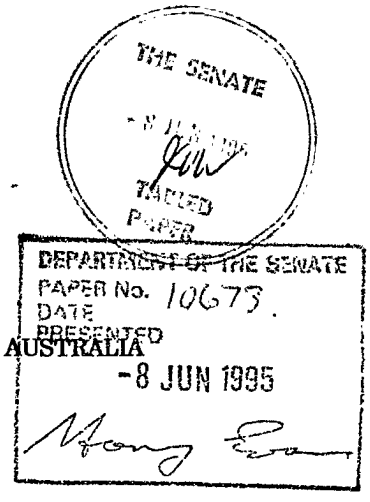

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES

RULES OF THE INDUSTRIAL RELATIONS COURT

ONE HUNDRED AND FIRST REPORT

JUNE 1995

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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 Jacinta Collins[1]
Senator Michael Forshaw[2]
Senator Stephen Loosley[3]
Senator Nick Minchin
Senator Tom Wheelwright[4]
Senator Olive Zakharov[5]

1 Senator Jacinta Collins commenced as a member of the Committee on 30 May 1995.
2 Senator Forshaw commenced as a member of the Committee on 1 March 1995 and was discharged on 30 May.
3 Senator Loosley resigned from the Senate on 21 May 1995.
4 Senator Wheelwright commenced as a member of the Committee on 30 May 1995.
5 Senator Zakharov was a member of the Committee until 1 March 1995.

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

LEGISLATIVE CONSIDERATIONS

1.1 Each of Australia's four federal courts may make legislative instruments under express provisions of the Acts which establish those courts or, in the case of the High Court of Australia, under the two Acts which make provision for aspects of the operation of that Court.

The High Court

1.2 Section 86 of the *Judiciary Act 1903* provides that the judges of the High Court may make rules of court and outlines particular matters in respect of which rules of court may be made.

1.3 Section 87 of the *Judiciary Act 1903* applies sections 48, 48A, 48B, 49 and 50 of the *Acts Interpretation Act 1901* to rules of court made under section 86. With the exception of section 49A, which provides for prescribing matters by reference to other instruments, the specified sections comprise the whole of Part XII of the *Acts Interpretation Act 1901*. These sections, in effect, provide for parliamentary scrutiny of the rules of court, with the possibility that either House may disallow an entire set of the Rules, or any discrete, numbered rule included either as part of that set of rules or inserted by them in the principal rules.

1.4 Section 48 of the *High Court of Australia Act 1979* provides that the power to make rules of court under the *Judiciary Act 1903* extends to making rules to carry into effect the provisions of the *High Court of Australia Act 1979*.

The Family Court

1.5 Section 123 of the *Family Law Act 1975* provides that the judges of the Family Court of Australia, may make rules in relation to the practice and procedure of the Family Court and any other courts exercising jurisdiction under that Act. That section also specifies particular matters in respect of which rules may be made, and applies sections 48, 48A, 48B, and 49 and 50 of the *Acts Interpretation Act 1901* to any rules of court.

The Federal Court and the Industrial Relations Court

1.6 Section 59 of the *Federal Court of Australia Act 1976* provides for rules to be made by the judges of that court, and applies the same provisions of the *Acts Interpretation Act 1901* to those rules. Section 486 of the *Industrial Relations Act 1988* makes similar provision for the judges of the Industrial Relations Court to make rules. It is by virtue of subsection 486 (4) that the previously mentioned provisions of the *Acts Interpretation Act 1901* apply to the rules of court.

Summary

1.7 In summary, enabling Acts provide for the judges of the four federal courts to make rules of court relating to the operation of each court. Those Acts, however, also provide for each House of the Commonwealth Parliament to supervise and control this exercise of power by the judges. The Acts, by generally applying to rules of court the same provisions which the *Acts Interpretation Act 1901* applies to regulations, provide important safeguards in respect of the rules. Some of these safeguards are that the rules must be gazetted, must be tabled in each House of the Parliament within 15 sitting days of that House after the making of the regulations, must not operate prejudicially before gazettal and may be disallowed by either House.

1.8 The result of these provisions is that each House has the ultimate option of vetoing any rules made by the judges of federal courts. In the Senate, Standing Order 23 provides that all disallowable legislative instruments stand referred to the Standing Committee on Regulations and Ordinances ('the Committee') for consideration and, if necessary, report. Standing Order 23 also requires the Committee to scrutinise these instruments to ensure that they comply with parliamentary propriety and do not detrimentally affect personal rights and liberties. It is the Committee, therefore, which, on behalf of the Senate, scrutinises rules of the federal courts and reports on any possible defects which it finds.

CHAPTER 2

SCRUTINY OF COURT RULES

2.1 Most of the approximately 1,600 instruments of delegated legislation scrutinised by the Committee each year are made by officers or other representatives of the Executive, including the Governor-General, Ministers, statutory authorities, statutory officers and departmental officers. There are numbers of instruments, however, which are made by the Legislature or by the Judiciary. Instances of those made by officers of the Legislature include the **Parliamentary Presiding Officers' Determinations** and the **Clerk of the Senate's Determinations**. This present Report will describe recent scrutiny by the Committee of one set of legislative instruments made by judges, specifically the **Rules of the Industrial Relations Court of Australia, Statutory Rules No 110 of 1994.**

2.2 The Committee scrutinises legislative instruments made by the Judiciary against the same criteria it uses when scrutinising instruments made by the Legislature or by the Executive. The Committee's objective is to ensure that all delegated legislation satisfies similar standards of parliamentary propriety and that it does not trespass unduly on personal rights and liberties. A brief summary of some of the results of the Committee's scrutiny of instruments made by judges illustrates the kind of concerns which the Committee raises.

Some instruments made by federal courts

2.3 The Committee scrutinised **High Court Directions No 1 of 1984** made under section 19 of the *High Court of Australia Act 1979*, a disallowable instrument made on behalf of the Court by the Clerk of the Court. The Directions included an incorrect reference, which the Clerk undertook to correct, and two offence provisions which placed the onus of proof on the defendant rather than the prosecution. After considerable correspondence the Court advised the Committee that it could not accept suggested amendments but would delete the two provisions.[1]

2.4 The Committee was also concerned about High Court Rules which imposed an interest rate on judgment debts of double the previous rate, with a

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1 Senate Standing Committee on Regulations and Ordinances, *Seventy-fifth Report, Legislation Considered February to June 1984*, Parliamentary Paper No. 303/1984, CGP, Canberra, 1985: 7.

retrospective effect of almost two years. On this occasion the High Court agreed to remove the retrospectivity.[2] The High Court, through the Chief Justice, also undertook to change the way the Rules publish a schedule of costs.[3]

2.5 On another occasion, the Committee was concerned with the inadequacy of the Explanatory Statement which accompanied an amendment of the **Family Court of Australia (Delegation of Powers) Rules, Statutory Rules 1988 No 10**. The Chief Justice of the Family Court advised the Committee that the court lacked the resources to prepare more detailed Explanatory Statements. The Committee considered this to be unsatisfactory, particularly given the amount of interest in this area of the Law. Accordingly, the Committee supported the Chief Justice in his request to the Attorney-General to make arrangements for the provision of proper Explanatory Statements to accompany amendments to the Rules.[4]

2.6 The Committee's legal adviser, Emeritus Professor Douglas Whalan AM, advised the Committee that the **High Court Rules (Amendment), Statutory Rules 1993 No 324**, included a reference error. This error was, however, subsequently corrected before the Committee could write to the Court.

2.7 It was in this context of the continuing oversight by the Committee, on behalf of the Senate, of legislative instruments made by judges of federal courts that the Committee scrutinised the **Rules of the Industrial Relations Court of Australia, Statutory Rules No 110 of 1994**, made on 30 March 1994 and tabled in the Senate on 11 May 1994.

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2 Senate Standing Committee on Regulations and Ordinances, *Seventy-third Report, Legislation Considered March to November 1982*, Parliamentary Paper No. 326/1982, CGP, Canberra, 1983: 10.

3 Senate Standing Committee on Regulations and Ordinances, *Eighty-third Report*, Parliamentary Paper No. 377 of 1988, AGPS, Canberra 1988: 86.

4 Senate Standing Committee on Regulations and Ordinances, *Eighty-fifth Report*, Parliamentary Paper No. 464 of 1989, AGPS, Canberra, June 1989: 17.

CHAPTER 3

ACTION BY THE COMMITTEE

3.1 After the Committee received the Legal Adviser's report on the **Industrial Relations Court Rules, Statutory Rules No 110 of 1994** ("the Rules") and considered the issues which that report raised, the Chairman wrote to the Chief Justice in the following terms:

27 May 1994

Chief Justice M R Wilcox
Industrial Relations Court of Australia
Law Court Building
Queens Square
SYDNEY NSW 2000

Dear Chief Justice

I refer to the Industrial Relations Court Rules, Statutory Rules 1994 No 110, considered by the Committee at its meeting of 2 June 1994. The Committee raises the following matters, about which it would be grateful for your advice.

1. *Order 1, r.2 provides that the Rules come into operation on 30 March 1994, which is the day that they were made. The Note to the Rules, however, advises that they were not notified in the Gazette until 5 May 1994, more than five weeks later. The Committee asks whether any obligations were imposed or people prejudiced in any way by the Rules during that five week period. If so, the Committee would be concerned and would appreciate your comments on the implications for personal rights of this delay.*

2. *Order 3, r.2(5) provides that s.36(2) of the Acts Interpretation Act 1901 does not apply to the Rules. The Committee assumes that there is express statutory power for the Rules to negate the provisions of an Act in this way and would be grateful for your confirmation of this.*

3. *Order 4, r.12(3) twice refers to Order 71, which does not appear to exist.*

4. *Order 7, r.13 refers to telegrams, which no longer appear to exist.*

5. *Order 8, rr.14 and 16 refer to Forms 14A, 14B and 14C in the First Schedule, which do not appear to exist.*

6. *Despite the provisions of Order 1, r.7, members of provisions expressly refer to individually numbered Forms, sometimes with and sometimes without a similar reference in the heading*

to each Rule. Also, sometimes the heading to a Rule refers to a numbered Form with no corresponding reference in the Rule. On the other hand, numbers of provisions appear to rely on Order 1, r.7 and do not refer at all to Forms by individual numbers. The Committee asks whether there is a reason for these drafting differences.

7. *Order 8, r.16(3) refers to subrule 15(2), which does not appear to exist.*

8. *Order 36, r.1 appears to be missing some words.*

9. *Order 43 several times refers to an infant or minor. There do not appear to be definitions of either word in the Rules and the Committee assumes that they are defined in the Act. Definitions could be relevant if there are differences between jurisdictions.*

10. *Order 43, r.4(2) refers to the Curator of Estates of Deceased Persons of the Australian Capital Territory, which is an office which may have been abolished in 1985.*

11. *The Committee asks whether the reference in Order 48, r.1 to Division 7 of Part X of the Act is correct.*

12. *Order 48, r.4 refers to regulation 94 when regulation 98A may be meant.*

13. *Order 52, r.33(6) includes drafting oversights.*

14. *Order 62, r.42(3)(d) provides for payment to the Registrar of $750 as security for costs. The Committee asks whether there is provision for refund of this amount if no party claims it. There is such a provision in the Federal Court Rules, Order 62, r.46(6A).*

15. *The Title of Form, Form Number 37, in the Numerical Table of Forms appears wrong.*

16. *Form 44A probably should refer to r.29(2)(a) of Order 52, not r.29(5), which does not appear to exist.*

17. *Form 54A probably should refer to r.15(3) of Order 52, not r.15(5), which does not appear to exist.*

18. *Form 129 appears to be headed incorrectly.*

19. *The High Court Rules, the Federal Court Rules and the Family Court Rules are all reprinted with the relevant Order number at the top of each page. It may have been helpful if this was done for these principal Rules.*

Yours sincerely

Mal Colston
Chairman

3.2 The Chief Justice replied to the Committee as follows:

9 June 1994

Senator Mal Colston
Chairman
Standing Committee on Regulations & Ordinances
The Senate
Parliament House
CANBERRA 2600

Dear Senator Colston

Thank you for your letter of 27 May regarding the Rules of the Industrial Relations Court.

The Rules that came into operation on 30 March had to be prepared under circumstance of great urgency, as the Judges were appointed only shortly before that date. It is very likely that there are some anomalies and I will go through your queries and consider what amendments are necessary.

I am not aware of the reason for the delay in gazetting the rules. The delay may have been caused by the bulk of the Rules and the difficulty of finding appropriate Gazette space. However, the delay could not have prejudiced anybody. The Rules were available to interested people at each of the District Registries during the period before gazettal. Registry staff were instructed to assist people in relation to the Rule requirements concerning the filing of applications. They did in fact do this. I am not aware of any problem having been encountered.

I will write to you again when I have examined your queries.

Yours sincerely

Murray Wilcox

3.3 After considering this reply the Committee wrote again to the Chief Justice as follows:

24 June 1994

Chief Justice M R Wilcox
Industrial Relations Court of Australia
Law Court Building
Queens Square
SYDNEY NSW 2000

Dear Chief Justice

Thank you for your letter of 9 June 1994 about the Industrial Relations Court Rules, Statutory Rules 1994 No 110.

The Committee would also appreciate your comments on the operation on the Rules of subsection 48(2) of the Acts Interpretation Act 1901, which provides that instruments such as the Rules are of no effect if they would take effect before notification in the Gazette and as a result the rights of a person at the date of notification would be affected so as to disadvantage that person, or liabilities would be imposed on a person in respect of anything done or omitted to be done before notification.

The Committee considers that the Rules appear to be void under subsection 48(2), with all action taken under the Rules therefore having no effect. In this context, the advice in the third paragraph of your letter does not appear relevant to the question of validity.

Given the nature of these concerns the Committee would be grateful for your early advice.

In order to preserve the options of the Committee I will give a notice of motion of disallowance of the Rules on Tuesday 28 June 1994, the last day on which it is possible to do so. The notice will be in respect of 15 sitting days after that date, which, according to the timetable of sittings of the Senate will be 11 October 1994.

Yours sincerely

Mal Colston
Chairman

3.4 Amendments to the Rules, contained in the **Industrial Relations Court Rules (Amendment), Statutory Rules No 145 of 1994**, were tabled in the Senate on 6 June 1994. Following the tabling of these amendments, the Chairman wrote to the Chief Justice as follows:

29 June 1994

Chief Justice M R Wilcox
Industrial Relations Court of Australia
Law Courts Building
Queens Square
SYDNEY NSW 2000

Dear Chief Justice

Further to my letter of 24 June 1994 about the validity of the Industrial Relations Court Rules, Statutory Rules 1994 No 110, I refer to the Industrial Relations Court Rules (Amendment), Statutory Rules 1994 No 145.

As you know, the Committee considers that the principal Rules appear to be void. If so, the present set of amending Rules can have no effective operation. Nevertheless, the Committee would appreciate your advice on the following matters.

This set of amending Rules did not include either a date of making, which is unusual, or an express commencement provision. Therefore, under subparagraph 48(1)(b)(iv) of the Acts Interpretation Act

1901 the amending Rules commenced on notification in the Gazette, which a Note to the Rules indicates was 30 May 1994. The Committee would be grateful for your advice of the date on which the Rules were made and for your assurance that the amendments were not applied in any way by the Judges or staff of the Court, or by practitioners, before 30 May 1994.

The date of making is also important because paragraph 48(1)(c) of the Acts Interpretation Act requires instruments such as the Rules to be tabled within 15 sitting days of making. The amending Rules were tabled in both Houses on 6 June 1994 with substituted copies tabled in the Senate on 22 June 1994 and in the House of Representatives on 27 June 1994.

Neither the original nor the substituted copies appeared to be accompanied by an Explanatory Statement and the Committee would be pleased to receive one. At present, the Committee is unaware of the reason for the substituted copy although the latter does correct a typographical error.

Yours sincerely

Mal Colston
Chairman

3.5 The Acting Chief Justice replied to the Committee as follows:

30 June 1994

Senator M Colston
Chairman
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Colston

I refer to your letter dated 24 June 1994 concerning the Industrial Relations Court Rules.

Unfortunately the Chief Justice is overseas at present so he is unable to respond personally to your letter. However, I understand that he has previously expressed the view that the Rules were validly made and it is not my intention to canvass this issue.

The purpose of my letter is to ask the Committee to withdraw the Notice of Motion of Disallowance of the Rules.

I should mention that there have been two sets of amendments made to the Rules since the original Rules were made. On my behalf the Acting Registrar of the Court has discussed your correspondence with officers of the Attorney-General's Department and they have offered to assist the Court with re-

making of the Rules so that a clearly validly-made consolidated set of Rules incorporating both amendments and picking up the errors that you have pointed out will be available to the public as quickly as possible.

At this early stage in the Court's operations a consolidated set of Rules is most desirable. The Department has offered to undertake this work and have new Rules available around mid July.

However, I will not be able to have the Rules re-made unless the Notice of Motion of Disallowance is withdrawn. I am happy to give you my undertaking that the Rules will be re-made.

I hope this meets your concerns and that your Committee will agree to withdraw the Notice and enable the Court to proceed to re-make the Rules.

Yours sincerely

R M Northrop
Acting Chief Justice

3.6 The Senate was due to rise for seven weeks on 30 June 1994, the date on which the Acting Chief Justice's letter was written and received. The Committee was fully aware of the consequences of not withdrawing its notice of motion of disallowance, as alluded to in the final sentence of the Acting Chief Justice's letter. Section 48B of the *Acts Interpretation Act 1901*, which applies to rules of the Industrial Relations Court, provides that a regulation cannot be remade while subject to notice of motion of disallowance.

3.7 The Committee, however, was not prepared to accede to the request to withdraw the motion of disallowance. To do so would have meant the Senate no longer had any powers of scrutiny over Rules which were of concern to the Committee. On the other hand, the Committee decided that it would accommodate the Industrial Relations Court, if possible, and the Chairman moved in the Senate on 30 June 1994:

(1) That, if the Chairman of the Standing Committee on Regulations and Ordinances, before the next meeting of the Senate, notifies the President in writing that the Committee wishes to withdraw the notice of motion for the disallowance of the Industrial Relations Court Rules, as contained in Statutory Rules 1994 No 110, the notice of motion shall then be taken to have been withdrawn, unless another Senator has before that time indicated to the President in writing that that senator requires that the notice of motion remain on the Notice Paper until the Senate next meets.

(2) The President shall notify each Senator and the relevant minister if the notice of motion is withdrawn pursuant to paragraph (1).

3.8 The Chairman advised the Senate that the purpose of the motion was to allow the Committee to remove the notice of motion of disallowance of the Rules before the Senate met again in seven weeks time, if the Committee considered that it was appropriate to do so. The Chairman noted that if the Committee did remove the notice, this would enable the Rules to be remade some weeks earlier than would otherwise be possible, thereby allowing the Rules to operate with unambiguous validity.

3.9 Senator Harradine then expressed concern about the usual right of a Senator under Standing Order 78, after a notice of intention to withdraw a motion of disallowance, to object to the withdrawal, in which case that Senator's name is placed on the notice and the notice is not withdrawn.

3.10 Senator Colston replied that he understood Senator Harradine's point and that, before the Senate rose, he would ensure that a copy of the motion was sent to all Senators so that they were aware of the fact that the notice might be withdrawn and that they could object if they wished. The Senate then approved the motion.[5]

3.11 The Chairman then wrote to the Attorney-General, and in similar terms to the Acting Chief Justice, as follows:

1 July 1994

The Hon Michael Lavarch MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to the Industrial Relations Court Rules, Statutory Rules 1994 No 110, made under the Industrial Relations Act 1988. Although that Act is administered by the Minister for Industrial Relations I understand that in this case it would be appropriate to write directly to you.

On 28 June 1994, on behalf of the Committee, I gave notice of a motion of disallowance of the Rules, which may have breached subsection 48(2) of the Acts Interpretation Act 1901. Subsequently, the Committee received an undertaking from the Acting Chief Justice of the Industrial Relations Court to re-make the Rules, which would allow them to operate with unambiguous validity for cases initiated in the Court after the re-making.

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5 Senate, *Weekly Hansard*, No 12, 1994, (30 June 1994) pp 2503-4.

The Committee remains concerned, however, about the validity of the present rules and would welcome your detailed advice on the operation of subsection 48(2) of the Acts Interpretation Act 1901 on the Rules. You would be aware of the judicial and legislative history of this provision and that its effect was strengthened by amendment as recently as 1990, with the apparent intention of applying the provisions to cases such as the present.

I have also written to the Acting Chief Justice asking for advice on the operations of subsection 48(2). I indicated to the Acting Chief Justice, however, that the Committee would have no objection to receiving one set of advice on behalf of the Court and yourself.

After receiving your advice the Committee will decide whether to remove its notice of motion of disallowance. Last night, on my motion, the Senate agreed that the Committee could withdraw the notice of motion during the long adjournment. When I spoke to the motion I advised the Senate that although the Committee could not agree to withdraw the notice at this time, in the interests of the orderly administration of justice it would do so as soon as its concerns about the validity of the present Rules were addressed.

The Committee will give early consideration to your advice after it is received.

Yours sincerely

Mal Colston
Chairman

3.12 The Acting Chief Justice replied to the Committee as follows:

8 July 1994

Senator M Colston
Chairman
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Colston

Industrial Relations Court Rules
Statutory Rules 1994 No 110

I refer to the earlier correspondence on this matter and in particular to your letter dated 1 July 1994. I thank you for the arrangements you have made.

There seems little doubt that section 48 of the Acts Interpretation Act 1901 applies to Rules of Court made by the Judges of the Industrial Relations Court under section 486 of the Industrial Relations Act 1988, see subsection 48(1) of the Acts Interpretation Act. The other sections of that Act referred to in subsection 486(4) of the Industrial Relations Act apply also.

In his letter to you dated 9 June 1994, the Chief Justice mentions the urgency surrounding the making of the Industrial Relations Court Rules. I do not know why the requirements of subsection 48(1) of the Acts Interpretation Act were not followed.

In your letter dated 1 July 1994 you indicate you would welcome my advice on the operation of subsection 48(2) of the Acts Interpretation Act on the Court Rules. Before doing this, some general observations may be relevant.

The Industrial Relations Court Rules were adapted from the Federal Court Rules. To this extent they are similar to the Rules of the High Court of Australia and of the Federal Court. Having regard to the nature and purpose of Court rules, there is nothing unusual contained in the Industrial Relations Court Rules.

Essentially, Court rules are designed to facilitate the hearing and determination of matters brought before the court. This is illustrated by the following extract from p11 of the Federal Court of Australia Annual Report 1992-1993.

> *"The rules provide the procedural framework for bringing matters before the Court."*

Rules of court advise prospective litigants of how this is to be done. They are procedural in nature. They do not create or impose substantive rights or liabilities.
The position is illustrated by section 472 of the Industrial Relations Act which provides:

> *"472(1) Subject to any provision made by or under this or any other Act with respect to practice and procedure, the practice and procedure of the Court shall be in accordance with Rules of Court made under this Act.*
>
> *(2) In so far as the provisions for the time being applicable in accordance with subsection (1) are insufficient, the Rules of the High Court, as in force for the time being, apply to the Court's practice and procedure, so far as they can, and so apply:*
>
> *(a) with such modifications as the circumstances require; and*
>
> *(b) subject to any directions of the Court of a Judge.*
>
> *(3) In this section:*
>
> *"practice and procedure" includes all matters in relation to which Rules of Court may be made under this Act."*

In the absence of Industrial Relations Court Rules, a Judge could give directions relating to practice and procedure in a form similar to those contained in the Industrial Relations Court Rules. This would be inconvenient and confusing to litigants and prospective litigants but illustrates the particular nature of rules relating to practice and procedure. Any directions so given would not be

subject to section 48 of the Acts Interpretation Act.

These observations should help in an understanding of my opinion that the Industrial Relations Court Rules are not rendered ineffective by subsection 48(2) of the Acts Interpretation Act and thus invalid. That subsection, in effect, provides that a regulation not made in conformity with subsection 48(1) has no effect if, as a result of the regulation, the rights of a person as at the date of the notification would be affected so as to disadvantage that person or liabilities would be imposed on a person in respect of anything done or omitted to be done before the date of notification. These rights and liabilities relate to what are commonly referred to as substantive rights and substantive liabilities.

The Industrial Relations Court Rules do not affect the substantive rights of persons. They do not impose substantive liabilities on persons.

The substantive rights and liabilities of persons being litigants or prospective litigants before the Court are conferred and imposed by, essentially, the Industrial Relations Act. This is the function of the Parliament, not the Judges. The Court Rules provide the method by which the rights and liabilities are to be determined.

In my opinion, the Industrial Relations Court Rules do not cease to have effect by reason of subsection 48(2) of the Acts Interpretation Act. The Court Rules are valid.

At the same time it is important that the Judges of the Industrial Relations Court, in future, observe the procedural requirements of subsection 48(1) of the Acts Interpretation Act.

In all the circumstances, and for the benefit of litigants before the Court, it is requested that the Committee remove the notice of disallowance as soon as possible.

In the last paragraph of your letter of 1 July, you state that you have written in similar terms to the Attorney-General asking for advice about subsection 48(2) of the Acts Interpretation Act and that you would have no objection to receiving the one set of advice on behalf of the Attorney-General and myself. I thank you for the suggestion but it is important to note that the duties and responsibilities of the Chief Justice of a superior court of record created by the Parliament under Chapter III of the Constitution are completely different from those of the Attorney-General in administering the Act which creates that court. In those circumstances it is considered appropriate that I should respond to your request in my capacity as the Acting Chief Justice of the Industrial Relations Court of Australia.

Yours sincerely

R M Northrop
Acting Chief Justice

3.13 The Acting Chief Justice also wrote to the Committee as follows:

21 July 1994

Senator M Colston
Chairman
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Colston

Industrial Relations Court Rules (Amendment)
Statutory Rules 1994 No 145

Your letter dated 29 June 1994 addressed to the Chief Justice of the Industrial Relations Court was forwarded to me by facsimile on 13 July 1994. As you know the Chief Justice is overseas and in his absence I am acting as the Chief Justice of the Court.

I refer to the correspondence between us relating to the Industrial Relations Court Rules, Statutory Rules 1994 No 110. In the fourth paragraph of my letter to you of 30 June 1994, I drew attention to the fact that two sets of amendments had been made to the original Rules. Those amendments are contained in Statutory Rules 1994 No 145 and Statutory Rules 1994 No 200 respectively.

That letter refers also to the fact that the Court Rules are in the course of being consolidated and will be made in conformity with the requirements of s486 of the Industrial Relations Act 1988 as soon as practicable.

My letter to you dated 8 July 1994 expresses my opinion that the Court Rules are valid. The same reasoning applies to the amendments. Additional amendments will be included in the consolidated rules.

I do not know the date on which the amendments contained in SR No 145 of 1994 were made but I understand they were made on 27 April 1994. The amendments contained in SR No 200 of 1994 were made on 26 May 1994 and were notified in the Commonwealth Gazette on 22 June 1994. Certainly, I do not give the assurance sought in the third paragraph of your letter. The request for that assurance illustrates a misunderstanding of the nature of rules of court. These matters are explained in my letter of 8 July 1994 which you would have received after you wrote your letter of 29 June 1994. Certainly, no substantive right or liability of any person has been affected by the amendments made to the Rules.

In all the circumstances, it would appear that the most practical way to resolve the difficulties which have arisen is for your Committee to remove the notice of motion of disallowance to enable the consolidated rules to be made.

Yours sincerely

R M Northrop
Acting Chief Justice

3.14 At this stage, the Committee was still unconvinced that the rules were all valid. The Acting Chief Justice's letter of 8 July 1994 stated that rules of court are procedural in nature. The Committees concerns with this proposition, however, were twofold. First, the wording of subsection 48(2) of the *Acts Interpretation Act 1901* does not draw a distinction between procedural rights and liabilities and substantive rights and liabilities. Subsection 48(2) refers to "the rights of a person" and "liabilities ... [that would] be imposed on a person". Therefore, if the procedural rights and liabilities of a person would be affected so as to disadvantage that person, such rules may be invalid.

3.15 Secondly, that the Rules were only of a procedural nature was not the conclusion of the Committee. The Committee could not accept that the Rules did "not create or impose substantive rights or liabilities". In the Chairman's letter of 27 May 1994 to the Chief Justice, reference was made to the provision in the Rules for payment to the Registrar of $750 as security for costs. It seemed to the Committee that this provision imposed a clear liability, whether that liability arose on payment of the security or retrospectively in the event that the security was not refunded. Other provisions were of similar concern to the Committee. For example, order 47 rule 6 appeared to impose a clear liability on solicitors in respect of fees of the Sheriff. The Committee believed that it could also be argued that other provisions affected substantive rights. One such provision was order 33 rule 3(A) which provided that the court may at any stage of the proceeding dispense with compliance with the rules of evidence for proving any matter which is not bona fide in dispute.

3.16 The Acting Attorney-General replied to the Committee as follows:

8 July 1994

Senator Mal Colston
Chairman
Senate Standing Committee on Regulations
and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Colston

Thank you for your letter of 1 July 1994 about the Industrial Relations Court Rules.

In the Attorney-General's absence I am responding to your request for advice on the operation of subsection 48(2) of the Act Interpretation Act 1901 on the Rules. In particular, you expressed the Committee's concern that this subsection may operate so as to invalidate those Rules.

The particular Rules about which you are concerned are Statutory Rules 1994 No 10. These Rules were made by the Judges of the Court under the Industrial Relations Act 1988. They were the first Rules to be made by the Judges. The Rules were expressed to come into operation on 30 March 1994, the date on which they were made, but they were not notified in the Gazette until 5 May 1994.

Subsection 48(2) of the Acts Interpretation Act provides that:

'(2) A regulation, or a provision of regulations, has no effect if, apart from this subsection, it would take effect before the date of notification and as a result:

(a) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) as at the date of notification would be affected so as to disadvantage that person; or

(b) liabilities would be imposed on a person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification.'

Section 486 of the Industrial Relations Act, which empowers the Judges to make Rules of Court, applies section 48 of the Acts Interpretation Act (among others) to the Rules of Court.

Consequently, if, as a result of the Rules, either of the matters mentioned in para.(a) or (b) occurs, the Rules will be invalid.

However, in my opinion the Rules are not invalid because of the operation of subsection 48(2).

Section 472 and 486 of the Industrial Relations Act make it clear that the Rules of Court are to be confined to matters of practice and procedure. The purpose of the Rules is thus to facilitate the conduct of proceedings in the Industrial Relations Court. Those proceedings, among other things, involve determination of persons' rights and liabilities in respect of matters within the Court's jurisdiction. But those rights and liabilities are not affected or imposed by the Rules. Any rights that

may be affected or liabilities that may be imposed by the Rules are not rights or liabilities of substance and are not, in my opinion, rights or liabilities of the kind referred to in subsection 48(2).

Moreover, as the Rules facilitate the conduct of proceedings in the Court, I cannot see how this could be said to affect anyone's rights to their disadvantage in any event. As far as liabilities are concerned, the kinds of liabilities imposed by the Rules, for example, the requirements to use certain documents, to abide by certain time limits and to conform to certain steps in the conduct of proceedings, are procedural. So too are the provisions of the Rules regarding contempt of court, the substantive power to punish for contempt being conferred by section 429 of the Industrial Relations Act. As such I do not think that they can be said to be liabilities imposed 'in respect of anything done or omitted to be done' as referred to in subsection 48(2). That provision, in my opinion, is directed to substantive rights and liabilities and not procedural matters.

Finally, I mention that section 472 of the Industrial Relations Act allows the Court or a Judge to give directions about practice and procedure so that, if the Rules were thought to have infringed subsection 48(2) of the Acts Interpretation Act, their substance would still probably govern proceedings in the Court on that basis.

You mentioned in your letter that you would have no objection to receiving one set of advice on behalf of the Court and the Attorney-General. The Acting Chief Justice and I consider that it is more appropriate to furnish you with separate advices.

I trust that this advice meets your concerns.

Yours sincerely

Duncan Kerr

3.17 Although the Committee was empowered by the previously mentioned resolution of the Senate of 30 June 1994 to withdraw the notice of motion of disallowance prior to the next meeting of the Senate, it did not do so. It was still concerned about the question of validity of the Rules and was prepared to remove the notice only when it was certain that new rules were ready to be remade.

3.18 The Senate met on 23 August 1994 and the Committee met two days later. The Rules and the related correspondence were discussed and, as a result, the Chairman wrote to the Attorney-General, and in similar terms to the Chief Justice, as follows:

25 August 1994

The Hon Michael Lavarch MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to the letter of 8 July 1994 from the Acting Attorney-General about the Industrial Relations Court Rules. The Committee considered the letter and related matters at its meeting of 25 August 1994.

The Committee noted the advice in the letter about the validity of the Rules, together with advice on the same matter from the Acting Chief Justice of the Court. The Committee will report to the Senate on its scrutiny of the Rules after they are remade and I will send you a copy of the report as soon as it is tabled.

The Committee understands that the Chief Justice would prefer to remake the Rules after other amendments are agreed, probably late in September or early in October, and we have no objection to this. I have suggested that the Committee staff (phone 06-2773066) keep in touch with the Chief Justice or his associate and that the Committee remove its notice of disallowance of the Rules after it has been indicated that the Rules are ready to be remade.

In relation to the earlier suggestion from the Committee that it would accept one set of advice on behalf of you and the Chief Justice, the Committee was aware of your respective duties and responsibilities. In this case, however, the Committee noted the advice in a letter of 30 June 1994 from the Acting Chief Justice that the Attorney-General's Department had offered to assist the Court with making a clearly valid consolidated set of the Rules.

I am writing in similar terms to the Chief Justice.

Yours sincerely

Mal Colston
Chairman

3.19 The Chairman also wrote to the Chief Justice as follows in relation to further Rules considered by the Committee:

25 August 1994

Chief Justice M R Wilcox
Industrial Relations Court of Australia
Law Court Building
Queens Square
SYDNEY NSW 2000

Dear Chief Justice

I refer to the Industrial Relations Court Rules (Amendment), Statutory Rules 1994 No 200, considered by the Committee at its meeting of 25 August 1994.

The Rules were not accompanied by an Explanatory Statement.

Rule 11 provides for the deletion of specified words and the substitution of other words in Order 74 rule 3. These specified words do not appear in Order 74 rule 3, but they do in Order 75 rule 3, as amended by Statutory Rules 1994 No 145.

I will write separately to you in reply to the Acting Chief Justice's letters of 8 July and 21 July 1994.

Yours sincerely

Mal Colston
Chairman

3.20 The Chief Justice replied to the Committee as follows:

30 August 1994

Senator Mal Colston
Chairman
Standing Committee on Regulations
and Ordinances
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Colston

Thank you for your two letters of 25 August.

I confirm that my preference is to remake the Rules, with the amendments to which you have drawn attention and some other amendments which we are contemplating in order to streamline procedures in unlawful termination claims. There is to be a Judges' meeting on 21 September and I expect that we will be able to finalise the new Rules by the end of September. We will endeavour to arrange early gazettal. In order to meet the concern that has been expressed by your Committee I will propose to the Judges that the new Rules should take effect only on gazettal.

As you suggest, we will keep in contact with the Committee staff. I welcome your offer to remove your notice of disallowance when we indicate that the Rules are ready to be remade.

Yours sincerely

Murray Wilcox
Chief Justice

3.21 Senator Colston, on behalf of the Committee, subsequently removed the notice of motion of disallowance on 11 October 1994, and the judges of the court made the **Industrial Relations Court Rules, Statutory Rules 1994 No 357**, on the same day. These Rules repealed and largely remade the existing principal **Industrial Relations Court Rules**. The Committee scrutinised the Rules in the usual way and wrote to the Attorney-General as follows:

16 November 1994

The Hon Michael Lavarch MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to the Industrial Relations Court Rules, Statutory Rules 1994 No 357.

Of the 11 copies of the Rules received by the Committee, at least six were flawed. In the flawed copies pages 1-92 appear, then pages 61-92 are repeated, followed by pages 125-273. Thus the 32 pages from 93-124 are missing. The two copies of the Rules sent to the Senate for tabling were also flawed, although on the initiative of the Committee these were replaced by correct copies.

The Committee would be grateful for your advice on the number of copies of the Rules printed and, if known, of the number of flawed copies. Also, could you advise when the existence of the flawed copies first became known to your Department and to the Court and of any steps taken consequent upon the discovery. In this context the Committee noted that the Rules were made on 11 October 1994, commenced on gazettal on 14 October 1994, and were tabled on 7 November 1994. The Committee also noted that the Australian Government Publishing Service sells the Rules for $35.

The Committee understands that it is more appropriate to write to you on these matters than to the Chief Justice.

Yours sincerely

Mal Colston
Chairman

3.22 The Attorney-General's reply indicated that his Department was not aware that there were flawed copies until it was notified by the Committee. The Attorney-General's letter read as follows:

28 February 1995

Senator Mal Colston
Chairman
Senate Standing Committee
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Colston

Thank you for your letter of 16 November 1994 bringing to my attention the printing problems with the Industrial Relations Court Rules (Statutory Rules 1994 No. 357).

The Printing of these Rules was undertaken, using camera-ready copy provided by the Office of Legislative Drafting in my Department, by the Australian Government Publishing Service (AGPS), which was also responsible for their distribution to the Committee. The defect resulted from faulty collation of otherwise correctly printed material.

I understand that 1,500 copies of the Rules were printed and distributed by AGPS and of them some 50 have been found flawed and have subsequently been withdrawn and replaced.

The discovery of the flawed copies became known to my Department on receipt of your letter on 24 November 1994. On the same day, an officer of my Department contacted both Tabling Offices, to ensure that no flawed copies had been tabled, and also brought the matter to the attention of AGPS, which immediately checked all copies under its control. As noted above, all flawed copies that have come to the attention of AGPS have been replaced. AGPS has also advised that it will write to subscribers notifying them of the error, so that any other flawed copies can be replaced.

AGPS has informed my Department that its quality control procedures for the checking of the material following printing and before despatch have been reviewed and updated.

Officers of my Department have also been instructed to ensure that all material submitted for tabling is thoroughly checked prior to delivery to the Tabling Offices.

Yours sincerely

Michael Lavarch

CHAPTER 4

CONCLUSIONS

4.1 The scrutiny by the Committee of the **Rules of the Industrial Relations Court of Australia (Statutory Rules No.110 of 1994)** illustrates the desirability of the Senate, through the Committee, continuing its supervision and ultimate control not only of legislative instruments made by the Executive, but also of those made by the Judiciary. In the present case, action by the Committee resulted in improvements to the drafting, accessibility and effect of the Rules.

4.2 In summary, the Rules, which were first made on 30 March 1994, to come into effect on that date, included many drafting oversights. Also, although the *Acts Interpretation Act 1901* requires the Rules to be gazetted, this was not done until 5 May 1994, more than five weeks later, during which time the Rules were in operation. As a result, under another provision of the *Acts Interpretation Act 1901*, being subsection 48(2), at least some of the rules may have been void due to prejudicial retrospectivity. As evidenced by the correspondence in Chapter 3, the issue of possible invalidity was the subject of detailed consideration.

4.3 The Rules were amended on an unknown date in April. An initial version of the amendment was tabled in both Houses on 6 June 1994 with substituted copies which appeared to correct a typographical error, tabled in the Senate on 22 June 1994 and in the House of Representatives on 27 June 1994.

4.4 The Rules were amended again on 26 May 1994, although the amendment included a drafting error and was not accompanied by an Explanatory Statement. Finally, fresh Rules were made on 11 October 1994 with the object of providing a valid set of Rules. Numbers of copies of those Rules, however, including the two copies sent to the Senate for tabling, were produced with missing and duplicate pages.

4.5 There was obviously a difference of opinion between the Committee and both the Attorney-General and the Industrial Relations Court on the issue of validity of the first set of Rules. When faced with such conflict, the Committee is often content to pursue the issue no further and to allow the matter to be contested in court, should any person wish to challenge the validity of the particular delegated legislation. On this occasion, however, the Committee did persist because it believed it was essential that the court should be operating with a set of Rules of unambiguous validity.

4.6 In its Ninety-Ninth Report, which dealt with the *Legislative Instruments Bill 1994*, the Committee noted the recommendation of the Administrative Review Council (ARC) that the regime proposed under that Bill should apply to rules of court made by Federal courts. In his Second Reading Speech following the introduction of the Bill, however, the Minister stated that supervision by the Executive of rules of court made by the Judiciary, risked interfering with judicial independence and offending the doctrine of the separation of powers. As a result, the Government did not accept this recommendation of the ARC, and the Bill proposed that the Acts governing the operation of Federal courts should be amended to set up court-specific regimes based on the principles of the Bill.

4.7 While not opposing a specific regime for rules of court, the Committee noted that, as the Bill was presently drafted, it was possible for regulations to remove court rules from parliamentary scrutiny. While such regulations would remain subject to parliamentary scrutiny, and possible disallowance, rules made by virtue of those regulations would operate at least until the regulations had been disallowed, and would not be subject to control by Parliament.

4.8 Accordingly, the Committee recommended that the *Legislative Instruments Bill 1994* should be amended to provide that any regulations should not modify Part 5 of the Bill - Parliamentary Scrutiny of Legislative Instruments - in its application to rules of court.

4.9 The Committee is pleased to note that the Government, in its response to the Committee's report, accepted this recommendation, and foreshadowed that it would be moving amendments to the Bill to this effect. Such amendments will ensure that the Committee can continue its valuable work in this area.

Mal Colston
Chairman
8 June 1995