



THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES**

**ONE HUNDRED AND SECOND REPORT
ANNUAL REPORT 1994-95**

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CONTENTS

		Page
Members of the Committee		
Principles of the Committee		
Chapter 1	Overview and Statistics	
	Introduction	1
	Membership	2
	Independent Legal Adviser	2
	Committee Staff	2
	Statistics	2
	Ministerial Undertakings	3
	Other Committee Activities	3
Chapter 2	Issues and Roles	
	Senator Colston, 8 December 1994	5
	Senate Weekly Hansard p.4165	
	Senator Colston, 27 June 1995	10
	Senate Weekly Hansard p.1835	
Chapter 3	Guidelines on the Application of the Principles of the Committee	
	Principle (a) Is delegated legislation in accordance with the statute?	19
	Principle (b) Does delegated legislation trespass unduly on personal rights and liberties?	27
	Principle (c) Does delegated legislation make rights unduly dependent on administrative decisions which are not subject to independent review of their merits?	31
	Principle (d) Does delegated legislation contain matters more appropriate for parliamentary enactment?	35
Chapter 4	Ministerial Undertakings Implemented	37
Chapter 5	Ministerial Undertakings Not Yet Implemented	41
Chapter 6	Delegated Legislation made under the Veterans' Entitlements Act 1986 and the Civil Aviation Regulations: statement by Senator Colston	47

Appendix 1	Classification of Legislative Instruments under the Heading “Miscellaneous” in Paragraph 1.8	51
Appendix 2	Disallowable Instruments tabled in the Senate 1994-95	53
Appendix 3	Alphabetical Index of Legislation and Delegated Legislation with Paragraph References 1994-1995	57

**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
Senator Nick Minchin
Senator Tom Wheelwright

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 take other action to meet the Committee's 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 Bill O'Chee (Deputy Chairman)²
- Senator Eric Abetz³
- Senator Jacinta Collins⁴
- Senator Michael Forshaw⁵
- Senator Stephen Loosley⁶
- Senator Nick Minchin⁷
- Senator Tom Wheelwright⁸
- Senator Olive Zakharov⁹

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

During the year the Committee scrutinised 2,087 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 Senator Colston was elected as Chairman on 30 September 1993. Senator Colston was a former Chairman from 14 May 1990 to 18 October 1990.

² Senator O'Chee was appointed as Deputy Chairman on 30 September 1993.

³ Senator Abetz commenced as a member of the Committee on 24 February 1994.

⁴ Senator Collins commenced as a member of the Committee on 30 May 1995.

⁵ Senator Forshaw commenced as a member of the Committee on 1 March 1995 and was discharged on 30 May 1995.

⁶ Senator Loosley resigned from the Senate on 21 May 1995.

⁷ Senator Minchin commenced as a member of the Committee on 18 August 1993.

⁸ Senator Wheelwright commenced as a member of the Committee on 30 May 1995.

⁹ Senator Zakharov was a member of the Committee until 1 March 1995.

INSTRUMENTS EXAMINED BY COMMITTEE 1994-95

Civil aviation orders	715
Statutory rules	419
Veterans' entitlements instruments	316
Public service and defence determinations	277
Human services and health instruments	66
Education instruments	35
Remuneration Tribunal determinations	30
Primary industries and energy instruments	29
ATSIC instruments	21
Miscellaneous instruments, details of which are in Appendix 1	<u>179</u>
	2,087

Ministerial Undertakings

1.9 During the year Ministers and other law makers undertook to amend or review 27 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 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-Ninth Report, Legislative Instruments Bill 1994, tabled on 17 October 1994.

One Hundredth Report, Annual Report 1993-94, tabled on 8 December 1994.

One Hundred and First Report, Rules of the Industrial Relations Court, tabled on 8 June 1995.

1.11 Other significant matters, which are reported in Chapters 2 and 6, are as follows:

On 6 February 1995 Senator Colston, on behalf of the Committee, made a statement to the Senate on delegated legislation made under the *Veterans' Entitlements Act 1986* and the Civil Aviation Regulations.

On 8 December 1994 and 27 June 1995 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, 8 December 1994, Senate Weekly Hansard, p.4165

Overview

2.2 "During the sittings the Committee continued its non-partisan scrutiny of the usual large number of disallowable legislative instruments tabled in the Senate, made under scores of parent Acts administered through virtually every Department of State. Legislative instruments implement administrative details of almost every program established by Act.

2.3 "The Committee acts on behalf of the Senate to scrutinise each of these instruments to ensure that they comply with the same high standards of parliamentary propriety and personal rights which the Senate applies to Acts. If the Committee detects any breach of these standards it writes to the Minister or other law maker about the apparent defect, asking that the instrument be amended or an explanation provided. If the breach appears serious, or if the Committee has not received a satisfactory reply from the Minister, the Chairman of the Committee gives notice of a motion of disallowance of the offending instrument. This allows the Senate, if it wishes, to disallow the instrument. This ultimate step is rarely necessary, however, because Ministers almost invariably take action which satisfies the Committee.

2.4 "As usual, during the sittings Ministers gave the Committee undertakings to amend many provisions in different instruments or parent Acts to meet its concerns. The Committee is grateful for this high level of cooperation from Ministers.

2.5 "During the present sittings the Committee scrutinised 757 instruments, compared to 826 for the sittings in the first half of 1994. Of these, 201 were from the statutory rules series, which are generally better drafted and presented than other series of legislative instruments. The other 556 instruments were the usual heterogeneous collection of different series.

2.6 "Each of the 757 instruments was scrutinised by the Committee under its four principles, or terms of reference, which are included in the Standing Orders. There were 94 apparent defects or matters worthy of comment in those 757 instruments. The defects are described below under each of the four principles.

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

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

2.8 "Technical validity is, however, an important aspect of the work of the Committee. Under the *Acts Interpretation Act 1901*, legislative instruments which operate with prejudicial retrospectivity are void unless only the Commonwealth is affected. Four instruments operated retrospectively to assist patients but were void because they adversely affected medical funds and hospitals. Another may have been invalid because it purported to insert retrospectively a phrase which had been inadvertently omitted from an earlier instrument. Another instrument with prejudicial effect may have commenced invalidly before gazettal. One instrument appeared to commence a levy retrospectively. Another appeared to provide retrospectively for offence provisions.

2.9 "Legislative instruments which subdelegate legislative powers are void unless the subdelegation is authorised by the parent Act. One instrument provided for a subdelegation to vary the amount of a pension. Another subdelegated powers in respect of allowances.

2.10 "One legislative instrument, in breach of the *Acts Interpretation Act*, appeared to incorporate material as in force from time to time, rather than as in force at a particular time.

2.11 "One legislative instrument was made with no power in the parent Act for such an action. Another conferred powers on public officials with no apparent enabling power. Another provided for authorised officers to perform certain functions although neither the Act nor the regulations appeared to provide for the appointment of authorised officers. One instrument provided in one place that it was made for and on behalf of an authority and in another that it was made by a delegate of the authority.

2.12 "One instrument failed to effect the legislative intention advised in the explanatory statement. Another failed to effect its purported legislative intention. Another appeared to have effect for only a few days before unintended revocation.

2.13 "There were drafting anomalies in two instruments which were expressly made under section 4 of the *Acts Interpretation Act*, which provides that certain instruments may be made before the enabling Act commences.

2.14 "The standard of drafting of legislative instruments should be not less than that of Acts. During the present sittings one legislative instrument was made under the wrong Act, another referred to different enabling Acts in different parts of the instrument and the heading of another included an Act the short title of which had been amended some years previously. One instrument did not indicate the date on which it was made, which was an important omission given that the mandatory tabling period for legislative instruments starts from that date. Another was made under the wrong provision. One instrument provided for remuneration and allowances with no indication whether these were weekly, daily or for each meeting. The notes to several instruments were incorrect, one including an instrument disallowed by the Senate in the instruments comprising the principal instrument. Several other instruments included drafting oversights and reference errors.

2.15 "Due to the efforts of the Committee it is now accepted that each legislative instrument should be accompanied by appropriate explanatory material. One instrument did not have an explanatory statement, another had the wrong explanatory statement, other explanatory statements included errors and two did not explain that the purpose of the instrument was to implement an undertaking given by the Minister to the Committee.

2.16 "Any unexplained change in fees, charges or allowances may breach parliamentary propriety. The explanatory statement for one instrument did not explain the basis of the first fees set under a new Act, while another did not explain extensive changes under which some fees remained the same, others were reduced, others restructured and a new fee introduced. Several other instruments provided for unexplained fees and charges.

2.17 "As with drafting, the standards of presentation and access of legislative instruments should be not less than those of Acts. Some copies of one instrument repeated 32 pages and omitted the next 32 pages. Another instrument used the scientific names of species but not the common names as well.

2.18 "Legislative instruments which operate retrospectively, even if valid, may breach parliamentary propriety if the retrospectivity is not reasonable in the circumstances. Two instruments provided for retrospectivity of four years, although only the Commonwealth was affected. The explanatory statements, however, did not advise the amount of Commonwealth money involved.

2.19 "The Committee questions any instruments with unusual or unexpected provisions. One instrument determined salary levels for 20 separate offices of \$104,418 and one of \$104,419. Another prescribed the unusually modest penalty of \$20.

2.20 "Legislative instruments may themselves provide for legislation to be made. As well as scrutinising the validity of such provisions, the Committee ensures that they provide for appropriate parliamentary oversight. One instrument did not provide for any parliamentary scrutiny at all of new legislation, while another removed existing provisions for tabling and disallowance.

2.21 "Each legislative instrument should include a system of numbering or citation, without which users may be confused. Several instruments did not do this.

Principle (b)

Does delegated legislation trespass unduly on personal rights and liberties?

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

2.23 "One instrument provided appropriate procedural safeguards for athletes selected for drug testing. Some of the safeguards, however, were discretionary instead of mandatory. Another instrument, which implemented a budget decision to introduce lump sum payments as part of a program, did not provide for the payments to be mandatory. A group of instruments provided for reforms to five different types of taxes but did not do so for a sixth. The same group of instruments also provided safeguards for taxpayers in

respect of five of the taxes, which were not the same five for which the reforms were provided, but not for a different sixth tax.

2.24 "One instrument which suspended a councillor from office advised that the suspended person had been convicted of infamous crimes. The Committee questioned whether the offences were really infamous and whether procedural requirements for the suspension had been satisfied. Another instrument required an occupier to restore land which had been damaged by a disaster or emergency, even if the occupier did not cause the damage.

2.25 "Some instruments provide for matters which could affect privacy. The Committee asked whether the Privacy Commissioner had been consulted about one such instrument.

Principle (c)

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

2.26 "Many legislative instruments provide for Ministers or other public officials to exercise discretions. The Committee considers 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 usually be the Administrative Appeals Tribunal.

2.27 "The Committee looks carefully at discretions which affect personal rights. One instrument provided for discretions to recognise a person as an accredited orthodontist; another for discretions in respect of personal superannuation funds; and another for discretions relating to the benefits of a program. There was no indication that these discretions were reviewable by the AAT, although in one instrument other discretions were so reviewable.

2.28 "The Committee also examines closely discretions relating to business. One instrument provided for a discretion to remit business fees; another for discretions relating to mandatory professional indemnity insurance requirements; and another that license holders must comply with recommendations of a public servant. Again, these instruments did not appear to provide for AAT review.

2.29 "The Committee questioned a discretion which provided for only broad criteria to guide and limit the decision maker. In another case the Committee asked for confirmation that a discretion in a legislative instrument was reviewable under provisions of the parent Act. The Committee also referred numbers of replies from Ministers about review to the Administrative Review Council.

Principle (d)

Does delegated legislation contain matter more appropriate for parliamentary enactment?

2.30 "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.

2.31 "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 Rwanda.

2.32 "The Committee advised the Select Committee on Superannuation, at its request, on the appropriate legislative instrument for defining the jurisdiction of the Superannuation Complaints Tribunal. That Committee considered that the advice was important because of the expertise of the Regulations and Ordinances Committee.

Other developments

2.33 "In addition to its main task of scrutinising legislative instruments, the Committee was active in other ways during the sittings.

2.34 "On 17 October 1994 the Committee tabled its *Ninety-Ninth Report*, on the Legislative Instruments Bill 1994. This Report followed a recommendation of the Selection of Bills Committee on 25 August 1994, adopted by the Senate on the same day, that the bill be referred to the Committee for inquiry and report. This was the first such referral of a bill to the Committee. During its inquiry the Committee held a public hearing and received 18 submissions from bodies as diverse as the Law Council of Australia, the Business Council of Australia, the National Farmers' Federation and the Australian Council of Social Service. The Report endorsed the objectives and principles of the bill but recommended changes to some details of its general scheme.

2.35 "The Committee intends to table its *One Hundredth Report*, the Annual Report for 1993-94, by the end of the sittings. The Committee also decided to table a Report on its scrutiny of the Industrial Relations Court Rules.

2.36 "The Chairman and Members held discussions with the Standing Committee on Uniform Legislation and Intergovernmental Agreements of the Western Australian Parliament.

2.37 "The Chairman attended a meeting of the Chairs of Australian legislative scrutiny committees.

2.38 "The Chairman, Legal Adviser and Committee secretary met with visiting academics from China University, Peking.

2.39 "The Legal Adviser and the Committee secretary met with officers of the Civil Aviation Authority to discuss a continuing major review of legislative instruments made or administered by the CAA.

2.40 "The Legal Adviser and the Committee secretary were briefed by officers of the Attorney-General's Department on the proposed Legislative Instruments Register.

2.41 "The Committee secretary met with visiting parliamentary officers from Thailand and from the Marshall Islands.

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

Senator Colston, 27 June 1995, Senate Weekly Hansard, p.1835

2.43 "During the present sittings, the Committee scrutinised the highest volume of delegated legislation ever recorded for a sitting period in the history of the Committee. The Committee scrutinises all disallowable legislative instruments tabled in the Senate, to ensure compliance with non-partisan principles of personal rights and parliamentary propriety. Of credit to the Committee, the Committee's secretariat and its legal adviser, Emeritus Professor Douglas Whalan AM, the scrutiny process has maintained high standards notwithstanding the increased workload.

2.44 "The high volume of legislation reflects a growth in the number of government programs, the broad policy of which is set out in principal Acts. The delegated legislation authorised by the Acts generally contains the administrative details of these programs. It is the Committee's task to scrutinise the subordinate legislation against certain criteria which have been summarised into four general principles set out in Senate Standing Order 23. These are:

- (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.

2.45 "In the event that the Committee finds that any of these principles may have been breached, the Committee's usual procedure is to forward a letter to the relevant Minister or law maker, requesting that the concerns raised by the Committee be examined. A response which satisfies the Committee may be an explanation which dispels the Committee's concerns, or confirmation that there exists a defect requiring remedial action, together with an assurance that such action will be taken. The Committee frequently receives an undertaking that appropriate amendments will be made to the offending legislation. If, however, a satisfactory response is not received and the Committee, in all the circumstances, is of the opinion that the situation warrants it, notice of motion of disallowance is given by the Chairman in respect of the subject instrument. A disallowance motion is the ultimate and last resort sanction of the Committee in respect of legislation which fails, or appears to fail the scrutiny process. The actual disallowance of legislation, however, is a rare occurrence. In fact, subordinate legislation has not been disallowed since 1988 due to action taken by the Committee.

2.46 "The fact that such disallowance of legislation is a rare occurrence is testimony to the cooperation which the Committee receives from Ministers and Government Departments and Agencies. The action taken by the Committee and the response to that action by the Parliamentary Secretary to the Treasurer in relation to Income Tax Regulations, Statutory Rules 1994 No. 461 detailed below under principle (c), exemplifies the cooperative effort between the Committee and relevant Government representatives.

2.47 "The Committee is always appreciative of responsive and responsible action which serves to avoid the unnecessary disallowance of legislation. It is, of course, in the interests of all parties, that legislation is of the highest possible standard. The non partisan approach adopted by the Committee underpins the ability of the Committee to achieve that objective.

2.48 "During the present sittings the Committee scrutinised 1,330 instruments. This represents an increase of 75.7 per cent on the last sittings. Of these 123 were statutory rules, the drafting of which is generally considered to be of a superior standard than that of other kinds of subordinate legislation. The remaining balance of instruments, being 1,207, were the usual heterogeneous collection of different series. Each of the 1,330 instruments was scrutinised by the Committee against the criteria summarised in the four principles mentioned above. There were 145 *prima facie* defects or matters worthy of comment in those instruments. The matters raised by the Committee with the relevant Ministers and law makers are described below under each of the four principles.

Principle (a)

Is delegated legislation in accordance with the statute?

2.49 "A disproportionately high number of concerns are raised by the Committee under this principle. This reflects the broad interpretation which the Committee places upon this principle. It covers not only technical invalidity, but also every other aspect of parliamentary propriety. There were one hundred and three matters raised under this principle.

2.50 "Delegated legislation must be legally valid and must comply with its parent Act and with other Acts such as the *Acts Interpretation Act 1901*. Section 49A of the *Acts Interpretation Act* limits the type of material "as in force from time to time" which may be incorporated in legislative instruments. One instrument defined an expression by reference to 'the national classification of TAFE courses'. The question was raised whether the instrument referred to that classification system as it existed at a particular time, or whether it was intended to cover the classifications in the forms in which they may exist from time to time. The Minister advised that the classification system is the "national classification of TAFE courses" which is of a fixed nature. The Committee was satisfied that the incorporation did not impinge upon section 49A. Another instrument provided for the means of calculating the increase in the national employer benefit in any year by referring to Consumer Price Index (CPI) increases published by the Statistician. In that case the consensus of legal opinion was that the incorporation was valid, notwithstanding that it referred to more than one figure, because the figures do not link as an instrument or other writing as in force from time to time. On another occasion, however, the Committee detected a breach of section 49A which was confirmed by the relevant Minister. An Airworthiness Directive required compliance with a specific document and subsequent temporary revisions. This purported incorporation was in breach of section 49A.

2.51 "The question regarding the validity of an incorporation of documents was also raised in respect of the *Agricultural and Veterinary Chemicals Code Regulations* which incorporated many documents by reference. In such a scientific field, the incorporation is

probably desirable. Nonetheless, the Committee examined the incorporation to ensure that it is in accordance with the provisions of the relevant legislation. The Committee has also inquired as to whether the standards made by the Australian Accounting Standards Board are instruments of a kind which may be incorporated under section 49A, as they exist from time to time.

2.52 "On two occasions, the Committee's processes revealed that instruments which were the subject of an amending instrument, had not been tabled. This was due to the unorthodox tabling provisions which exist under the principal Act. The Minister had, however, previously undertaken to review these tabling provisions. Another instrument purported to revoke the former instrument in the same series. A search of available records indicated that the former instrument had not been received for scrutiny and that, although it was notified in the Gazette, it appeared not to have been tabled in either House of Parliament. The Committee has raised appropriate questions with respect to that instrument.

2.53 "It is a clearly established principle that the drafting of delegated legislation should be of a standard equal to that of Acts. During the present sittings there were many errors in relation to numbering and citation. Two instruments had no numbering. Three instruments had no numbering and no other means of citation. One instrument had two different systems of numbering. The renumbering of another instrument contained errors. Other instruments contained errors in the numbering used throughout the document and in referring to provisions in other instruments. Where the renumbering of an instrument had occurred due to previous errors and renumbering is contained in a separate amending instrument, the Committee explored the possibility of the instrument being reprinted as it deals with the rights of the aged and infirm. Yet another instrument had an irrelevant attachment.

2.54 "Some instruments were found to contain typographical errors of a minor nature and others contained imprecise or objectionable language. One instrument, for example, referred to "Parliamentary Council" when clearly "Parliamentary Counsel" was intended. Yet another incorrectly spelt the name of a disease. The Committee noted the extensive use of sexist language in a Treaty set out in a schedule to Regulations. Whilst recognising that removal of such language from the Treaty would be outside the practical capabilities of the Committee, it acknowledged the unacceptability of such language in either Commonwealth Acts or subordinate legislation. Several instruments contained imprecise definitions or lacked definitions where definitions were required. Some defined terms or phrases not even used in the instrument. Similarly some instruments defined expressions which were not even used, but which were similar to other expressions which were in the instrument. In addition some instruments contained vague or peculiar expressions. For example, AUSTUDY Regulations (Amendment), Statutory Rules 1994 No. 409, provided that amongst the changes to a person's circumstances about which the department must be notified is if a person "gets a spouse".

2.55 "Every instrument should be accompanied by full and detailed explanatory material. One instrument had no Explanatory Statement. Others had Explanatory Statements which did not contain sufficient explanatory material, or which contained ambiguous material. Several Explanatory Statements contained errors of a minor nature, such as typographical

errors and incorrect dates. One Explanatory Statement was inconsistent with the instrument. The Explanatory Statement referred to three named institutions, whereas the instrument itself referred to two different institutions. A number of instruments fulfilled or partially fulfilled previous undertakings given to the Committee to amend errors which the Committee had identified. Many of these, however, were accompanied by Explanatory Statements which did not mention the role of the Committee in identifying the problem.

2.56 "The Acts Interpretation Act 1901 provides that delegated legislation which operates to prejudice a person retrospectively is void. Even where retrospectivity is valid, the Committee will raise a query, particularly where long periods of retrospectivity are involved. During the present sittings, the Committee raised concerns about retrospectivity on seventeen occasions. The issue of possible prejudicial retrospectivity was raised in relation to several instruments from a single authority. Retrospectivity was frequently raised in the context of compliance dates, where certain inspections were required to have taken place by dates which had already passed. The Committee's concern was that such compliance, if it had not already occurred, was now impossible. In other instruments in the same series, some compliance dates appeared remote when considered in the context of the danger the instrument sought to avert. On one occasion, the non-existent compliance date of 31 June 1995 was given.

2.57 "Some instruments are intended to operate retrospectively but without prejudicially affecting any individual other than the Commonwealth. Where the Explanatory Statement does not give an appropriate assurance in relation to retrospectivity, the Committee has sought confirmation that this is so.

2.58 "Some technical errors which appear to be minor at first glance may, in fact, have substantial ramifications. The Committee raised concerns about apparent discrepancies in two instruments which adjusted the Higher Education Contribution Scheme liabilities of institutions for certain years. Discrepancies were detected between the institutions named in the instrument and those institutions named in the Principle Act under which the payments are authorised. In several cases, the discrepancies were minor. Others, however, were more significant. The Committee is advised, in respect of one of those instruments, that an appropriate declaration was made changing the name of the institution. The Committee was satisfied with this response.

2.59 "Concerns were raised on the grounds that some instruments may be technically invalid. Four instruments in a particular series appeared to have been made outside the period provided by the enabling provisions under which they were made. The Minister undertook to introduce amending legislation to ensure the validity of the instruments and any decisions made thereunder. In addition, one of those instruments was undated and extraneous material was provided to verify the date the instrument was signed. Two of these instruments also lacked gazettal dates.

2.60 "In ensuring that subordinate legislation conforms with all aspects of parliamentary propriety, the Committee raised three other matters worthy of specific comment. One instrument provided the procedures to be followed to ensure that persons affected by reviewable decisions of the Administrative Appeals Tribunal are made aware of their rights to seek review of those decisions on the merits. The instrument, however, did not appear

to stipulate how the "public notice" is to be given. The Committee was sufficiently concerned to make appropriate inquiries. Second, another instrument proposed to make an amendment which appeared to remove certain instruments from parliamentary scrutiny. The Committee always views such initiatives with concern and made appropriate inquiries to determine precisely which instruments, if any, would be affected by the proposed regulation. The Committee was satisfied by the response received.

2.61 "Third, another instrument declared that insect repellent for use on human beings was to be regarded as "an agricultural chemical product". This provision raised the question of whether it went beyond the limits of the Act requiring such products to be subjected to all the testing and modification procedures required by the Agricultural Chemical Products code. The Committee's inquiries were satisfied.

Principle (b)

Does delegated legislation trespass unduly on personal rights and liabilities?

2.62 "The Committee interprets this principle broadly, to include every aspect of personal rights. The Committee views with concern legislation which contains unreasonable provisions or provisions which appear to impose harsh and unfair penalties. Furthermore, procedures provided for in subordinate legislation should be fair and accompanied by appropriate safeguards. In addition to those matters, the Committee will also query unusual or unexpected provisions. During the present sittings the Committee raised the following matters in relation to delegated legislation under this heading.

2.63 "The Committee examined two instruments which it considered contained material appropriate for consideration by the Privacy Commissioner. The first instrument authorised the release of certain types of information and in the circumstances, the Committee felt it appropriate that the Privacy Commissioner should have been consulted in the process of development of the instrument. The second instrument involves the release of personal information. Although the Explanatory Statement noted that the disclosure of personal information is aligned with parts of Privacy Principle 11 in the *Privacy Act 1991*, the Committee considered that it was appropriate to ask whether the Privacy Commissioner had been consulted. These matters have been raised with the relevant Ministers.

2.64 "Another instrument proposes to impose strict liability in circumstances in which it may be unreasonable to do so. The Committee has written to the relevant Minister drawing attention to those provisions and pointing out the possible unfair consequences for some defendants. The Committee has inquired as to whether the imposition of strict liability in circumstances which may have an unfair result may be avoided. In relation to other instruments, the Committee has sought confirmation that the rights of persons have not been disadvantaged.

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

2.65 "It is common for subordinate legislation to contain provisions which confer discretions on Ministers or other public officials. Some of the discretions conferred may be significant. The Committee supports the conferring of narrow discretions which are exercised against well defined and objective criteria. The Committee believes that decisions made in the exercise of such discretions should be subject to a review on the merits by an external and independent tribunal. This is normally satisfied by the provision for review by the Administrative Appeals Tribunal. Sometimes there are additional opportunities for review by other independent bodies and the Committee welcomes such opportunities.

2.66 "During the present sittings the Committee raised concerns about the provision of review procedures on thirteen occasions. Concerns were raised in relation to, for example, the importation of certain firearms and part of firearms, and the allocation of capacity under the International Air Services Commission Regulations (Amendment). Such decisions may have considerable commercial implications for affected parties.

2.67 "Another instrument involved the procedures to be followed at the Annual General Meetings of a particular organisation. The procedures enabled the organisation itself to determine the status of individuals which affected voting rights. Although decisions affecting status would be reviewable by the Administrative Appeals Tribunal, the Committee was concerned to inquire as to whether the review process would be completed prior to the Annual General Meeting. The Committee also questioned the status of resolutions passed at an Annual General Meeting from which potential voters had been wrongly excluded. The concerns of the Committee were allayed by the response which fully described the relevant procedures and related matters.

2.68 "One instrument conferred a discretion on the Secretary of the relevant Department to enable the holder of a visa to be employed in Australia by any employer for a period in excess of three months. The response explained the discretion in the context of a previous amendment which had erroneously omitted the discretion. The Committee was satisfied with the explanation. Another instrument conferred a discretion on a Minister which would be exercised in respect of the operator of one enterprise only. The Committee has made relevant inquiries regarding the review procedures available in relation to the exercise of that discretion.

Income Tax Regulations, Statutory Rules No. 461 of 1994

2.69 "The following illustrates the application of the third principle to the Income Tax Regulations. These amending regulations, amongst other things, outline the method for calculating transitional lump sum reasonable benefit limits (RBLs) and transitional pension RBLs as proposed in section 140ZE of the *Income Tax Assessment Act 1936*. Some of the regulations confer very wide discretions on the Commissioner, particularly those contained in regulations 51 and 53E. Regulation 51 provides that the Commissioner may

determine RBLs at a higher rate than otherwise provided by the regulations "because of special circumstances". Under regulation 53E, the Commissioner may permit registration of a transitional RBL at a date later than the cut-off date of 31 December 1996.

2.70 "The Committee wrote to the Parliamentary Secretary to the Treasurer, inquiring as to whether decisions made by the Commissioner in exercise of the discretion were subject to independent review. To preserve the Committee's options, notice of motion of disallowance was given on 21 March 1995.

2.71 "The response to the Committee's letter indicated that the only review available was that under the *Administrative Decisions (Judicial Review) Act 1977*. The Committee considered this response against its third term of reference which requires the Committee to ensure that delegated legislation does not unduly make citizens rights dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal. Against this criteria the Committee concluded that it was unsatisfactory that the Administrative Decisions (Judicial Review) Act should be the only avenue for review. The Committee therefore wrote again in more specific terms.

2.72 "As notice of motion of disallowance was due to expire an appropriate course of action had to be determined. It was clear that there were competing interests in this matter. On the one hand, the nature of the discretions in the regulations demanded an additional and independent opportunity for review on the merits. On the other hand, disallowance could result in the loss of the only flexibility available in the system for calculating RBLs. This could have meant a very negative result for taxpayers.

2.73 "A draft response to the Committee's second letter was received. That letter confirmed the Committee's conclusions regarding the lack of opportunity for review of decisions on their merits. Hoping to avoid the invalidation of the regulations, and thereby preserve some flexibility in the system for the taxpayer, the Chair on behalf of the Committee, again wrote to the Parliamentary Secretary. The Chair indicated that an undertaking by the Parliamentary Secretary to provide the requisite review mechanism would be an appropriate response.

2.74 "The Parliamentary Secretary provided that undertaking on the same day. From the point of view of the Committee, this was a most satisfactory resolution. This case illustrates the cooperative effort of the Committee and relevant Government representatives to avoid the unnecessary disallowance of legislation whilst ensuring that subordinate legislation conforms with parliamentary propriety.

Principle (d)

Does delegated legislation contain matter more appropriate for Parliamentary enactment?

2.75 "Matters are not often raised under this principle. It is, nevertheless, an important principle. It is a breach of the fundamental requirement of responsible government if matters are contained in delegated legislation which should be subject to all the safeguards of the parliamentary passage of a Bill.

Undertakings

2.76 "During the present sittings, eleven instruments were considered by the Committee in the usual course of its scrutiny powers which fulfilled or partially fulfilled undertakings given to the Committee by the relevant Ministers. The majority of these instruments were accompanied by explanatory material which set out the history of the amendment, making particular mention of the Committee's role in identifying problems and errors. The Committee is appreciative of this recognition.

Condolences

2.77 "The Committee suffered the sad loss of an extremely hard working and dearly loved member, Senator Olive Zakharov as a result of a traffic accident. Senator Zakharov had been a member of the Committee for approximately six years and her contribution was greatly valued.

Other developments

Committee Membership

2.78 "On 1 March 1995 Senator Forshaw was appointed to the Committee replacing Senator Zakharov. Senator Loosley resigned from the Senate on 21 May 1995 and was replaced on the Committee by Senator Jacinta Collins who was appointed on 30 May 1995. Also on 30 May 1995, Senator Forshaw was discharged from the Committee and was replaced by Senator Wheelwright.

Reports

2.79 "On 8 June 1995, the Chairman, on behalf of the Committee, tabled the Committee's One hundred and first report. That report outlines the action by the Committee in relation to the Industrial Relations Court Rules, Statutory Rules 1994 No. 110.

Statements

2.80 "The Chairman on behalf of the Committee made a statement to the Senate in relation to the withdrawal of notices of motion of disallowance in respect of two instruments of delegated legislation, namely, Instrument No 45 of 1994 made under subsection 196B(3) of the *Veterans' Entitlements Act 1986* and an Exemption under regulation 207 of the Civil Aviation Regulations.

2.81 "The Chairman, on behalf of the Committee, also made a special statement to the Senate on the tabling of the Committee's Report on the Industrial Relations Court Rules.

Conferences

"The Chairman and the Acting Committee Secretary attended a conference in Melbourne on 2 June 1995 in relation to the finalisation of draft Discussion Paper No 1 on the scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles."

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 made validly under both its parent Act and any other relevant legislation such as the *Acts Interpretation Act 1901*.

3.3 Subregulation 48(2) of the Acts Interpretation Act provides generally that prejudicially retrospective delegated legislation affecting anyone except the Commonwealth is void. **Determinations INS 23/1995, HIT 5/1994, HIT 6/1995 and HIT 7/1994**, made respectively under ss.4(1)(dd), 4(1)(dd), 4D(1)(a) and 4D(1)(b) of the *National Health Act 1953*, were expressed to operate retrospectively. The Explanatory Statements for these instruments advised that the retrospectivity advantaged patients, who otherwise would be liable to refund benefits to health funds and hospitals. The Committee suggested that the provisions prejudicially affected those same health funds and hospitals. The Minister advised that the instruments were void. The **Exemption No. BKFO/59/94 made under regulation 207 of the Civil Aviation Regulations** did not indicate the date on which it was made, although the instrument was expressed to be effective from a specified date. Therefore, under s.48(2) of the Act, the instrument would be void unless gazetted by that date. The Minister confirmed that the instrument was void.

3.4 The Committee raised with the Minister the question of apparent prejudicial retrospectivity in numbers of **Civil Aviation Orders**. The Minister advised that the instruments were not intended to have retrospective effect; future instruments would be drafted in a style which made this clear. The Committee obtained from the Minister an assurance that amendments of the *Superannuation Act 1976* and the *Superannuation Act 1990* by the *Superannuation Legislation Amendment Act 1994*, made to implement an undertaking given to the Committee, provided for the validity of the prejudicially retrospective **Superannuation (Continuing Contributions for Benefits) Regulations (Amendment)** and the **Superannuation (PSS) Membership Inclusion Declaration No. 12**,

Statutory Rules 1994, Nos 115 and 117. The National Health Regulations (Amendment), Statutory Rules 1994 No. 201, allocated a new approval number to a nursing home to reflect a change in ownership. The Explanatory Statement advised that the allocation was retrospective, but there was no provision for retrospectivity in the Regulations. The Minister advised that the nursing home was not disadvantaged and that future amendments would clearly identify periods of individual proprietorship.

3.5 The Committee sought and obtained from the Ministers assurances that the following instruments were either gazetted on or before the date upon which they were expressed to come into effect, or prejudicially affected no person or only the Commonwealth. **Antarctic Marine Living Resources Conservation Regulations, Statutory Rules 1994 No. 345; Applications of Act to Pre-existing Capacity between Australia and Taiwan made under s.54A of the International Air Services Commission Act 1992; Childcare Rebate (Definition of Child Care) Determination No. 1 of 1994 and Childcare Rebate (Special Circumstances – Australian Resident) Guidelines, both made under the Childcare Rebate Act 1993; Health Insurance Commission Regulations (Amendment), Statutory Rules 1994 No. 450; Instrument No. 45 of 1994 made under s.196B(3) of the Veterans' Entitlements Act 1986; Patents Regulations (Amendment), Statutory Rules 1995 No. 16; and Remuneration Tribunal Determinations Nos 30 and 33 of 1994.**

3.6 Delegated legislation is void if it purports to subdelegate legislative power without the authority of an Act. The **Superannuation Industry (Supervision) Regulations (Amendment), Statutory Rules 1994 No. 189**, provided that the pension valuation factor would be indexed at a rate "calculated in accordance with arrangements determined in writing by the Commissioner". The Minister advised that this provision was probably a subdelegation of legislative power unsupported by the parent Act and therefore invalid. **Defence Determination 1994/27** provided for service overseas to be declared warlike or non-warlike by the Minister for Defence. Similarly, the instrument provided for the Chief of the Defence Force to declare an area to be an operational area, while other powers were conferred upon the Minister for Defence Science and Personnel. The Minister advised that the Committee's inquiry about subdelegation gave rise to an unusually complex set of policy and drafting issues which had to be resolved in parallel and in consultation with all the interested parties, including the ADF, the Attorney-General's Department, relevant Ministers and the Department of Industrial Relations. The Minister advised that it was possible to interpret the declarations by the Minister for Defence and the Chief of the Defence Staff as invalid subdelegations of legislative power and a fresh Determination, **Defence Determination 1994/57**, had therefore been made to remove any possible invalidity. Other provisions were valid subdelegations of administrative rather than legislative power, apart from one power which was more open to question. This power was also addressed by the fresh instrument. The Committee then asked for an assurance that any other instruments providing for invalid subdelegation would be amended. The Minister advised that one other Determination, while not clearly invalid, would be changed, while two other Determinations would be amended to put their validity beyond doubt.

3.7 The **Customs (Prohibited Imports) Regulations (Amendment), Statutory Rules 1994 No. 104**, defined an approved testing authority as one approved by the Minister on the recommendation of the Australian Wool Corporation or the Australian Wool Research

and Promotion Organisation. The Minister advised that the approval was administrative not legislative, although the function of AWRAP itself in setting standards for testing authorities was legislative. The **National Health (Pharmaceutical Benefits) Regulations (Amendment), Statutory Rules 1994 No. 348**, removed mandatory forms from parliamentary scrutiny and substituted forms approved by the Secretary. The Minister advised that the power was administrative, not legislative, that the forms were used only by pharmacists, medical practitioners and hospital authorities, not by the general public, and that the information sought by the forms was limited. Nevertheless, the Committee's concerns would be taken into account when the Regulations were next amended. Similarly, the **Civil Aviation Regulations (Amendment), Statutory Rules 1994 No. 382**, provided for a power to exempt or vary legislative requirements. The Minister advised that this power was administrative not legislative and was reviewable by the AAT. In respect of **Defence Determination 1994/40** the Minister advised the Committee that a power to negate the provisions of a Determination was administrative.

3.8 Section 49A of the Acts Interpretation Act provides generally that delegated legislation may incorporate or adopt the provisions of an Act or of other delegated legislation in force from time to time, but may only incorporate other material as in force or existing when the incorporating instrument takes effect. The **Civil Aviation Order Part 105 AD/E27/103 Amdt 6** incorporated a document and "subsequent temporary revisions" of that document. The Minister advised that the references to subsequent revisions was an error and would be removed. The relevant Ministers advised the Committee that incorporation of material by the **Determination No 1994/1 made under s.7(1)(c)(i) of the Student Assistance Act 1973** and by **Marine Orders Part 20, Ship Machinery, Issue 1-Amendment, Marine Orders No. 1 of 1994**, and **Part 15, Ship Fire Protection, Fire Detection and Fire Extinction, Issue 2, Marine Orders No. 2 of 1995**, were intended to apply to material as existing at the time of incorporation. The Ministers further advised that if the incorporated material was amended then the delegated legislation would also be amended. The Committee questioned the incorporation in the **Military Superannuation and Benefits Trust Deed (Amendment) (No. 2 of 1994) made under s.5 of the Military and Superannuation Benefits Act 1991** of CPI increases as published by the Statistician. The Minister advised that while the references to the CPI were adopted by the instrument, they were isolated and separate publications and not in the nature of a continuing but changing register.

3.9 Each instrument of delegated legislation must be made and submitted for parliamentary scrutiny within the terms of the enabling provisions of its parent Act or some other Act. The Committee questioned the validity of four **Guidelines under ss.39HB, 39F, 39EA and 39E of the Industry Research and Development Act 1986**. Section 39EA was inserted into the Act by the *Taxation Laws Amendment Act (No. 5) 1992*, which received Royal Assent on 24 December 1992. Subsection 39EA(1) provided that the Industry Research and Development Board "must, as soon as practicable (and, in any event, within 90 days) after the commencement of this section, formulate written guidelines" in relation to certain matters. A **Guideline under s.39EA** was gazetted on 24 March 1993, within the 90 day deadline. However, because it was not tabled, that guideline ceased to have effect after 15 sitting days following gazettal. Some two years later a fresh **Guideline under s.39EA** was made exactly the same as the first, the Explanatory Statement

for which advising that its purpose was to confirm decisions made under the original Guideline and to enable applications under the Guideline to be resubmitted. The Committee was concerned that the new Guidelines may be invalid because they were not made within the 90 day period. The Committee also raised the validity of the other three Guidelines, none of which were made within similar 90 day deadlines. The Minister advised that the Guidelines were valid but that legislation would be introduced and accorded status for passage during the then parliamentary sittings which would provide certainty and remove doubt about the validity of the Guidelines. The Minister also advised that all action taken by the Board under the first Guideline after it ceased to have effect was invalid, but that the amendments of the Act would also address this. The **Citizen Band Radio Stations Class Licence** and the **Handphone Stations (27MHz) Class Licence**, both made under s.132(1) of the *Radiocommunications Act 1991*, provided for directions to be given about the operation of stations. The Minister advised that the legislative authority to provide for such directions was included in the power to provide conditions for licences.

3.10 The **Exemption No. BKFO/59/94 under regulation 207 of the Civil Aviation Regulations** provided that it was made by a delegate of the Civil Aviation Authority. However, it was signed by the rule-maker for and on behalf of the CAA. The Committee asked whether this inconsistency had any implications for validity. The Exemption also provided that a specified airline may act contrary to a certain Civil Aviation Order. However, r.207 did not appear to provide such a power. The Minister advised that the Exemption was invalid. The Chief Justice of the Industrial Relations Court and the Minister both advised the Committee that the **Industrial Relations Court Rules, Statutory Rules 1994 No. 110**, and amendments made by **Statutory Rules 1994 No. 145 and 200**, were not invalid for prejudicial retrospectivity but would be repealed and remade to put the matter beyond doubt. The Committee's scrutiny of the Rules was the subject of its *101st Report*. However, the Committee understands that it is accepted that Order 3, r.2(5), which provided that s.36(2) of the Acts Interpretation Act did not apply to the Rules, was invalid. Such a provision would require express statutory power to negate the provisions of an Act.

3.11 Parent Acts and other relevant Acts may provide for mandatory procedures relating to the making or parliamentary scrutiny of delegated legislation. The Committee checks that these requirements have been met. The *Remuneration Tribunal Act 1973* provides that certain Determinations made under the Act must be tabled within 15 sitting days of the Minister receiving a Determination, rather than the usual 15 sitting days of making. In response to the Committee's inquiry the Minister advised that **Remuneration Tribunal Determinations Nos 18, 19 and 21 of 1993** had been tabled in the Annual Report of the Remuneration Tribunal. The Minister undertook to amend the Act as soon as practicable to impose a time limit for sending Determinations to the Minister, taking into account the debate on the *Legislative Instruments Bill 1994*. In respect of **Declaration No. 5 of 1994 under s.10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984** the Committee obtained an assurance from the Minister that lengthy and detailed procedures required by s.10 had been followed. **Public Service Determination 1995/3**, which was made on 11 January 1995, inserted two new APS classifications. The Explanatory Statement for the Determination advised that these classifications were included in an

Agreement which was expected to be ratified by the Industrial Relations Commission before the end of February 1995. The Committee asked whether it was appropriate to make delegated legislation in expectation of the outcome of a non-statutory process. The Minister advised that the Explanatory Statement gave the wrong impression and that even if the Agreement had not been ratified by the IRC in April 1995 the Determination would still be effective.

3.12 Section 4 of the Acts Interpretation Act provides that delegated legislation may be made, but may not commence, between the passing of an enabling Act and its commencement. The **Determination of Representative Aboriginal/Torres Strait Islander Body Nos 1 and 2: 1994 made under s.202 of the Native Title Act 1993** were both expressed to be made under s.4 of the Acts Interpretation Act as well as under s.202 of the Native Title Act. Section 202 commenced on 1 January 1994 and the Determinations were made on 18 May 1994. Similarly, the **Nuclear Non-Proliferation (Safeguards) Regulations (Amendment), Statutory Rules 1994 No. 178**, made on 9 June 1994, recited that they were made under s.4 of the Acts Interpretation Act as well as under the parent Act, even though the relevant enabling provisions commenced on 1 November 1993. The Committee asked why it was necessary for the three instruments to be made under section 4. The relevant Ministers advised that the references to section 4 were redundant.

3.13 The **Determination of Technical Standard Notice No TS3 of 1994 under s.246 of the Telecommunications Act 1991** made amendment No. 1 to TS005-1992; Cellular Mobile Telephone System Air Interface Compatibility. However, both the amendment itself and the Explanatory Statement referred to TS005-1992; Analogue Cellular Mobile Telecommunications System – AMPS Mobile Station. The Minister advised that the instrument would be repealed and a new Determination made. The **Rules of the Australian Industrial Relations Commission (Amendment), Statutory Rules 1994 No. 464**, required the identification of seven rather than the statutory three categories of employee. Other provisions of the Rules also appeared to go further than the specific requirements of the Act. The President advised that the provisions of the Act were not exhaustive and that the requirements of the Rules were not inappropriate in the context of the statutory obligations of the AIRC.

3.14 The **Determination of Representative Aboriginal/Torres Strait Islander Body No. 2:1994 made under s.202 of the Native Title Act 1993**, recited that the Minister was satisfied that a specified body was an appropriate body for the purposes of the Act. However, the determination clause did not mention any body. The Minister advised that a fresh Determination had been made and would be tabled.

3.15 The **Northern Prawn Fishery Management Plan 1995, NPF01**, and the **Southern Bluefin Tuna Fishery Management Plan 1995, SBT01**, made under s.17 of the *Fisheries Management Act 1991*, did not include a commencement date, although both provided that the Plan would commence when notice of the fact of its determination was published under s.19(1) of the Act. The Minister advised that commencement dates would be included in future Plans, either by a Note or in the Plan itself, as appropriate.

Drafting defects

3.16 The Committee considers that the standard of drafting of delegated legislation should not be less than that for Acts. The **Customs (Prohibited Exports) Regulations (Amendment), Statutory Rules 1994 No. 32**, included a number of expressions which the Committee considered may be imprecise and uncertain. For instance, one reference was to information "that, in relation to which the Commonwealth has, for the purposes of giving effect to an agreement or arrangement with the government of another country, taken steps to prevent its dissemination to persons generally." This provision was so vague that members of the public might not have been able to ascertain their legal rights and obligations. The Minister advised that the application of several of the provisions was obviously large but were drafted as precisely as possible and could be identified if the need arose. The Minister agreed that the coverage of two provisions may be difficult for the public to ascertain, but this was a function of the type of prohibition rather than drafting deficiencies. The **First Home Owners Regulations (Amendment), Statutory Rules 1994 No. 347**, provided merely that the Secretary "may" pay applicants under the First Home Owners Scheme a lump sum, whereas the Explanatory Statement appeared to advise that the intention was that all applicants would be paid a lump sum consequent upon the termination of the scheme. The Committee asked why the word "must" was not used. The Minister advised that in this case the use of "may" did not provide a discretion and that payment was mandatory. The **Declaration No. 94/ESP2 made under s.18(1) of the Endangered Species Protection Act 1992** amended the ANZECC list of threatened Australian flora. However, unlike the earlier **Declaration No. 94/ESP1**, the present Declaration included only scientific names of flora, rather than both scientific and common names. The Minister advised that names of the plant species in the present Declaration had no common name, or alternative common names. As a matter of principle Declarations would include common names where they exist and are widely accepted and their inclusion would not create confusion.

3.17 The **National Health (Pharmaceutical Benefits) Regulations (Amendment), Statutory Rules 1994 No. 348**, provided for four new offences, the maximum penalty for which was the small amount of \$20. The Minister advised that this was intended, subject to a future review of the penalties. The Regulations also included reference oversights which the Minister undertook to correct. The **Australian War Memorial Regulations (Amendment), Statutory Rules 1994 No. 375**, provided for authorised officers to exercise discretions. However, neither the parent Act nor the Regulations provided for authorised officers. The Minister advised that the power to authorise officers for particular purposes without express legislative authority to do so is authorised by judicial authority. However, provision would be made for authorised officers if the Act or the Regulations were amended. The **Customs (Prohibited Imports) Regulations (Amendment), Statutory Rules 1994 No. 104**, provided for the Minister to authorise any officer of the Department, no matter how junior, as an authorised person. The Minister advised that only one senior executive officer had been so authorised and that total numbers should not exceed 10. If the Committee wished, the Regulations could be amended. The Committee was satisfied with the advice.

3.18 There were drafting oversights in the following instruments: The **Therapeutic Goods (Charges) Regulations (Amendment), Statutory Rules 1994 No. 223**, were made

under the wrong act; the Minister advised that the Regulations were valid under the "slip rule", under which a manifest error in an instrument may be disregarded if the maker's intention is plain. The **Childcare Rebate (Definition of Child Care) Determination No. 1 of 1994** was made under the wrong provision; the Minister advised that this would not affect validity. The **Quarantine Determination No. 1 of 1995 made under s.86E of the Quarantine Act 1908**, included two drafting discrepancies, which the Minister undertook to correct. The **Remuneration Tribunal Determination No. 19 of 1994** determined a basic rate of salary for 20 individuals of \$104,418 and then determined one other rate of \$104,419; the Minister advised that this was unintentional and would be corrected when the salary was next adjusted. The **AUSTUDY Regulations (Amendment), Statutory Rules 1994 No. 409**, included reference oversights which the Minister undertook to correct. The **Instrument No. 6 of 1995 made under s.196B(3) of the Veterans' Entitlements Acts 1986** included inconsistent spelling of a medical condition, in respect of which the Minister advised that amendment would be considered. The Minister also advised that the rule-maker had subsequently installed a spell check with a medical dictionary. The Committee raised aspects of the drafting of **Instruments Nos 41-46 and 65-66 of 1995 made under s.196B of the Veterans' Entitlements Acts 1986**. The Minister advised that different definitions of the same term had the same intention, that the omission of certain definitions was an oversight which would be corrected and that the omission of other definitions would not have a negative effect on veterans' claims.

Scrutiny of Notes

3.19 Printed copies of delegated legislation may include Notes as well as an attached Explanatory Statement. While Notes do not form part of an instrument the Committee scrutinises such Notes for compliance with its principles. The **Immigration (Education) Charge Regulations (Amendment), Statutory Rules 1994 No. 263**, included a Note with incorrect references to other legislation; the Minister undertook to provide a correct Note with the next amendment of the Regulations. The **AUSTUDY Regulations (Amendment), Statutory Rules 1994 No. 409**, omitted an earlier Note which advised of a right of review; the Minister advised that this was an oversight. The **Therapeutic Goods (Charges) Regulations (Amendment), Statutory Rules 1994 No. 223**, included a Note of the instruments comprising the principal Regulations. One of these instruments was **Statutory Rules 1990 No. 89**, which was disallowed by the Senate on 16 May 1990. They could therefore not be part of the principal Regulations nor could they, as advised by the Note, be amended by **Statutory Rules 1990 No. 395**. Also, two other sets of Statutory Rules were missing from the Note. Finally, the Note referred to **Statutory Rules 1991 Nos 88 and 430**, which were respectively amendments of the **Migration Regulations** and the **Shipping Registration Regulations**. The Committee suggested that these had accidentally migrated to the Note and should be shipped out when the Regulations were next amended. The Minister undertook to do this. The Note to **Instruments Nos 111 and 112 of 1995 made under s.196B of the Veterans' Entitlements Act 1986** advised that a species of scorpion, to which the Instruments refer, is found in the West Indies. The Committee asked whether it was intended to restrict the operation of the Instruments to veterans who were bitten in the West Indies. The Minister advised that the Note would be removed.

Inadequate explanatory material

3.20 Due to the previous efforts of the Committee, it is now accepted that each instrument of delegated legislation should be accompanied by adequate explanatory material. The Explanatory Statements for the **Instruments Nos 1 to 26 made under s.196B of the Veterans' Entitlements Act 1986** all referred to the Instruments being made in 1994 when they were made in 1995. The Minister advised that this was an oversight. The Explanatory Statement for the **Determination No. 29 of 1994 made under s.16 of the Higher Education Funding Act 1988** advised that the Determination provided for grants for three named institutions. However, two of the three institutions were not mentioned in the Determination, whereas three others were. These three others were not mentioned in the Explanatory Statement. The Minister advised that the Explanatory Statement was incorrect. **Eight Proclamations under s.6 and 7 of the World Heritage Properties Conservation Act 1983** were not accompanied by Explanatory Statements. The Minister advised that explanatory material had been proposed but inadvertently omitted. The Explanatory Statement for the **Agricultural and Veterinary Code Regulations, Statutory Rules 1995 No. 27**, was scarcely one page long, although the complex principal Regulations were 88 pages long. The Minister provided a revised Explanatory Statement. The Explanatory Statement for the **Family Law (Child Abduction Convention) Regulations (Amendment), Statutory Rules 1994 No. 252**, did not mention that the purpose of the Regulations was to implement an undertaking given to the Committee to extend the protection of the Convention. The Committee was advised that this would be done in future where appropriate. The Committee's work on the effect of Child Abduction Convention was the subject of its *Ninety-Eighth Report*, tabled on 29 June 1994. The Explanatory Statement for the **Public Service Determination 1994/71**, which was made on 30 June 1994 and operated retrospectively from 30 August 1990, advised that this was as a result of a decision of the Australian Industrial Relations Commission under the Structural Efficiency Principles. The Committee obtained from the Minister details of the decision and of the cost of the retrospectivity.

3.21 The Explanatory Statements for the **Australian Securities Commission Regulations (Amendment)**, the **Corporations Regulations (Amendment)** and the **Corporations (Fees) Regulations (Amendment), Statutory Rules 1994 Nos 301-3**, which were substituted for earlier statements, advised that a Note to each set of Regulations was incorrect. The Committee asked why a substituted copy of each set of Regulations was not produced as well. This could have been done because the Notes do not form part of the Regulations. The Committee noted that recently one set of regulations was substituted for an earlier set to correct one letter in the given name of a Minister. The Minister advised that to do so may have cast doubt on the validity of the Regulations which had already been made and would have caused considerable confusion.

Replies from Ministers

3.22 Letters from the Committee to Ministers about aspects of the **Immigration (Education) Charge Regulations (Amendment), Statutory Rules 1994 No. 263**, and the **Determination of Conversion Factors to apply to Imported Forest Products made under s.6 of the Forest Industries Research Import Charge Act 1993** were answered by

departmental officers. The Committee advised the Ministers that it would prefer to continue the long accepted practice under which letters from the Committee to Ministers were answered by Ministers. This practice recognised the importance of a communication from a Committee of the Senate. The Committee noted that it had received prompt and helpful personal replies from the Ministers in response to other queries.

Numbering and citation

3.23 Due to the efforts of the Committee, it is now accepted that every instrument of delegated legislation should provide a clear system of numbering or citation. Without such a system delegated legislation may be imprecise and confusing. For instance, both the *Determination No. 1994-95/10 (Guidelines No. 9BG1 of 1995) made under s.9B of the Aged or Disabled Persons Care Act 1953* and the *Guidelines for Industry Work Experience Criteria-1995, Determination No. G2 of 1995, made under s.36 of the Higher Education Funding Act 1988* were tabled under one citation in the Senate and under another in the House of Representatives. In both cases the Minister undertook to simplify the citations.

3.24 Ministers also undertook to provide numbering or citation for instruments in the following series: *Civil Aviation Orders Part 107; Determination of Conversion Factors to Apply to Imported Forrest Products made under s.6 of the Forrest Industries Research Import Charge Act 1993; Extension of CFC Quota Period made under s.8 of the Ozone Protection Act 1989; Guidelines under s.42 of the Export Market Development Grants Act 1994; Heritage Conservation Rebate (Provisional Certificate Criteria and Procedures) Determination made under s.159UF of the Income Tax Assessment Act 1936; Heritage Conservation Rebate (Recognised Heritage Register and Recognised Heritage Body) Declaration made under s.159UB of the Income Tax Assessment Act 1936; Notice made under s.159UD of the Income Tax Assessment Act 1936; and Proclamation made under s.6(3) and Proclamation made under s.7 of the World Heritage Properties Conservation Act 1983. The Minister undertook to provide a more prominent numbering system for instruments following *Determination No. G2 of 1995 made under s.36 of the Higher Education Funding Act 1988.**

Principle (b)

Does delegated legislation trespass unduly on personal rights and liberties?

Harsh or unfair provisions

3.25 It is a breach of personal rights if provisions of delegated legislation are harsh or unreasonable. The *Telecommunications National Code made under s.117 of the Telecommunications Act 1991* provided that certain telecommunications carriers must rectify any damage to land caused by a prescribed activity which is necessary in the public interest and which is engaged in during a proclaimed disaster or while protecting life or property. The Committee suggested that this provision may be harsh, with carriers put to the expense of rectifying damage to land caused by, for instance, fighting a bush fire or assisting with flood control. The Minister advised that, while carriers could

contribute to such activities, the relevant provision was more likely to operate to require a carrier to rectify damage caused by the carrier's repair work to its own facilities or installations and to restore its own services following a disaster.

3.26 The **Wool Tax (Administration) Regulations (Amendment)**, the **Tobacco Charges Regulations (Amendment)**, the **Sales Tax Procedure (Old Law) Regulations (Amendment)**, the **Sales Tax Assessment Regulations (Amendment)**, the **Income Tax Regulations (Amendment)**, and the **Child Support (Registration and Collection) Regulations (Amendment)**, **Statutory Rules 1994 Nos 191-195 and 197**, provided for the use of evidentiary certificates. These were, however, differences between such provisions in the amended **Child Support (Registration and Collection) Regulations** and those provisions in the other amended principal Regulations. Those other provisions, and similar earlier provisions in the **Fringe Benefits Tax Regulations**, provided safeguards for the use of evidentiary certificates which were lacking in the **Child Support (Registration and Collection) Regulations**. The Minister advised that it was correct that under the **Child Support (Registration and Collection) Regulations** evidentiary certificates were not required to state the basis or the particulars of the liability or that notice of the liability had been served on a person. However, the scheme of the child support legislation was different to the other legislation and the certificate reflected the intention of the parent Act. There were procedures under that Act to dispute adverse assessments.

3.27 The **Suspension of a Regional Councillor from Office, No. 1 of 1994**, made under s.122A(3) of the **Aboriginal and Torres Strait Islander Commission Act 1989** provided the reasons for the suspension from office by ATSIC of a Regional Councillor. The parent Act, however, required ATSIC to terminate the suspension if both Houses of Parliament declared that the person ought to be restored to office. Because of the effect upon the individual concerned the Committee scrutinised the Suspension carefully. The Suspension advised that ATSIC regarded convictions of the Councillor for a number of offences under the **Social Security Act 1991** as infamous crimes. The Committee asked whether the offences were really infamous and, even if they were, what was the legal effect of this, given that the parent Act did not mention infamous crimes. The Committee also asked for advice about an apparently related instrument, the **ATSIC (Misbehaviour) Determination, 1994 No. 1**. The Minister advised that the social security offences would come within the dictionary meaning of infamous and within the ordinary meaning of misbehaviour. The Determination relating to misbehaviour, which did not mention infamous crimes, was made after the convictions of the Councillor. The suspension relied only on the provision in the parent Act that ATSIC may suspend a Councillor from office for misbehaviour or physical or mental incapacity.

3.28 The **Australian Sports Drug Agency Regulations (Amendment)**, **Statutory Rules 1994 No. 284**, expressly provided that where an accredited laboratory tested a sample and confirmed that there was the possibility of a positive result, it did not have to notify the affected competitor. The Committee noted that this provision did not appear to preclude a laboratory notifying the competitor if it wished. On the other hand, the Regulations expressly required the laboratory to tell the competitor where the test did not confirm a positive result. The Committee asked why a negative result must be notified, while the notification of a possible positive sample was apparently left to the discretion of the testing laboratory. The Minister advised that the requirement to notify the competitor was a

drafting error, which would be corrected. Accredited laboratories are never given the names of competitors. The Regulations would also be amended to require laboratories to notify the ASDA of both positive and negative test results.

3.29 Instruments Nos 23 and 24 of 1995 made under s.196B of the *Veterans' Entitlements Act 1986* determined statements of principles relating to trigeminal neuralgia and different types of service rendered by veterans and by members of the Forces. One Instrument provided for eight factors which must exist before such a connection was established, whereas the other Instrument provided only for five of the eight factors. The Minister advised that the difference was due to the standard of proof required by the parent Act. Under one Instrument the standard was that of reasonable hypothesis, while under the other the standard was the balance of probabilities. The Minister advised that, as observed by the Committee, in many Instruments the relevant factors for each standard of proof correspond. However, this was not the case with the present Instruments.

3.30 *Defence Determinations 1994/36 and 1994/38* included definitions which resulted in ADF members being entitled to rights which existed for members of the APS under *Public Service Determination 1983/15* as in force from time to time. That latter Determination was, however, repealed by *Public Service Determination 1994/163*. The Committee asked whether new Determinations would be made to ensure that ADF members continued to receive the same entitlements the APS. The Minister confirmed that this had been done.

Privacy

3.31 The Committee ensures that delegated legislation respects the basic right of privacy. The *Australian Securities Commission Regulations (Amendment), Statutory Rules 1994 No. 301*, specified bodies corporate to which the ASC could disclose confidential information. The Committee asked whether the Privacy Commissioner was consulted before the amendments were made. The Minister advised that this was not the case. However, the bodies prescribed were the very ones contemplated by enabling amendments of the Act, which restricted the bodies corporate which could be prescribed. The purpose of the amendments was to facilitate cooperation between the ASC, domestic securities and future exchanges and their clearing houses. Also, the Act included a safeguard which prevented a prescribed body corporate from using information provided to it by the ASC for a purpose other than that for which it was provided. This was intended to ensure that the amendments of the Act were consistent with privacy principles relating to the use of personal information. The *Statistics Determination (Amendment), Statutory Rules 1994 No. 465*, provided for the disclosure of information by the Statistician, some of which appeared to be sensitive. The Minister confirmed that the Privacy Commissioner was consulted about the amendments. The Privacy Commissioner noted this in the Annual Report on the Operation of the Privacy Act: 1993-94. The Privacy Commissioner would keep under review the appropriateness and desirability of his office undertaking an audit of Bureau of Statistics practices in disclosing information.

Fees and charges

3.32 Many instruments of delegated legislation provide for levels of fees and charges. Unexpected or unusual levels of fees or charges may not only breach parliamentary propriety, but also affect personal rights. **Quarantine Determination No. 1 of 1994 made under s.86E of the Quarantine Act 1908** set some 120 fees, some of which were the same level as the previous fees, some of which were reduced, others were restructured and a new fee introduced. The Explanatory Statement did not give reasons for the changes. The Minister advised that the reductions were in areas where the Australian Quarantine and Inspection Service was able to reduce costs. The Minister also explained the other changes. The **Export Inspection (Quantity Charge) Regulations (Amendment), Statutory Rules 1994 No. 395**, decreased charges. The Committee noted that in 1989 the Minister advised the Committee that significant increases in charges represented partial cost recovery. The Minister advised that the reductions reflected reduced costs.

3.33 The **Family Law Rules (Amendment), Statutory Rules 1994 No. 401**, increased two fees and decreased two others, although the Explanatory Statement advised that the general intention was to reduce fees. The Chief Justice advised that the apparent increase now represented two combined fees, with the result that fees were actually lower for the same services. The Explanatory Statement for the **Corporations (Fees) Regulations (Amendment), Statutory Rules 1994 No. 303**, did not explain the basis for new fees. The Minister advised that the fees were intended to offset costs incurred by the ASC. The fee in each case was intended to be similar to existing comparable fees. For instance, the fee for lodging annual returns of a non-company was set at \$750, the same as the fee for lodging annual returns of public and foreign companies. The **Petroleum (Submerged Lands) Fees Regulations (Amendment), Statutory Rules 1994 No. 237**, set the first fees under the *Petroleum (Submerged Lands) Fees Act 1994*, which consolidated provisions of the four Acts which it replaced. The Minister advised that the basis for the fees remained the same as advised by the second reading speech for the Primary Industries and Energy Legislation Amendment Bill (No. 2) 1989. This was to provide timely adjustment of fees to reflect more closely actual administrative costs incurred by the States and the Northern Territory, who administer the scheme.

Lengthy unexplained retrospectivity

3.34 Instruments which operate retrospectively, even if valid, may breach both parliamentary propriety and personal rights 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.

3.35 The Australian Capital Territory **Classification of Publications (Amendment) Ordinance (No. 3) 1994, No. 5 of 1994**, imposed a nine year retrospective liability to pay an application fee, with any such payments during that time taken to discharge that liability. The retrospectivity approved valid under the parent *Seat of Government (Administration) Act 1910*. However, the Committee asked for advice on the legislative and administrative considerations which dictated the retrospective liability and the apparent simultaneous discharge of that liability. In particular, the Committee asked

whether, in the absence of the retrospectivity, fees paid during the nine years would have to be refunded and, if so, how much money was involved. The Minister advised that the decision to legislate retrospectively was not taken lightly because of the general undesirability of retrospectivity, reflected in the strict approach of the Committee to such provisions. Nevertheless, the fee had been collected in good faith and the services to which the fee related has been delivered. A person who had paid the fee could have brought a successful claim to recover it, but in the absence of a claim the Commonwealth would not have been obliged to repay the fee. The fee was a nominal fee for service of \$50, involving a total of \$1350.

3.36 The **Training Guarantee (Administration) Regulations (Amendment), Statutory Rules 1994 No. 176**, operated retrospectively for almost four years. Although the Explanatory Statement advised that the retrospectivity did not affect any person other than the Commonwealth the Committee asked for the reasons for the lengthy retrospectivity and whether, as appeared possible, the Commonwealth would now have to repay money. The Minister advised that the retrospectivity was necessary because the Indonesian Government did not agree to the introduction of the Training Guarantee in Zone A of the Timor Gap, under joint Australian and Indonesian control. It was unlikely that the Commonwealth would have to repay any money.

Self-incrimination

3.37 The Committee usually asks for an explanation for delegated legislation providing for self-incrimination. The **Protection of the Sea (Oil Pollution Compensation Fund) Regulations, Statutory Rules 1994 No. 126**, provided that the Australian Maritime Safety Authority may require a person to produce documents that are relevant to ascertaining the liability of a person to contribute to the Fund. The Committee suggested that the provision appeared to involve self-incrimination. The Minister advised that while the concept of self-incrimination may arise where there are no judicial proceedings on foot, for instance in the course of an executive inquiry, and that the concept applied to civil penalties as well as to conviction for a crime, the present provisions did not expose a person to the liability. Any liability was established by the Act.

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

3.38 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.

3.39 The **Customs Regulations (Amendment), Statutory Rules 1994 No. 435**, were made consequent upon changes to anti-dumping and countervailing regimes effected by the *Customs Legislation (World Trade Organization Amendments) Act 1994*. The Regulations

conferred wide discretions on the Minister, providing that if the Minister was not satisfied that sufficient information had been provided then he or she may determine the matter having regard to all relevant information. For these purposes the Minister could disregard any information which he or she considered unreliable. The Minister advised that the purpose of the amending Act and Regulations was to enable Australia to meet its obligations under the Uruguay Round of the GATT. Discretions exercised in the context of an investigation culminating in a Positive Preliminary Finding by the Australian Customs Service must be referred to the anti-dumping authority for full merit review and a Final Finding. The **Customs (Prohibited Imports) Regulations (Amendment), Statutory Rules 1995 No. 15**, provided for the Minister to exercise discretions relating to the import of firearms for use in films or in the development of mountings for laser target designators. The discretions included criteria or other limits on their exercise. The Minister advised that the provisions were not subject to AAT review, being based on high government policy considerations of public safety. It was not desirable to have merits review where decisions were based on these grounds, or on national security, defence or international treaty obligations. A decision to refuse import permission could only be made by the Minister, which was a necessary corollary to the high government policy exception to the reviewability of decisions. The Minister considered that merits review by the non-elected AAT of decisions based on high government policy grounds is inconsistent with the doctrine of government responsibility in the Westminster system. The Minister further advised, however, that the distinction between non-reviewable and reviewable decisions might be difficult and that this would be addressed by the government's response to the Australian Law Reform Commission report on customs and excise legislation, in the context of a consistent position on the reviewability of decisions.

3.40 The **Corporations Regulations (Amendment), Statutory Rules 1994 No. 302**, provided administrative details to implement the *Corporate Law Reform Act 1994*. The Regulations provided for a number of discretions in relation to registration of notices, prohibition of publication of notices, sales of shares and issues of shares. The Minister advised that the *Corporations Law* provided for the AAT to review decisions of the ASC made under that law, which included decisions made under the Regulations. The **Corporations (Fees) Regulations (Amendment), Statutory Rules 1994 No. 34**, provided for the ASC to decide whether a company was operating solely as a trustee of a regulated superannuation fund. The discretion appeared important because the Explanatory Statement advised that the purpose of the amendments was to prevent abuse of the fees. The Minister confirmed that the discretions were subject to AAT review.

3.41 The **Telecommunications National Code made under s.117 of the Telecommunications Act 1991** conferred a number of discretionary powers on the Secretary. For instance, the Secretary could make a mandatory recommendation to a carrier. The Committee asked whether the discretions were subject to AAT review and, if not, for the reasons for the exclusions and for confirmation that the exclusions were within the relevant guidelines of the Administrative Review Council. The Minister advised that the discretions were not subject to AAT review. The exclusion came within the ARC guidelines that review may not be necessary where the reviewing body would have to undertake an inquiry of considerable width involving the competing interests of several parties in order to establish relevant facts. Also, the ARC had advised that decisions

which involve public consultation as part of a process are not appropriate for external review. Decisions by the Secretary would be likely to come within these categories. The Minister would, however, examine again the question of AAT review of decisions under the Code in the light of the government response to the ARC Report No. 36 on administrative review of environmental decisions. The Committee advised the Minister that it would send a copy of his reply to the ARC.

3.42 The **Industrial Chemicals (Notification of Assessment) Regulations (Amendment), Statutory Rules 1994 No. 368**, inserted a discretion for the Director to remit certain fees. There was, however, no provision for AAT review of the discretion, even though an existing discretion to remit other fees was subject to such review. The Minister undertook to provide for AAT review. The **Insurance (Agents and Brokers) Regulations (Amendment), Statutory Rules 1994 No. 325**, provided a discretion for the Commissioner in respect of professional indemnity insurance. The Minister advised that as a result of earlier action by the Committee the Act and Regulations had been reviewed and the conclusion reached that general provisions for AAT review in the Act extended to decisions made under the Regulations. The **Education Services for Overseas Students (Registration of Providers and Financial Regulation) Regulations (Amendment), Statutory Rules 1994 No. 282**, provided that a provider was exempt from membership of a Tuition Assurance Scheme if the Minister was satisfied about specified matters. The Minister advised that rights of providers were adequately protected by AAT review available after a decision was made to suspend the registration of a provider.

3.43 The **Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1994 No. 369**, provided for discretions for the Secretary to refund or remit charges. The Committee noted that it had raised the possibility of AAT review of related discretions provided for by earlier amendments of the principal regulations by **Statutory Rules 1994 No. 65**, and the Minister had advised that AAT review was inappropriate. The Committee had then referred the Minister's replies to the ARC, see *100th Report: Annual Report 1993-94*, paragraph 3.55. In the present case the Minister advised that a right of AAT review was neither appropriate nor necessary because all arrangements were discussed with industry groups prior to the exercise of the discretionary power. The Committee then asked the Minister for further details. After considering the Minister's reply the Committee asked for more information, which the Minister supplied. The ARC subsequently recommended that AAT review be provided for all discretions in the **Export Inspection and Meat Charges Collection Regulations**. The Committee's scrutiny of these Regulations will be the subject of a Committee Report.

3.44 The **Marine Orders Part 20, Ship Machinery, Issue 1-Amendment; Marine Orders Part 15, Ship Fire Detection, Fire Detection and Fire Extinction, Issue 2; and Marine Orders Part 16, Load Lines, Issue 1-Amendment; Marine Order Nos 1,2 and 3 of 1994**, provided for a number of new discretions with commercial implications. The three Explanatory Statements all advised that the discretions were subject to AAT review. The Committee obtained an assurance that all appropriate decisions made under Marine Orders were now subject to AAT review.

Review of decisions affecting personal rights

3.45 The Committee also ensures that delegated legislation provides appropriate criteria and review rights for discretions which directly affect individuals. In this context, numbers of instruments provide for the administration of public and private sector superannuation schemes. The **Military Superannuation and Benefits Trust Deed (Amendment)(No 2 of 1994)** made under s.5 of the **Military Superannuation and Benefits Act 1991** provided for the Commission to approve payment because of particular circumstances of part of the employer benefit included in the preserved benefit. The Minister advised that review processes were revised in 1993 in consultation with the Privacy Commissioner and the Ombudsman. The present procedures were that unsuccessful applicants could first apply for an internal review, followed by review by the Ombudsman. The Committee asked for further information on how the discretion was exercised. The **Income Tax Regulations (Amendment), Statutory Rules 1994 No. 461**, provided for the Commissioner to exercise a similar discretion to determine higher reasonable benefit limits in special circumstances. The Explanatory Statement advised of circumstances where the Commission might exercise the discretion, but the Regulations themselves did not provide for any such criteria. The Minister advised that no criteria were provided because discussions with the industry failed to arrive at common rules which could be put in the Regulations. However, the Regulations would be amended as soon as practicable to provide for merits review. The **Superannuation Industry (Supervision) Regulations, Statutory Rules 1994 No. 57**, provided for the Commissioner to exercise discretions affecting both the operation of funds and the rights of members of the fund. Some of these discretions were subject to AAT review, while others were not. The Committee asked for advice on why some decisions were excluded from review and for confirmation that the exclusions were within the relevant guidelines of the ARC. The Minister advised that a number of decisions were reviewable indirectly by the AAT under provisions in the parent Act. The decisions excluded from review either operated in practice for a limited period of time, or were of a preliminary or procedural nature having no substantive effect, or were decisions of a law enforcement nature.

3.46 Discretions which affect the right of a person to earn a living should normally be subject to external merits review. The **Health Insurance (1994-1995 General Medical Services Table) Regulations, Statutory Rules 1994 No. 362**, provided for the Minister to accredit certain orthodontists. There were criteria for the exercise of this discretion. The Minister advised that discretions were reviewable by the Medical Benefits (Dental Practitioners) Appeal Committee. The **Civil Aviation Orders amendments to s.40.1.0 of the Orders** provided for the Civil Aviation Authority to exercise a number of discretions in respect of endorsements for licences issued to individuals. This could affect a person's livelihood. One of the provisions replaced an objective standard with a discretionary subjective standard. The Minister confirmed that the discretions were subject to AAT review. The **Migration Regulations (Amendment), Statutory Rules 1995 No. 38**, provided for the Secretary to permit the holder of a working holiday visa to be employed for more than three months by one employer. The Minister advised that the discretion was not subject to merits review because it was a condition of a visa, not a criteria for the grant of a visa. Decisions could, however, be investigated by the Ombudsman.

3.47 Discretions which affect eligibility for government assistance programs should also usually be subject to external merits review. The **Veterans' Entitlements (Rehabilitation Allowance) Regulations, Statutory Rules 1994 No. 107**, provided for the Repatriation Commission to approve or reject programs of vocational rehabilitation, which affected eligibility for an allowance. The Minister advised that originally it was considered that external review was not warranted because the discretion was to confer a benefit over and above the entitlements already provided under the Act. If the Commission rejected a program, that rejection would not in itself result in a diminution of the right to a pension. The enabling provision of the Act was a special section, intended for limited use entirely as the Commission saw fit. Nevertheless, the Regulations would be amended to provide for AAT review. The **AUSTUDY Regulations (Amendment), Statutory Rules 1994 No. 409**, provided for the Secretary to suspend and to recommence payment of benefits. The Committee obtained confirmation from the Minister that these decisions were subject to review by the Social Security Appeals Tribunal and then the AAT.

3.48 Review of discretions should be timely in all the circumstances. The **Australian Wool Research and Promotion Organisation (AGM) Regulations, Statutory Rules 1995 No. 8**, provided for the Australian Wool Research and Promotion Organisation to determine whether a person was a wool tax payer for a particular AGM. The Regulations provided for AAT review of this discretion. The Committee noted, however, that the AGM might take place before the AAT review was completed. The Minister advised that a person would normally have around 42 days notice before an AGM of an AWRPO decision. The present AAT procedures should enable the matter to be resolved within this period. The Minister undertook to monitor the operation of the provisions to review them if necessary.

Principle (d)

Does delegated legislation contain matter more appropriate for parliamentary enactment?

3.49 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.

3.50 On 31 August 1994 Senator John Watson, Chair of the Select Committee on Superannuation, wrote to the Committee seeking its advice on concerns of that Committee that the jurisdiction of a federal tribunal, the Superannuation Complaints Tribunal, was provided for by delegated legislation, the **Superannuation (Resolution of Complaints) Regulations, Statutory Rules 1994 No. 56**. The Regulations, which excluded medical matters from the matters with which the SCT could deal, had been disallowed by the Senate on 29 August 1994. The Select Committee on Superannuation had, however, received a submission from the Administrative Review Council that all exemptions from the jurisdiction of the SCT should be specified in the Act by, for instance, including a schedule of excluded subject matter. Regulations could exclude subject matter as a convenient short term mechanism, but such exclusions should be later included in the Act. The Select Committee on Superannuation also recommended (13th Report, August 1994) that the government seek advice from the Standing Committee on Regulations and

Ordinances on the appropriate legislative instrument for defining the jurisdiction of the SCT.

3.51 The Committee advised Senator Watson and the ARC that where an enabling Act, which had been subject to parliamentary scrutiny and debate, provided for matters to be prescribed by regulation, the Committee would normally intervene only in the case of an unexpected or unusual use of that power. If asked, however, whether such a power should be given in an Act, the Committee would suggest that the power radically to alter the jurisdiction of a tribunal should not be in subordinate legislation, but should be set out in the Act. The general preference of the Committee is that an Act should set out the jurisdiction of a tribunal. In the present case the Committee noted the cogent and persuasive arguments in the ARC submission that this particular use of the regulation making power did not fit in with the general pattern of jurisdiction conferred on tribunals.

3.52 The Senate subsequently rescinded its disallowance motion on 17 October 1994, thus allowing a regulation similar in substance to the disallowed instrument to be made. The provisions of that instrument, the **Superannuation (Resolution of Complaints) Regulations (Amendment), Statutory Rules 1994 No. 374**, were generally the same as those of the disallowed instrument. The new instrument, however, provided for continuing parliamentary control by a "sunset" provision under which it ceased to have effect after six months. An extension beyond that time would require a fresh instrument, which would itself be subject to parliamentary scrutiny. On the expiry of the six months, the **Superannuation (Resolution of Complaints) Regulations (Amendment), Statutory Rules 1995 No. 77**, extended the sunset period for a further six months.

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.

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

4.2 On 24 June 1994 the Minister for Aboriginal and Torres Strait Islander Affairs, the Hon Robert Tickner MP, undertook to remove an offence provision. This undertaking was implemented by *ATSIC (Misbehaviour) Determination No. 2 made under s.4A of the Aboriginal and Torres Strait Islander Commission Act 1989*, of 21 September 1994.

Australian Sports Drug Agency Regulations (Amendment) Statutory Rules 1994 No. 284

4.3 On 9 November 1994 the Minister for the Environment, Sport and Territories, Senator the Hon John Faulkner, undertook to amend the Regulations to correct a drafting oversight. This undertaking was implemented by the *Australian Sports Drug Agency Regulations (Amendment), Statutory Rules 1994 No. 410*, of 6 December 1994.

Civil Aviation Orders, Part 105 AD/F27/103 Amdt 6

4.4 On 28 April 1995 the Parliamentary Secretary to the Minister for Transport, the Hon Neil O'Keefe MP, undertook to amend the Order to correct a reference. This undertaking was implemented by *Civil Aviation Orders, Part 105 AD/F27/103 Amdt 7*, of 12 April 1995.

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

4.5 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. This undertaking was implemented by *Declaration No. 1 of 1995 made under s.9(1) of the Wildlife Protection (Regulation of Exports and Imports) Act 1982*, of 30 May 1995.

Defence Determination 1994/27

4.6 On 22 December 1994 the Assistant Minister for Industrial Relations, the Hon Gary Johns MP, undertook to amend certain determinations to validate particular provisions. This undertaking was implemented by *Defence Determination 1994/57*, of 22 November 1994 and *Overseas Defence Determinations Nos 6 and 7 of 1995*, of 16 February 1995 and 7 March 1995 respectively.

Determination of Technical Standard Notice No. TS 3 of 1994 made under s.246 of the Telecommunications Act 1991

4.7 On 7 September 1994 the Minister for Communications and the Arts, the Hon Michael Lee MP, undertook to amend the Determination to correct a reference. This undertaking was implemented by *Determination of Technical Standard Notice No. TN 1 of 1994 made under s.246 of the Telecommunications Act 1991*, of 13 September 1994.

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

4.8 On 12 November 1992 the Minister for Resources, the Hon Alan Griffiths MP, undertook to amend the Regulations to correct a reference oversight. This undertaking was implemented by the *Export Inspection Charges Collection Regulations (Amendment)*, Statutory Rules 1993 No. 376, of 22 December 1993.

Family Law (Child Abduction Convention) Regulations (Amendment) Statutory Rules 1993 No. 358

4.9 On 24 May 1994 the Attorney-General, the Hon Michael Lavarch MP, undertook to amend the Regulations to include a reference in relation to certain UN sanctions resolutions. This undertaking was implemented by the *Family Law (Child Abduction Convention) Regulations (Amendment)*, Statutory Rules 1994 No. 252, of 6 July 1994 and *Family Law (Child Abduction Convention) Regulations (Amendment)*, Statutory Rules 1994 No. 344, of 11 October 1994.

Immigration (Education) Charge Regulations (Amendment) Statutory Rules 1994 No. 263

4.10 On 17 November 1994 the Assistant Secretary of the Department of Immigration and Ethnic Affairs on behalf of the Minister for Immigration and Ethnic Affairs, Senator the Hon Nick Bolkus, undertook to amend the Regulations to correct a reference. This undertaking was implemented by the *Immigration (Education) Charge Regulations (Amendment)*, Statutory Rules 1995 No. 39, of 7 March 1995.

Industrial Chemicals (Notification and Assessment) Regulations (Amendment) Statutory Rules 1994 No. 368

4.11 On 19 January 1995 the Assistant Minister for Industrial Relations, the Hon Gary Johns MP, undertook to amend the Regulations to provide for review by the

Administrative Appeals Tribunal. This undertaking was implemented by the **Industrial Chemicals (Notification and Assessment) Regulations (Amendment), Statutory Rules 1995 No. 81**, of 2 May 1995.

Instrument No. 6 of 1995 made under s.196B(3) of the *Veterans' Entitlements Act 1986*

4.12 On 27 March 1995 the Minister for Veterans' Affairs, the Hon Con Sciacca MP, undertook to amend the Instrument to correct a drafting oversight. This undertaking was implemented by **Instrument No. 125 of 1995 made under s.196B(3) of the *Veterans' Entitlements Act 1986***, of 13 April 1995.

Instruments Nos 47-48 and 65-66 of 1995 made under s.196B(2) and (3) of the *Veterans' Entitlements Act 1986*

4.13 On 22 May 1995 the Minister for Veterans' Affairs, the Hon Con Sciacca MP, undertook to amend the Instruments to provide for definitions. This undertaking was implemented by **Instruments Nos 158-161 of 1995 made under s.196B(2) and (3) of the *Veterans' Entitlements Act 1986***, dated 25 May 1995.

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

4.14 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. This undertaking was implemented by the **National Parks and Wildlife Regulations (Amendment), Statutory Rules 1994 No. 411**, of 6 December 1994.

**Quarantine Determinations No. 1 of 1995 made under s.86E of the
*Quarantine Act 1908***

4.15 On 19 June 1995 the Minister for Primary Industries and Energy, Senator the Hon Bob Collins, undertook to amend the Determination to correct a reference. This undertaking was implemented by **Quarantine Determinations No. 2 of 1995 made under s.86E of the *Quarantine Act 1908***, of 21 June 1995.

**Veterans' Entitlements (Rehabilitation Allowance) Regulations
Statutory Rules 1994 No. 107**

4.16 On 11 July 1994 the Minister for Veterans' Affairs, the Hon Con Sciacca MP, undertook to amend the Regulations to provide for AAT review. This undertaking was implemented by the **Veterans' Entitlements (Rehabilitation Allowance) Regulations (Amendment), Statutory Rules 1994 No. 341**, of 4 October 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 1995, 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.

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

5.3 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

5.4 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 War Memorial Regulations (Amendment) Statutory Rules 1994 No. 375

5.5 On 27 March 1995 the Minister for Veterans' Affairs, the Hon Con Sciacca MP, undertook to amend the *Australian War Memorial Act 1980* or the Regulations to incorporate the list of 'authorised officers' of the Council of the Australian War Memorial.

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.

**Childcare Rebate (Definition of Child Care) Determination No. 1 of
1994 under the Childcare Rebate Act 1993**

5.10 On 8 November 1994 the Minister for Family Services, Senator the Hon Rosemary Crowley, undertook to amend the Determination to correct a reference.

Civil Aviation Airworthiness Directives

5.11 On 19 June 1995 the Parliamentary Secretary to the Minister for Transport, the Hon Neil O'Keefe MP, undertook to implement drafting changes in respect of multiple compliance dates.

Civil Aviation Orders, Part 107 AD/PROP/1

5.12 On 22 June 1995 the Parliamentary Secretary to the Minister for Transport, the Hon Neil O'Keefe MP, undertook to amend Civil Aviation Orders Part 107 to identify clearly each particular amendment.

**Determinations HIT 5/1994, HIT 6/1994 and HIT 7/1994 made
under the National Health Act 1953**

5.13 On 3 November 1994 the Minister for Human Services and Health, the Hon Carmen Lawrence MP, undertook to remake the Determinations to correct invalidity.

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

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

Determination No. T29 of 1994 made under s.16 of the *Higher Education Funding Act 1988*

5.15 On 9 June 1995 the Minister for Employment, Education and Training, the Hon Simon Crean MP, undertook to amend the Determination to correct certain references.

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

5.16 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*

5.17 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 and Meat Charges Collection Regulations
(Amendment)
Statutory Rules 1994 No. 369**

5.18 On 22 March 1995 the Minister for Primary Industries and Energy, Senator the Hon Bob Collins, undertook to amend the Regulations to correct drafting oversights.

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

5.19 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*

5.20 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**

5.21 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**

5.22 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**

5.23 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.

Guidelines made under s.39HB, s.39F, s.39EA and s.39E of the *Industry Research and Development Act 1986*

5.24 On 21 June 1995 the Minister for Industry, Science and Technology, Senator the Hon Peter Cook, undertook to amend the Act to give effect to the Guidelines.

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

5.25 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.

**Income Tax Regulations (Amendment)
Statutory Rules 1994 No 461**

5.26 On 31 May 1995 the Parliamentary Secretary to the Treasurer, the Hon Paul Elliott MP, undertook to amend the Regulations to provide for review under the *Taxation Administration Act 1953*.

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

5.27 On 23 February 1994 the Minister for Housing, Local Government and Human Services, the Hon Brian Howe MP, undertook to provide for notification of rights.

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

5.28 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**

5.29 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**

5.30 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.

National Health (Pharmaceutical Benefits) Regulations (Amendment)**Statutory Rules 1994 No. 348**

5.31 On 29 December 1994 the Parliamentary Secretary to the Minister for Human Services and Health, the Hon Andrew Theophanous MP, undertook to amend a drafting oversight.

National Health (Pharmaceutical Benefits) Regulations (Amendment)**Statutory Rules 1994 No. 348**

5.32 On 3 March 1995 the Parliamentary Secretary to the Minister for Human Services and Health, the Hon Andrew Theophanous MP, undertook to take the Committee's concerns into account in relation to the provisions covering changes to forms when the Regulations are next reviewed.

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

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

**Northern Prawn Fishery (NPF) Management Plan 1995 (Plan NPF01)
Southern Bluefin Tuna (SBT) Fisheries Management Plan (Plan SBT01)**

5.34 On 6 June 1995 the Minister for Resources, the Hon David Beddall MP, undertook to provide for the insertion of commencement dates in all future plans of management.

Nursing Home Nasogastric Feeding Principles 1992 (NGPI/1992)**Nursing Home Oxygen Treatment Principles 1992 (OTPI/1992)**

5.35 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

5.36 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**

5.37 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 Determination No. 19 of 1994

5.38 On 9 December 1994 the Minister for Industrial Relations, the Hon Laurie Brereton MP, undertook to amend the Determination to correct a drafting oversight.

Remuneration Tribunal Determinations

5.39 On 17 March 1995 the Minister for Industrial Relations, the Hon Laurie Brereton MP, undertook to amend tabling requirements for determinations made under the *Remuneration Tribunal Act 1973*.

Statutory Rules series

5.40 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.

**Superannuation Industry (Supervision) Regulations (Amendment)
Statutory Rules 1994 No. 189**

5.41 On 7 November 1994 the Parliamentary Secretary to the Treasurer, the Hon Paul Elliott MP, undertook to remake the Regulations to remove an invalid subdelegation.

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

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

**Therapeutic Goods (Charges) Regulations (Amendment)
Statutory Rules 1994 No. 223**

5.43 On 23 September 1994 the Minister for Family Services, Senator the Hon Rosemary Crowley, undertook to amend the Regulations to correct a drafting oversight.

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

5.44 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*

5.45 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 *VETERANS' ENTITLEMENTS ACT 1986* AND THE CIVIL AVIATION REGULATIONS: STATEMENT BY SENATOR COLSTON

6.1 On 6 February 1995, on behalf of the Committee, Senator Colston made a statement on delegated legislation made under the *Veterans' Entitlements Act 1986* and the Civil Aviation Regulations.

Senator Colston, 6 February 1995, Senate Weekly Hansard, p.515

6.2 "I gave notice last Thursday that, on behalf of the Standing Committee on Regulations and Ordinances, I would withdraw notices of motion of disallowance today in respect of two instruments of delegated legislation, namely, Instrument No. 45 of 1994 made under subsection 196B(3) of the *Veterans' Entitlements Act* and an exemption under Regulation 207 of the Civil Aviation Regulations.

6.3 "Both of these instruments were subject to a motion of disallowance of which I gave notice on 15 November 1994. The Committee terms such notices as 'protective'. They are protective in the sense that the notice allows time for the Committee and the issuing authority to resolve matters about which the Committee has concern regarding a particular instrument or group of instruments. Once the protective notice is given, 15 sitting days of the Senate can elapse before an instrument is deemed to have been disallowed due to the passage of time.

6.4 "It is not unusual for the Committee to give notice of disallowance where it is not satisfied with some aspect of an instrument and it is clear that the matter cannot be resolved within 15 sitting days of the tabling of that instrument. After that period of 15 sitting days has elapsed and no disallowance has taken place, it is not possible to take any action in relation to a delegated instrument. A protective notice of disallowance therefore must be given within the initial 15 sitting day period.

6.5 "The Committee has usually corresponded with the relevant minister before placing an instrument under a protective notice of disallowance. Informal discussions often take place after the initial correspondence is forwarded to the minister. Those discussions, when necessary, can lead to a resolution of matters of concern to the Committee. The Committee believes that this is the most appropriate way for it to discharge its responsibility to the Senate. It is preferable for the Committee to resolve problems with delegated legislation, if that is possible, rather than concern the Senate with actual motions of disallowance.

6.6 "Because the Committee operates in the way which I have outlined, it has not considered it necessary to recommend disallowance of a delegated instrument to the Senate since 1988. On the other hand, the Committee will not hesitate to recommend disallowance to the Senate if it deems that course of action to be necessary.

6.7 "For the Committee to operate as it does, it requires the cooperation of the agencies responsible for delegated legislation. The Committee should not be placed in the position of giving notice of intention to withdraw a notice of disallowance, pending the receipt of a satisfactory response before the next sitting day. This is what occurred in relation to the two instruments to which I have already referred, namely, Instrument No. 45 of 1994 made under the Veterans' Entitlements Act and an exemption under Regulation 207 of the Civil Aviation Regulations.

6.8 "Last Thursday morning, the Standing Committee on Regulations and Ordinances had not received satisfactory responses in relation to either of these instruments. The last day for resolving the motions of disallowance, however, was today. It was for this reason, on behalf of the Committee, that I gave notice of my intention to withdraw each notice of disallowance. I made it clear on Thursday, however, that if satisfactory replies had not been received by today, I would not proceed with the withdrawal. The instruments would thus be deemed to be disallowed.

6.9 "In the case of the former instrument, a response had been received by the Committee, but the Committee required further clarification. That information was not available by Thursday morning last. If the agency concerned had been more prompt in its initial response, the situation may not have been reached where the delegated legislation risked the possibility of lapsing because of effluxion of time. In this regard, my original correspondence to the minister was forwarded on 10 November 1994, but the minister's initial reply to that correspondence was dated some two months later on 10 January 1995.

6.10 "In relation to the latter instrument, on behalf of the Committee, I wrote to the minister on 18 October last outlining the Committee's concerns. Not until Thursday of last week did the Committee receive any written response, despite reminders from staff of the Regulations and Ordinances Committee and finally by me direct to the minister's office. The blame does not lie directly with the minister, but the Committee would expect he would inform his officers that correspondence from the Committee should be answered promptly. For officers to do otherwise is treating the Committee and the Senate with disdain.

6.11 "Both responses were received by Thursday afternoon and I withdrew the protective notices some few minutes earlier today. It appears that the latter instrument is invalid, but as the time for its operation has now expired, nothing would have been gained by proceeding to disallowance. It may be necessary, however, for the Committee to allude to this instrument further in its annual report.

6.12 "I remind agencies that although the Standing Committee on Regulations and Ordinances is a multi-party Committee, politics do not intrude in its examination of delegated legislation. Its examination is confined to the principles as outlined in the Senate's standing order 23(3). That part of Standing Orders reads as follows:

The Committee shall scrutinise each instrument 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 by a judicial or other independent tribunal; and
- (d) that it does not contain matter more appropriate for parliamentary enactment.

6.13 "Finally, I take this opportunity to thank those ministers and agencies that regularly cooperate fully with the Committee. The matters which I have raised in relation to the circumstances surrounding the two particular instruments are certainly of concern but are, fortunately, exceptions to the norm."



Mal Colston
Chairman
November 1995

APPENDIX 1

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

Territory instruments	17
Customs and excise instruments	18
Radiocommunications instruments	15
Employment services instruments	10
Social security instruments	10
Marine orders	13
Native title instruments	8
Superannuation instruments	8
Telecommunications instruments	8
World heritage instruments	8
Industry research and development instruments	5
Motor vehicle standards instruments	5
Parliamentary presiding officers' determinations	5
States grants (petroleum products) instruments	5
Currency determinations	4
Occupational health and safety instruments	4
Quarantine instruments	4
Safety, rehabilitation and compensation instruments	4
Income tax instruments	3
Military superannuation and benefits instruments	3
Accounting standards	2
International Air Services Commission instruments	2
Interstate road transport instruments	2
Privacy instruments	2
Administrative Appeals Tribunal instrument	1
Air navigation instrument	1
Anti-dumping authority instrument	1
Bounty (computers) instrument	1
Broadcasting instrument	1
Defence force (superannuation) productivity benefit determination	1
Endangered species instrument	1
Environment protection instrument	1
Export market development guidelines	1
Insurance (agents and brokers) instrument	1
Occupational superannuation scheme instrument	1
Ozone protection instrument	1
Supported accommodation instrument	1
Wildlife protection declaration	1
	179

APPENDIX 2

DISALLOWABLE INSTRUMENTS TABLED IN THE SENATE 1994-95

During the year 1994-95 there were 2,087 disallowable legislative instruments considered by the Committee. Of these, 419 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. However, the other 1,668 instruments 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 (zone election), s.138
<i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i>	declarations, ss.9,10,12
<i>Administrative Appeals Tribunal Act 1975</i>	determinations, s.27B
<i>Aged or Disabled Persons Care Act 1954</i>	determinations, s.10 guidelines, s.9B principles, ss.10GC,10GD
<i>Air Navigation Act 1920</i>	determinations, s.4
<i>Anti-Dumping Authority Act 1988</i>	instruments of approval, s.3AA
<i>Australian Capital Territory (Planning and Management) Act 1988</i>	territory plans, ss.19, 21
<i>Australian Horticultural Corporation Act 1987</i>	orders, s.115
<i>Bounty (Computer) Act 1984</i>	notices, s.5
<i>Broadcasting Services Act 1992</i>	notices, s.31
<i>Business Franchise (Tobacco) Act 1975 (W.A.) (C.I.)</i>	territory regulations, s.20
<i>Child Care Act 1972</i>	guidelines, s.12A
<i>Child Care Rebate Act 1993</i>	determinations, s.15
<i>Christmas Island Act 1958</i>	ordinances, s.10 regulations, s.23
<i>Civil Aviation Act 1988</i>	orders, s.98(5) exemptions, r.308

<i>Cocos (Keeling) Islands Act 1955</i>	ordinances, s.13 regulations, s.20
<i>Corporations Act 1989</i>	accounting standards, s.32
<i>Currency Act 1965</i>	determinations, s.13A
<i>Customs Act 1901</i>	instruments of approval, s.4A notices, s.164
<i>Data-Matching Program (Assistance and Tax) Act 1990</i>	guidelines, s.12
<i>Defence Act 1903</i>	determinations, s.58B
<i>Defence Force (Home Loans Assistance) Act 1990</i>	declarations, s.3
<i>Employment Services Act 1994</i>	determinations, s.37
<i>Endangered Species Protection Act 1992</i>	declarations, s.18
<i>Environment Protection (Impact of Proposals) Act 1974</i>	orders, s.6
<i>Excise Act 1901</i>	instruments of approval, s.4A
<i>Export Control Act 1982</i>	orders, s.25
<i>Export Market Development Grants Act 1974</i>	guidelines, s.42
<i>Fisheries Management Act 1991</i>	management plans, s.17
<i>Health Insurance Act 1973</i>	declarations, ss.106L,124X determinations, ss.3C,23DNA directions, s.106K guidelines, s.87
<i>Heard Island and McDonald Islands Act 1953</i>	ordinances, s.11
<i>Horticultural Policy Council Act 1987</i>	orders, s.9
<i>Imported Food Control Act 1992</i>	orders, s.16
<i>Income Tax Assessment Act 1936</i>	declarations, s.159UB determinations, s.159UF guidelines, s.51AL notices, s.159UD
<i>Industry Research and Development Act 1986</i>	guidelines, s.39EB
<i>Insurance (Agents and Brokers) Act 1984</i>	principles, s.41
<i>International Air Services Commission Act 1992</i>	declarations, s.54A
<i>Interstate Road Transport Act 1985</i>	determinations, s.43A

<i>Meat and Live-stock Industry Act 1995</i>	orders, s.16H
<i>Military Superannuation and Benefits Act 1991</i>	instruments, s.5
<i>Motor Vehicle Standards Act 1989</i>	determinations, ss.7,9
<i>National Health Act 1953</i>	declarations, s.85 determinations, ss.4,47,54,98,99 guidelines, s.135AA notices, s.40AA,40AH principles, ss.39,40AA,48,52,58
<i>Native Title Act 1993</i>	determinations, s.202
<i>Navigation Act 1912</i>	marine orders, s.19
<i>Occupational Health and Safety (Commonwealth Employees) Act 1991</i>	declarations, s.7
<i>Pasture Seed Levy Act 1989</i>	declarations, s.9
<i>Public Service Act 1922</i>	determinations, s.82D determinations (LES), s.82D determinations (Parliamentary), s.9
<i>Quarantine Act 1908</i>	determinations, s.86E
<i>Radiocommunications Act 1992</i>	class licences, s.132 determinations, ss.98,115,119,132 147,179,293,300
<i>Radiocommunications (Permit Tax) Act 1983</i>	determinations, s.7
<i>Radiocommunications (Receiver Licence Tax) Act 1983</i>	determinations, s.7
<i>Radiocommunications (Transmitter Licence Tax) Act 1983</i>	determinations, s.7
<i>Remuneration Tribunal Act 1973</i>	determinations, ss.7,8,37
<i>Rice Levy Act 1991</i>	notices, s.6
<i>Safety Rehabilitation and Compensation Act 1988</i>	declarations, s.108C notices, s.16
<i>Seafarers Rehabilitation and Compensation Act 1992</i>	notices, ss.28,49,50
<i>Seat of Government (Administration) Act 1910</i>	ordinances, s.12
<i>Social Security Act 1991</i>	determinations, s.1157

<i>States Grants (Petroleum Products) Act 1965</i>	amendments, s.4
<i>Student and Youth Assistance Act 1973</i>	determinations, s.355
<i>Student Assistance Act 1973</i>	determinations, s.7 guidelines, s.44
<i>Superannuation Act 1976</i>	determinations, ss.133,134, 238,240,241,248
<i>Superannuation Benefits (Supervisory Mechanisms) Act 1990</i>	determinations, s.7
<i>Supported Accommodation Assistance Act 1994</i>	agreements, s.6
<i>Taxation Laws Amendment Act (No. 3) 1994</i>	determinations, s.154
<i>Telecommunications Act 1991</i>	directions, s.238 notices, ss.246,267
<i>Telstra Corporation Act 1991</i>	determinations, ss.20,21,23
<i>Therapeutic Goods Act 1989</i>	orders, s.10
<i>Training Guarantee (Administration) Act 1990</i>	guidelines, s.30
<i>Veterans' Entitlements Act 1986</i>	principles, s.196B
<i>Wildlife Protection (Regulation of Exports and Imports) Act 1982</i>	declarations, s.9
<i>World Heritage Properties Conservation Act 1983</i>	proclamations, ss.6,7

APPENDIX 3

ALPHABETICAL INDEX OF LEGISLATION AND DELEGATED LEGISLATION WITH PARAGRAPH REFERENCES 1994-95

A

<i>Acts Interpretation Act 1901</i>	2.8-2.13, 2.50, 2.56. 3.2-3.3, 3.10, 3.12
Administrative Appeals Tribunal Regulations (Amendment) Statutory Rules 1994 No. 276	5.2
<i>Administrative Decisions (Judicial Review) Act 1977</i>	2.71
Agricultural and Veterinary Chemicals Code Regulations Statutory Rules 1995 No. 27	2.51. 3.20
Antarctic Marine Living Resources Conservation Regulations Statutory Rules 1994 No. 345	3.5
Applications of Act to Pre-existing Capacity between Australia and Taiwan made under s.54A of the <i>International Air Services Commission Act 1992</i>	3.5
ATSIC (Misbehaviour Determination, 1994 No. 1 made under s.4A of the <i>Aboriginal and Torres Strait Islander Commission Act 1989</i>	3.27. 4.2
ATSIC (Misbehaviour Determination, 1994 No. 2 made under s.4A of the <i>Aboriginal and Torres Strait Islander Commission Act 1989</i>	4.2
Australian Dried Fruits Board (AGM) Regulations Statutory Rules 1993 No. 144	5.3
Australian Horticultural Corporation (Honey Export Control) Regulations Statutory Rules 1993 No. 26	5.4
Australian Securities Commission Regulations (Amendment) Statutory Rules 1994 No. 301	3.21, 3.31
Australian Sports Drug Agency Regulations (Amendment) Statutory Rules 1994 No. 284	3.28. 4.3
Australian Sports Drug Agency Regulations (Amendment) Statutory Rules 1994 No. 410	4.3
Australian War Memorial Regulations (Amendment) Statutory Rules 1994 No. 375	3.17, 5.5
Australian Wool Corporation Regulations (Amendment) Statutory Rules 1992 No. 438	5.6
Australian Wool Research and Promotion Organisation (AGM) Regulations Statutory Rules 1995 No. 8	3.48
AUSTUDY Regulations (Amendment) Statutory Rules 1994 No. 409	2.54. 3.18, 3.19, 3.47

B

Banking (Statistics) Regulations Statutory Rules 1989 No. 357	5.7
--	-----

C

Cash Transaction Reports Regulations (Amendment) Statutory Rules 1992 No. 90	5.8
<i>Charter of the United Nations Amendment Act 1993</i>	2.31
Child Care Centre Relief Eligibility Guidelines made under s.12A of the <i>Child Care Act 1972</i>	5.9
Childcare Rebate (Definition of Child Care) Determination No. 1 of 1994 made under the <i>Childcare Rebate Act 1993</i>	3.5, 3.18, 5.10
Childcare Rebate (Special Circumstances – Australian Resident) Guidelines made under the <i>Childcare Rebate Act 1993</i>	3.5
Child Support (Registration and Collection) Regulations (Amendment) Statutory Rules 1994 No. 197	3.26
Citizen Band Radio Stations Class Licence made under s.132(1) of the <i>Radiocommunications Act 1991</i>	3.9
Civil Aviation Airworthiness Directives	5.11
Civil Aviation Order Part 105 AD/F27/103 AMDT 6	3.8, 4.4
Civil Aviation Order Part 105 AD/F27/103 AMDT 7	4.4
Civil Aviation Orders	3.4
Civil Aviation Orders amendments to section 40.1.0 of the Orders	3.46
Civil Aviation Orders Part 107	3.24
Civil Aviation Orders Part 107 AD/PROP/1	5.12
Civil Aviation Regulations (Amendment) Statutory Rules 1994 No. 382	3.7
Classification of Publications (Amendment) Ordinance (No. 3) 1994 No. 5 of 1994	3.35
<i>Corporate Law Reform Act 1994</i>	3.40
Corporations (Fees) Regulations (Amendment) Statutory Rules 1994 No. 34	3.40
Corporations (Fees) Regulations (Amendment) Statutory Rules 1994 No. 303	3.21, 3.33
Corporations Regulations (Amendment) Statutory Rules 1994 No. 302	3.21, 3.40
<i>Customs Legislation (World Trade Organization Amendments) Act 1994</i>	3.39
Customs (Prohibited Imports) Regulations (Amendment) Statutory Rules 1994 No. 32	3.16
Customs (Prohibited Imports) Regulations (Amendment) Statutory Rules 1994 No. 104	3.7, 3.17

Customs (Prohibited Imports) Regulations (Amendment) Statutory Rules 1995 No. 15	3.39
Customs Regulations (Amendment) Statutory Rules 1994 No. 435	3.39
D	
Declaration No. 5 of 1994 under s.10 of the <i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i>	3.11
Declarations Nos 94/ESP1 and 94/ESP2 made under s.18(1) of the <i>Endangered Species Protection Act 1992</i>	3.16
Declaration made under s.9(1) of the <i>Wildlife Protection (Regulation of Exports and Imports) Act 1982</i>	4.5
Declaration No. 1 of 1995 made under s.9(1) of the <i>Wildlife Protection (Regulation of Exports and Imports) Act 1982</i>	4.5
Defence Determination 1994/27	3.6, 4.6
Defence Determination 1994/36	3.30
Defence Determination 1994/38	3.30
Defence Determination 1994/40	3.7
Defence Determination 1994/57	3.6, 4.6
Determination No 1994-95/10 (Guidelines No. 9BG1 of 1995) made under s.9B of the <i>Aged or Disabled Persons Care Act 1953</i>	3.23
Determination of Conversion Factors to apply to Imported Forest Products made under s.6 of the <i>Forest Industries Research Import Charge Act 1993</i>	3.22-3.23
Determination No. T29 of 1994 made under s.16 of the <i>Higher Education Funding Act 1988</i>	3.20, 5.15
Determination No. G2 of 1995 made under s.36 of the <i>Higher Education Funding Act 1988</i>	3.24
Determination of Representative Aboriginal/Torres Strait Islander Body Nos 1 and 2:1994 made under s.202 of the <i>Native Title Act 1993</i>	3.12, 3.14
Determinations INS 23/1995, HIT 5/1994, HIT 6/1995, HIT 7/1994 made respectively under ss.4(1)(dd), 4(1)(dd), 4D(1)(a) and 4D(1)(b) of the <i>National Health Act 1953</i>	3.3
Determinations HIT 5/1994, HIT 6/1994, HIT 7/1994 made under the <i>National Health Act 1953</i>	5.13
Determinations INS 21/1993 made under s.4(10)(dd) of the <i>National Health Act 1953</i>	5.13
Determination No 1994/1 made under s.7(1)(c)(i) of the <i>Student Assistance Act 1973</i>	3.8
Determination of Technical Standard Notice No TS3 of 1994 under s.246 of the <i>Telecommunications Act 1991</i>	3.13, 4.7
Determination of Technical Standard Notice No TN1 of 1994 under s.246 of the <i>Telecommunications Act 1991</i>	4.7

E

Education Services for Overseas Students (Registration of Providers and Financial Regulation) Regulations (Amendment) Statutory Rules 1994 No. 282	3.42
Electricity (Amendment) Ordinance 1991 Territory of Christmas Island Ordinance No. 2 of 1991	5.16
Exemption No. BKFCO/59/94 made under regulation 207 of the Civil Aviation Regulations	2.80, 3.10, 6.2, 6.7
Exempt Nursing Homes Principles 1990, EXP 1/1993, made under the <i>National Health Act 1953</i>	5.17
Export Inspection and Meat Charges Collection Regulations (Amendment) Statutory Rules 1994 No. 369	3.43, 5.18
Export Inspection (Charges Collection) Regulations (Amendment) Statutory Rules 1992 No. 251	4.8
Export Inspection Charges Collection Regulations (Amendment) Statutory Rules 1992 No. 251	3.32, 4.8
Export Inspection (Quantity Charge) Regulations (Amendment) Statutory Rules 1993 No. 376	4.8
Extension of CFC Quota Period made under s.8 of the <i>Ozone Protection Act 1989</i>	3.24

F

Family Law (Child Abduction Convention) Regulations (Amendment) Statutory Rules 1994 No. 252	3.20, 4.9
Family Law (Child Abduction Convention) Regulations (Amendment) Statutory Rules 1994 No. 344	4.9
Family Law (Child Abduction Convention) Regulations (Amendment) Statutory Rules 1994 No. 358	4.9
Family Law Rules (Amendment) Statutory Rules 1994 No. 401	3.33
Fisheries Levy (Northern Fish Trawl Fishery) Regulations (Amendment) Statutory Rules 1992 No. 13	5.19
First Home Owners Regulations (Amendment) Statutory Rules 1994 No. 347	3.16
Formulation of Principles made under s.58CD of the <i>National Health Act 1953</i>	5.20
Freedom of Information (Miscellaneous) Provisions Regulations (Amendment) Statutory Rules 1991 No. 321	5.21
Fringe Benefits Tax Regulations	3.26

G

Great Barrier Reef Marine Park Regulations (Amendment) Statutory Rules 1993 No. 206	5.22
Great Barrier Reef Marine Park Regulations (Amendment) Statutory Rules 1993 No. 266	5.23

Guidelines under s.42 of the <i>Export Market Development Grants Act 1994</i>	3.24
Guidelines for Industry Work Experience Criteria-1995, Determination No. G2 of 1995, made under s.36 of the <i>Higher Education Funding Act 1988</i>	3.23
Guidelines under ss.39FB, 39F, 39EA and 39E of the <i>Industry Research and Development Act 1986</i>	3.9, 5.24
H	
Handphone Stations (27MHz) Class Licence made under s.132(1) of the <i>Radiocommunications Act 1991</i>	3.9
Health Insurance Commission Regulations (Amendment) Statutory Rules 1994 No. 450	3.5
Health Insurance (1994-1995 General Medical Services Table) Regulations Statutory Rules 1994 No. 362	3.46
Health Insurance Regulations (Amendment) Statutory Rules 1992 No. 111	5.25
Heritage Conservation Rebate (Provisional Certificate Criteria and Procedures) Determination made under s.159UF of the <i>Income Tax Assessment Act 1936</i>	3.24
Heritage Conservation Rebate (Recognised Heritage Register and Recognised Heritage Body) Declaration made under s.159UD of the <i>Income Tax Assessment Act 1936</i>	3.24
I	
Immigration (Education) Charge Regulations (Amendment) Statutory Rules 1994 No. 263	3.19, 3.22, 4.10
Immigration (Education) Charge Regulations (Amendment) Statutory Rules 1995 No. 39	4.10
<i>Income Tax Assessment Act 1936</i>	2.69
Income Tax Regulations (Amendment) Statutory Rules 1994 No. 461	2.46, 2.69-2.74, 3.45, 5.26
Income Tax Regulations (Amendment) Statutory Rules 1994 No. 195	3.26
Industrial Chemicals (Notification of Assessment) Regulations (Amendment) Statutory Rules 1994 No. 368	3.42, 4.11
Industrial Chemicals (Notification of Assessment) Regulations (Amendment) Statutory Rules 1995 No. 81	4.11
Industrial Relations Court Rules Statutory Rules 1994 No. 110	2.79, 3.10
Instrument 1419 (9308) made under s.40AA(6)(ce) of the <i>National Health Act 1953</i>	5.27
Instrument No 45 of 1994 made under subsection 196B(3) of the <i>Veterans' Entitlements Act 1986</i>	2.80, 3.5, 6.2, 6.7

Instruments Nos 1 to 26 made under subsection 196B(3) of the <i>Veterans' Entitlements Act 1986</i>	3.20
Instrument No 6 of 1995 made under subsection 196B(3) of the <i>Veterans' Entitlements Act 1986</i>	3.18, 4.12
Instruments Nos 23 and 24 of 1995 made under subsection 196B of the <i>Veterans' Entitlements Act 1986</i>	3.29
Instruments Nos 111 and 112 of 1995 made under subsection 196B(3) of the <i>Veterans' Entitlements Act 1986</i>	3.19
Instruments Nos 41-46 and 65-66 of 1995 made under subsection 196B(3) of the <i>Veterans' Entitlements Act 1986</i>	3.18
Instruments Nos 47-48 and 65-66 of 1995 made under subsection 196B(2) and (3) of the <i>Veterans' Entitlements Act 1986</i>	4.13
Instrument No 125 of 1995 made under subsection 196B(3) of the <i>Veterans' Entitlements Act 1986</i>	4.12
Instruments Nos 158-161 of 1995 made under subsection 196B(2) and (3) of the <i>Veterans' Entitlements Act 1986</i>	4.13
Insurance (Agents and Brokers) Regulations (Amendment) Statutory Rules 1994 No. 325	3.42
International Air Services Commission Regulations (Amendment)	2.66
M	
Marine Orders Part 15, Ship Fire Protection, Fire Detection and Fire Extinction, Issue 2	
Marine Orders No. 2 of 1995	3.8, 3.44
Marine Orders Part 16, Loan Lines, Issue 1 -- Amendment	
Marine Orders Nos. 1, 2 and 3 of 1994	3.44
Marine Orders Part 20, Ship Machinery, Issue 1 -- Amendment	
Marine Orders No. 1 of 1994	3.8, 3.44
Meat Inspection (General) Orders (Amendment)	
Meat Inspection Orders No. 3 of 1993	5.28
Meat Inspection (New South Wales) Orders	
Meat Inspection Orders No. 5 of 1993	5.29
Migration (1993) Regulations	
Statutory Rules 1992 No. 367	5.30
Migration Regulations (Amendment)	
Statutory Rules 1995 No. 38	3.46
Military Superannuation and Benefits Trust Deed (Amendment) (No. 2 of 1994) made under s.5 of the <i>Military and Superannuation Benefits Act 1991</i>	3.8, 3.45
N	
National Health (Pharmaceutical Benefits) Regulations (Amendment) Statutory Rules 1994 No. 348	3.7, 3.17, 5.31-5.32

National Health Regulations (Amendment) Statutory Rules 1994 No. 201	3.4
National Parks and Wildlife Regulations (Amendment) Statutory Rules 1992 No. 319	4.14
National Parks and Wildlife Regulations (Amendment) Statutory Rules 1994 No. 411	4.14
NHMRC Guidelines for the Protection of Privacy in the Conduct of Medical Research	5.33
Northern Prawn Fishery (NPF) Management Plan 1995, (Plan NPF01) made under s.17 of the <i>Fisheries Management Act 1991</i>	3.15, 5.34
Nuclear Non-Proliferation (Safeguards) Regulations Statutory Rules 1994 No. 178	3.12
Nursing Home Nasogastric Feeding Principles 1992 (NGP1/1992)	5.35
Nursing Home Oxygen Treatment Principles 1992 (OPT1/1992)	5.35
O	
Overseas Defence Determinations Nos 6 and 7 of 1995	4.6
P	
Patents Regulations (Amendment) Statutory Rules 1995 No. 16	3.5
<i>Petroleum (Submerged Lands) Fees Act 1994</i>	3.33
Petroleum (Submerged Lands) Fees Regulations Statutory Rules 1994 No. 237	3.33
Principles NHP 2/1993 made under the <i>National Health Act 1953</i>	5.36
<i>Privacy Act 1991</i>	2.63
Proclamations under s.6(3) and 7 of the <i>World Heritage Properties Conservation Act 1983</i>	3.20, 3.24
Protection of the Sea (Oil Pollution Compensation Fund) Regulations Statutory Rules 1994 No. 126	3.37
Public Service Determination 1994/71	3.20
Public Service Determination 1995/3	3.11
Q	
Quarantine Determination No. 1 of 1994 made under s.86E of the <i>Quarantine Act 1908</i>	3.32
Quarantine Determination No. 1 of 1995 made under s.86E of the <i>Quarantine Act 1908</i>	3.18, 4.15
Quarantine Determination No. 2 of 1995 made under s.86E of the <i>Quarantine Act 1908</i>	4.15

R

Radiocommunications Regulations	
Statutory Rules 1993 No. 177	5.37
<i>Remuneration Tribunal Act 1973</i>	3.11
Remuneration Tribunal Determinations	5.39
Remuneration Tribunal Determinations Nos 18 and 21 of 1993	3.11
Remuneration Tribunal Determination No. 19 of 1993	3.11, 3.18
Remuneration Tribunal Determination No. 19 of 1994	5.38
Remuneration Tribunal Determinations Nos 30 and 33 of 1994	3.5
Rules of the Australian Industrial Relations Commission (Amendment)	
Statutory Rules 1994 No. 464	3.13

S

Sales Tax Assessment Regulations (Amendment)	
Statutory Rules 1994 No. 194	3.26
Sales Tax Procedure (Old Law) Regulations (Amendment)	
Statutory Rules 1994 No. 193	3.26
<i>Seat of Government (Administration) Act 1910</i>	3.35
<i>Social Security Act 1991</i>	3.27
Southern Bluefin Tuna (SBT) Fishery Management Plan 1995, (Plan SBT01) made under s.17 of the <i>Fisheries Management Act 1991</i>	3.15, 5.34
Statistics Determination (Amendment)	
Statutory Rules 1994 No. 465	3.31
Statutory Rules series	5.40
<i>Superannuation Act 1976</i>	3.4
<i>Superannuation Act 1990</i>	3.4
Superannuation (Continuing Contributions for Benefits) Regulations (Amendment)	
Statutory Rules 1994 No. 115	3.4
Superannuation Industry (Supervision) Regulations (Amendment)	
Statutory Rules 1994 No. 57	3.45
Superannuation Industry (Supervision) Regulations (Amendment)	
Statutory Rules 1994 No. 189	3.6, 5.41
<i>Superannuation Legislation Amendment Act 1994</i>	3.4
Superannuation (PSS) Membership Inclusion Declaration No. 12	
Statutory Rules 1994 No. 117	3.4
Superannuation (Resolution of Complaints) Regulations	
Statutory Rules 1994 No. 56	3.50
Superannuation (Resolution of Complaints) Regulations (Amendment)	
Statutory Rules 1994 No. 374	3.52
Superannuation (Resolution of Complaints) Regulations (Amendment)	
Statutory Rules 1995 No. 77	3.52

Suspension of a Regional Councillor from Office, No. 1 of 1994, made under s.122A(3) of the <i>Aboriginal and Torres Strait Islander Commission Act 1989</i>	3.27
T	
<i>Taxation Laws Amendment Act (No. 5) 1992</i>	3.9
Telecommunications National Code made under s.117 of the <i>Telecommunications Act 1991</i>	3.25, 3.41
Television Licence Fees Regulations (Amendment)	
Statutory Rules 1992 No. 448	5.42
Therapeutic Goods (Charges) Regulations (Amendment)	
Statutory Rules 1994 No. 223	3.18–3.19, 5.43
Tobacco Charges Regulations (Amendment)	
Statutory Rules 1994 No. 192	3.26
Training Guarantee (Administration) Regulations (Amendment)	
Statutory Rules 1994 No. 176	3.36
V	
<i>Veterans' Entitlements Act 1986</i>	1.11,
Veterans' Entitlements (Rehabilitation Allowance) Regulations	
Statutory Rules 1994 No. 107	3.47, 4.16
Veterans' Entitlements (Rehabilitation Allowance) Regulations	
Statutory Rules 1994 No. 341	4.16
W	
Wool Research and Development Corporation Regulations (Amendment)	
Statutory Rules 1992 No. 443	5.44
Wool Tax (Administration) Regulations (Amendment)	
Statutory Rules 1994 No. 191	3.26
Z	
Zone Election Rules, Rules No. 4 of 1990 made under the <i>Aboriginal and Torres Strait Islander Commission Act 1989</i>	5.45