalistic. At present, it would require a lawyer to interpret the notes. The Minister undertook to change the notes.

Principle (b) Does delegated legislation trespass unduly on personal rights and liberties?

Harsh or unfair provisions

3.39 It is a breach of personal rights if provisions of delegated legislation are harsh or unreasonable. The Committee was concerned at three aspects of the **Superannuation Guarantee (Administration) Regulations, Statutory Rules 1993 No.52**. One provision provided that an employee would lose an entitlement if action was not taken within a specified

time; another that allowances were not payable to a person attending before the Commissioner as employer, employee or person representing an employer, which suggested that a person representing an employee would be paid an allowance but not a person representing an employer; and another that an employer must notify the change of address of an employee within one month, failing which the old address was deemed to continue to be the address, which suggested that an employee may be disadvantaged by the neglect of an employer. The Minister advised that the purpose of the time limit for entitlements was to encourage employees to arrange transfer of their entitlements; that the payment of allowances to those representing employees but not to those representing employers was based on the **Income Tax Regulations**; and that the notification of address provision, also based on the **Income Tax Regulations**, was essential for administrative purposes. The Committee accepted the Minister's advice but pointed out that evolving standards of personal rights meant that what may have been appropriate and acceptable only a few years ago may not be so today. In another provision relating to a time limit, the **Importation of Arms, Ammunition and Explosives Ordinance 1992, Territory of Cocos (Keeling) Islands Ordinance No.6 of 1992**, provided that unless seized firearms were returned within 60 days, they must be taken to court and dealt with according to law. The Committee suggested that this appeared a long period. The Minister advised that the reason for this was the isolation of the Territory and the fact that court officers were based in Western Australia. Nevertheless, the Minister undertook to monitor the operation of the provision and to amend it if the time appeared excessive. Also on time limits, the **Australian Horticultural**

Corporation (Honey Export Control) Regulations, Statutory Rules 1993 No.26, provided for persons to be disqualified from holding a licence for five years if they have had a licence revoked or cancelled, have entered into a prescribed financial arrangement or been guilty of a prescribed offence. The Minister advised that the provision was based on related export control legislation. The **Occupational Health and Safety (Commonwealth Employees) Regulations (Amendment), Statutory Rules 1993 No.5**, provided that an employer must retain a record of a report of an accident or dangerous occurrence for 30 years. The Minister advised that the provision was needed to monitor gradual onset diseases.

3.40 The **Migration (1993) Regulations (Amendment), Statutory Rules 1993 No.235**, expressly excluded a de facto relationship from a marital relationship for the purposes of a particular entry permit even though the principal Regulations defined a marital relationship to include such relationships. The Minister advised that it was inappropriate, given the circumstances of the particular entry permit, to include de facto spouses. The **Locally Engaged Civilian Butterworth Determination 1993/1** provided that a female employee whose husband was living could not be allocated certain accommodation. The Committee asked whether a male employee whose wife was living was similarly excluded. The Minister advised that the provision was based on an agreement 20 years old and that the provision would be deleted.

3.41 The **Migration (1993) Regulations, Statutory Rules 1992 No.367**, imposed obligations on sponsors of migrants which included necessary financial support and accommodation, responsibility for an applicant's financial obligations and

compliance with industrial awards, repayment of job search, newstart and special benefits and lodgement of a bond. The Minister advised that the purpose of sponsorship was to protect the Australian community from the likelihood of burdens relating to the settlement of migrants.

3.42 The **Immigration (Education) Charge Regulations (Amendment), Statutory Rules 1993 No.254**, doubled a charge to \$2,040 but provided that the increases did not apply to a visa application lodged on or after 1 October 1993 if the visa was granted before 1 January 1994. The Committee was concerned that this provision may operate unfairly if a visa was delayed beyond 1 January 1994 through no fault of the applicant. The Minister advised that it was intended that all migrants would be required to pay the new charge and that it would be exceptional for any migrants not to have to pay.

3.43 The **Land Legislation Ordinance 1992, Territory of Cocos (Keeling) Islands Ordinance No.8 of 1992**, provided for the creation of easements over land with no explanation in the explanatory statement of the effect of those provisions on the rights of private land owners. The Minister advised that the changes would not be prejudicial as they applied only to land where the Commonwealth already possessed the rights for which the Ordinance provided. The **Great Barrier Reef Marine Park Regulations (Amendment), Statutory Rules 1993 No.266**, provided that a public authority may require a permit holder to indemnify the authority for any costs incurred as a result of the activities of the holder. The Committee suggested that this was a wide provision which may require a holder to indemnify the authority for matters for which the holder was not directly responsible. The Minister advised that the

indemnity was consistent with those in other industries such as mining and was intended to ensure that the taxpayer does not have to meet the cost of rectifying damage to the Park.

3.44 The **Administrative Appeals Tribunal Regulations (Amendment), Statutory Rules 1993 No.276**, provided for a summons to produce documents. In contrast to other forms of summons, however, there was no provision for fees to be paid to a person required to do this. The Minister confirmed that fees were not payable. The Committee suggested that this could have a harsh effect on persons who lived away from the place of hearing, because the Regulations required personal attendance at the hearing or at the place of the hearing. The Committee understood that there was an informal arrangement under which documents may be sent by post or courier. The person summonsed, however, was required to pay the postage or courier charges. In any event, the note to the summons did not advise of this right. The Minister undertook to amend the Regulations to provide that documents may be produced by post or courier. Reimbursement of expenses in these cases may be appropriate and the Minister undertook to consult the federal courts in relation to similar changes.

Procedural Safeguards

3.45 Procedures provided for by delegated legislation should be fair and should be accompanied by appropriate safeguards. The **Australian Dried Fruits Board (AGM) Regulations, Statutory Rules 1993 No.144**, provided for the annual general meeting of a public authority. The explanatory statement advised that the first AGM of the authority, for 1991-92, must be held on or before 30 June 1993. The Regulations were not made,

however, until 22 June 1993, with commencement on gazettal on 23 June 1993. There were also several provisions with which it appeared impossible to comply. These included periods of notice for certain matters of 7 days and 42 days before the AGM. Also, provisions relating to notices of motion were unclear. The Minister advised that drafting instructions were given for the Regulations 38 weeks before the AGM, which was actually held at the request of the industry on 23 June 1993. The AGM was held in substantial compliance with the Regulations, which would be amended to address the concerns of the Committee about clarity. Both the **Australian Wool Corporation Regulations (Amendment), Statutory Rules 1992 No.438**, and the **Wool Research and Development Corporation Regulations (Amendment), Statutory Rules 1992 No.443**, changed the voting majorities for motions relating to wool tax recommendations. The Committee asked the Minister for an assurance that payers of wool tax would not be prejudiced by the changes. The Minister advised that the changes were intended to improve the accountability of industry bodies to their constituents.

3.46 The **Australian Sports Drug Agency Regulations (Amendment), Statutory Rules 1993 No.210**, provided for safeguards for certain sports competitors selected for drug testing. These safeguards, however, were not mandatory but discretionary. The Committee suggested that this may be an oversight. The Minister advised that the safeguards were not mandatory because there were practical difficulties in applying the safeguards where, for instance, samples may be required immediately from major place getters in particular events. The Privacy Commissioner supported the discretionary

provisions. The **Migration (1993) Regulations, Statutory Rules 1992 No.367**, provided for the issue of a warrant for the arrest of a witness who fails to appear on summons. The person executing such a warrant may break and enter any place, building or vessel. The provision, however, did not include the usual safeguard that such a person may use only reasonable force, even though such safeguards were included in warrants issued under the parent Act. The Minister undertook to amend the Regulations.

3.47 The **ATSIC (Misbehaviour) Determination No.1 made under the Aboriginal and Torres Strait Islander Commission Act 1989**, provided that conviction for an offence punishable by imprisonment was taken to be misbehaviour for the purposes of the Act. Conviction was taken to include being charged and found guilty but discharged without conviction, or not being found guilty but the court has taken the offence into account in passing sentence for another offence. The Committee noted that under these provisions persons were deemed to have been convicted of matters for which a court decided they should not be convicted or for which they have not even been found guilty. The Committee accepted that the provisions were based on the existing s.85ZM of the *Crimes Act 1914*, but that s.85ZM applied only to benefit individuals, not to prejudice them. The Minister advised that the Determination struck a balance between public accountability and personal rights. The Committee then wrote again to the Minister, who undertook to amend the Determination. The **Endangered Species Protection Regulations, Statutory Rules 1993 No.84**, provided for a declaration to accompany specified applications. The declaration had to include whether applicants had been convicted or are

subject to proceedings in relation to any offence under a wide range of Commonwealth, State and Territory laws. The Minister advised that many of the species listed in the Regulations were in immediate danger of extinction and it was considered prudent to consider all offences relevant to nature conservation not only where there has been a conviction, but also where the offence is the subject of proceedings.

3.48 The **Radiocommunications Regulations, Statutory Rules 1993 No.177**, provided for the payment of a penalty under an infringement notice procedure. If such a penalty was paid, then the liability of the person affected was discharged, no further proceedings in respect of the matter could be taken and the person was not regarded as having been convicted of an offence. There was, however, no requirement for the infringement notice to notify the person affected of these important safeguards. The Committee suggested that this was a serious omission. The Minister undertook to amend the Regulations.

3.49 The **Public Service Determination 1993/24**, required an officer to elect to retire on the same day that the Determination was made. The Minister advised that the quick retirement was at the request of the officer and that this also suited the Department. The **Locally Engaged Staff Determination 1993/8**, changed the rates of certain allowances in Indonesia. The explanatory statement advised that the rates were last adjusted five years previously. The Minister advised that in future there would be greater emphasis on the need for regular reviews of conditions.

3.50 The **Family Law (Child Abduction Convention) Regulations (Amendment), Statutory Rules 1993 No.358**, removed

important existing safeguards relating to the rights of children. Scrutiny of these Regulations was the subject of the Committee's *Ninety-Eighth Report*, tabled on 29 June 1994.

Unfair penalties

3.51 It is a breach of personal rights if offences or penalties provided for by delegated legislation are harsh or unfair. The **Family Law Rules (Amendment), Statutory Rules 1994 No.25**, increased penalties relating to three types of subpoena from \$500 to \$5,000. The only explanation for this given in the explanatory statement was that \$5,000 is now the maximum sum which applies for all breaches of a statutory rule. The Chairman of the Rules Committee of the Family Court advised that the maximum penalty had not been increased for 17 years, that the widely divergent circumstances of offences would mean that in some cases less than \$500 would be an appropriate penalty while in others \$5,000 would be inadequate and that, by comparison, under the Federal Court Rules there is no maximum fine or maximum period of imprisonment for similar offences. The **Great Barrier Reef Marine Park Regulations (Amendment), Statutory Rules 1993 No.266**, provided for a vicarious liability offence. The Committee always questions the need for such offences. The Minister advised that the liability of an employer applied only in relation to employees working directly to instructions and that the relevant State legislation also provided for vicarious liability.

Unusual provisions

3.52 The Committee questions unusual or unexpected provisions in delegated legislation. The **Public Service**

Determination 1993/153, provided for vehicle allowance and contribution rates for employees in Iran to be greater for vehicles with an engine capacity under 1,500 cc than for those with an engine capacity of more than 1,500 cc. The Minister advised that in Iran repairs and insurance were a larger component of running costs for smaller vehicles than for larger and that the low price of petrol did not offset these costs. The **Public Service Determination 1992/333**, conferred a discretion on a public official to reduce an allowance. Apart from the question of validity the Committee suggested to the Minister that this was a surprising power. The Minister advised that the power would be deleted.

Principle (c)

Does delegated legislation make rights unduly dependent upon administrative decisions which are not subject to independent review of their merits?

Review of decisions with commercial and livelihood implications

3.53 Delegated legislation often provides for discretions which affect business operations. In such cases, the Committee believes that discretions should be limited and guided by objective criteria and be subject to external review of their merits by an independent body, usually the AAT. Instances of such instruments are set out below under Departments.

(a) Department of Primary Industries and Energy

3.54 Fisheries Notices Nos.NPF26 and NPF28 provided for discretions which could affect commercial operations. The

Committee noted earlier advice that it was unusual for Fisheries Notices to include discretions. The Committee also accepted that pressure of time may preclude the provision of a review procedure for one discretion. The Minister agreed that a review procedure was appropriate but that as the parent Act was being replaced it would not be amended to provide AAT review. The Committee replied that a provision in a Notice could provide such review. The Minister advised that an internal review process would be provided pending full introduction of the new Act. The **Northern Prawn Fishery Management Plan (Amendment), Plan of Management No.NPF10**, provided for discretions relating to the compulsory reduction of certain fishing rights. The Minister advised that, although discretions were provided, there were no obvious circumstances in which discretions could be adversely exercised. All decisions had been favourable to applicants and the discretions have no continuing application.

3.55 The **Australian Meat and Livestock Corporation Order No.M62/93** provided for the AMLC to vary a meat quota "in its absolute discretion and without giving reasons". The Committee suggested that this was an unusual power, particularly as there were no criteria to guide and limit its exercise. The Minister advised that the discretions were reviewable by the AAT and that those affected could require the AMLC to provide a statement of reasons for decisions. The **Meat Inspection (General) Orders (Amendment), Meat Inspection Orders No.3 of 1993**, and the **Meat Inspection (New South Wales) Orders, Meat Inspection Orders No.5 of 1993**, provided for discretions with commercial importance. The Committee noted that the latter Orders expressly provided for AAT review of decisions which appeared to be less important than

others which may not be subject to review. The Minister undertook to review the Orders and to make appropriate amendments. The **Meat Inspection (Fees) Orders, Meat Inspection Orders No.1 of 1994**, and the **Export Control (Fees) Orders, Export Control Orders No.1 of 1994**, provided for internal reconsideration of discretions followed by some AAT review. This right of review, however, did not extend to certain reconsidered decisions which appeared to be the most commercially valuable. The Minister advised that AAT review in these cases may be exploited by persons seeking to delay payment of fees. The Minister gave similar advice in respect of the **Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1994 No.65**, as well as advising that relevant discretions were not specified in Administrative Review Council guidelines as matters excluded from AAT review. The Minister understood, however, that the guidelines were not intended to be exhaustive. The Committee then advised the Minister that it would refer these replies to the ARC for information.

3.56 The **Australian Horticultural Corporation (Honey Export Control) Regulations, Statutory Rules 1993 No.26**, provided for review of a decision not to grant, not to review, to vary or to revoke a licence, but not of a decision to impose conditions on a licence. The Minister undertook to amend the Regulations.

(b) Department of the Treasury

3.57 The **Occupational Superannuation Standards Regulations (Amendment), Statutory Rules 1992 No.463**, provided for discretions with financial implications. The Minister advised that such discretions, if exercised, would be expressed to apply to all funds, rather than to individual funds. The **Superannuation Guarantee**

(Administration) Regulations, Statutory Rules 1993 No.52, conferred on a public official a discretion to exempt persons from an offence provision for up to 10 years. There were other discretions which were not drafted as such. The Minister advised that, while AAT review was not available, judicial review under the **Administrative Decisions (Judicial Review) Act 1977** was adequate for these cases. The Committee replied that that Act was limited to procedural matters and did not extend to the merits of decisions. The **Occupational Superannuation Standards Regulations (Amendment), Statutory Rules 1993 No.213**, provided for a number of apparently important discretions which the Committee suggested should be subject to AAT review. The Minister advised that one discretion involved commercial processes for which AAT review was inappropriate and the others were, in practice, reviewable by the AAT under provisions in the parent Act.

3.58 The **Trade Practices Regulations (Amendment), Statutory Rules 1993 No.21**, provided for a discretion to decide that a concessional fee may be paid. The Assistant Minister advised that AAT review was inappropriate because the decision was a technical one, the Trade Practices Commission was the best body to determine these technical issues and the costs and delays of AAT review would outweigh any benefit.

(c) Department of the Environment, Sport and Territories

3.59 The **Great Barrier Reef Marine Park Regulations (Amendment), Statutory Rules 1993 No.266**, provided for apparently unreviewable discretions to suspend or revoke certain permits for activities in the Park. The Committee noted that it had previously raised the question of

review of discretions in the Regulations and had received a positive response. The Minister advised that the Regulations would be amended to provide AAT review of decisions not presently reviewable. The Minister gave similar assurances in respect of the **Great Barrier Reef Marine Park Regulations (Amendment), Statutory Rules 1993 No.206**. The Minister agreed with the Committee that fresh discretions in the **Antarctic Seals Conservation Regulations (Amendment), Statutory Rules 1993 No.289**, were included in existing review provisions. In respect of the **Wildlife Protection (Regulation of Exports and Imports) Regulations (Amendment), Statutory Rules 1993 No.226**, the Minister advised that AAT review of a discretion was not available because the public was involved in the decision making process.

3.60 The **Importation of Arms, Ammunition and Explosives Ordinance 1992, Territory of Cocos (Keeling) Islands Ordinance No.6 of 1992**, conferred discretions in respect of permits. Several discretions provided only for subjective criteria, while another provided no criteria at all. Two discretions were reviewable by the Minister, while two other comparable discretions were not. The Minister advised that the criteria were based on those of the relevant Western Australian Act and undertook to provide review of one of the two discretions. The explanatory statements for the **Liquor Licensing Act 1988 (W.A.) (C.I.) (Amendment) Ordinance 1993, Territory of Christmas Island Ordinance No.8 of 1993**, and the **Liquor Licensing Act 1988 (W.A.) (C.K.I.) (Amendment) Ordinance 1993, Territory of Cocos (Keeling) Islands Ordinance No.7 of 1993**, advised that there was a right of review to the Liquor Licensing Court of one discretion but did not mention other discretions. The Minister assured the Committee that all discretions were reviewable.

(d) Department of Health

3.61 The *Guidelines for Determination of Eligible Child Care Centres (Childcare Assistance) CCA/4B/93/2* provided for both the Minister and the Secretary to exercise discretions. The explanatory statement, however, advised that new child care legislation presently being drafted by the Australian Law Reform Commission would provide for AAT review of ministerial decisions. The Committee noted that this was an appropriate safeguard. Nevertheless, the Guidelines commenced on 1 January 1994 while the new legislation would only be introduced into Parliament later in 1994. The Committee suggested that the Guidelines should be amended to provide review of ministerial decisions from 1 January 1994 and asked about review of decisions by the Secretary. The Minister undertook to amend the Guidelines and advised that review of decisions by the Secretary would be decided by the ALRC. The Minister also advised that the ALRC inquiry would address review of discretions in the *Childcare Assistance (Fee Relief) Guidelines CAA/12A/93/1*.

(e) Department of Transport

3.62 The Minister advised that discretions in the *Air Navigation Regulations (Amendment), Statutory Rules 1993 No.318*, were not subject to AAT review because they implement Air Services Agreements between Australia and other countries. It was important that Australia's legitimate interpretation of politically sensitive international rights and obligations not be subject to alteration by merits review. Also, the Agreements included dispute resolution procedures to deal with different interpretations by the parties to them. The Administration Review Council had accepted this position.

(f) Department of Employment, Education and Training

3.63 The *Training Guarantee (Administration) Regulations (Amendment), Statutory Rules 1993 No.252*, provided for review of direct decisions made by the Minister. The Committee suggested, however, that there could be disputes of fact under other provisions for which it may be appropriate to provide AAT review. The Minister advised that decisions under these provisions were ultimately reviewable under the existing Act and Regulations.

Review of decisions affecting personal rights

3.64 The Committee also ensures that delegated legislation provides appropriate criteria and review rights for discretions which directly affect individuals. The *Marine Orders, Order No.1 of 1993, Part 9 Health-Medical Fitness, Issue 4*, provided for a number of discretions, the exercise of which could affect the right of individual seafarers to pursue their careers. The discretions related to medical fitness and recognition of foreign medical certificates. One provision provided that a seafarer refused a certificate may apply again and is entitled to a second opinion. There was, however, no apparent requirement that the second opinion was binding and no indication of a general right of review. The Minister advised that there was no limit on the number of subsequent medical opinions and that review by additional medical opinions was supported by the industry. Medical fitness procedures were presently under review by the Australian Maritime Safety Authority, who had assured the Minister that the need for adequate review processes would be taken into account. The *Locally Engaged Civilian Butterworth Determination 1993/1*,

provided for a number of discretions, the exercise of which in the Australian Public Service could be reviewed by the Merit Protection and Review Agency. The Minister advised that under some circumstances locally engaged civilians would have access to the Malaysian Industrial Court and in others a right of review by the Director Industrial in the Department of Defence in Canberra. Staff and the relevant trade union supported this position. The *Radiocommunications (Qualified Operators) Determination No.1 of 1993 (Amendment No.2)*, provided for recognition of overseas qualifications and the *Civil Aviation Regulations (Amendment), Statutory Rules 1992 No.380*, provided for discretions relating to the endorsement of a permit and for the suspension of a licence. In both these cases the Minister advised that AAT review was available.

3.65 The *Fifth Amending Deed to Establish an Occupational Superannuation Scheme for Commonwealth Employees and other Persons*, provided for discretions which could disadvantage individuals. These included the power to decide what was a marital relationship and who was a spouse. The Minister advised that formal internal review was available and that the scheme would be subject to the *Superannuation (Resolution of Complaints) Bill 1993* when it became law. The Minister later confirmed that discretions in the subsequent Deed would be similarly subject to the provisions of the Bill. The *Seamen's War Pensions and Allowances Regulations (Amendment), Statutory Rules 1993 No.16*, provided for discretions relating to admission to private hospitals. The Minister advised that internal review was available by delegates of the Repatriation Commission. The discretions did not affect the basic right to medical treatment but rather dealt with cases where

mariners elected to obtain access to a private hospital of their choice. The *Superannuation (Former Eligible Employees) Regulations (Amendment), Statutory Rules 1993 No.262*, provided for discretions relating to total and permanent incapacity. The Minister confirmed that such decisions were reviewable by the AAT.

3.66 The *Local Government (Transition) (Amendment) Ordinance 1992, Territory of Cocos (Keeling) Islands Ordinance No.7 of 1992*, provided for discretions in relation to voting procedures. The Minister advised that the discretions were based on those in the applied Western Australian Act under which a candidate or a group of six or more electors could complain to a Court of Disputed Returns alleging that an election was invalid. The *Local Government (Transition) (Amendment) Ordinance 1993, Territory of Cocos (Keeling) Islands Ordinance No.1 of 1993*, provided for a discretion to reject an application for registration on the Owners and Occupiers Roll. The Minister advised that under the applied Western Australian Act the Minister could direct the compilation of a new electoral roll if satisfied that the existing roll was defective. The *Regional Council Election Rules (Amendment) (No.1) 1993* made under the *Aboriginal and Torres Strait Islander Commission Act 1989* provided for a number of discretions. The Minister advised that the parent Act provided for an election petition to the Federal Court, which must decide the petition guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities.

3.67 The *AUSTUDY/ABSTUDY Supplement Regulations, Statutory Rules 1992 No.454*, provided that a late application would be overlooked if an applicant had taken all reasonable steps but

could not lodge an application because of circumstances beyond his or her control. There was no indication of who was to make these decisions or whether they were reviewable. The Minister advised that AUSTUDY decisions were reviewable by the Student Assistance Review Tribunal and that ABSTUDY decisions were reviewable by a more senior officer and then by the Minister. Following a further request from the Committee, the Minister advised in detail of the exercise of relevant ministerial powers.

Principle (d)

Does delegated legislation contain matter more appropriate for parliamentary enactment?

3.68 This is a principle not often raised by the Committee. It is, however, a breach of parliamentary propriety if matters which should be subject to all the safeguards of the parliamentary passage of a Bill are provided for in delegated legislation.

CHAPTER 4

MINISTERIAL UNDERTAKINGS IMPLEMENTED

4.1 Ministerial undertakings to amend legislation to meet the concerns of the Committee were implemented during the reporting period by the following instruments. Some of the undertakings were given during previous reporting periods but were not implemented until the present reporting year. Other undertakings were implemented during earlier reporting periods but not reported upon until now.

Air Navigation Regulations (Amendment)

Statutory Rules 1991 No.193

4.2 On 8 October 1991 the Minister for Transport and Communications, the Hon Kim Beazley MP, undertook to amend the Regulations to correct reference errors. This undertaking was implemented by the **Air Navigation Regulations (Amendment), Statutory Rules 1993 No.369**, of 15 December 1993.

Australian Sports Drug Agency Regulations

Statutory Rules 1991 No.19

4.3 On 21 June 1991 the Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon Ros Kelly MP, undertook to amend the Regulations to correct reference errors. This undertaking was implemented by the **Australian Sports Drug Agency Regulations (Amendment), Statutory Rules 1993 No.210**, of 27 July 1993.

AUSTUDY Regulations

(Amendment)

Statutory Rules 1993 No.367

4.4 On 23 February 1994 the Minister for Schools, Vocational Education and Training, the Hon Ross Free MP, undertook to amend the Regulations to correct drafting errors. This undertaking was implemented by the **AUSTUDY Regulations (Amendment), Statutory Rules 1994 No.91**, of 29 March 1994.

Civil Aviation Orders Parts 105, 106 and 107 Amendment Lists 12/90

4.5 On 5 March 1991 the Minister for Shipping and Aviation Support, Senator the Hon Bob Collins, undertook to amend the Orders to restrict discretions and to provide for AAT review. This undertaking was implemented by the **Civil Aviation Regulations (Amendment), Statutory Rules 1991 No.487**, of 23 December 1991.

Civil Aviation Orders Part 105 AD/F28/45 Amdt No.2

4.6 On 28 March 1991 the Minister for Shipping and Aviation Support, Senator the Hon Bob Collins, advised that the **Civil Aviation Orders Part 105 AD/F28/45 Amdt 3**, of 7 March 1991, had been made to meet the concerns of the Committee about legislative intent.

Civil Aviation Regulations (Amendment)

Statutory Rules 1993 No.268

4.7 On 1 March 1994 the Minister for Transport, the Hon Laurie Brereton MP, advised the Committee that the **Civil Aviation Regulations (Amendment), Statutory Rules 1994 No.368**, of 15 December 1993, had been made to meet the concerns of the Committee about the validity of provisions of the earlier Regulations.

Civil Aviation Regulations (Amendment)

Statutory Rules 1993 No.319

4.8 On 1 March 1994 the Minister for Transport, the Hon Laurie Brereton MP, undertook to amend the Regulations to provide for disallowance for certain directives and instructions. This undertaking was implemented by the **Civil Aviation Regulations (Amendment), Statutory Rules 1994 No.187**, of 9 June 1994.

Civil Aviation Regulations (Amendment)

Statutory Rules 1992 No.417

4.9 On 7 April 1993 the Minister for Transport and Communications, Senator the Hon Bob Collins, undertook to amend the Regulations to provide for certain directions to be given by Civil Aviation Orders. The undertaking was implemented by the **Civil Aviation Regulations (Amendment), Statutory Rules 1993 No.221**, of 10 August 1993.

Customs (Prohibited Exports) Regulations (Amendment)

Statutory Rules 1992 No.412

4.10 On 21 May 1993 the Minister for Science and Small Business, Senator the

Hon Chris Schacht, undertook to amend the Regulations to restrict the level of delegation. This undertaking was implemented by the **Customs (Prohibited Exports) Regulations (Amendment), Statutory Rules 1993 No.322**, of 2 December 1993.

Determination HSB 18/1992 made under s.23DNB(6) and s.23DNC(5) of the Health Insurance Act 1973

4.11 The Minister for Health, Housing and Community Services, the Hon Brian Howe MP, undertook to amend the Determination to provide for notice of right of appeal to the Administrative Appeals Tribunal as part of the Determination. This undertaking was implemented by **Determination INS13/1993 made under s.23DNA of the Health Insurance Act 1973**, of 9 June 1993.

Determination INS21/1993 made under s.4(1)(dd) of the National Health Act 1953

4.12 On 8 December 1993 the Minister for Health, Senator the Hon Graham Richardson, undertook to amend the Determination to amend drafting errors. This undertaking was implemented by **Determination INS23/1993 made under s.4(1)(dd) of the National Health Act 1953**, of 22 November 1993.

Determination No.TAFE 26/93 made under the States Grants (TAFE Assistance) Act 1989

4.13 On 6 October 1993 the Minister for Schools, Vocational Education and Training, the Hon Ross Free MP, advised that **Determination No.TAFE 28/93**, made on 16 September 1993, addressed the concerns of the Committee about invalidity.

Federal Airports (Amendment) By-Laws No.2 of 1992

4.14 On 5 November 1992 the Minister for Shipping and Aviation Support, Senator the Hon Peter Cook, undertook to remake invalid By-Laws. This undertaking was implemented by the **Federal Airports (Amendment) By-Laws No.2 of 1993**, of 3 November 1993.

Federal Airports Corporation Regulations

Statutory Rules 1992 No.255

4.15 On 15 October 1992 the Minister for Shipping and Aviation, Senator the Hon Peter Cook, undertook to amend the Regulations to correct reference errors. This undertaking was implemented by the **Federal Airports Corporation Regulations (Amendment), Statutory Rules 1993 No.344**, of 2 December 1993.

Great Barrier Reef Marine Park Regulations (Amendment)

Statutory Rules 1992 No.69

4.16 On 29 June 1992 the Minister for the Arts, Sport, the Environment and Territories, the Hon Ros Kelly MP, undertook to amend the Schedules to specify the common as well as the scientific names of marine creatures. This undertaking was implemented by the **Great Barrier Reef Marine Park Regulations (Amendment), Statutory Rules 1993 No.206**, of 27 July 1993.

Guidelines for Determination of Eligible Child Care Centres (Childcare Assistance) (No.CCA/4B/93/2) made under s.4C(1) of the Child Care Act 1972

4.17 On 10 December 1993 the Minister for Family Services, Senator the Hon

Rosemary Crowley, undertook to amend the Guidelines to provide for AAT review from 1 January 1994. This undertaking was implemented by the **Guidelines for Determination of Eligible Child Care Centres (Childcare Assistance) (Amendment) (No.CCA/4B/93/3)**, of 16 December 1993.

Importation of Arms, Ammunition and Explosives Ordinance 1992 Territory of Cocos (Keeling) Islands Ordinance No.6 of 1992

4.18 On 16 August 1993 the Parliamentary Secretary to the Minister for the Environment, Sport and Territories, the Hon Warren Snowdon MP, undertook to amend the Ordinance to correct references and to provide for review. This undertaking was implemented by the **Importation of Arms, Ammunition and Explosives (Amendment) Ordinance 1994, Territory of Cocos (Keeling) Islands Ordinance No.1 of 1994**, of 18 February 1994.

Leases Ordinance 1992 Jervis Bay Territory Ordinance No.1 of 1992

4.19 On 11 May 1993 the Minister for the Environment, Sport and Territories, the Hon Ros Kelly MP, undertook to amend the Ordinance to provide for AAT review and to limit delegation. This undertaking was implemented by the **Leases (Amendment) Ordinance 1993, Jervis Bay Territory Ordinance No.1 of 1993**, of 28 October 1993.

Locally Engaged Civilian Butterworth Determination 1993/1

4.20 On 15 October 1993 the Minister for Defence Science and Personnel, Senator the Hon John Faulkner, undertook to

amend the determination to correct outmoded and discriminatory provisions relating to the provision of accommodation. This undertaking was implemented by the **Locally Engaged Civilian Butterworth Determination 1993/2**, of 3 December 1993.

Migration (1993) Regulations (Amendment) Statutory Rules 1993 No.29

4.21 On 13 October 1993 the Minister for Immigration and Ethnic Affairs, Senator the Hon Nick Bolkus, advised that the **Migration (1993) Regulations (Amendment)**, Statutory Rules 1993 No.218, of 8 February 1993, had been made to meet the concerns of the Committee about the validity of provisions of the earlier Regulations.

Migration (1993) Regulations Statutory Rules 1992 No.367

4.22 On 29 September 1993 the Minister for Immigration and Ethnic Affairs, Senator the Hon Nick Bolkus, advised that the **Migration (1993) Regulations (Amendment)**, Statutory Rules 1993 Nos 19 and 88, of 22 January 1993 and 27 May 1993 respectively, had corrected drafting oversights noted by the Committee.

Notice No.5 of 1992 under ss.4 and 97 of the Commonwealth Employees' Rehabilitation and Compensation Act 1988

4.23 On 17 October 1993 the Minister for Industrial Relations, the Hon Laurie Brereton MP, advised that the **Notice No.1 of 1993 under s.97 of the Safety, Rehabilitation and Compensation Act 1988**, of 14 December 1993, had been made to meet the concerns of the

Committee about the validity of the earlier Notice.

Occupational Superannuation Standards Regulations (Amendment) Statutory Rules 1992 No.463

4.24 On 8 June 1993 the Parliamentary Secretary to the Treasurer, the Hon Gary Johns MP, undertook to amend the Regulations to correct references. This undertaking was implemented by the **Occupational Superannuation Standards Regulations (Amendment)**, Statutory Rules 1993 No.213, of 27 July 1993.

Ozone Protection (HCFC, HBFC and Methyl Bromide) Regulations Statutory Rules 1993 No.359

4.25 On 9 February 1994 the Minister for the Environment, Sport and Territories, the Hon Ros Kelly MP, undertook to amend the Regulations to correct drafting errors. This undertaking was implemented by the **Ozone Protection (HCFC, HBFC and Methyl Bromide) Regulations (Amendment)**, Statutory Rules 1994 No.136, of 16 May 1994.

Public Service Act 1922

4.26 On 15 December 1992 the Minister for Industrial Relations, Senator the Hon Peter Cook, undertook to amend the Act to validate the incorporation of overseas law. This undertaking was implemented by s.46 of the **Prime Minister and Cabinet (Miscellaneous Provisions) Act 1994**, assented to on 15 March 1994.

Public Service Determination 1992/30

4.27 On 24 July 1992 the Minister for Industrial Relations, Senator the Hon Peter

Cook, undertook to amend the Determination to correct a drafting oversight. This undertaking was implemented by **Public Service Determination 1992/82**, of 27 July 1992.

Public Service Determination 1992/333

4.28 On 3 August 1993 the Minister for Industrial Relations, the Hon Laurie Brereton MP, undertook to amend the Determination to delete a discretionary power. This undertaking was implemented by **Public Service Determination 1993/211**, of 17 August 1993.

Rules under the Federal Court of Australia Act 1976 Statutory Rules 1990 No.414

4.29 On 8 July 1991 the Chief Justice of the Federal Court undertook to amend the rules to correct a drafting oversight. This undertaking was implemented by the **Federal Court Rules (Amendment)**, Statutory Rules 1991 No.249, of 26 July 1991.

South East Fishery (Individual Transferable Quota) Management Plan 1991 Plan of Management No.SEF1 (No.11 of 1991)

4.30 On 27 May 1992 the Minister for Primary Industries and Energy, the Hon Simon Crean MP, undertook to amend the Plan to correct references. This undertaking was implemented by the **South East Fishery (Individual Transferable Quota) Management Plan 1991 (Amendment) (No.3)**, of 30 December 1992.

Superannuation (PSS) Temporary Employee Declaration No.2 Statutory Rules 1993 No.222

4.31 On 22 February 1994 the Minister for Finance, the Hon Kim Beazley MP, undertook to amend the **Superannuation Act 1976** and the **Superannuation Act 1990** to provide for retrospective Declarations. This undertaking was implemented by the **Superannuation Legislation Amendment Act 1994**, assented to on 23 June 1994.

Wool International Regulations (Amendment) Statutory Rules 1994 No.43 Wool Tax (Administration) Regulations (Amendment) Statutory Rules 1994 No.45

4.32 On 1 June 1994 the Minister for Primary Industries and Energy, Senator the Hon Bob Collins, advised that the Regulations were amended to correct references. This undertaking was implemented by the **Wool International Regulations (Amendment)**, Statutory Rules 1994 No.89, of 29 March 1994 and the **Wool Tax (Administration) Regulations (Amendment)**, Statutory Rules 1994 No.90, of 29 March 1994.

CHAPTER 5

MINISTERIAL UNDERTAKINGS NOT YET IMPLEMENTED

5.1 Below are Ministerial and other undertakings, given to amend legislation to meet the concerns of the Committee, which had not been implemented at 30 June 1994, the end of the reporting period. Some have been implemented since that date.

**Administrative Appeals Tribunal
Regulations (Amendment)
Statutory Rules 1994 No.276**

5.2 On 14 April 1994 the Minister for Justice, the Hon Duncan Kerr MP, undertook to amend the Regulations to provide for notification of rights.

**ATSIC (Misbehaviour)
Determination No.1 made under
s.4A of the *Aboriginal and Torres
Strait Islander Commission Act
1989***

5.3 On 24 June 1994 the Minister for Aboriginal and Torres Strait Islander Affairs, the Hon Robert Tickner MP, undertook to remove an offence provision.

**Australian Dried Fruits Board
(AGM) Regulations
Statutory Rules 1993 No.144**

5.4 On 26 October 1993 the Minister for Primary Industries and Energy, the Hon Simon Crean MP, undertook to amend the Regulations to correct references and simplify procedures.

**Australian Horticultural
Corporation (Honey Export
Control) Regulations
Statutory Rules 1993 No.26**

5.5 On 30 August 1993 the Minister for Primary Industries and Energy, the Hon Simon Crean MP, undertook to amend the Regulations to improve drafting, delete provisions for mandatory forms and provide for review of discretions.

**Australian Wool Corporation
Regulations (Amendment)
Statutory Rules 1992 No.438**

5.6 On 10 August 1993 the Minister for Primary Industries and Energy, the Hon Simon Crean MP, undertook to amend the Regulations to improve drafting.

**Banking (Statistics) Regulations
Statutory Rules 1989 No.357**

5.7 On 23 July 1990 the Minister Assisting the Treasurer, the Hon Simon Crean MP, undertook to amend the Regulations to require that a notification be in writing.

**Cash Transaction Reports
Regulations (Amendment)
Statutory Rules 1992 No.90**

5.8 On 2 October 1992 the Attorney-General, the Hon Michael Duffy MP, undertook to amend the Regulations to correct a drafting oversight.

Child Care Centre Relief Eligibility Guidelines made under s.12A of the Child Care Act 1972

5.9 On 27 May 1992 the Minister for Aged, Family and Health Services, the Hon Peter Staples MP, undertook to amend the Act and delegated legislation to provide for review of discretions, following an Australian Law Reform Commission review of child care.

Declaration made under s.9(1) of the Wildlife Protection (Regulation of Exports and Imports) Act 1982

5.10 On 18 February 1994 the Minister for the Environment, Sport and Territories, the Hon Ros Kelly MP, undertook to include common as well as scientific names in future Declarations.

Determination INS 21/1993 made under s.4(1)(dd) of the National Health Act 1953

5.11 On 8 December 1993 the Minister for Health, Senator the Hon Graham Richardson, undertook to validate the legislative intention of the Determination.

Electricity (Amendment) Ordinance 1991 Territory of Christmas Island Ordinance No.2 of 1991

5.12 On 22 August 1991 the Minister for Arts, Tourism and Territories, the Hon David Simmons MP, undertook to amend the Ordinance to provide for public officials to carry and produce identity cards.

Exempt Nursing Homes Principles 1990, EXP 1/1993, made under the National Health Act 1953

5.13 On 1 March 1994 the Minister for

Housing, Local Government and Community Services, the Hon Brian Howe MP, undertook to amend the Principles to improve drafting.

Export Inspection (Charges Collection) Regulations (Amendment) Statutory Rules 1992 No.251

5.14 On 12 November 1992 the Minister for Resources, the Hon Alan Griffiths MP, undertook to amend the Regulations to correct reference errors.

Fisheries Levy (Northern Fish Trawl Fishery) Regulations (Amendment) Statutory Rules 1992 No.13

5.15 On 3 June 1992 the Minister for Primary Industries and Energy, the Hon Simon Crean MP, undertook to amend the Regulations to correct a drafting oversight.

Formulation of Principles made under s.58CD of the National Health Act 1953

5.16 On 22 November 1993 the Minister for Housing, Local Government and Community Services, the Hon Brian Howe MP, undertook to validate provisions of the Principles.

Freedom of Information (Miscellaneous) Provisions Regulations (Amendment) Statutory Rules 1991 No.321

5.17 These Regulations, which provided for a conclusive exemption certificate to remain in force for five years, were disallowed by the Senate on policy grounds on 24 March 1992, with the result that such certificates remained in force indefinitely. On 29 April 1992 the Attorney-General, the Hon Michael Duffy

MP, undertook to consult with other agencies to ascertain the best way to resolve the matter.

Great Barrier Reef Marine Park Regulations (Amendment) Statutory Rules 1993 No.206

5.18 On 17 November 1993 the Minister for the Environment, Sport and Territories, the Hon Ros Kelly MP, undertook to amend the Regulations to provide for review of certain discretions.

Great Barrier Reef Marine Park Regulations (Amendment) Statutory Rules 1993 No.266

5.19 On 10 January 1994 the Minister for the Environment, Sport and Territories, the Hon Ros Kelly MP, undertook to amend the Regulations to provide for review of certain discretions.

Health Insurance Regulations (Amendment) Statutory Rules 1992 No.111

5.20 On 5 November 1992 the Parliamentary Secretary to the Minister for Health, Housing and Community Services, the Hon Gary Johns MP, undertook to amend the Regulations to limit the delegation of discretions.

Instrument 1419 (9308) made under s.40AA(6)(ce) of the National Health Act 1953

5.21 On 23 February 1994 the Minister for Housing, Local Government and Human Services, the Hon Brian Howe MP, undertook to include a reference to appeal mechanisms.

Meat Inspection (General) Orders (Amendment) Meat Inspection Orders No.3 of 1993

5.22 On 31 May 1994 the Minister for Primary Industries and Energy, Senator the Hon Bob Collins, undertook to validate provisions of the Orders.

Meat Inspection (New South Wales) Orders Meat Inspection Orders No.5 of 1993

5.23 On 2 May 1994 the Minister for Primary Industries and Energy, Senator the Hon Bob Collins, undertook to amend the Orders to provide for review of discretions.

Migration (1993) Regulations Statutory Rules 1992 No.367

5.24 On 29 September 1993 the Minister for Immigration and Ethnic Affairs, Senator the Hon Nick Bolkus, undertook to amend the Regulations to validate the incorporation of material and to provide safeguards for arrest warrants.

Migration (1993) Regulations (Amendment) Statutory Rules 1994 No.38

5.25 On 10 June 1994 the Minister for Immigration and Ethnic Affairs undertook to consider amending the Regulations to make clear the effect of a *Gazette* notice.

National Parks and Wildlife Regulations (Amendment) Statutory Rules 1992 No.319

5.26 On 10 February 1993 the Minister for the Arts, Sport, the Environment, Tourism and Territories, the Hon Ros Kelly

MP, undertook to amend the Regulations to extend the time for impounded animals to be claimed; and to provide for tabling and disallowance of legislative instruments.

NHMRC Guidelines for the Protection of Privacy in the Conduct of Medical Research

5.27 On 3 September 1991 the Minister for Justice, Senator the Hon Michael Tate, undertook to provide for the tabling and disallowance of the Guidelines.

Nursing Home Nasogastric Feeding Principles 1992 (NGP1/1992) Nursing Home Oxygen Treatment Principles 1992 (OTP1/1992)

5.28 On 1 October 1992 the Minister for Aged, Family and Health Services, the Hon Peter Staples MP, undertook to amend the Principles to provide for review of discretions.

Principles NHP 2/1993 made under the National Health Act 1953

5.29 On 7 October 1993 the Parliamentary Secretary to the Minister for Housing, Local Government and Community Services, the Hon Andrew Theophanous MP, undertook to amend the Principles to delete a legislative power.

Radiocommunications Regulations Statutory Rules 1993 No.177

5.30 On 25 November 1993 the Minister for Communications, the Hon David Beddall MP, undertook to amend the Regulations to provide for notification of rights.

Remuneration Tribunal Determinations

5.31 On 19 January 1993 the Minister for Industrial Relations, Senator the Hon Peter

Cook, undertook to consider amending the tabling requirements for Determinations made under the *Remuneration Tribunal Act 1973* following a review of the present procedures.

Statutory Rules series

5.32 On 10 August 1990 the Attorney-General, the Hon Michael Duffy MP, undertook to amend the *Acts Interpretation Act 1901* to provide that statutory rules relying on s.4 of that Act for their authority as well as another parent Act, may be made in the same instrument as those which rely only on a parent Act.

Television Licence Fees Regulations (Amendment) Statutory Rules 1992 No.448

5.33 On 19 August 1993 the Minister for Communications, the Hon David Beddall MP, undertook to amend the Regulations to correct a drafting error.

Wool Research and Development Corporation Regulations (Amendment) Statutory Rules 1992 No.443

5.34 On 10 August 1993 the Minister for Primary Industries and Energy, the Hon Simon Crean MP, undertook to amend the Regulations to improve drafting.

Zone Election Rules, Rules No.4 of 1990 made under the Aboriginal and Torres Strait Islander Commission Act 1989

5.35 On 12 April 1991 the Minister for Aboriginal Affairs, the Hon Robert Tickner MP, undertook to amend the Rules to remove strict liability and vicarious liability offences and a reversal of the usual onus of proof.

CHAPTER 6

DELEGATED LEGISLATION MADE UNDER THE UNIVERSITY OF CANBERRA ACT 1989: STATEMENT BY SENATOR COLSTON

6.1 On 16 December 1993, on behalf of the Committee, Senator Colston made a statement to the Senate on delegated legislation made under the *University of Canberra Act 1989*.

Senator Colston, 16 December 1993, Senate Weekly Hansard, p.4750

6.2 "Senator Mal Colston, the Chairman of the Committee, is the person appointed to the Council of the Australian National University (ANU) by the Governor-General on the nomination of the Prime Minister under s.10(1)(g) of the *Australian National University Act 1991*.

6.3 "The Australian National University Act provides for the general establishment and operation of the ANU. Among other things that Act provides that the ANU is, subject to one express exception, not subject to taxation under the laws of the Commonwealth or of a State or Territory. That exception is s.48(2), which provides that the ANU is subject to payroll tax under the law of a State or Territory.

6.4 "In the course of his duties as a member of the Council of the ANU, Senator Colston was informed that the University of Canberra also paid payroll tax to the Australian Capital Territory government, apparently under some instrument of delegated legislation.

6.5 "Senator Colston then asked the Legal Adviser to the Committee, Emeritus

Professor Douglas Whalan, about the legislative basis upon which the University of Canberra paid this tax. Professor Whalan reported that there appeared to be no legislative requirement for the tax to be paid. The Legal Adviser added, however, that he was somewhat hesitant about his opinion, because it seemed unusual that a major institution was paying considerable amounts in tax with no legal obligation to do so.

6.6 "The University of Canberra was the effective successor to the Canberra College of Advanced Education, established under the *Canberra College of Advanced Education Act 1967*. There was no doubt that the Canberra CAE was required to pay payroll tax. A series of Regulations, made under an express provision of the parent Act, provided for such liability, the latest being the *Canberra College of Advanced Education (Liability to Taxation) Regulations (Amendment), Statutory Rules 1989 No. 90*. The effect of those regulations was that the CAE was liable to taxation under the *Pay-roll Tax (Territories) Assessment Act 1971* and the *Payroll Tax Ordinance 1987* of the Australian Capital Territory.

6.7 "The University of Canberra was then established under the *University of Canberra Act 1989*, which commenced on 1 January 1990. That Act repealed the Canberra College of Advanced Education Act. Section 38 of the new Act established the liability to taxation of the University of Canberra. That section provided:

Taxation

“38. (1) Subject to subsection (3), the University is not subject to taxation under the laws of the Commonwealth or of a State or Territory.

“(2) Without limiting the generality of subsection (1) but subject to subsection (3), the University is not subject to taxation imposed by the *Debits Tax Act 1982*.

“(2A) Subject to subsection (3), sales tax is not payable by the University, or by any other person, on goods that are for use by the University.

“(3) The Governor-General may make regulations providing that this section does not apply in relation to taxation under a specified law.”

6.8 “No regulations had been made providing that section 38 did not apply in relation to taxation under a law imposing ACT payroll tax. The question, therefore, was whether any other provision of the University of Canberra Act expressly required payment of the tax, provided the power to require such payment, or provided that the liability of the CAE to pay payroll tax continued as an obligation of the University. Professor Whalan could find no such provisions.

6.9 “The University of Canberra Act provided for the Council to make Statutes on a wide range of matters. The Statutes appeared to be legislative and were required to be approved by the Governor-General, notified in the *Gazette* and tabled in both Houses of Parliament. Rules and orders could be made under the Statutes. There was nothing, however, to indicate that a Statute could override the plain words of a section of the Act. In any event, no such Statutes had been made.

6.10 “The University of Canberra Act also provided extensive consequential and transitional provisions to ensure a smooth transition from the old CAE to the new University. Thus, the University was deemed to be the successor in law of the CAE, the assets and liabilities of the CAE became those of the University, and CAE instruments (expressly defined to include legislative instruments) and Statutes continued to have effect. Here also, however, there was nothing to indicate either that payroll liability continued or that power existed under these provisions to impose such liability.

6.11 “Senator Colston therefore wrote to the University of Canberra and to the Commonwealth Auditor-General, whom the University of Canberra Act requires to audit the financial statements of the University. The replies which he received confirmed that there was no requirement for the University to pay payroll tax under the ACT Act. The replies also indicated that either the Act would be amended or regulations made to impose such liability.

6.12 “The **University of Canberra Regulations, Statutory Rules 1993 No.244**, were then made on 15 September 1993. The Regulations were quite short, providing that section 38 of the Act did not apply in relation to taxation under the *Payroll Tax Act 1987* of the Australian Capital Territory. The regulations were taken to have commenced retrospectively to 1 January 1990, which was the date of commencement of the University of Canberra Act.

6.13 “The explanatory statement for the Regulations set out the background to their making. It advised that it had been intended that the University would be liable to pay ACT payroll tax. Recent legal

advice had, however, indicated that in the absence of specific regulations under subsection 38 (3) of the University of Canberra Act, the University was not liable to the payment of this tax. The explanatory statement further advised that the purpose of the Regulation was to make the University liable to the payment of payroll tax under the ACT Payroll Tax Act.

6.14 “The explanatory statement then properly discussed the legal effect of the retrospective commencement of the Regulations. Under s.48 (2) of the *Acts Interpretation Act 1901* regulations are void if the rights of a person, other than the Commonwealth or an authority of the Commonwealth, would be prejudiced or liabilities imposed upon them before the date of gazettal of the regulations. Therefore, unless the University was an authority of the Commonwealth, the Regulations would be void. The explanatory statement then explained that the Office of General Counsel, Attorney-General's Department, had advised that the University was created as an instrument of government. Although the University was granted considerable autonomy in carrying out its functions, the Commonwealth retained significant powers in relation to those functions. Its purpose in providing higher education, in the opinion of the Office of General Counsel, may rightly be viewed as governmental and the University as an authority of the Commonwealth. The retrospective commencement of the Regulations was not, therefore, in contravention of s.48 (2) of the *Acts Interpretation Act*.

6.15 “The Committee was surprised at this advice that the University of Canberra was created as an instrument of government and was an authority of the Commonwealth. It therefore wrote to the

Minister for Employment, Education and Training, the Hon Kim Beazley MP, asking for a copy of the Office of General Counsel's advice and of the advice that before the Regulations were made the University was not liable to pay ACT payroll tax.

6.16 “The Minister promptly arranged for the Committee to receive the advisings, which accorded with the advice in the explanatory statement.

6.17 “The Committee does not dispute the advice from Office of General Counsel. Rather, it draws this matter to the attention of the Senate as an interesting by-way of Commonwealth public administration. The Committee spends a great deal of its time looking at provisions of delegated legislation which should never have been made. It is unusual for it to encounter a case where delegated legislation should have been made but was not.”

CHAPTER 7

THE STANDARD OF PROOF IN AUSTRALIAN FEDERAL POLICE DISCIPLINARY PROCEEDINGS: STATEMENT BY SENATOR COLSTON

7.1 On 16 December 1993, on behalf of the Committee, Senator Colston made a statement to the Senate on the standard of proof in Australian Federal Police Disciplinary Proceedings.

Senator Colston, 16 December 1993, Senate Weekly Hansard, p.4752

7.2 "On 23 June 1992 Senator Giles, then Chair of the Committee, reported to the Senate on its scrutiny of the **Complaints (Australian Federal Police) Regulations (Amendment), Statutory Rules 1992 No.58**. Senator Giles reported that the Regulations raised issues of such interest and concern that the Committee considered that a detailed statement should be made. The purpose of this present statement is to inform the Senate of recent developments in this matter.

7.3 "The substantive issue which concerned the Committee about these Regulations was a provision that the standard of proof required before the Federal Police Disciplinary Tribunal is proof beyond reasonable doubt. This standard of proof was that required in criminal proceedings, rather than the lesser civil standard of proof on the balance of probabilities. The Committee asked the Minister why the higher standard of proof was adopted.

7.4 "The then Minister for Justice, Senator the Hon Michael Tate, advised that the purpose of the Regulations was to

validate the existing standard of proof, not to implement a new policy decision. The reason for the criminal standard of proof was that penalties imposed following disciplinary proceedings could have practical consequences as severe as any criminal sentence short of imprisonment. In addition, many breaches of discipline could also be crimes. This was significant because of the confrontational nature of much police contact with the public. Also, the prospect of a lower standard of proof would discourage pursuit of criminal investigation of those police who breached discipline. Finally, the lower standard could harm an AFP member in ambiguous circumstances and be a means for dishonest persons to raise doubts about police evidence or avenge themselves on an AFP member.

7.5 "The Committee considered that this matter was so important that it should be briefed by the then Commonwealth Ombudsman, Mr Alan Cameron, and by other senior officials of his office. The Ombudsmen advised that the civil standard was a floating standard, which varied according to the degree of seriousness of the charge. On the other hand, the criminal standard encouraged undue caution when disciplinary proceedings are being considered. The criminal standard may be defensible when a member's career was at stake, but the civil standard was more suitable for less serious offences. Most State police forces now had the civil standard.

7.6 “The Committee therefore had to balance two compelling but conflicting arguments. On the one hand, the criminal standard of proof beyond reasonable doubt gave a high level of protection to individual AFP members while providing lesser protection to members of the public. On the other hand, the civil standard of proof on the balance of probabilities gave lesser protection to AFP members but greater protection for the broader public interest.

7.7 “After considerable discussion the Committee adopted its usual course where there are two or more conflicting sets of rights to be protected, and did not seek amendment of the relevant delegated legislation.

7.8 “The matter then rested for more than a year, with no further developments coming to the attention of the Committee. The Committee then received for scrutiny two sets of regulations which overturned the previous policy about the standard of proof in AFP disciplinary procedures expressly affirmed by regulation eighteen months previously.

7.9 “The **Complaints (Australian Federal Police) Regulations (Amendment), Statutory Rules 1993 No.307**, made on 17 November 1993, are very short. The only substantive provision is two lines long, amending the principal Regulations by omitting “beyond reasonable doubt” from the regulations dealing with the standard of proof in AFP disciplinary proceedings and substituting “on the balance of probabilities”. Because the Regulations do not expressly provide for a date of commencement, they commenced on gazettal, in this case 25 November 1993.

7.10 “The explanatory statement advised that the purpose of the Regulations was to replace the existing criminal standard of

proof which is applied in disciplinary proceedings before the Federal Police Disciplinary Tribunal with the civil standard of proof. The explanatory statement further advised that the level of proof required in proceedings under the new standard would not be significantly different as a result of this change where the breach of discipline is serious. This is because the test provides for a higher standard of proof depending on the seriousness of the issue and the gravity of consequences following from an adverse finding of the Tribunal. The new Regulations ensure, advises the explanatory statement, that the AFP internal disciplinary scheme is an effective personal management tool and is consistent with the standard of proof required in most other Australian police forces.

7.11 “The **Australian Federal Police (Discipline) Regulations (Amendment), Statutory Rules 1993 No.306**, also made on 17 November 1993, among other things omit “beyond reasonable doubt” from a regulation dealing with hearings before the Commissioner and substitute “on the balance of probabilities”. Because the Regulations do not provide for a date of commencement, they commenced on gazettal, which was 25 November 1993. The relevant parts of the explanatory statement for these Regulations were identical with those for the corresponding amendments of the **Complaints (Australian Federal Police) Regulations**.

7.12 “The Committee noted that the two sets of Regulations overturned the previous policy on the standard of proof, but decided not to write to the Minister. From its previous investigation the Committee was aware of the relevant issues and accepted that reasonable people of good will could differ on how to address these

issues. Accordingly, it accepted the executive prerogative to change the law in this way, thereby affecting the existing balance of personal rights and safeguards. Nevertheless, this does not mean that Members of the Committee do not hold definite views on the matter.

7.13 “This case illustrates the flexibility of executive law making and how a major change of policy may be implemented by delegated legislation. It also illustrates the difficult task of balancing the rights of different groups, where to provide effective safeguards for one may result in the dilution of existing safeguards for another. As noted previously the Committee is not assertive in such cases, seeking rather to inform itself of the issues and to be aware of the dilemma. This is particularly so, as in the present case, where Members of the Committee are as likely to hold different views on the matter as any other representative Australian group.”

CHAPTER 8

REQUIREMENTS FOR TABLING OF DELEGATED LEGISLATION: STATEMENT BY SENATOR COLSTON

8.1 On 29 June 1994, on behalf of the Committee, Senator Colston made a statement to the Senate on the requirements for tabling of delegated legislation.

Senator Colston, 29 June 1994, Senate Weekly Hansard, p.2219

8.2 "The *Acts Interpretation Act 1901* provides a number of mandatory procedural and other safeguards which ensure that the Senate exercises an appropriately effective supervision of delegated legislation made by the Executive. These are that legislative instruments must be tabled in both Houses within 15 sitting days of making, and are subject to disallowance up to 15 days sitting days after a notice of a motion of disallowance which itself may be given up to 15 sitting days after tabling. In addition, if after 15 sitting days of a notice of a motion of disallowance the notice has not been called on or otherwise disposed of, the regulations in the notice are deemed to have been disallowed. There are special safeguards protecting the right of a House of Parliament to disallow where the House of Representatives is dissolved or expires, or the Parliament is prorogued.

8.3 "The ability of Parliament to supervise delegated legislation is also protected by provisions under which delegated legislation must not be re-made before it is tabled and must not be re-made while subject to disallowance, while disallowed delegated legislation must not

be re-made without approval of the disallowing House.

8.4 "There are other safeguards in the Act which directly protect the rights of the public. For instance, delegated legislation must be gazetted, prejudicial provisions must not operate retrospectively and there are limits on the material which may be incorporated.

8.5 "The consequences of breaches of these safeguards are suitably severe, offending instruments being either void in whole or part or ceasing to have effect at the end of a specified period.

8.6 "The Senate has delegated to the Standing Committee on Regulations and Ordinances the responsibility of scrutinising the non-policy aspects of each one of the 1,600 disallowable legislative instruments tabled each year to ensure compliance with the highest standards of personal rights and parliamentary propriety. In addition, individual Senators often take action in respect of policy aspects of delegated legislation.

8.7 "To exercise this control over delegated legislation, however, the Parliament, which in practice means the Senate, and the Standing Committee on Regulations and Ordinances must be adequately informed. In this context there is a duty on public servants to ensure that disallowable instruments are tabled within a time which allows adequate scrutiny. In this context, there are situations where it is unacceptable for tabling to be delayed until

the end of the statutory period of 15 sitting days after making. The Committee recently encountered such a situation.

8.8 "In this case a Declaration No 2 of 1994, which extended an earlier Declaration No 1 of 1994 for 30 days from 6 March 1994, was made and gazetted on 4 March 1994. The Declaration therefore ceased to have effect on 6 April 1994. The Declaration was not tabled in either House, however, until the last day upon which it was possible to do so, on the fifteenth sitting day after making, 30 May 1994, more than three weeks after it ceased to have effect and some three months after it was made.

8.9 "This position was most unsatisfactory, as Parliament had no opportunity to scrutinise the Declaration until well after it ceased to have effect. Moreover, in this case the breach of parliamentary propriety was exacerbated because a further separate Declaration then effectively extended the operation of the terms of Declaration No 2 of 1994 for a further five years. This later Declaration was made on 6 April 1994 and tabled on 10 May 1994, some three weeks before the Declaration which it replaced was tabled. Further, it seems probable that Declaration No 2 of 1994 would not have been tabled at all without a reminder from staff of the Regulations and Ordinances Committee.

8.10 "Given the nature of Declaration No 2 of 1994, it should have been tabled on the first available sitting day after making, on 14 March 1994, which was 10 days after the Declaration was made. It is noteworthy that it was found to be possible to arrange gazettal of the Declaration, which is not even a statutory requirement under the enabling Act, for the same day as making. It was, however, apparently not possible to arrange tabling, which is a statutory requirement and a necessary prerequisite

for scrutiny, until almost three months after it was made.

8.11 "There have also been recent cases of failures by public officials to table even by the fifteenth sitting day. In one instance the Senate received from a Department a disallowable instrument for tabling with a covering memorandum dated 3 June 1994. The instrument itself had been made on 17 November 1993 and was therefore required to be tabled 15 sitting days after that, on 17 December 1993. Failure to table by that date resulted in the instrument thereby ceasing to have effect. The instrument did not include an express commencement provision and therefore, under the Acts Interpretation Act, it commenced on gazettal. The Committee understands that the instrument was not gazetted and therefore did not come into operation. Nevertheless the instrument, which was not accompanied by an explanatory statement, appeared to be an important part of a major government program.

8.12 "This situation is also unsatisfactory. The result was that the Senate was not able to scrutinise a significant legislative instrument which was apparently intended to enter into force. That it did not do so, because of failure to observe procedural requirements, was fortuitous.

8.13 "Episodes such as these reflect poorly on the administrative competence of Departments and agencies. Ministers should instruct the agencies for which they are responsible to ensure that tabling requirements are met promptly and, in particular, that Parliament is given every opportunity to scrutinise instruments in a meaningful way. Appropriate compliance with legislative requirements is a hallmark of the administrative effectiveness of an agency."

CHAPTER 9

THE TERRITORY OF CHRISTMAS ISLAND CASINO CONTROL ORDINANCE 1988: STATEMENT BY SENATOR COLSTON

9.1 On 29 June 1994, on behalf of the Committee, Senator Colston made a statement to the Senate on the **Territory of Christmas Island Casino Control Ordinance 1988**.

Senator Colston, 29 June 1994, Senate Weekly Hansard, p.2220

9.2 "The **Territory of Christmas Island Casino Control Ordinance 1988** was made under the *Christmas Island Act 1958* by the Governor-General on 22 September 1988 and was scrutinised by the Committee in the usual way. This scrutiny revealed a number of apparent defects which the Minister undertook to remove by amending the Ordinance.

9.3 "One of these defects was lack of provision for parliamentary scrutiny and control of procedures under which the casino licence was to be granted. In the case of this particular ordinance, the Committee accepted that it was necessary for the eventual grant of the licence to be tabled in both Houses only, rather than to be subject to both tabling and possible disallowance. The reason for this is that, as the establishment of a casino would have considerable commercial implications for a private sector organisation, it was considered sufficient for Parliament to be informed about the grant of the licence but not have the licence subject to disallowance. On the other hand, the Committee considered that Parliament should be in ultimate control of the procedures leading to the grant. In a matter

as important and sensitive as the grant of a casino licence in an area for which the Commonwealth Government has responsibility, parliamentary supervision of the processes leading to the grant would be more likely to ensure that appropriate safeguards are initiated before a commercial agreement actually came into force.

9.4 "Accordingly, the Committee accepted the undertaking of the Minister of 23 November 1988 to amend the Ordinance to provide, among other changes to satisfy the Committee, that no fewer than 12 procedural requirements should be subject to tabling and possible disallowance. These procedures included those leading to the grant or assignment of a casino licence, the lease of the casino or its associated resort hotel, agreements between the developer and the operator, certain contracts for the supply of goods and services to the casino, licences for employees and exclusion of people from the casino. The Minister's undertaking was implemented by the **Casino Control (Amendment) Ordinance 1989, Ordinance No 8 of 1989**.

9.5 "It is worth noting that the relevant disallowance provisions in all these cases were provided for directly by reference to the parent *Christmas Island Act 1958*, not by applying appropriate provisions of the *Acts Interpretation Act 1901* or by making use of the regulation making power in the principal Ordinance. The relevant provisions of the Christmas Island Act

provide not only for disallowance of legislative instruments, but also for partial disallowance. This is an important safeguard, which the Committee has argued should be available for all delegated legislation. Unfortunately, the number of series of instruments in respect of which this option may be exercised is at present quite limited.

9.6 "On 5 November 1993 the Parliamentary Secretary, acting for the Minister, granted a casino licence under s.53(1) of the Ordinance. The instrument was tabled in the Senate on 18 November 1993. The instrument was neither numbered nor accompanied by an explanatory statement. As noted earlier, the grant of a licence under s.53(1) was subject to tabling but not disallowance. Under s.53(2), however, the licence must be in a form approved by the Minister, with the actual form being subject to both tabling and disallowance.

9.7 "The Committee was concerned at a number of aspects of the instrument. The Committee accepted that the lack of numbering, although virtually all delegated legislation is numbered, was perhaps understandable as the legislation contemplated only one casino licence for Christmas Island, which was granted for 15 years. The lack of an explanatory statement, however, was an unfortunate defect, as it may have explained the chief concern of the Committee. This was that the approved form of the licence had not been tabled as required by s.53(2). This was a disturbing aspect of the administration of the Ordinance, as parliamentary scrutiny of the processes leading to the grant of a licence is an important safeguard, expressly included to meet the earlier concerns of the Committee.

9.8 "Several explanations suggested themselves to the Committee. The first was that the failure to table the form of the licence was simply a managerial oversight, which could possibly be cured by future tabling. The second was that, for some reason, tabling of the approved form had been deliberately delayed. The most likely explanation, however, appeared to be that the s.53(2) approval was implied in the s.53(1) grant. In this context, the Committee's Legal Adviser, Emeritus Professor Douglas Whalan AM, advised that the latter position would be both unusual and unsatisfactory.

9.9 "The Committee therefore wrote to the Minister, noting that it had not seen a s.53(2) approval and asking whether one would be tabled, or whether the tabling of the s.53(1) instrument was intended to satisfy the requirements of s.53(2). If tabling the one non-disallowable instrument was also considered to be tabling the other disallowable instrument the Committee asked for urgent confirmation that the one page tabled instrument was subject to disallowance. If this was not the case the Committee asked for advice on the precise text which was subject to disallowance. Also, if it was not intended to table a separate approved form, the Committee asked the Minister to arrange for suitably senior officers of the Department to attend its next meeting to brief Members on the procedural responsibilities imposed by the Ordinance. Finally, the Committee pointed out that express approvals of other forms had been separately tabled. For instance, approval of the form of an agreement under s.62(2) between Christmas Island Resort Pty Ltd and Casinos Austria International Pty Ltd was tabled. That form correctly indicated that it was a s.62(2) disallowable instrument and not an approval of the agreement

under s.62(1), which is subject to tabling but not disallowance.

9.10 "The reply to the Committee's letter relied on written advice from the Department of the Environment, Sport and Territories and from the Attorney-General's Department. The advice was that the scheme envisaged by the Ordinance was that an appropriate form for a casino licence would probably be approved by the Minister under s.53(2) before a licence would be granted under s.53(1). In this case, however, a separate form was not approved. Instead, the Parliamentary Secretary impliedly approved the form of the licence and expressly granted the licence in the same document. The advice was that although the form of the licence was not blank but already filled in, this did not matter because under the Ordinance there will normally only be a single licensee. The advice emphasised that the position may well be different if an approved form would be completed by or in respect of many individuals. In this case, however, it was likely that the form of the licence would be different for each consecutive licensee, reflecting the fact that the Minister may have particular requirements for each licence.

9.11 "The Attorney-General's Department then advised that those parts of the one page instrument tabled on 18 November 1993 which were part of the approved form were disallowable, while the rest, not part of the form, were not disallowable. Further, if the disallowable parts were actually disallowed, the licence would not thereby cease to be valid.

9.12 "The result was that a single, short, one page document was tabled in the Senate, some of the text of which was disallowable while other text was not. The practicalities of the situation were

complicated by the tabled grant of the casino licence consisting of six paragraphs, which were not numbered, each of which contained only one sentence. It appears that some individual words and phrases could be disallowed but not other words and phrases in the same sentence.

9.13 "The Committee accepted the advice without insisting on the information it had requested in its letter to the Minister about the precise text which was disallowable. Instead, it noted that the advice expressly confirmed that the procedures followed were probably not those envisaged when the Governor-General made the Ordinance. It also noted the advice of its Legal Adviser that the present procedures were both unusual and unsatisfactory. The Committee believes that future action under the Ordinance should take the form that was originally intended and which was in fact used in respect of other aspects of the administration of the Ordinance. To do otherwise, as occurred in this case, is to make a mockery of either primary or delegated legislation or both."

Mal Colston
Chairman
December 1994

APPENDIX 1

CLASSIFICATION OF LEGISLATIVE INSTRUMENTS UNDER THE HEADING "MISCELLANEOUS" IN PARAGRAPH 1.8

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APPENDIX 2

DISALLOWABLE INSTRUMENTS TABLED IN THE SENATE 1993-94

During the year 1993-94 there were 1,803 disallowable legislative instruments considered by the Committee. Of these, 490 were included in the statutory rules series, which are easily accessible to users, being part of a uniform series which is consecutively numbered, well produced, available on ADP, indexed and eventually included in annual bound volumes. The other 1,313 instruments, however, are generally less accessible, possessing few of the advantages of statutory rules. These other series are listed as follows:

<i>Aboriginal and Torres Strait Islander Commission Act 1989</i>	determinations, ss.4A,119,194 notices, s.116 rules, ss.113,138
<i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i>	declarations, ss.9,10,12
<i>Acts Interpretation Act 1901</i>	orders, s.19BA
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<i>Australian Antarctic Territory Act 1954</i>	ordinances, s.12
<i>Australian Capital Territory (Planning and Management) Act 1988</i>	territory plans, ss.19,21
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<i>Corporations Act 1989</i>	accounting standards, s.32
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<i>Defence Force (Home Loans Assistance) Act 1990</i>	declarations, s.3C
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<i>Health Insurance Act 1973</i>	declarations, ss.106L,124X
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<i>Horticultural Research and Development Corporation Act 1987</i>	orders, s.81
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